**NUMBER 13-14-00363-CV**

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**LONG ISLAND VILLAGE OWNERS ASSOCIATION, INC., ET AL.,** **Appellants,**

**v.**

**MAURICE O. BERRY,** **Appellee.**

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**On appeal from the 107th District Court of Cameron County, Texas.**

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# MEMORANDUM OPINION

**Before Justices Garza, Benavides and Longoria**
**Memorandum Opinion by Justice Garza**

This is a dispute involving appellee Maurice O. Berry's claims that appellants failed to reasonably maintain the canals in a bayfront condominium development located in Port Isabel, Texas. Following a jury trial, the trial court entered judgment in Berry's favor and

against appellants, the Long Island Village Homeowners Association and its Board of Directors (collectively "LIVOA" or "LI" or "Long Island").[1] The trial court found Long Island liable for breach of contract and negligence and awarded Berry the following damages: (1) $147,000 for Long Island's wrongful conduct; (2) pre-judgment interest in the amount of $29,404; (3) $75,900 in attorneys' fees and expenses; (4) conditional attorneys' fees of $9,000 in the event of an appeal to this Court and $6,000 in the event of an appeal to the supreme court; and (5) post-judgment interest of 5%, compounded annually. The trial court also entered a declaratory judgment ordering Long Island to dredge Canal "A"—the canal where Berry's property is located—to a "depth of -5.0 [feet] MSL (Mean Sea Level)."

By five issues, which we have reordered and renumbered, Long Island contends: (1) the evidence is legally and factually insufficient to support the jury's findings of breach of contract and negligence; (2) Berry lacked standing to sue; (3) the trial court erred in awarding Berry attorneys' fees; and (4) the trial court erred in granting the declaratory judgment requiring Long Island to dredge Canal "A' to a particular depth. Because we find the evidence insufficient to support the jury's award of some damages, we reverse and render judgment, in part, reverse and remand, in part, and affirm, in part.

## I. BACKGROUND

Berry testified that he purchased property at Long Island in 2005. Prior to purchasing the property, Berry made several trips to the area and spoke with realtors and owners at Long Island. Berry also met with several builders who owned properties at Long Island. According to Berry, at Long Island's management office, he reviewed the

[1] Appellants are the Long Island Village Homeowners Association and its Board of Directors, who were sued in their official capacity as board members. The Board members are Don Halbach, Don Pelletier, Mary M. Steffensen, Eddie Montalvo, Annita White, Tom Bergsma, Bill Gagan, Jose Guerra, Virginia Martin, and Patricia L. Burke. Berry also sued Burke individually for slander, but the jury rejected the claim.

original plat of the property, which reflected property lines, permissible dock locations and lengths, and the depth of the canals when constructed. Berry stated that the plat showed that the canals were originally constructed to a depth of 6.5 feet "mean low tide," which is the same as 7.5 feet "mean lower low water," a more standard measurement used in navigation charts.[2] Berry testified that he was told by Long Island's then-manager that the association had finished dredging in 2004 and had a permit to dredge through 2010. However, Canal "A," where Berry purchased property, was not dredged in 2004. Berry received a copy of the March 2005 "Restatement of the Declaration of Covenants, Conditions and Restrictions" for Long Island ("the Declarations"), which provided that the canals were included in the "limited common elements" of the association. Berry chose to purchase Lot 92 because of its proximity to the intracoastal waterway. Even before he purchased the property, Berry was aware that when he purchased a large sailboat, as he planned to do, he would have to access the waterway by using Canal "C." Another owner with a 47-foot boat docked on Canal "C" told Berry that he had no trouble navigating the canal. Berry eventually purchased a 39-foot boat, which he sailed to Port Isabel from Florida. Berry testified that "from the beginning," he could only navigate the canal within four or five hours of high tide, and the boat's motor sometimes overheated because he was pushing several feet of silt.

In March 2008, Berry purchased a home in Georgetown, Texas. At trial, Berry was questioned about his deposition testimony, in which he was asked why he purchased the home in Georgetown. In his deposition, Berry responded, "I wasn't having any luck finding

[2] The National Oceanic and Atmospheric Administration uses mean lower low water (MLLW), which is the average height of the lowest tide recorded at a tide station each day during the recording period. *See* https://en.wikipedia.org/wiki/Chart_datum, (last visited January 8, 2016).

anyone to sail or to be company with down there. I found that the people down there really didn't care for Anglos, so I went back up north."

Berry made his first written complaint regarding the condition of the canals in July 2009 by sending an email to then-president of Long Island's board of directors, Patricia Burke.[3] Burke forwarded Berry's email to the other board members and responded that if there were insufficient funds to permit dredging in 2009, the board would include the cost in the 2010 budget. In 2002, the United States Army Corps of Engineers ("the Corps") issued to Long Island a permit to conduct maintenance dredging on the property. That permit, which remained active in 2005, was scheduled to expire on December 31, 2010, with an optional extension. The permit allowed the canals to be dredged to a depth of six feet below mean low tide or the minimum depth required for vessel traffic. The minimum depth required for Berry's boat was 5.5 feet.

At the annual owners' meeting on March 6, 2010, Berry addressed the owners and the board and requested action to pursue dredging of the canals. Several board members also advocated taking action to address canal maintenance. Bill Gagan, a board member, passed out a memo to owners outlining the issues with the canals and proposed solutions. Another board member, Tom Bergsma, distributed a memo outlining the issues and proposing that owners approve the budgeting of $1,000,000 for the dredging project, with a special assessment of $1,000 per owner. Bergsma's memo proposed dredging the canals to their original depth of 6.5 feet. Berry asserted that, at the meeting, several people, including board members, suggested that he should try to remedy the problem himself. Around March 11, 2010, Berry attempted to clear a path through Canal "A" by

[3] Hurricane Dolly struck the South Padre Island/Port Isabel area in the summer of 2008. By all accounts, Long Island's "silt problem" was exacerbated considerably after the hurricane.

pulling a “rolling anchor” behind his powerboat “to loosen up the center of the channel.” Several property owners complained that Berry had snagged and destroyed their fishing lights. Long Island’s general manager, Rick Horner, questioned Berry about his actions. Berry’s actions were reported to the county constable and to the Corps. On March 15, 2010, Berry submitted a lengthy written complaint to Burke detailing his problems with the canals. On March 16, 2010, Berry submitted a similar letter to Don Halbach, Vice President of the Board. Berry asserted that Burke damaged his reputation by telling others at a board coffee session that he had committed a criminal act by attempting to dredge the canal.

At the October 2010 board meeting, the results of a survey questionnaire sent to owners regarding the dredging issue were reported. Of 1,100 owners, 460 responded. Of the respondents, a majority—253—voted in favor of dredging.

Berry submitted into evidence the original dredging permit issued in 1977 to Long Island’s predecessor, Outdoor Resorts. Long Island was not created until October 1982. He also submitted Long Island’s January 21, 2013 permit application to the Corps. The 2013 permit application, which was eventually approved, proposed dredging to bring the canals to “5 feet deep at mean tide.” The application also stated that the project was to bring the channels to their “original depth.”

With respect to his damages, Berry submitted Exhibit 4, an estimate from a boatyard in Aransas Pass to repair his boat for damage incurred to his boat. Exhibit 4 shows estimated repairs in the amount of $12,491.06. Exhibit 5 is an estimate of repairs given to Berry by Wesley Thom, when he inspected Berry’s boat in Port Isabel. Thom estimated repairs to be in the range of $13,700 to $16,800. Berry testified that the

damage was incurred because the boat sat in the dock in mud since 2009. Berry stated that he could not take the boat out because it had already been damaged by attempting to navigate the shallow canals.

Berry testified that chartering a sailboat on a daily basis costs approximately $900 per day for a party of ten, or $90 per day per person. Berry stated that he suffered "a lot of heartache and a lot of anguish" trying to get Long Island to respond to his complaints. Berry stated he has never been able to enjoy the property in the way that he anticipated, which was sailing in the Gulf. Berry testified that he purchased the property in 2005 at a cost of $106,000. The value of his property, as reflected in his most recent tax statement, was $96,000. Berry stated that these problems have caused him a lot of anguish and he has been treated for depression and angina. Berry said he began treatment for depression in 2000, prior to purchasing the property, but his depression has "gotten worse." He further stated that he has spent over $50,000 in legal fees, not including trial.

On cross-examination, Berry agreed that, based on responses to the survey, 94% of the boat owners responding said that they required a draft of one-and-a-half to two-and-a-half feet. Three out of 447 boat owners required a draft of at least four feet. Berry admitted that he could have continued to use his boat if he had rented a boat slip at another marina in the area for approximately $450 per month.

On February 22, 2011, Berry sued Long Island, asserting among others, claims for breach of contract and negligence for failure to reasonably maintain the canals. Horner testified that the board asked him in February 2010 to assist in gathering information regarding dredging options. Horner testified that in March 2011, the board hired a registered surveyor to determine how much silt needed to be removed. A permit

application was submitted to the Corps in November 2011, but it was eventually dismissed because it lacked several critical documents. In January 2013, the Corps suggested that it would reconsider a permit application. At the recommendation of the Corps, the board hired an environmental consulting firm with expertise in the area in early 2013. Eventually, the board's permit application was approved by the Corps. The 2013 permit authorized dredging to a depth of five feet. The board accepted bids for the dredging project in January 2014. On cross-examination, Horner agreed that the project as bid contemplated dredging to a level of five feet, but that accommodating Berry's boat required dredging to a level of five-and-a-half feet.

At the conclusion of the evidence, Long Island's counsel moved for a directed verdict on all causes of action alleged; the trial court denied the motions. The jury found Long Island breached the terms of the Declaration "by failing to dredge the canals" and that Long Island's negligence harmed Berry. The jury awarded Berry $17,000 for costs to repair his sailboat, $5,000 for the diminution in value to his real property, $75,000 for the loss of use of his property, and $50,000 for mental anguish. The trial court also entered a declaratory judgment that Long Island must dredge Canal "A" to a level of five feet below mean sea level and awarded $75,900 in attorneys' fees, plus conditional attorneys' fees in the event of appeal. Long Island filed a motion for judgment notwithstanding the verdict and motion for new trial, both of which were denied. This appeal followed.

## II. STANDING

We begin with Long Island's second issue: that Berry lacked standing to sue. Long Island argues that Berry lacked standing because: (1) he failed to join all co-owners

in his suit; and (2) a claim for damages incurred as a result of failure to maintain common areas belongs to a homeowner's association, not to individual homeowners.

**A. Standard of Review and Applicable Law**

Whether a court has subject matter jurisdiction is a question of law we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Dowell v. Quiroz*, 462 S.W.3d 578, 582 (Tex. App.—Corpus Christi 2015, no pet.). Standing is an element of subject matter jurisdiction that can be raised at any time. *Finance Com'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013).

**B. Discussion**

Long Island first argues that Berry lacked standing because he failed to join all of the Long Island co-owners in his suit. On the day trial began, Long Island filed a motion to dismiss asserting that Berry lacked standing because he "failed to join any of his co-tenants in [the] lawsuit." The trial court denied Long Island's motion.

Berry responds that in *Brooks v. Northglen Association*, 141 S.W.3d 158, 162–63 (Tex. 2004), "the Texas Supreme Court established the controlling law on this issue." *Brooks* involved a group of property owners who sued their homeowner's association asserting that the association exceeded its authority in increasing assessments and imposing late fees. *Id.* at 160. The association was comprised of six subdivisions, but the plaintiffs included representatives from only four of the six subdivisions. *Id.* at 162. The association asserted that the trial court lacked jurisdiction because the plaintiffs failed to join all of the property owners. *Id.* at 161–62. In analyzing rule 39, which governs joinder of persons under the Declaratory Judgment Act, *see* TEX. R. CIV. P. 39, TEX. CIV. PRAC. & REM. CODE ANN. § 37.006 (West, Westlaw through 2015 R.S.), the supreme court

held that the failure to join all property owners did not deprive the trial court of jurisdiction over the parties before it. *Brooks*, 141 S.W.3d at 162. The court also found that, because there were no plaintiffs from two of the subdivisions in the association, the trial court lacked jurisdiction to issue a judgment regarding those sections. *Id.* at 163–64. Similarly, the First Court of Appeals has held that the failure to join all property owners affected by restrictive covenants in a declaratory judgment action did not deprive the trial court of jurisdiction. *See Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W. 3d 682, 698 (Tex. App.—Houston [1st Dist.] 2007, no pet.). We agree that *Brooks* controls and reject Long Island's argument. *See Brooks*, 141 S.W.3d at 162.

Long Island also argued that Berry lacked standing because a claim for damages for misuse of common property belongs to the association, not to an individual property owner. We disagree. Section 81.201(b) of the property code provides that a council of owners of a condominium regime may institute litigation on behalf of two or more condominium owners concerning matters related to common elements, but provides that the subsection "does not limit the right of an apartment owner to bring an action in the apartment owner's own behalf." TEX. PROP. CODE ANN. § 81.201(b) (West, Westlaw through 2015 R.S.); *see Celotex Corp., Inc. v. Gracy Meadows Owners Ass'n*, 847 S.W.2d 384, 390 (Tex. App.—Austin 1993, writ denied) ("An owner who suffers harm specific to his own property may, of course, always sue in his own behalf, even if the harm is somehow 'related' to common elements."). Here, Berry sued on his own behalf, alleging that he suffered harm specific to his property, even though the claim was related to maintenance of the canals.

We hold that Berry had standing to sue and that the trial court did not err in denying Long Island's motion to dismiss for lack of jurisdiction. We overrule Long Island's second issue.

## III. SUFFICIENCY OF THE EVIDENCE

By its first issue, Long Island contends there was "no evidence to support jury findings of breach of contract and negligence for failure to dredge canals to their originally constructed depth . . . ." Long Island also contends "the jury findings of breach of contract and negligence were against the great weight and preponderance of the evidence and unreasonable, and the jury awards of repair, loss of use, and mental anguish damages are unreasonable and not supported by competent evidence."[4] We begin by addressing Long Island's challenges to the legal and factual sufficiency of the evidence supporting the jury findings of breach of contract and negligence.

### A. Standard of Review

When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, the appellant must demonstrate that there is no evidence to support the adverse finding. *City of Keller v. Wilson,* 168 S.W.3d 802, 810 (Tex. 2005); *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Such a no-evidence challenge will be sustained only if: (1) there is 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

[4] Although not included in the "Issues Presented" section of its brief, Long Island also challenged the factual sufficiency of the evidence supporting Berry's damages awarded for diminution in the value of his real property. To determine if an issue is properly raised, we look not to the issue statements in isolation, but also to the substance of the brief's argument section. *See Perry v. Cohen*, 272 S.W.3d 585, 587–88 (Tex. 2008).

more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *City of Keller*, 168 S.W.3d at 810; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In conducting a legal sufficiency review, we review the evidence presented at trial in the light most favorable to the jury's verdict and indulge every reasonable inference that would support it, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010); *City of Keller*, 168 S.W.3d at 822, 827.

In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant did not have the burden of proof, we consider and weigh all of the evidence and set aside the verdict only if the evidence that supports the jury finding is so weak as to make the verdict clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Ins. Network of Tex. v. Kloesel*, 266 S.W.3d 456, 469–70 (Tex. App.—Corpus Christi 2008, pet. denied); *Bay, Inc. v. Ramos*, 139 S.W.3d 322, 329 (Tex. App.—San Antonio 2004, pet. denied) (en banc). In a factual-sufficiency challenge, we must examine both the evidence supporting and that contrary to the judgment. *See Dow Chem. Co*., 46 S.W.3d at 242; *Plas–Tex, Inc. v. U.S. Steel Corp.,* 772 S.W.2d 442, 445 (Tex. 1989). Additionally, the jury is the sole judge of witnesses' credibility, and it may choose to believe one witness over another; a reviewing court may not impose its own opinion to the contrary. *See Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 761 (Tex. 2003).

To recover for breach of contract, a plaintiff must show: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the terms of the contract; and (4) the plaintiff suffered damages as a result of the defendant's breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.); *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 235–36 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *McLaughlin, Inc. v. Northstar Drilling Tech., Inc.,* 138 S.W.3d 24, 27 (Tex. App.—San Antonio 2004, no pet.).

A negligence action requires "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *Telesis/Parkwood Ret. I, Ltd. v. Anderson*, 462 S.W.3d 212, 223 (Tex. App.—El Paso 2015, no pet.) (citing *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009) (further citations omitted)). To establish proximate causation in a negligence claim, a party must prove both "cause-in-fact" and foreseeability. *Id.* at 223. The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. *Id.* at 223–24. Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Id.* at 224.

**B. Discussion**

Question 1 of the jury charge asked: "Did Long Island Village Owners Association, Inc. fail to comply with the terms of the March 2005 [Declarations] by failing to dredge the canals?" Question 2 asked: "Did the negligence, if any, of LIVOA through its Board Members, proximately cause harm to Berry?" The jury answered "yes" to both questions.

Question 3—to be answered if the jury answered "yes" to either question 1 or 2—asked, "[w]hat sum of money, if any, if paid now in cash, would fairly and reasonably compensate M.O. Berry for his damages, if any, that were caused by such conduct?" Thus, if we find that there was sufficient evidence supporting the jury's finding on breach of contract, we need not consider its finding on negligence.[5]

Long Island argues that it had no contractual duty to dredge the canals to their original depth of six-and-a-half feet. Long Island argues that Berry's only evidence that Long Island had a duty to dredge to the original depth is the original plat, which is "only a construction document and is not binding" on Long Island.[6]

Berry responds that, even assuming that Long Island did not have a duty to dredge the canals to their specific original depth, it is undisputed that the Declarations required Long Island to reasonably maintain the canals, and that by not dredging the canals at all, Long Island failed to reasonably do so. Berry points to evidence that he was advised by board members in 2005 that Long Island had an active dredging permit that permitted maintenance dredging until 2010. Berry argues that the jury was entitled to consider all of the evidence and make a determination regarding whether Long Island acted to reasonably maintain the canals.

The March 2005 By-Laws of the Declarations state that the Long Island Board of Directors is empowered "to maintain, repair and replace" the common elements and the

[5] Long Island did not object to the broad-form damages question, which asked the jury to award damages based on only Long Island's "conduct," without distinguishing between Berry's breach of contract and negligence claims. *See Laredo Med. Group, Inc. v. Mireles*, 155 S.W.3d417, 428 (Tex. App.—San Antonio 2004, pet. denied) ("to preserve charge error on broad-form submission, a party must make '[a] timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is no evidence to support its submission.'").

[6] We note that a map showing the lots, roads, and waterways was introduced into evidence, but we do not find the "original plat" to be included in the evidence.

limited common elements of the condominium. It is undisputed that the canals are included in the limited common elements.

In addition to Berry's testimony, the jury heard the following testimony:

Dr. Gary Jeffress, a registered land surveyor and professor at Texas A&M University at Corpus Christi, testified that Long Island's 2003 permit from the Corps of Engineers entitled it to "maintenance dredge" a certain amount of silt each year, with no limitation on the schedule for dredging.

Patricia Burke testified by deposition that she was president of the Board in July 2009 when she first received an email complaint from Berry about the condition of the canals. Burke testified that the cost of dredging the canals was not included in the 2010 budget, but that the Board could have levied a special assessment for the cost in 2010.

William Gagan testified by deposition that he was a member of the Long Island Board in March 2011 when the Board received estimates that the cost of dredging the canals would be in the range of $300,000 to one million dollars. Gagan acknowledged that he advocated dredging before Long Island's permit expired in 2010. When he left the Board at the end of 2012, no dredging company had been hired.

Berry also called Tom Bergsma by deposition. Bergsma is a former member of the Long Island Board whose term ended in 2010. Bergsma testified that while he was on the board, Pat Burke called him and asked him to stop Berry from attempting to dredge the canal on his own. Bergsma refused to interfere with Berry's activities. Bergsma testified that he initially ran for the board in order to get the board to take some action in maintaining the canals. Bergsma identified a November 2009 memo that he prepared for the 2010 annual owners' meeting, in which he outlined the "silt problem" in Long Island's

canals, which was exacerbated by Hurricane Dolly in 2008. Bergsma proposed dredging the canals to their original depth, six-and-a-half feet. In the memo, Bergsma warned that without boat access to Long Island's properties, property values would decline. Bergsma outlined that Long Island's first step should be to hire a survey hydrographic firm to calculate how much sediment should be removed. The firm would then assist Long Island in applying for a permit to the Corps of Engineers. After the permit was approved, the firm would also assist in preparing bid specifications to be submitted to dredge contractors. Bergsma's memo concluded by proposing that Long Island budget $1,000,000 for the project and pay for it with a special assessment of $1,000 per owner.

Bergsma testified that he had lived at Long Island for twenty-one years and the only dredging that he knew of was very limited dredging on Canal "H" that had been done seven or eight years earlier. He did not know of any property-wide maintenance dredging that had ever been done. After Bergsma made his proposal, he said that he was "something of a pariah" for aggressively pursuing the dredging issue. Bergsma testified that the board did not want to talk about dredging because the project would cost too much. The board did not want to hire the Houston firm recommended by Bergsma because it would be costly. According to Bergsma, the services offered by the Houston firm included all steps of the process. Bergsma stated that instead of hiring the Houston firm, William Gagan recommended hiring a surveyor, but the project never moved beyond the surveying stage. Bergsma testified that his primary concern was not being able to use his boat to go fishing. Bergsma stated that the board conducted a survey in 2011 by sending out questionnaires drafted by Gagan. Bergsma drafted a memo summarizing the results of the survey. Of 460 responses received, a slight majority—253 to 207—

voted in favor of dredging; however, only 92 respondents voted to dredge to the original depth. Bergsma stated that, twenty-one years ago, many owners had big boats, but as the canals filled up, most of those owners left the development.

On cross-examination, Bergsma admitted that his property is located on Canal "H," which is not included in the common areas of Long Island. Berry announced the conclusion of his presentation of witnesses. The trial court denied Long Island's motions for directed verdict as to Berry's claims for breach of contract,[7] negligence, and slander. The trial court granted Long Island's motions for directed verdict as to Berry's claims for fraud and violations of the DTPA. The trial court deferred a ruling as to Long Island's motion for directed verdict on Berry's declaratory judgment claim.[8] Long Island then presented testimony from the following witnesses.

Mary Steffenson testified that she served on the Long Island Board from 2007 until 2012 as treasurer, and was re-elected to the board in 2013. Steffenson testified that the 2004 dredging was a "limited" "spot dredging in a limited channel." At the January 2010 board meeting, the board voted to table the dredging issue until the March 2010 annual owners' meeting. At the March 2010 owners' meeting, after a discussion of the dredging issue, a majority of owners present expressed by a show-of-hands vote that they were opposed to dredging at that time. The board agreed to table the matter until the following year. After the 2010 owners' meeting, board member Bergsma was asked to gather more information regarding the dredging. Long Island requested an extension of the expiration

[7] Long Island's counsel again admitted that Long Island had a duty to maintain the canals, but argued that it had no duty to maintain them at a particular depth or at a particular frequency.

[8] The trial court ultimately decided the declaratory judgment issue. The issue did not go to the jury.

of the existing permit from the Corps of Engineers, but the request was denied because there was no approved site to deposit the spoils.[9] The permit expired at the end of 2010. In January 2011, Bergsma recommended that the board retain the services of the Houston company, but the board rejected the proposal because the million-dollar cost seemed excessive. Throughout 2011 and 2012, the board attempted to secure an agreement with a nearby landowner for a location to deposit the spoils, but discussions were hampered by difficulties in contacting the landowner. According to Steffenson, the board "wanted to get the dredging done" and it was a "high priority," but gathering information about how to proceed was time-consuming.

On cross-examination, Steffenson admitted that dredging could have been included in the 2010 budget, but they did not have specific information regarding the total cost for the project at that time.

Richard Horner testified that he has been the general manager for Long Island since August 2009. In February 2010, the board asked Horner to obtain information regarding how to secure a permit to authorize dredging the canals. Horner testified that he was contacted in March 2010 when Berry attempted to dredge the canal on his own. In late August 2010, Horner learned from the Corps of Engineers that Long Island's dredging permit would not be granted an extension. Horner testified about the lengthy process involved in obtaining sufficient information to apply for a permit from the Corps of Engineers. Horner met with the Freeland family, the nearby property owners who were willing to take the spoils from the dredging. In August 2011, the board hired a surveyor to determine the amount of silt to be removed. After the survey was completed, a new

[9] "Spoils" refers to "earth and rock excavated or dredged." *See* http://www.merriam-webster/com/dictionary/spoil, last visited February 22, 2016.

application for a permit was submitted in November 2011. In January 2012, the Corps responded that they needed a letter from the Freelands regarding accepting the spoils and more precise maps of the area where the spoils were to be deposited. Many months passed without any success in obtaining the documents.

By spring 2012, aerial photographs of the Freeland property had been obtained. In April 2012, Long Island's application was dismissed because it was still missing some critical documents. In July 2012, Horner received a call from a Corps representative who was in the area and offered to take a look at the site. In late 2012, the Corps indicated that neither of the proposed spoils sites on the Freeland property were acceptable. In January 2013, however, Horner received a call from the Corps representative who said the Corps was reconsidering the proposed spoils sites. In late January, Corps representatives visited the sites and gave tentative approval to one of the sites. The Corps recommended that Long Island retain the services of an environmental engineering firm to expedite the application process. The board approved hiring the environmental firm in February 2013. The information was then submitted in a new 2013 application by the board. The 2013 application requested permission to dredge all canals to a depth of five feet at mean low tide. By April of 2013, Long Island had an approved permit to dredge. According to Horner, a change in the personnel of the Corps of Engineers resulted in a positive change in the permitting process. The environmental engineering firm assisted the board in preparing the package to submit for bid proposals. In November 2013, the Board solicited bid proposals. In January 2014, a bid proposal was accepted by the board to complete the dredging for $832,000. Horner said he had no idea how many hours he had spent on the dredging project.

On cross-examination, Horner admitted that once the environmental engineering firm was retained, the permit was secured within three months.

In order to prevail on its legal sufficiency challenge to the jury's breach-of-contract findings, Long Island was required to establish that there was "no evidence" to support the jury's finding that it failed to comply with Declarations by failing to maintain the canals. *See City of Keller,* 168 S.W.3d at 810. We conclude that there was more than a mere scintilla of evidence that Long Island failed to reasonably maintain the canals by failing to dredge them. *See id.* The jury heard evidence that apart from some "limited" "spot dredging" in 2004, Long Island had never dredged its canals despite evidence that there was a "silting problem" since prior to 2008. Bergsma testified that he called the "silting problem" to the board's attention in November 2009 when he proposed dredging the canals. In fact, Bergsma recommended hiring a firm in 2009 that would provide "turnkey" assistance in accomplishing the dredging project for approximately one million dollars, a fee only slightly higher than the amount finally approved by the board in awarding a bid in 2014, five years after Bergsma's proposal. Bergsma testified that the board rejected his proposal because it would be too costly. Instead, the board pursued the dredging project on its own, without the expertise of professional assistance, with limited success over the next five years.

The jury also heard evidence that, after the owners expressed their disapproval of pursuing the dredging project at the March 2010 owners' meeting, the board agreed to table the issue until the following year. We agree with Berry that, even assuming that Long Island had no duty to dredge the canals to their original depth, the jury could have reasonably found that by not dredging the canals at all, or by acting to postpone the

project, Long Island breached its contractual duty to reasonably maintain the canals "by failing to dredge the canals." And, considering and weighing all of the evidence, *see Kloesel*, 266 S.W.3d at 469–70, we do not find that the evidence supporting the jury finding as to breach of contract is so weak as to make the verdict clearly wrong and manifestly unjust. *See id.* We hold that the evidence is legally and factually sufficient to support the jury's breach of contract finding. We overrule Long Island's first issue.[10] We overrule Long Island's second issue insofar as it challenges the factual sufficiency of the evidence upholding the jury's breach of contract finding.

## IV. DAMAGES

By a sub-issue of his first issue, Long Island also challenges the factual sufficiency of the evidence supporting the jury's award of repair, diminution of value, loss of use, and mental anguish damages. We address these issues in turn.

### A. Repair Damages

Long Island contends that the trial court erred in admitting Berry's Exhibits 4 and 5, which Berry represented to be estimates to repair damage to his boat incurred as a result of the silted-in canals. Long Island asserts that it objected to the admission of these exhibits on the ground that they were unaccompanied by any business records affidavit and were hearsay. Exhibit 4 is an estimate for repairs to Berry's sailboat that he obtained from a boatyard in Aransas Pass. Berry testified that the estimate was emailed to him. Exhibit 4 reflects an estimate of $12,491.06. Exhibit 5 is a description of repairs to the sailboat and general estimate prepared by Wesley Thom. Exhibit 5 estimated repairs in

[10] Because we have found the evidence legally and factually sufficient to support the jury's breach of contract finding, and because Long Island did not object to the broad-form damages question, we need not address its negligence finding. *See* TEX. R. APP. P. 47.1.

the range of $12,700 to $16,800. Berry testified that the damage to the boat was incurred by "sitting in the dock and sitting in the mud since 2009."

In response, Berry argues that: (1) Long Island failed to adequately brief the issue; (2) even if it had adequately briefed the issue, Long Island failed to timely object to the admission of the exhibits; and (3) any error in admitting the exhibits was harmless.

We review a trial court's decision on the admission of evidence under an abuse of discretion standard. *Yzaguirre v. KCS Res., Inc.*, 47 S.W.3d 532, 543 (Tex. App.—Dallas 2000), *aff'd*, 53 S.W.3d 368 (Tex. 2001).

We must construe appellate briefs reasonably, yet liberally, so that the right to appellate review is not lost by waiver. *See* TEX. R. APP. P. 38.1(f); *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam); *Jarvis v. Field*, 327 S.W.3d 918, 928–29 (Tex. App.—Corpus Christi 2010, no pet.) (analyzing issues in the interest of justice and in accordance with supreme court directive to construe appellate issues liberally so that right to appeal is not lost). We should reach the merits of an appeal whenever reasonably possible. *Perry*, 272 S.W.3d at 587; *Jarvis*, 327 S.W.3d at 928.

Here, Long Island has stated its issues in a cursory manner. Construing the brief liberally, however, we can ascertain the crux of Long Island's complaint regarding the admission of Berry's Exhibits 4 and 5 and we will address the complaint if Long Island timely objected to admission of the exhibits.

Berry argues that Long Island waived its objections to the admission of Exhibits 4 and 5 because it failed to timely object—that its objections were "too late." The relevant testimony follows:

Q. [Berry's counsel]: Okay. Let's talk about Exhibit 4. It's a two-page document. Can you tell the jury what the first page of Exhibit 4 is?

A. [Berry]: It's an estimate to do repairs on my boat. I had the boat taken out over to the marina and had a surveyor come over and do a survey on it.

Q. Okay. And what—what is the work that you are having estimated on here?

A. Repair the bottom, prep and apply new barrier coat, sandblast the keel, reinstall the prop, and do other work, not including—well, what this says is not including repairs to the keel or fiberglass repairs to the hull.

Q. Okay. And the damage that is—what is the repair amount in this document?

A. $12,491.06.

[LI's counsel]: Your Honor, I'm sorry. I'm going to object to this because it—this appears to be some kind of invoice for something from somebody else, and it hasn't been admitted into evidence, Your Honor. I'd ask that it be taken down right now while we discuss this, please.

[Berry's counsel]: That's fine, Your Honor.

[LI's counsel]: This has not been admitted into evidence, Your Honor. I'm assuming it's some kind of invoice from a dealer or something—

[Berry's counsel]: I've taken it down, Your Honor.

THE COURT: All right.

[LI's counsel]: —that hasn't been proven up. And so I would object to its admission or counsel discussing it.

THE COURT: All right.

[Berry's counsel]: I'll ask the witness questions.

THE COURT: All right.

[LI's counsel]: And I ask that any testimony from the invoice be stricken and that the jury be asked to disregard anything that was shown on the screen.

THE COURT: All right. Just go ahead and disregard all the testimony up to this point. Strike it from the record. Go ahead and lay the predicate.

[Berry's counsel]: Thank you.

Q. [Berry's counsel]: Mr. Berry, what is Exhibit 4?

A. Exhibit 4 is an estimate that I received from a boatyard to do repairs on my sailboat.

Q. And where is this boatyard?

A. This boatyard is in Aransas Pass, Texas.

Q. Okay. And what are the repairs that they are estimating be done on your boat?

[LI's counsel]: Your Honor, she's still getting into a document that hasn't been admitted into evidence. I'm going to object until she gets—properly lays the foundation that it's a business record.

THE COURT: I'll sustain at this point.

Q. [Berry's counsel]: Mr. Berry, where did you get this document?

A. I got it in response to a survey that was done at my request at the boatyard in South—in Port Isabel, Texas.

Q. What do you mean a survey?

A. I had the boat hauled out and cleaned and surveyed by a licensed inspector. And his report was given to me, and I gave that report to the local boatyard and also sent it up to Aransas Pass, another boatyard where he recommended that I take it for repairs, to get an estimate of the damage for this lawsuit.

Q. And who was the individual that did your survey?

A. Wes Thom, Wesley Thom.

Q. And does the first page of Exhibit 4 represent the work that Mr. Thom was planning to do on your boat?

A. Yes, it does.

Q. Okay.

[Berry's counsel]: Your Honor, I'd move to have Exhibit 4 admitted into evidence.

[LI's counsel]: And, Your Honor, I'm going to object because it's still hearsay. It hasn't been proven up as a business record. The proper way to do this was to submit it—to either get somebody from the repair place to come and testify that this is their business record. He can't testify to that. I don't know where this came from. I mean, he could have—I've never heard of these shops. I don't know if they're real shops. I don't—we don't—there's no authenticity. There's no way for me to cross-examine these folks. And she has not properly proven it up. It's either a business record or it's hearsay. It's hearsay, Your Honor. She hasn't proven it up.

[Berry's counsel]: Your Honor, it was produced in discovery along with the identification of Mr. Thom and his boatyard. They had every opportunity to ask for their depositions or take their depositions, and they didn't do that. This is clearly proper evidence.

THE COURT: Let me see it.

[LI's counsel]: And, Your Honor, the Court knows that just producing something in discovery doesn't make it admissible into evidence; and [Berry's counsel] knows that, too, Your Honor. It has to have been—it's a business record. It has to be proven up as a business record, and it hasn't been proven up. And unless you bring somebody from the shop to prove it up at this point, it should not be admitted

into evidence. The basic rule on hearsay evidence, Your Honor.

[Berry's counsel]: Your Honor, they were identified in discovery along with these records.

THE COURT: So who was this sent to, or who requested it, or—

[Berry's counsel]: We requested it to show the damage to Mr. Berry's boat.

THE COURT: Who's "we," you or your client?

[Berry's counsel]: Mr. Berry took his boat out, had the survey done, had an estimate done on his boat, no different than someone in a car accident taking their car to a collision shop. We don't bring in the body shop individual to prove up their records.

THE COURT: That's what I'm saying. This was mailed to him or—

[Berry's counsel]: Yes.

THE COURT: He received it?

[Berry's counsel]: Yes.

THE COURT: Well, I don't think you covered that. If he received—you received that information, Mr. Berry?

[Berry]: Yes, I did, sir.

THE COURT: Through the mail or fax or how did you get it?

[Berry]: He actually gave it to me and I printed it. He e-mailed it to me, and I was there at the inspection myself.

THE COURT: Okay. You were there at the inspection, and then he e-mailed you that information?

[Berry]: Right.

THE COURT: All right. I'll overrule the objection. Four will be admitted.

(Plaintiff's Exhibit No. 4 admitted)

[LI's counsel]: Note my objection, Your Honor, the hearsay objection.

THE COURT: It'll be noted.

[Berry's counsel]: So Exhibit 4 is admitted, Your Honor?

THE COURT: It's admitted.

[Berry's counsel]: Thank you.

Q. [Berry's counsel]: What is the amount of repair that Mr. Thom is estimating it's going to cost to do this work?

A. In reading through here, I added it up. It didn't add it up here, but it's approximately $30,000.

Q. Okay. But if you look at this number right here on Exhibit 4, what is that?

A. That's just to repair the bottom and sandblast the keel.

Q. Okay. And what is that number?

A. $12,491.06.

Q. Okay. And then Exhibit 5, do you have that in front of you?

A. Yes, I do.

Q. Is that an additional estimate from Mr. Thom?

A. This is the estimate that Mr. Thom gave me, and he gave this to the South Padre boatyard and we sent this up to the Aransas Pass boatyard at his request.

Q. So Mr. Thom handed this to you, Exhibit 5?

A. No. He e-mailed it to me.

Q. He e-mailed it to you. And were you present when he was doing this inspection?

A. Yes, I was.

Q. Okay.

A. And I was at his house when we went over it, so—

[Berry's counsel]: Your Honor, I'd move to have Exhibit 5 admitted into evidence.

[LI's counsel]: Your Honor, same objection that it's a business record. We have no way of cross-examining these folks, and she should have submitted it as a business record. I think this is improper hearsay, and we would object to it in the way of authenticating that those numbers are real or that they relate to damage that he suffered as a result of the allegations he's making in this case, Your Honor. So we would also—we have no way of knowing whether the damages to this keel had anything to do with any—a grounding in Canal A or anywhere on the premises of Long Island Village. So we would say that it hasn't been proven up, Your Honor, and it's hearsay and there's no authenticity.

THE COURT: Okay. It'll be overruled. It'll be admitted.

(Plaintiff's Exhibit No. 5 admitted)

Berry argues that Long Island's objection to Exhibit 4 was "too late" because the exhibit had already been placed on the "Elmo" and Berry had already answered several questions about it. We disagree.

Generally, in order for an objection to the admission of evidence to be timely, it must be made when the evidence is offered, not after it has been introduced. *Perez v. Bagous*, 833 S.W.2d 671, 674 (Tex. App.—Corpus Christi 1992, no writ). Here, Long Island objected to Exhibits 4 and 5 immediately after they were offered. *See* TEX. R. APP.

P. 33.1(a); *Schwartz v. Forest Pharm., Inc.*, 127 S.W.3d 118, 123 (Tex. App.—Houston [1st Dist. 2003, pet. denied) (noting party failed to preserve error when it did not object until after substantial testimony was given). We conclude that Long Island preserved its objection to the admission of Exhibits 4 and 5.

Long Island argues that the trial court erred in admitting Exhibits 4 and 5 because "there was no business records affidavit on file to except the documents from the operation of the hearsay rule, and Berry was incompetent to testify as to the reasonableness and necessity of the repairs purportedly evidenced by the admitted documents."

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a). In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic. The trial court's determination of whether the proponent has met this threshold requirement is subject to appellate review for an abuse of discretion and should not be countermanded so long as it is within the zone of reasonable disagreement. This has been aptly described as a "liberal standard of admissibility."
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> . . . .
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> Even when a trial court judge *personally* harbors some doubt as to the general credibility of a sponsoring witness, a decision to admit particular evidence sponsored by that witness may not necessarily be outside the zone of reasonable disagreement. So long as the ultimate fact-finder could rationally choose to believe the sponsoring witness, and the witness's testimony would establish that the item proffered "is what its proponent claims[,]" the trial court will not abuse its discretion to admit it. As we said in *Tienda* [*v. State,* 358 S.W.3d 633 (Tex. Crim. App. 2012)], "[t]he ultimate question whether an item of evidence is what its proponent claims [is] a question for the fact-finder—the jury, in a jury trial." *Tienda*, 358 S.W.3d at 638.

*Butler v. State*, 459 S.W.3d 595, 600, 605 (Tex. Crim. App. 2015) (some internal citations omitted); *see also Hernandez v. W-S. Indus. Servs.*, No. 13-14-00404-CV, 2015 WL 5136771, at *4 (Tex. App.—Corpus Christi Aug. 31, 2015, no pet.) (mem. op.).

With respect to Exhibit 4, Berry testified that he was personally present when his boat was inspected and that the estimate was emailed to him. As to Exhibit 5, Berry testified that he was present at the inspection and that Wesley Thom emailed him the estimate of the work to be done on the boat. We hold that this testimony was sufficient to establish that Exhibits 4 and 5 were what Berry claimed—estimates of the cost of repairs to his boat. *See* TEX. R. EVID. 901(a). Accordingly, the trial court did not abuse its discretion in concluding that Exhibits 4 and 5 were authenticated. *See* TEX. R. EVID. 901(a).

However, our conclusion that Exhibits 4 and 5 were properly authenticated does not end our analysis because Long Island also explicitly objected to the admission of the exhibits on hearsay grounds. Specifically, Long Island argued that the exhibits were hearsay, *see* TEX. R. EVID. 801(d), and that Berry failed to meet the requirements of the business record exception to the hearsay rule. *See id.* R. 803(6). We agree.

Exhibit 4 is an estimate prepared by a boatyard in Aransas Pass, and Exhibit 5 is an estimate prepared by Wesley Thom. It appears from Berry's testimony that Thom based his estimate of repairs on a "survey" that he conducted on Berry's sailboat. It further appears that the estimate prepared by the Aransas Pass boatyard was based on the survey conducted in Port Isabel, not on a physical inspection of the sailboat. No affidavit accompanied either exhibit. *See id.* R. 902(10). "Under the Rules of Evidence, a statement is hearsay if it is made by someone other than the witness while testifying, if

it is offered to prove the truth of the matter explicitly or impliedly asserted, and if the probative value of the statement results from the declarant's belief of the matter asserted." *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 662 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (citing TEX. R. EVID. 801(c), (d) (holding that invoices stating the cost of reinstalling and rewiring air-conditioning units were inadmissible hearsay when offered to prove cost of repairs). When hearsay is admitted over an appropriate objection, it has no probative value and should not be considered in evaluating the sufficiency of the evidence. *Id.*; *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242 (Tex. App.—Corpus Christi 1994, writ denied).

We agree with Long Island that Berry failed to establish any exception to the hearsay rule. As the party offering the evidence, Berry had the burden of showing that the exhibits met the requirements of the business-records exception or some other exception. *See Volkswagen of Am., Inc., v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004).

> Rule 803(6) creates a hearsay exception for properly authenticated business records. *See* TEX. R. EVID. 803(6). The foundation for the business records exception has four requirements: (1) the records were made and kept in the course of a regularly conducted business activity, (2) it was the regular practice of the business activity to make the records, (3) the records were made at or near the time of the event that they record, and (4) the records were made by a person with knowledge who was acting in the regular course of business.

*Good v. Baker*, 339 S.W.3d 260, 273 (Tex. App.—Texarkana 2011, pet. denied) (citing *Powell v. Vavro, McDonald, & Assocs*., 136 S.W.3d 762, 765 (Tex. App.—Dallas 2004, no pet.)); *see* TEX. R. EVID. 803(6). Here, Berry's testimony did not establish these requirements. In response to Long Island's hearsay objection to the exhibits, Berry did not assert that a hearsay exception applied, and we do not find any applicable exception.

The trial court therefore erred in admitting Exhibits 4 and 5 over Long Island's hearsay objections. *See Tempo Tamers, Inc.*, 715 S.W.2d at 662. Because no probative evidence supported the jury's answer with regard to cost-of-repair damages, we reverse that part of the trial court's judgment awarding $17,000 for repair damages and render judgment that Berry take nothing by way of his claims for cost-of-repair damages. *See id.* We sustain that portion of Long Island's first sub-issue that challenges the evidence supporting the award of repair damages.

**B. Diminution in Real Property Value**

Long Island also challenged the factual sufficiency of the evidence supporting the jury's award of $5,000 in damages for an alleged decrease in the value of Berry's real property. Long Island argues that Berry's only evidence in support of these damages was his own testimony that he purchased the property in 2005 for $106,000 and that in his most recent tax statement, the property was appraised at $96,000. Long Island argues that the $5,000 award of damages is "unsupported by the evidence, is against the great weight and preponderance of the evidence, and is unreasonable."

Again, Berry argues that Long Island failed to adequately brief this issue. Again, although we agree that Long Island made only a cursory argument, we can easily ascertain that the issue is whether Berry's own testimony regarding the diminution in value of his property is sufficient to support the jury's award of damages. Accordingly, we will address it.

The "property owner rule," which falls under Texas Rule of Evidence 701, permits a property owner to give opinion testimony about the value of his or her property. *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012); TEX. R. EVID. 701.

However, the supreme court requires that such testimony meet the "same requirements as any other opinion evidence." *Justiss*, 397 S.W.3d at 156. Thus, the supreme court has determined that a property owner's valuation testimony must have a basis in fact, such as evidence of price paid, nearby sales, tax valuations, or appraisals. *Id.* at 159.

Here, Berry testified that he purchased the property in 2005 for $106,000 and that his most recent tax statement reflected an appraised value of $96,000, a decrease in value of $10,000. The jury awarded Berry $5,000 in damages for the diminution in value of his real property.

Long Island argued that there is insufficient evidence to attribute any diminution in value solely to the failure to dredge Canal A. However, Long Island never offered any evidence showing an alternate cause of the diminution in Berry's real property value. We conclude that the evidence is factually sufficient to support the jury's award of $5,000 in diminution-of-value damages. *See id.*; *Kloesel*, 266 S.W.3d at 469–70. We overrule that portion of Long Island's first sub-issue challenging the sufficiency of the evidence supporting the $5,000 award of damages.

**C. Loss-of-Use Damages**

Long Island also challenged the factual sufficiency of the evidence supporting the jury's award of damages for Berry's loss of use and enjoyment of his property. Long Island argues that the only evidence supporting the award of loss-of-use damages was Berry's testimony that the reasonable replacement value of the use of his sailboat could be calculated as $90 per day per person, the estimated cost to charter a similar sailboat. Berry again argues that Long Island failed to adequately brief the issue. However,

although we agree that Long Island provided only a cursory argument, the crux of its challenge to Berry's evidence is plain, and we will therefore address it.

The jury was asked to award Berry damages, if any, for "[t]he value of the harm done to Berry for his loss use [sic] and enjoyment of his property sustained in the past." The jury awarded $75,000 in loss-of-use damages.

Loss-of-use damages are permitted where, as here, cost-of-repair damages are sought. *Tex. Farm Bureau Mut. Ins. Co. v. Wilde*, 385 S.W.3d 733, 737 (Tex. App.—El Paso 2012, no pet.). The usual measure of damages for loss of use is the reasonable cost of renting replacement property. *Wells Fargo Bank Nw., N.A. v. RPK Capital XVI, L.L.C.*, 360 S.W.3d 691, 710 (Tex. App.—Dallas 2012, no pet.). To prove up loss of use, the reasonable rental value of a substitute is sufficient evidence to support an award of actual damages. *Luna v. N. Star Dodge Sales, Inc.*, 667 S.W.2d 115, 119 (Tex. 1984), *overruled in part on other grounds by St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 648 (Tex.1987). However, it is not a prerequisite to recovery of damages that the plaintiff actually rent a substitute during the period of the loss of use. *Id.* at 118. The primary purpose for allowing loss-of-use damages is not simply to compensate the plaintiff for the expenses of a substitute, but to award the owner actual pecuniary compensation for his loss. *Chem. Express Carriers, Inc. v. French*, 759 S.W.2d 683, 687 (Tex. App.—Corpus Christi 1988, writ denied). Latitude is allowed the fact-finder in determining damages where there is no precise measurement. *Id.* Looking at the evidence supporting the award, we determine if it established with fair certainty the reasonable value of the lost use. *Goose Creek Consol. Indep. Sch. Dist. of Chambers & Harris Ctys., Tex. v. Jarrar's Plumbing, Inc.,* 74 S.W.3d 486, 498 (Tex. App.—Texarkana 2002, pet. denied). The

damages must be ascertainable in some manner other than by mere speculation or conjecture, and by reference to some fairly definite standard, established experience, or direct inference from known facts. *Berry Contracting, Inc. v. Coastal States Petrochem. Co*., 635 S.W.2d 759, 761 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (citing *Tex. Tool Traders, Inc. v. Mosley Mach. Co.*, 422 S.W.2d 229, 231 (Tex. Civ. App.—Waco 1967, no writ)).

Here, Berry testified that he had not been able to sail his boat for about four-and-a-half years, or fifty-four months. He testified that he had previously chartered sailboats in the Bahamas, the British Virgin Islands, St. Thomas, and in San Diego. The daily cost for chartering a sailboat in those areas was approximately $90 per person. When asked specifically whether there were sailboats available for charter in Port Isabel or South Padre Island, Berry stated, "I don't believe there is. I do not know, no."

On cross-examination, Berry acknowledged that he moved to Georgetown in 2008. When asked whether he would have sailed two to three times a week after moving to Georgetown, Berry responded that he came to his property frequently "trying to sail" and often brought friends along.

Thus, the issue is whether Berry's testimony regarding the cost of chartering a sailboat in the Bahamas, the British Virgin Islands, St. Thomas, and San Diego established with fair certainty the reasonable value of the loss of use of Berry's sailboat. *See Jarrar's Plumbing, Inc.*, 74 S.W.3d at 498. Stated differently, did Berry's testimony establish the reasonable rental value of a "substitute"? *See Luna*, 667 S.W.2d at 119. We conclude that it did not. Berry admitted that he did not believe sailboats were available for charter in Port Isabel or South Padre Island. The record is silent regarding whether

chartering a sailboat in some destinations is more expensive than in others. Berry offered no testimony supporting the inference that the cost of chartering a sailboat in Port Isabel was likely to be comparable to chartering a sailboat in the identified destinations. Although Berry's testimony was based on his "established experience," *see Berry Contracting, Inc.*, 635 S.W.2d at 761, he offered no experience of chartering a sailboat in Texas. Accordingly, his testimony was no more than "mere speculation or conjecture" regarding the reasonable cost of chartering a sailboat in the Port Isabel area. *See id.* We find the evidence factually insufficient to support the jury's award of $75,000 in loss-of-use damages. *See Kloesel*, 266 S.W.3d at 469–70. We sustain that portion of Long Island's first sub-issue challenging the factual sufficiency of the evidence supporting the award of loss-of-use damages.

**D. Mental Anguish Damages**

Long Island also challenged the sufficiency of the evidence supporting the jury's award of $50,000 for mental anguish damages. Long Island notes that no expert testimony was offered and no business records were offered. Long Island cites *Parkway Co. v. Woodruff* as "stating the test for proof of mental anguish." 901 S.W.2d 434, 444 (Tex. 1995).

**1. Applicable Law**

Texas law defines mental anguish as a "relatively high degree of mental pain and distress." *Id.* "It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." *Id.* We will uphold an award

of mental anguish damages against an evidentiary sufficiency challenge when the claimant has "introduced direct evidence of the nature, duration, and severity" of her mental anguish that establishes a "substantial disruption" to her daily routine. *Id*.; *see Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011); *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002). An award of mental anguish damages may also be supported by some evidence of "'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger.'" *Parkway Co*., 901 S.W.2d at 444 (quoting *J.B. Custom Design & Bldg. v. Clawson*, 794 S.W.2d 38, 43 (Tex. App.—Houston [1st Dist .] 1990, no writ)). "It is well-settled that there must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded." *Pay & Save, Inc. v. Martinez*, 452 S.W.3d 923, 930 (Tex. App.—El Paso 2014, pet. denied) (citing *Guerra*, 348 S.W.3d at 231).

In reviewing a mental anguish award, we must be tolerant of the limits of proof in this realm; indeed, "[t]he process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss." *Figueroa v. Davis*, 318 S.W.3d 53, 62 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (quoting *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 871 (Tex. App.—Fort Worth 2005, no pet.)). Given this lack of objective measures, so long as some compensable mental anguish has been established, the task of fixing the exact amount of damages is "generally left to the discretion of the fact finder." *Id*. (quoting *Pentes Design, Inc. v. Perez*, 840 S.W.2d 75, 80 (Tex. App.—Corpus Christi 1992, writ denied)). But the discretion of a fact-finder in awarding damages for mental anguish is not unlimited. Although recognizing that juries

must be afforded "a measure of discretion in finding [mental anguish] damages", the Supreme Court of Texas has still held that "[t]here must be evidence that the amount is fair and reasonable compensation." *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

**2. Discussion**

Berry testified that (1) his issues with Long Island "caused [him] a lot of anguish;" (2) he had been treated for, and was still receiving treatment for angina and depression; and (3) that he began treatment for depression in 2000, before he purchased the property, but that his depression had "gotten worse to the point where they had actually changed [his] medication."

We conclude that this testimony did not constitute "direct evidence of the nature, duration, and severity" of Berry's mental anguish that established a "substantial disruption" to his daily routine. *See Parkway Co.*, 901 S.W.2d at 444. Neither did it constitute evidence of "a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Id.* (internal citations omitted). Even if we were to assume that Berry's testimony that he is being treated for angina and depression is some evidence of the existence of compensable mental anguish, there was no evidence whatsoever to justify the amount awarded. "[T]he jury cannot simply pick a number and put it in the blank but must award fair and reasonable compensation based upon the evidence." *Martinez*, 452 S.W.3d at 930. We hold there is no evidence to support the jury's award of $50,000 for mental anguish damages. We sustain that portion of Long Island's first sub-issue that challenges the evidence supporting the award of mental anguish damages.

## V. ATTORNEYS' FEES

By its third issue, Long Island contends that the trial court erred in awarding Berry attorneys' fees because his counsel failed to segregate recoverable fees from those that were not. Long Island argues that Berry was entitled to recover fees on his breach of contract claim and his declaratory judgment action, but was not entitled to recover fees on his claims for negligence, fraud, and defamation. Long Island argues that because Berry's counsel did not provide evidence of the percentage of time she worked on each claim, the unsegregated fees "should have been reduced by at least sixty percent."

Berry responds by noting the "overlapping nature" and "interrelatedness" of his claims. Berry argues that "evidence of the breach of contract claim advanced the other claims and vice versa."

### A. Standard of Review

We review de novo a trial court's decision as to whether to require segregation of attorneys' fees. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312 (Tex. 2006). "[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *Id.* at 313. An exception to this rule applies when recoverable and non-recoverable claims "are so intertwined that they need not be segregated." *Id*.; *see A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007) ("It is only when legal services advance both recoverable and unrecoverable claims that the services are so intertwined that the associated fees need not be segregated.").

### B. Discussion

Here, Berry's counsel submitted a three-page affidavit in which she detailed how all of Berry's claims—except the slander claims against Patricia Burke individually—were intertwined and based on the same facts. Berry's counsel's affidavit stated, in relevant part:

> Of the total hours billed by attorneys on this matter, 313 hours were spent on the prosecution of the breach of contract, declaratory judgment, negligence, DTPA and fraud claims, which involved the same set of inter[t]wined common nucleus of operative facts. I spent five hours, or $1125, on the slander claim. Total fees incurred by Mr. Berry for the prevailing causes of action are $68,400.00, which does not include the five (5) hours spent on the cause of action for slander.[11]

As noted by Berry's counsel in her affidavit, the main issue in the lawsuit was whether Long Island "had a duty to maintain (dredge) canals and to what depth and to what extent." All of Berry's claims were variations on the same assertion: that Long Island led him to believe that it would reasonably maintain the canals but did not do so. Berry's fraud claim asserted that Long Island "ma[de] representations to [Berry] that the canals would be dredged." Berry's negligence claim asserted that Long Island failed to perform its duty to maintain the canals. Berry's DTPA claims asserted that Long Island falsely represented to him that it would maintain the canals. The only claim in Berry's live petition that did not involve maintaining the canals was his claim for slander against Burke, the fees for which his counsel segregated and excluded from the remainder of the attorneys' fees.

However, Long Island did not object at trial to the failure to segregate attorneys' fees. Therefore, its objection is waived. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997) ("if no one objects to the fact that the attorney's fees are not segregated

[11] Berry's counsel stated that expenses totaled $7,500, which added to the fees of $68,400, equaled the amount awarded by the trial court.

as to specific claims, then the objection is waived"); *McKeithan v. Condit*, No. 13-10-00226-CV, 2013 WL 6729963, at *10 (Tex. App.—Corpus Christi Dec. 19, 2013, no pet.) (mem. op.).

Even if Long Island had not waived its objection, the affidavit of Berry's counsel supports a conclusion that there were no attorneys' fees claimed that related solely to a claim for which such fees were unrecoverable—all of the attorneys' drafting time would have been necessary even if the claims for which attorneys' fees were nonrecoverable had not been asserted—so no segregation of fees was necessary.[12] *See Chapa*, 212 S.W.3d at 313–14; *see also Am. Int'l Indus., Inc. v. Scott*, 355 S.W.3d 155, 164 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *USAA Tex. Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602, at *10–11 (Tex. App.—Corpus Christi July 31, 2014, pet. filed) (mem. op.). We overrule Long Island's third issue.

## VI. DECLARATORY JUDGMENT

By its fourth issue, Long Island contends the trial court erred in entering a declaratory judgment requiring Long Island to "dredge the entirety of Canal 'A' and continuing out 148' to the Intracoastal Waterway to a depth of -5.0 MSL (Mean Sea Level) . . . ." Long Island argues that the only evidence that it was required to dredge to a particular depth was the original plat, which was not binding on Long Island because: (1) Long Island never adopted those construction plans; (2) the plat was not adopted by

[12] Berry's attorneys' fees were recoverable for his claims of breach of contract, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West, Westlaw through 2015 R.S.), and declaratory judgment, *see id.* § 37.009 (West, Westlaw through 2015 R.S.). Attorneys' fees were not recoverable for his claims of fraud, *see Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006), negligence, *see Endsley Elec., Inc. v. Altech, Inc.,* 378 S.W.3d 15, 28 (Tex. App.—Texarkana 2012, no pet.), and defamation, *see River Oaks L-M, Inc. v. Vinton-Duarte*, 469 S.w.3d 213, 234 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

reference on a deed; and (3) Berry did not introduce any deed to his lot into evidence so that it could be determined if the conveyance referenced a plat showing the canals.

Under the Declaratory Judgments Act, "[a] court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(a) (West, Westlaw through 2015 R.S.). The purpose of the Declaratory Judgments Act is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and the Act is to be liberally construed and administered. *Id.* § 37.002(b) (West, Westlaw through 2015 R.S.); *see Linden*, 222 S.W.3d at 699.

"We review declaratory judgments under the same standards as other judgments and decrees." *Rourk v. Cameron Appraisal Dist*., 305 S.W.3d 231, 234 (Tex. App.—Corpus Christi 2009, pet. denied) (quoting *Montfort v. Trek Res. Inc*., 198 S.W.3d 344, 354 (Tex. App.—Eastland 2006, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (West, Westlaw through 2015 R.S.). "We look to the procedure used to resolve the issue at trial to determine the standard of review on appeal." *Rourk*, 305 S.W.3d at 234 (quoting *Montfort*, 198 S.W.3d at 354. When the trial court determines the declaratory judgment issue after a bench trial, we review its factual findings under a sufficiency of the evidence standard and review its conclusions of law de novo. *Id*.

Here, by his live petition, Berry requested that the trial court "determine that under [Long Island's Declarations and By-Laws, Long Island has] a duty to dredge the canals." We have already determined that the evidence is legally and factually sufficient to support the trial court's findings that Long Island breached its duty to reasonably maintain the canals. Even assuming, as Long Island argues, that no duty was imposed on Long Island

to dredge to a particular depth by a plat or deed, the trial court was free to consider all of the evidence and declare that Long Island was required to dredge to a particular depth in Canal "A." We overrule Long Island's fourth issue.

## VII. CONCLUSION

We reverse (a) the trial court's award of $17,000 in repair damages, (b) the award of $75,000 in loss-of-use damages, and (c) the award of $50,000 in mental anguish damages, and render judgment that Berry take nothing as to those damages. We reverse the trial court's award of $29,404 in pre-judgment interest and remand to the trial court for a recalculation of pre-judgment interest. We otherwise affirm the judgment.

DORI C. GARZA,
Justice

Delivered and filed the
17th day of March, 2016.