NUMBER 13-17-00337-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

USAA TEXAS LLOYD'S COMPANY AND ALLCAT CLAIMS SERVICE, LP, Appellants,

v.

JOHN R. GRIFFITH, Appellee.

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Benavides

Appellee John Griffith's house was damaged in a hail storm that struck McAllen in the spring of 2012. Griffith filed suit against appellant USAA Texas Lloyd's Company (USAA) and others,[1] alleging various causes of action related to their handling of his

[1] Although the judgment did not award relief against Allcat, Allcat filed a conditional notice of appeal. Griffith elected to recover based upon the jury's answer to question 4(C) which resulted in relief

insurance claim. The jury found USAA liable as alleged and awarded Griffith roughly $776,000 in actual damages, treble damages, exemplary damages, penalty interest, attorney's fees, and expert witness fees. USAA appeals contending there is legally insufficient evidence to support the jury's findings of breach of contract, knowing violations of the insurance code, fraud, expert witness fees, and damages arising from these findings. In addition, USAA argues that the jury charge was erroneous, and the award of attorney's fees must be reversed. We affirm in part and reverse and render in part.

I. BACKGROUND

A. Trial Evidence

Griffith held a USAA policy on his house in McAllen, which had a sizeable roof composed of wood shakes, a type of wood-plank shingling. The roof was newly built in the early 2000's. Shortly before the storm, Griffith had maintenance performed on the roof which included replacing some damaged shakes and oiling the rest.

Six weeks before the storm, USAA sent an inspector to survey Griffith's house for the purpose of underwriting a new insurance policy. In his report, the inspector documented the home's good condition, took photos showing there were no holes in the roof visible from the attic, and increased the home's appraisal value by over $100,000.

In April 2012, McAllen was struck by a hail storm. There was evidence of sixty-mile-per-hour winds and 3.2-inch sized hail at Griffith's house. Griffith reported home damage to USAA within four days.

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solely against USAA. Allcat filed a conditional notice of appeal to preserve its right to challenge any reformed judgment.

USAA sent an inspector from Allcat Claims Service, LP, to assess the damage, which the Allcat inspector agreed was caused by the hail storm. The Allcat inspector's photos showed that there were now holes in the roof where daylight could be seen from the attic. The inspector found that other than hail damage, the roof was well maintained and had minimal wear and tear.

The Allcat inspector used a "test square" method, whereby he evaluated a test patch on each slope of the roof, counted the number of damaged shakes in each patch, and used those numbers to extrapolate the damage to the rest of the roof. He found broken shakes on each slope, with a total of eighty-seven shakes split by hail in the test patches. Based on these tests, he determined that the right slope of the house should be replaced entirely, and that the other three slopes could be spot-repaired, with an estimated 1,730 shakes to be individually replaced on the other three slopes. He estimated the cost to repair Griffith's roof and other areas of his property at $41,077, which, after depreciation and deductibles, would result in a $32,190 payment to Griffith.

USAA relied on the Allcat estimate and issued Griffith a check for $32,190. Griffith saw that his neighbors' roofs were being replaced, not spot repaired, and he wanted a full replacement as well. He retained Rimkus, an inspection company often used by insurers, to perform an estimate. The Rimkus inspector determined that the roof should be replaced because all slopes showed significant damage, with over fifty percent of the shakes damaged on at least two slopes. Additionally, the punctured felt underlayment needed to be replaced or else the roof would leak. He estimated that USAA owed Griffith $119,850.45, including $73,405 for replacement of the roof. The remainder included

damage to windows and screens, a satellite dish, and pool decking.

Griffith submitted the Rimkus estimate to USAA and requested additional payment. USAA in turn submitted Rimkus's estimate to a third-party engineering firm called Project Time and Cost (PTC). Seven months after the storm, PTC sent an engineer to survey the roof. The PTC engineer determined that most of the damage to the roof was caused by natural wear and tear and "mechanical damage" such as foot traffic. He concluded that fewer than twenty shakes were damaged by hail, and that the largest hail at Griffith's house was probably one inch in diameter at most. Citing PTC's report, USAA sent Griffith a partial denial indicating that it would not pay any more than its initial offer of $32,190 based on Allcat's estimate. Griffith then sued USAA.

At trial, the parties submitted additional expert testimony on the roof, its condition, the source of the damage, and the prospects of repairing it. USAA called Steve Patterson, an engineer hired during the litigation, to testify. After inspecting the roof, Patterson found it to be in good condition with some damage attributable to hail. He testified, however, that he believed there was a construction defect which caused the holes in the attic: certain boards were misaligned so that the underlying felt paper was exposed, increasing the risk that hail would puncture the felt. Patterson believed that it was feasible to repair 1,700 shakes individually, and the underlying felt could be patched as well using caulking compounds. Patterson agreed that, contrary to PTC's report, the holes in the underlayment could not have been caused by natural wear occurring prior to the storm. Another of USAA's experts Alan Berryhill, a roofing expert hired during the litigation, testified that the roof was in good condition when he surveyed it years after the storm.

He agreed that there were no signs that the roof was leaking and that the roof could be repaired effectively for $32,190.

Griffith submitted the expert testimony of engineer Greg Becker and consultant Phil Spotts. Griffith's experts testified that to restore the home to its pre-storm condition, it was essential to replace the felt underlayment, or else the roof would not effectively shed water. They explained that because four years had passed since the storm the hail marks had faded; it would be very difficult to tell which boards were damaged without manually checking each one, and it would be hard to replace individual shakes without damaging the rest. Ultimately, Griffith's experts viewed the option of spot repairs as ineffective and impractical, and they felt USAA's proposal was "absurd." They agreed that the attic holes were caused when hail "shot the gap" between shakes that had shifted due to wind or where the shakes were laid with slight gaps.

B. Procedural History

At the conclusion of the evidence, the court submitted the case on three theories: breach of policy, bad faith violations of the insurance code, and fraud. The jury found in favor of Griffith on all theories. The jury found that USAA breached the insurance policy, and that it should have paid $76,500 more than the $32,190 it had already paid. The jury further found that USAA knowingly committed bad faith violations of the insurance code and the jury awarded treble damages on that basis. *See* TEX. INS. CODE ANN. § 541.060(a).

The jury also found that USAA committed fraud, for which it additionally awarded $33,000 to compensate for the premiums that USAA had wrongfully collected. Finally,

the jury found that USAA acted with malice in committing fraud, and it awarded exemplary damages. Griffith elected to recover primarily under his insurance code theory that USAA had refused to pay the claim without conducting a reasonable investigation, for which USAA alone was liable. Griffith also elected to recover any nonduplicative damages under his fraud theory. The trial court rendered judgment awarding Griffith: under his insurance code theory, $76,500 for damages, $153,000 in treble damages, penalty interest of $64,285.29, and $199,000 in attorney's fees; and under his fraud theory, $33,000 in lost premiums and $200,000 in exemplary damages. The judgment also awarded Griffith $26,423.04 to compensate for his testifying experts under rule of civil procedure 167, as well as pre- and post-judgment interest. TEX. R. CIV. P. 167. USAA appeals.

II. STANDARD OF REVIEW LEGAL SUFFICIENCY

A legal sufficiency 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 more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 810, 822 (Tex. 2005). In our review, we are mindful that jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony. *Id.* at 819. We review the evidence presented at trial in the light most favorable to the jury's verdict, 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).

In determining a question of insurance coverage, we look first to the language of the policy. *Gilbert Tex. Constr., LP v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 126 (Tex. 2010). We give the policy's terms their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense. *Id.* Since insurance policies are contracts, we construe them according to general rules of contract construction to ascertain the parties' intent. *USAA Tex. Lloyds Co. v. Menchaca,* 545 S.W.3d 479, 488 (Tex. 2018).

III. BREACH OF INSURANCE POLICY

By its first issue, USAA contends that there is legally insufficient evidence to demonstrate that USAA breached the insurance policy. USAA argues that, as a matter of law, it complied with the contract, and Griffith was not entitled to more policy benefits than the $32,190 that USAA paid. Citing *Menchaca,* USAA argues that Griffith cannot recover on his theory of bad faith violations of the insurance code. 545 S.W.3d at 490 ("The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy.").

A. Applicable Law

To establish a breach of contract, a plaintiff must prove (1) the existence of a valid contract, (2) the plaintiff's performance or tender of performance, (3) the defendant's breach of contract, and (4) the plaintiff's damages as a result of the breach. *S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018); *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)

(citing *Certain Underwriters at Lloyd's v. KKM Inc.*, 215 S.W.3d 486, 489 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied)). Thus, in the context of an insurance policy, a plaintiff must prove the existence of a valid insurance policy covering the denied claim and entitlement to money damages on that claim. *Davis*, 484 S.W.3d at 468.

USAA admits that Griffith's roof was covered for hail damage by a policy that was in force on the date of the hail storm. The policy provided:

> In return for payment of premium and subject to all terms of this policy, we will provide the insurance described. . . . We insure against "sudden and accidental," direct physical loss to tangible property described in PROPERTY WE COVER . . . . Windstorm or hail. We will pay our cost to repair or our cost to replace the damaged property with similar construction and for the same use on the premises shown in the Declarations . . . .

The policy excluded losses caused by microbial organisms, weather conditions, wear and tear, loss caused by "birds, rodents, insects," or defective construction, among others.

Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971); *Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.—Dallas 2015, no pet.); *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 258 (Tex. App.—Austin 2002, judgm't vacated w.r.m.). The doctrine of concurrent causation is not an affirmative defense or an avoidance issue. *Calitex*, 458 S.W.3d at 222. Because an insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof. *Id.*; *see Cooper Indus.,*

LLC v. Am. Int'l. Specialty Lines Ins. Co., 273 Fed. App'x 297, 308 (5th Cir. 2008). The insured is also required to produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy. *Calitex*, 458 S.W.3d at 222–23. Failure to segregate covered and noncovered perils is fatal to recovery. *Id.* at 223. "Although a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests." *Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263, 273 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 304 (Tex. App.—San Antonio 1999, pet. denied).

B. Discussion

USAA disputes whether Griffith was entitled to the cost to replace the roof, as the jury found or only to the cost of repair. USAA was contractually obligated to either repair or replace the hail-damaged roof, but under the language of the policy, USAA had the sole discretion to either repair or replace the roof. USAA paid Griffith $32,190 to repair the roof, but there was evidence before the jury that replacing the roof would have cost USAA $73,405 more than it already paid. There was other evidence that repairing the roof would have in fact cost far more, to the point that repairing the roof was regarded by many witnesses as impractical and even absurd. The jury evidently found this evidence credible and awarded Griffith the cost to replace the roof as damages—the least amount necessary to legitimately fulfill USAA's obligation under the policy. This amount of damages was supported by legally sufficient evidence. *See City of Keller*, 168 S.W.3d

at 820 (holding that the standard of review requires that we resolve inconsistencies in the evidence in favor of the jury's verdict).

USAA next disputes coverage, arguing that the loss falls into one of many exclusions from coverage. Griffith's policy incorporated exclusions for "wear and tear, marring, deterioration," "microbial organisms, including but not limited to mold," and "mechanical breakdown, latent defect, inherent vice, or any quality of the property that causes it to damage or destroy itself." USAA now argues that the roof's deterioration and design flaws acted as concurrent causes of damage to the roof, and it was Griffith's burden to segregate the damages attributable to these concurrent causes. USAA contends that because Griffith failed to supply a reasonable basis to apportion damages to these concurrent causes, his award cannot stand.

USAA's argument is contradicted by the evidence at trial. There was general consensus among the witnesses that the roof was well maintained and in good condition before the storm. Griffith explained that he had the roof regularly maintained, including service to repair any broken boards just months before the storm. There was also evidence USAA found the home to be in good condition and increased its appraisal value $100,000 just six weeks before the storm while taking photographs which documented the structural integrity of the roof. Following the storm, photographic evidence documented broken shakes, holes in the roof, and hail-pocked surfaces. Many witnesses, including the Allcat inspector who was hired by USAA, testified that any damage to the shakes was due solely to hail. The jury was entitled to credit this testimony and to reject evidence to the contrary.

More importantly, there was no evidence that wear or fungus acted as a concurrent cause of the damage to the roof. There was no testimony that hail synergized with natural wear or fungus to cause even greater damage than the hail might have otherwise caused to a newer roof. There was no evidence that natural wear and fungus required the roof to be replaced independent of any hail damage. In fact, USAA conceded at closing, "USAA didn't deny any of the damage that it found to Mr. Griffith's roof, that [the Allcat adjuster] Mr. Ellis found on Mr. Griffith's roof, didn't deny any of that based on wear and tear and deterioration or construction defects."

The central theme in USAA's case was that one slope of the roof needed replacement, but the rest of the roof could be spot-repaired. Only one witness suggested that wear or a design flaw was to blame for damage to the roof—the PTC engineer—but a reasonable jury could have disregarded this disputed testimony. *See Del Lago Partners*, 307 S.W.3d at 770.

Viewed in the light most favorable to the jury's verdict, this evidence would enable a rational jury to conclude that hail was the sole cause of Griffith's loss requiring replacement. *See id.* We conclude that there is more than a scintilla of probative evidence supporting the jury's finding that USAA breached the policy by failing to pay for the full extent of the hail damage. *See Davis*, 484 S.W.3d at 472 (deferring to the jury's resolution of conflicting testimony on the nature of a loss).

We overrule USAA's first issue.

IV. BAD FAITH

By its second issue, USAA asserts that there is legally insufficient evidence to

support a finding that USAA committed any bad faith violation of the insurance code, and by its fourth issue, USAA contends that there was certainly no evidence of a knowing bad faith violation. In particular, USAA challenges the evidence supporting the jury's finding that USAA wrongfully refused to pay a claim without conducting a reasonable investigation.

A. Investigation

Griffith and his experts faulted many aspects of USAA's investigation and handling of his claim. According to Griffith's experts, it was unreasonable for USAA to rely on reports from either the Allcat inspector or the PTC engineer because they erred in many respects. Viewed in the light most favorable to the jury's verdict, and disregarding contrary evidence where appropriate, the evidence at trial showed as follows:

- According to Griffith's experts, the Allcat inspector should have inspected the entire roof, but he instead extrapolated from test squares surveying only the lower portion of the roof. Griffith's experts cited USAA guidelines and the recommendations of another engineering firm, both of which recommended inspecting the entire roof, using a harness if necessary.

- Griffith's experts also opined that it was wrong to extrapolate from the test patches on the lower quadrant of the roof, because the Allcat inspector wrote in his report "more damage to upper areas of roof." According to Griffith's experts, extrapolating from these lower portions led to an inaccurate portrayal of the overall damage.

- Griffith's experts criticized the PTC engineer for evaluating the roof nine months after the storm from a ladder and for reaching his conclusion without ever setting foot on the roof or evaluating the shakes by hand. Griffith's experts contrasted this with the work of the Rimkus inspector, who evaluated the roof soon after the storm and climbed to the top of the roof to survey the damage directly.

- According to Griffith's experts, the Allcat inspector did not follow recommended practice in conducting test patches and surveying only a six-foot by ten-foot area rather than the recommended ten by ten area.

- According to Griffith's experts, the Allcat inspector assigned the wrong "repair difficulty factor" ("RDF"). Despite describing the roof as "very large," "very steep" and "very complex," the inspector applied an RDF of 1.3. RDF accounts for the steepness of the roof and can range from 1 to 2. Because the roof was so steep that no one could safely walk it, Griffith's experts opined that it should have been at least 1.9.

- The Allcat inspector determined that the roof could be replaced if the cost to repair exceeded 75% of the cost to replace the roof, whereas some internal USAA materials suggested the number should be 65%. Griffith's experts complained that USAA wrongly and arbitrarily left it to the inspector's discretion which threshold to use. On the slopes that the Allcat inspector said should be spot-repaired, he identified 12, 23, and 17 splits in the test patches alone. According to Griffith's experts, this conflicted with USAA's own internal guidelines, which recommend, "In general if you have 5+ hits on a slope replacement is very likely."

- The Allcat inspector erred in overruling satellite measurements and changing the steepness of the roof, which led him to errantly calculate the roof's area as 10,200 square feet, whereas the correct area was 11,200 square feet. According to Griffith's experts, this discrepancy cost Griffith approximately $4,350.

- The Allcat inspector included no allowance for a general contractor, which Griffith's experts testified was necessary, given that the repair job required the services of three or more tradesmen.

- The Allcat inspector included nothing in his estimate for repairing or replacing the "underlayment," a layer of felt underneath the shakes, which Griffith's experts opined was a necessary measure; without such a replacement, the roof would leak.

- The Allcat estimate was based on prices in April 2012, before the storm, whereas prices had become inflated after the storm with the glut of roofing claims. There was testimony, for instance, that the Allcat inspector estimated the cost to replace a shake at $8.13, though more current data showed the replacement cost to be $11.61.

- Griffith argued that the PTC engineer made biased claims to reach an evaluation that favored USAA. The PTC engineer asserted, for instance, that the baseball-sized hole in Griffith's pock-marked satellite dish was caused by a baseball rather than hail.

- Griffith's experts also suggested that the Allcat inspector was greatly overworked, performing four estimates per day, each one taking several hours to complete. Griffith argued that this time-strain contributed to the deficiencies in the Allcat inspector's report.

- Griffith's experts described the task of spot-repairing 1,700 unidentified shakes on a very steep roof as not "practical" and "ludicrous," and the inspector did not identify any roofer who would perform this task, especially for $32,190. Griffith's experts contrasted this with reports of price quotes from local roofers offering spot-repairs for $1200 per 100 square feet, which for Griffith's 11,200 square foot roof would amount to over $134,000.

- The Allcat inspector agreed that it was company policy to refrain from entering his estimate for replacements of expensive wood shake roofs into the company's estimating software until a supervisor had approved the replacement estimate. Griffith's experts theorized that this was to allow Allcat supervisors to avoid the estimating software's audit trail and to make changes to estimates without leaving evidence.

Griffith's experts also faulted USAA's adjusters for their role in handling his claim. There was testimony that USAA's standard procedure is to deal directly with the company providing the alternative estimate in hopes of resolving any differences, but it was undisputed that USAA did not contact Rimkus to attempt to resolve any discrepancy between the Allcat and Rimkus estimates. Griffith's experts faulted USAA for not doing further investigation, and instead relying on what the experts viewed as a biased investigation by the PTC engineer.

USAA was also faulted for not providing PTC and Allcat with key information. It was undisputed that USAA did not provide Allcat's inspector with the photographs that USAA's underwriter had captured six weeks before the storm, which showed the home's good condition prior to the storm. Similarly, Griffith's experts complained that USAA did not provide PTC's engineer with any prior photos or estimates, making his estimate inherently unreliable and without necessary context. Griffith argued that because USAA

had documented the roof's good condition just weeks before the storm, USAA acted in bad faith when it issued a partial denial of Griffith's claim in reliance on the PTC engineer's finding that the roof suffered from preexisting damage.

B. Applicable Law

A property insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *Menchaca*, 545 S.W.3d at 495 (quoting *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988)); *Waite Hill Servs, Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 185 (Tex. 1998). If a property insurer fails to pay the full amount of the claim as a result of an unfair claim-settlement practice under the insurance code, the insured may elect to recover its damages under either a breach-of-contract or a statutory-violation theory. *Waite Hill Servs, Inc.*, 959 S.W.2d at 185.

An insurer's liability under the insurance code incorporates the common-law bad faith standard developed as part of the elements of a claim for breach of the duty of good faith and fair dealing. *See Menchaca*, 545 S.W.3d at 488; *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam) (recognizing that "the common-law bad-faith standard is the same as the statutory standard" for insurance code violations); *Garcia v. Lloyds*, 514 S.W.3d 257, 278 (Tex. App.—San Antonio 2016, pet. denied); *Tex. Mut. Ins. Co. v. Sara Care Child Care Ctr., Inc.*, 324 S.W.3d 305, 317 (Tex. App.—El Paso 2010, pet. denied).

An insurer does not breach its common law duty of good faith merely by erroneously denying a claim. *US Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex.

1997) (per curiam). Evidence showing only a bona fide coverage dispute does not, by itself, demonstrate bad faith. *Id.* Moreover, a "simple disagreement among experts about whether the cause of the loss is one covered by the policy will not support a judgment for bad faith." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 67 (Tex. 1997). On the other hand, an insurer's reliance on an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997); *see also Thompson v. Zurich Am. Ins. Co.*, 664 F.3d 62, 67 (5th Cir. 2011) (applying Texas law). Whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder. *City of Keller*, 168 S.W.3d at 832–33; *Giles*, 950 S.W.2d at 56; *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 955 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.).

C. Evidence to Support Bad Faith Finding

Texas courts have issued a significant number of opinions "addressing very similar issues of an insurer's good faith in dealing with its insured's claims for damage." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998); *State Farm Lloyds v. Hamilton*, 265 S.W.3d 725, 734 (Tex. App.—Dallas 2008, pet. dism'd). "Some cases are resolved in the insurer's favor, some in the insured's." *Hamilton*, 265 S.W.3d at 734. Most of these cases "are rooted in the Texas Supreme Court's 1997 pronouncements on this issue in *Giles* and *Nicolau*." *See id.* "And in the end, the principles of those seminal cases, applied to the specific facts of the case, must govern." *Id.* In *Nicolau*, and again

in *Simmons*, the Texas Supreme Court discussed the sort of evidence that will support a finding that the insurer breached its duty of good faith and fair dealing. 951 S.W.2d at 448–50; 963 S.W.2d at 44–47.

In *Simmons*, the court relied on *Nicolau* to review the insurer's investigation and found it wanting. 963 S.W.2d at 44–47. The investigation into the arson ignored persons other than the insured, ignored evidence favorable to the insured, and developed erroneous evidence unfavorable to the insured. *Id.*

In *Nicolau*, State Farm contracted with Haag Engineering (Haag) to determine whether a foundation problem was caused by water damage. 951 S.W.2d at 447. Haag determined that the water leak did not cause the foundation problem, and State Farm denied the claim. *Id*. The plaintiffs argued that State Farm acted in bad faith because it was unreasonable to rely on Haag's report for many reasons. *Id.* The jury found bad faith, and the Texas Supreme Court affirmed. *Id.* In doing so, the *Nicolau* Court highlighted several types of evidence important to a finding of bad faith, some of which are present in this case, some of which are not. *Id.* at 448–49.

The *Nicolau* court first emphasized the evidence that a substantial amount of Haag's work was done for insurance companies; one Haag employee estimated that he derived eighty to ninety percent of his work from insurance companies. *Id.* at 448. In this case, there is similar evidence: both PTC and Allcat work predominantly for insurance companies, and there was some evidence that Allcat worked almost exclusively for USAA in Texas. The Allcat inspector agreed that he was not truly "independent" from USAA; instead, he viewed himself as working indirectly for USAA.

Next, the *Nicolau* court strongly emphasized that Haag was known for its tendency to find that a foundation problem was not caused by water damage. *Id.* at 448–49. State Farm was aware of this proclivity when it hired Haag, suggesting that State Farm sought out an expert to provide a pretext for denying coverage, not an expert who would provide a fair picture of the damage and its cause. *Id.* In this case, we have no similar evidence. Rather, there was evidence that the Allcat inspector was paid more in cases where he found more extensive damage, providing an apparent incentive to inflate damages, not underreport them.

The *Nicolau* court also noted evidence that Haag conducted a substandard investigation based on inadequate information, where Haag failed to examine certain pipes, take core samples, and perform other tests. *Id.* at 449. Here, Griffith and his experts testified at length concerning deficiencies in Allcat and PTC's investigation, such as failing to inspect the entire roof, miscalculating the size of the roof by roughly 1000 square feet, arbitrarily setting the RDF at 1.3 when it was acknowledged the roof was so steep no one could safely walk it, and other defects we have already discussed. Similarly, Griffith and his experts faulted USAA for not providing Allcat and PTC with all information necessary to develop an accurate estimate, such as the photographs captured by USAA's underwriting team.

In *Nicolau*, the plaintiffs retained an expert of their own to assess the foundation damage, who disagreed with State Farm's conclusion and found that water caused the foundation damage, rendering it a covered loss. *Id.* at 447. The *Nicolau* court emphasized the fact that neither State Farm nor Haag contacted the plaintiffs' expert or

made an effort to address the plaintiffs' contrary report. *Id.* at 449. Moreover, Haag did no further testing to confirm or deny the plaintiffs' expert's conclusions. *Id.* This case presents a similar scenario: after Griffith received Allcat's estimate, Griffith retained Rimkus to perform his own estimate, but USAA, Allcat, and PTC did not contact Rimkus to resolve any conflict between their reports. Instead, in response to the Rimkus report, USAA retained and relied on PTC, whose engineer did only a visual investigation from a ladder and found fewer than twenty damaged shakes. He attributed any remaining damage to preexisting causes—a conclusion that was contradicted by photographic evidence, the consensus among witnesses that the roof was in good condition prior to the storm, and the Allcat inspector's finding of over eighty broken shakes in small test areas.

The *Nicolau* court next discussed the fact that three of the plaintiffs' experts strongly disagreed with Haag's conclusions, and even State Farm's own expert disagreed with some of Haag's central conclusions. *Id.* at 450. In *Nicolau*, one of the plaintiffs' experts suggested that Haag's conclusion that the water leak did not cause the foundation problem was "the most ridiculous thing I've ever heard." *Id.* In this regard, the facts of this case directly parallel those of *Nicolau*: Griffith's experts strongly disagreed with Allcat's conclusions, and USAA's own experts partially disagreed with the PTC engineer's conclusions, yet USAA nonetheless relied on the PTC report as a basis for partially denying Griffith's claim. Griffith's witnesses further testified that USAA's repair proposal was "absurd," not "practical," and "ludicrous."

In *Nicolau*, based on Haag's faulty investigation, State Farm denied liability entirely. *Id.* at 447. Somewhat different from *Nicolau*, here USAA issued a partial

denial, and it admitted liability to the extent of its $32,190 payment to Griffith.

In closing, the *Nicolau* court reinforced its respect for the role of the jury:

> Were we the trier of fact in this case, we may well have concluded that State Farm did not act in bad faith. That determination is not ours to make, however. Instead, the Constitution allocates that task to the jury and prohibits us from reweighing the evidence, as the dissent does. *See* TEX. CONST. art. I, § 15 and art. V, § 10; art. V, § 6. Accordingly, viewing the evidence in the light most favorable to the Nicolaus, we hold that there is some evidence to support the jury's finding that State Farm denied the Nicolaus' claim in bad faith.

Id. at 450. We echo those sentiments here. While we may see the evidence somewhat differently than did the jury, we must remain mindful that we do not sit as the thirteenth juror. *See id.*; *Guajardo v. Liberty Mut. Ins. Co.*, 831 S.W.2d 358, 365 (Tex. App.—Corpus Christi–Edinburg 1992, writ denied) (reversing summary disposition of a bad faith claim, holding that the issue was "a question of fact for the jury").

Instead, as the many parallels between this case and *Nicolau* demonstrate, there is some evidence of a probative character to support the jury's resolution of this question. *See* 951 S.W.2d at 448–50; *Hamilton*, 265 S.W.3d at 735–36 (finding evidence sufficient to support conclusion that homeowners insurer denied claim in bad faith, where evidence that more than half its business came from insurers and there were numerous shortcomings and inconsistencies in the expert's investigation); *see also Beaumont Pres. Partners, LLC v. Int'l Catastrophe Ins. Managers, LLC*, No. 1:10-CV-548, 2011 WL 6707287, at *8 (E.D. Tex. Oct. 6, 2011) (finding sufficient evidence of bad faith based on deficiencies in expert's investigation and fact that expert did not adequately follow up on conflicting report from plaintiff, among other factors), *report and recommendation adopted*, No. 1:10-CV-548, 2011 WL 6709920 (E.D. Tex. Dec. 21, 2011); *State Farm*

Lloyds v. Johns, No. 05-96-01039-CV, 1998 WL 548887, at *6 (Tex. App.—Dallas Aug. 31, 1998, no pet.) (mem. op.) (finding sufficient evidence of bad faith where insurance company relied on an investigator who derived substantial income from State Farm, who did not seek a third opinion, performed a faulty investigation, and did not speak with the plaintiff's engineering expert). Accordingly, we conclude that the evidence is sufficient to support the jury's finding that USAA violated the insurance code and acted in bad faith. *See* TEX. INS. CODE ANN. § 541.006(a)(7). The judgment is affirmed for actual damages of $76,500 to compensate Griffith for this violation. *See AMJ Invs.*, 447 S.W.3d at 11.

We overrule USAA's second issue.

D. Sufficiency of the Evidence of a Knowing Violation

In its fourth issue, USAA asserts that there is insufficient evidence to support the jury's finding that USAA knowingly committed any bad faith violations. An insurer that violates the insurance code must pay for actual damages it causes as a result. *See Menchaca*, 545 S.W.3d at 489; *Minn. Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006). The insurance code "supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits." *Menchaca*, 545 S.W.3d at 488 (citing TEX. INS. CODE ANN. § 541.060(a)). "The Code grants insureds a private action against insurers that engage in certain discriminatory, unfair, deceptive, or bad-faith practices, and it permits insureds to recover . . . treble damages if the insurer 'knowingly' commits the prohibited act." *Id. (*citing TEX. INS. CODE ANN. § 541.152(b)). The insurance code

defines “knowingly” as “actual awareness of the falsity, unfairness, or deceptiveness of the act or practice on which a claim for damages under Subchapter D is based. Actual awareness may be inferred if objective manifestations indicate that a person acted with actual awareness.” *Id*. § 541.002(2); *St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co.,* 974 S.W.2d 51, 53 (Tex. 1998) (per curiam). The knowing requirement addresses whether USAA paid Griffith’s claim knowing that it failed to conduct a reasonable investigation.

There was little direct evidence concerning USAA’s knowledge or lack of knowledge. However, the Allcat adjuster’s activity report that was uploaded to USAA noted the number of roof shake splits on various portions of the roof and described the adjuster’s attempts to gain access to the upper portions of the roof. The activity report further described the adjuster’s conversation with Griffith in which Griffith asserted that his roof needed to be replaced. Griffith based his assertion on the many daylight holes now visible through the attic that were not present six weeks before when Griffith was in the attic with the inspector sent for underwriting purposes. USAA did not do anything with the information in the activity report furnished to it but issued a check to Griffith based upon the adjuster’s estimate without discussing it with the insured. The check was issued June 2, 2012.

In January 2013, Griffith furnished USAA with the Rimkus estimate and USAA sent PTC to view the roof to determine whether it could be repaired or needed to be replaced. PTC’s engineer reported that he found virtually no damage. Instead of trying to determine the source of the significant disagreement between the original adjuster’s

inspection, PTC's inspection, and Rimkus's inspection, USAA issued a letter denying any further payment. By that time USAA knew that hail was indisputably present in Griffith's area, had been documented to be large by their initial adjuster, and there was fresh hail damage documented by the initial adjuster, not just to the roof but to other portions of Griffith's property such as pool equipment and decking, window screens on one side of the house, and a satellite dish. USAA also knew the insured had from the beginning believed that the damage warranted roof replacement, not just spot repair. Yet Ralston never spoke to any of the persons who inspected the roof before issuing a partial denial in June 2015.

A jury's finding of "knowingly" may be based on evidence that gives rise to an inference that USAA had actual knowledge that its conduct, in this case, failing to conduct a reasonable investigation, was unfair or deceptive. *See* TEX. INS. CODE ANN. § 541.152(b); *United Nat'l Ins. Co. v. AMJ Invs., LLC,* 447 S.W.3d 1, (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (affirming jury's finding of knowingly based upon inference that insurer reneged on agreement to pay roof replacement); *AIG Aviation, Inc. v. Holt Helicopters, Inc.*, 198 S.W.3d 276, 287 (Tex. App.—San Antonio 2006, pet. denied) (finding evidence sufficient to conclude that AIG "knowingly conducted an outcome-oriented investigation"); *see also State Farm Lloyds v. Vega*, No. 13-16-00090-CV, 2018 WL 1773304, *9 (Tex. App.—Corpus Christi–Edinburg April 12, 2018, no pet.) (affirming knowingly finding after jury found that insurer refused to pay claim without conducting a reasonable investigation).

Griffith also complained that USAA acted wrongfully when it relied on the PTC engineer's conclusion that the roof suffered from preexisting damage—a conclusion that was contrary to photographs captured by USAA's underwriting team just weeks before the storm. Ralston testified that she had no access to USAA's underwriting department photographs and report, which was corroborated by USAA's corporate representative Beth Hammel. Griffith however made the initial adjuster aware that the inspection took place and corroborated that the hail damage and hole in the roof were new.

Griffith further complained that USAA acted deceitfully in collecting premiums for a roof that it believed was defective and would therefore never be covered under USAA's policy. However, Hammel testified that USAA had no knowledge of any construction defects in Griffith's roof until Patterson inspected the roof in 2016—several years after USAA issued its partial denial of Griffith's claim.

There was extensive testimony concerning shortcomings in Allcat and PTC's investigation of the roof, and evidence that from the beginning Griffith told USAA through the adjuster and through correspondence transmitting the Rimkus estimate, that he believed his roof needed replacement. All of that information was communicated to USAA. Both the Allcat adjuster and the PTC engineer testified that they did not speak to Ralston, and Ralston did not speak to the Rimkus estimator either. Based upon the evidence of the relationship between Allcat and USAA, the manner in which the original adjuster's estimate was handled, USAA's apparent refusal to engage with its insured directly even though it knew he disagreed with the original adjuster's estimate of repair, the jury could reasonably find that USAA knew that its investigation was unreasonable

and unfair to its insured. *See City of Keller*, 168 S.W.3d at 821 (reviewing evidence in the light favorable to the verdict and deferring to the jury's resolution of conflicting facts).

We overrule USAA's fourth issue.

E. Delay Damages

By its third issue, USAA contends that the trial court erred in awarding additional damages for delay. If an insurer delays payment of policy benefits for more than sixty days after receiving all reasonably requested and required information, it is liable for delay damages of eighteen percent on the amount of the claim plus attorneys' fees. TEX. INS. CODE ANN. §§ 542.058(a), 542.060(a).

USAA contends that because there is no evidence to show that it violated the insurance code or that it breached the contract, this Court should reverse and render judgment denying penalty interest for delay as well. We have determined that there is sufficient evidence to show that USAA breached the policy and violated the insurance code to support a recovery of actual damages on this basis. Accordingly, the trial court's award of penalty interest need not be reversed.

We overrule USAA's third issue.

V. FRAUD

By its fifth issue, USAA argues, *inter alia*, that Griffith adduced no evidence to support multiple elements of his fraud claim. By its sixth issue, USAA argues that the lack of evidence of fraud also requires us to vacate the punitive damages that were awarded under Griffith's fraud theory.

A. Applicable Law

To prevail on a fraud claim for misrepresentation, a plaintiff must show: (1) the defendant made a material representation that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and suffered injury as a result. *JPMorgan Chase Bank, NA v. Orca Assets GP, LLC*, 546 S.W.3d 648, 653 (Tex. 2018). To establish fraud by nondisclosure, appellants must prove: (1) the defendant failed to disclose facts to the plaintiff when the defendant had a duty to disclose such facts; (2) the facts were material; (3) the defendant knew of the facts; (4) the defendant knew that the plaintiff was ignorant of the facts and did not have an equal opportunity to discover the truth; (5) the defendant was deliberately silent and failed to disclose the facts with the intent to induce the plaintiff to take some action; (6) the plaintiff relied on the omission; and (7) the plaintiff suffered injury as a result. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219 (Tex. 2019); *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied).

B. Discussion

At trial, Griffith argued that USAA engaged in multiple forms of fraudulent misrepresentation or concealment. However, for each alleged form of fraud, there was a failure of proof on at least one element.

First, Griffith argued that USAA misrepresented the extent of the damages to his roof, and USAA wrongfully denied coverage on that basis. Under this theory, though,

there was no evidence that Griffith relied on USAA's supposed misrepresentation concerning the extent of damages. Just the opposite, Griffith contested USAA's offer, demanded additional compensation, hired his own estimator to perform a competing appraisal, and sued USAA when no additional payment was forthcoming.

Griffith next theorized that USAA committed fraud when it failed to disclose the defects in his roof, and when it wrongfully collected premiums from Griffith for decades despite knowing that any damage to the roof would inevitably be excluded under the defect exception. This fraud theory is unsupportable, for there was no evidence that USAA was aware of the supposed defects in his roof at any point prior to Patterson's inspection of the roof in 2016. The evidence at trial instead suggested that prior to 2016, USAA had no reason to suppose that the roof was defective: Griffith filed no claims prior to the hailstorm which would have apprised USAA of any defect; when the policy was renewed in January 2012, USAA's underwriting report stated that the roof was in good condition and made no note of any defect; following the storm, Allcat's report to USAA did not mention any design defects; and when the PTC engineer inspected the roof months later, he did not report any design defects to USAA. The first mention of a defect came from Patterson's inspection in 2016. Because there was no evidence of USAA's knowledge of any defect prior to 2016, this fraud theory fails as well.

Finally, for the first time on appeal, Griffith argues that USAA falsely stated that his roof was in good condition prior to the storm, and thereby induced him to renew his policy in 2012. However, again, there is no evidence that USAA knew the roof to be in poor condition prior to the storm. Instead, there was near-unanimous agreement among the

trial witnesses that the roof was, in fact, in good condition prior to the storm, being well-maintained and only ten years old. Indeed, Griffith himself testified that the roof was in "good shape" and that he took pains to maintain the roof. Consequently, we conclude there is insufficient evidence to show USAA's knowledge of the roof's allegedly poor condition prior to the storm.

Moreover, this fraud theory suffers from another problem: a lack of evidence showing justifiable reliance. Griffith claims that at the time he renewed his policy in 2012, he justifiably relied on USAA's representations in the underwriter's report concerning the good condition of his roof. However, Griffith conceded at trial that he did not see the underwriter's report until after the lawsuit commenced in 2014. Because Griffith was not privy to these supposed misrepresentations, we fail to see how Griffith could have justifiably relied on them as a basis for renewing his policy in 2012.

Because each of Griffith's fraud theories suffers from deficient evidence on one or more elements, we conclude the evidence is insufficient to support his fraud recovery. *See City of Keller*, 168 S.W.3d at 822. The award of $33,000 in lost premiums and $200,000 in exemplary damages cannot stand.

USAA's fifth and sixth issues are sustained.

VI. ALTERNATIVE THEORIES

By its seventh issue, USAA contends that the judgment of actual damages cannot be sustained on any alternative theory, such as breach of contract. We have already determined that Griffith's bad faith theory supports a recovery of actual damages. Accordingly, we need not consider whether any alternative theory would also support this

recovery.

We overrule USAA's seventh issue.

VII. ATTORNEY'S FEES AND EXPERT WITNESS FEES

By its eighth issue, USAA contends that the award of attorney's fees must be reversed if Griffith's recovery is substantially reduced by this Court's decision. "Not every appellate adjustment to the damages which a jury considered as 'results obtained' when making attorney's fees findings will require reversal." *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006). Although we reverse portions of the judgment, Griffin may still recover his actual damages of $76,500, prejudgment interest of $16,936.73, and additional interest of $64,285.29, which totals $157,722.02.

In determining the reasonableness of attorney's fees, the supreme court has instructed the fact-finder, here the jury, to consider the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved, and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. X, § 9)); *see also Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009) (confirming that factors in *Arthur Andersen* apply to either a trial court or a jury and "apply to an appellate court's assessment of whether fees were established as a matter of law").

Griffith's attorney fees evidence was presented through his expert witness Randy Cashiola who testified regarding an itemized statement of time worked and hourly rate for the attorneys and paralegals involved. Cashiola, an attorney from Beaumont, also discussed all of the factors from *Arthur Andersen*. He testified that his law practice is similar to that of Griffith's counsel. Cashiola testified that the hourly rates were reasonable, particularly in a contingent fee case in which all of the litigation risk was borne by counsel, and that the time charged for each of the tasks was reasonable and necessary based upon his own experience in handling similar first-party insurance disputes and trials.

The itemized statement prepared by Griffith's lawyers detailed the work performed by each member of Griffith's trial team from February 11, 2014, through November 29, 2016, for a total amount of $85,917.50 pretrial, an estimated amount for trial days of $46,250, and estimated lump-sum fees for appellate work if necessary. There were downward adjustments to correct the worksheet and for a five percent discount off the fees for the fraud claim for which attorneys' fees are not recoverable. The amount through trial was $114,642 before contingent appellate fees. *See Venture v. UTSW DVA*

Healthcare, LLP, No. 16-0006, 2019 WL 1873428, at *20 (Tex. Apr. 26, 2019) (holding that sufficient evidence of attorneys' fees must include *"e*vidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.").

The jury awarded $114,000 plus contingent appellate fees. USAA argues that if this Court reduces the amount of the damages, it should reverse and remand attorney's fees for recalculation because the jury may have considered the total amount awarded in deciding attorney's fees. However, only one of the eight *Arthur Andersen* factors relates to the size of the recovery as a basis for attorney's fees. *See* 945 S.W.2d at 818.

Griffith prevailed on both his breach of contract and his insurance code claims and is entitled to attorney's fees under either theory. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001; TEX. INS. CODE ANN. §§ 541.152(a), 542.060(a). The fees in this case for two years of work, including over ten oral depositions, numerous depositions on written questions, summary judgment proceedings, preparing for trial testimony of multiple experts on both sides, mediation, document review, and a trial, do not appear excessive or to be overly influenced by the amount of the recovery. *See State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 105 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (concluding that an award of $70,000 for attorney's fees was not excessive when insured prevailed on roof claim after jury trial in amount of $12,878); *Travelers Ins. Co. v. Brown*, 750 S.W.2d 916, 918–19 (Tex. App.—Amarillo 1988, writ denied) (affirming attorney's fees in breach of insurance contract for $2,500 plus contingent appellate fees on claim of

$7,016); *State Farm Mut. Auto Ins. Co. v. Clark*, 694 S.W.2d 572, (Tex. App.—Corpus Christi–Edinburg 1985, no writ) (affirming award of actual damages for breach of insurance contract and attorney's fees of $3,600); *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 285 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (affirming attorney's fees of $168,582.50 on loss of $459,741.58 where litigation took over two years and trial was lengthy).

Also within its eighth issue, USAA contests the award of fees to compensate for testifying experts pursuant to rule 167. Rule 167 sets out the applicable procedures for the award of litigation costs in certain circumstances where a party has rejected a settlement offer. *See* TEX. R. CIV. P. 167.1. If a party rejects a qualifying settlement offer and the judgment is "significantly less favorable" to the rejecting party than the settlement offer, then the offering party shall recover litigation costs. *Id.* R. 167.4(a). A judgment is "significantly less favorable" to the rejecting party in two circumstances: (1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or (2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer. *Id.* R. 167.4(b). Under this rule, litigation costs include "reasonable fees for not more than two testifying expert witnesses." *Id.* R. 167.4(c).

USAA contends that Griffith is ineligible to collect expert fees as litigation costs under rule 167. We agree. Under the plain text of the rule, only those who make qualifying settlement offers are eligible to collect litigation costs from those who receive the offers. *See id.* R. 167.4(a), (b). The parties have not identified any juncture where Griffith made a qualifying settlement offer to USAA, and we find none in the record.

Because Griffith never made a qualifying settlement offer to USAA, he was not eligible to collect litigation costs from USAA, including the $26,423.04 awarded to compensate for his testifying experts.

We overrule in part and sustain in part USAA's eighth issue.[2]

VIII. CONCLUSION

We reverse the trial court's awards of $33,000 in lost premiums, $200,000 in exemplary damages, and $26,423.04 to compensate for testifying experts, and we render judgment denying any recovery on these awards. We affirm the judgment in all other respects.

GINA M. BENAVIDES,
Justice

Delivered and filed the
26th day of June, 2019.

[2] By its ninth issue, USAA argues that it is entitled to remand for further proceedings with regard to its own settlement offer to Griffith and because of errors related to the jury charge. This issue is accompanied by limited argument and no citations to authority. We therefore find it inadequately briefed. *See* TEX. R APP. P. 38.1(i).