Affirmed and Opinion Filed January 30, 2026

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-24-00253-CV

KWA CONSTRUCTION, L.P. AND HARTFORD FIRE INSURANCE COMPANY, Appellants

V.

ADC WEST RIDGE, L.P., Appellee

On Appeal from the 471st Judicial District Court
Collin County, Texas
Trial Court Cause No. 471-00389-2018

MEMORANDUM OPINION

Before Justices Kennedy, Barbare, and Jackson
Opinion by Justice Barbare

This appeal involves a construction contract dispute among the general contractor, the surety, and the owner of a low-income multi-family apartment complex in McKinney, Texas (the Project).

KWA Construction, L.P. (KWA), the general contractor, sued ADC West Ridge, L.P. (ADC) for breach of the construction contract. ADC counterclaimed for damages caused by defective work and later filed a third-party petition against the surety, Hartford Fire Insurance Company (Hartford), to recover on a performance bond.

ADC filed several traditional and no-evidence motions for partial summary judgment against KWA's claims for unpaid contract amounts. The trial court granted two of these motions dismissing KWA's breach of contract claim and extinguishing its lien on the property. A bench trial was held on ADC's counterclaims. KWA and Hartford were found jointly and severally liable, and the trial court's final judgment awarded ADC $12,149,284.27 in actual damages and $419,725.00 in attorneys' fees. The trial court also ordered Hartford to pay an additional $217,717.00 in attorneys' fees to ADC.

On appeal, KWA raises three broad issues, with multiple sub-issues, challenging (1) the award of actual damages, (2) the two orders granting partial summary judgment, and (3) the attorneys' fees awarded against it and Hartford.

We reverse the trial court's award of $12,149,284.27 in actual damages against KWA and Hartford, jointly and severally, and render judgment that ADC take nothing on its breach of contract claim. We reverse the $419,725.00 in attorneys' fees awarded to ADC against KWA and Hartford, jointly and severally, and remand for further proceedings. We reverse the $217,717.00 in attorneys' fees awarded against Hartford and render judgment that ADC take nothing in this respect. In all other regards, the judgment of the trial court is affirmed.

Factual and Procedural Background

A. The Parties and the Contract

On May 19, 2016, ADC and KWA executed a contract to build a 132-unit apartment complex in McKinney, Texas. The contract was a "cost-plus" arrangement, under which ADC agreed to pay KWA the costs of construction plus a designated amount of profit. The contract capped the maximum construction costs for the Project at $14,220,745.00 and required KWA to substantially complete the work by July 19, 2017. Because the Project was designated as an "affordable mixed-use, mixed-income development," its financing was backed by the U.S. Department of Housing and Urban Development (HUD).

Terri Anderson (Anderson), an indirect owner and principal of ADC, hired Frank Pollacia (Pollacia) to serve as the Project's architect. Hartford provided the performance bond required by the contract.

The contract incorporated the 2007 version of the American Institute of Architect's Association (AIA) A201 General Conditions. The following relevant AIA provisions provided for dispute resolution procedures meant to allow the Project to move forward while disputes were resolved:

> § 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefore; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties subject to

> mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.
>
> § 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.
>
> § 15.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

The parties agreed that Pollacia would serve as the Project's initial decision maker (IDM), making him responsible for rendering initial decisions on any claims submitted by the parties under section 15 of the contract.

B. Pre-lawsuit Disputes

From the Project's outset, KWA experienced unexpected delays and disruptions. There were problems with civil engineering drawings for landscaping and the pool. Conflicts between the cities of Frisco and McKinney prevented water from being supplied to the construction site, which required KWA to negotiate an alternative method to supply water for the Project. Other utility issues delayed vertical construction. The problems led to numerous claims for extra work compensation, payment withholding, and time extensions.

KWA first asserted a general claim to Pollacia on October 19, 2017, seeking additional time and money to complete the Project. Pollacia closed the claim on November 6, 2017, because KWA provided "no specifics" in connection with its claim. Thereafter, on November 22, 2017, KWA made its first request for mediation.[1] ADC agreed to mediation and provided its mediator preferences. The parties participated in their first mediation on May 4, 2018; however, they did not resolve their disputes.

C. KWA's Lawsuit, ADC's Counterclaims, and the IDM's Decisions

KWA filed its original petition against ADC in January 2018, alleging breach of contract. It claimed that ADC breached its contract "by failing to process change orders when required, failing to pay sums properly owed to KWA on the Project and under the Contract, and failing to submit change order[s] to HUD and Lender for approval as required."[2] KWA maintained that ADC's prior material breach of the contract excused it from further obligations. Alternatively, KWA contended that all covenants and conditions precedent requiring it to pay had been waived, excused, or were otherwise void.

ADC answered and filed a counterclaim asserting numerous causes of action, including breach of contract. It argued that it had incurred "hundreds of thousands of dollars" in completion and repair costs which reduced the Project's value. ADC also filed a third-party petition against Hartford, as surety on the performance bond, seeking the correction and completion of KWA's work.

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[1] A January 2, 2018 email stated that "KWA is requesting mediation of all claims which are in dispute whether or not a decision has been made by the architect."

[2] KWA also sued for quantum meruit, violation of the Texas Prompt Payment Act, and foreclosure of a mechanic's lien. These causes of action are not subject to this appeal.

During this period, Pollacia resolved numerous pending claims, some of which involved KWA's applications for payment. All of these decisions were adverse to KWA.

On March 9, 2018, KWA filed a mechanic's and materialman's lien against the property because ADC stopped paying as required by the contract. KWA alleged that "[a]fter allowing all just credits, offsets, and payments, the amount of $2,408,722.63 remains unpaid and is due."

HUD signed the Permission to Occupy on July 31, 2018, allowing ADC to utilize the Project for its full, intended purpose. ADC began renting units two months later, and by April 2019, it was receiving over $100,000 per month in rental income.

HUD required a nine-month warranty report, which Pollacia completed in May 2019 after the parties participated in an inspection of the Project. He listed numerous items that remained incomplete or defective. When KWA did not resolve the items listed in the nine-month warranty report, Pollacia completed a twelve-month warranty report (signed August 15, 2019). It detailed ongoing problems with the Project, including water infiltration in subfloors and the roof, elevator failures, stone falling off the exterior, and some ADA compliance issues. At that time, Pollacia concluded that the cost to correct non-conforming or incomplete work totaled approximately $1,889,279.28.

On August 16, 2019, ADC submitted a claim to Pollacia based on KWA's continued failure to correct the nonconforming work. On September 24, 2019, Pollacia issued his decision to the parties. He essentially adopted his conclusions from the warranty report and noted that "[t]his item is closed with this final and binding decision of the IDM." Following the decision, the parties participated in a second mediation in December 2019 but did not resolve their disputes.

A year later, ADC asked Pollacia to "update his conclusions regarding deficiencies of construction and failures" by KWA because the report was more than a year old. ADC believed an updated report was appropriate to "determine if there are additional defects and if the costs for completion, replacement, and/or repair should be adjusted."

On October 7, 2021, Pollacia issued an update to the twelve-month warranty report and stated that the costs to correct and conform to the contract were $12,149,284.27. In making this determination, Pollacia relied on the proposal and spreadsheet from J4 Development (J4), a construction company that inspected the Project. Neither the proposal nor the spreadsheet explained how J4 arrived at its pricing estimates. Pollacia indicated that J4's proposal "amend[ed] the prior findings and determinations reflected in my 9-month and 12-month warranty reports." Following the decision, the parties participated in a third mediation in September 2022. Similar to the other mediation attempts, the third mediation did not resolve their disputes.

D. ADC's Motions for Partial Summary Judgment

ADC filed numerous motions for partial summary judgment between December 2019 and August 2020. Relevant to this appeal is the trial court's September 17, 2020 order, which ruled on two of ADC's seven motions for partial summary judgment: (1) its second motion for partial summary judgment, filed on December 11, 2019, and (2) the first amended second no-evidence motion for partial summary judgment, filed on August 3, 2020.

Taken together, these motions argued that ADC was entitled to partial summary judgment on KWA's breach of contract claim and to foreclosure on any liens on the property because ADC could not be held liable for failing to pay under the contract when the IDM did not certify or approve KWA's applications for certain payments. ADC asserted that the IDM's contractual obligations to certify or approve such payments was a condition precedent to KWA's obligation to pay. KWA responded, in part, that the provisions ADC relied on were covenants, not conditions precedent, and it attached thousands of pages of documents to its response. ADC objected to KWA's evidence on multiple grounds.

The trial court sustained ADC's objections to KWA's summary judgment evidence, granted the second motion for partial summary judgment and the first amended second no-evidence motion for summary judgment, and ordered that KWA take nothing on its breach of contract claim. The order also released any liens on the property.

E. The Bench Trial

The parties later participated in a bench trial. At that time, KWA no longer had any remaining claims against ADC. The trial proceeded on ADC's counterclaims for breach of contract, breach of warranty, and negligence against KWA, as well as its third-party claim against Hartford.

During opening statements, ADC emphasized that "this is all about confirming what the architect and/or the Initial Decision Maker determined" was the cost to correct and conform to the contract in the updated twelve-month warranty report. KWA countered that any notion that the trial court was required to "rubber stamp [$12,149,284.27] like an arbitration prove-up, a confirmation of an arbitration award" was not what the contract or law provided.

ADC's evidence at trial included live testimony from Anderson and excerpts from Pollacia's deposition. It did not present any evidence or expert testimony supporting J4's proposal or the spreadsheet that Pollacia relied on to update his twelve-month warranty report. KWA cross-examined Anderson at length and then presented several expert witnesses to dispute the reasonableness of J4's proposal.

During closing arguments, ADC continued to argue that it did not need to present evidence of reasonable and necessary costs supporting J4's proposal because the IDM's decision was final and binding. Alternatively, ADC asserted that, if the IDM's decision was not final and binding, the proper remedy was to allow the IDM to make another determination, not the court. KWA maintained that the trial court should not "rubber stamp" the IDM's decision, which was unsupported by any evidence, particularly in light of KWA's evidence establishing that the costs were unreasonable and unnecessary.

F. The Final Judgment and Post-Judgment Proceedings

On December 14, 2023, the court signed a final judgment that incorporated its previously-rendered partial summary judgment order from September 17, 2020, which extinguished KWA's claims. It found that ADC was entitled to judgment on its breach of contract and breach of warranty claims, jointly and severally, against KWA and Hartford.[3] The court awarded $12,149,284.27 in actual damages against KWA and Hartford, jointly and severally, $471,725.00 in attorneys' fees through the partial summary judgment against KWA and Hartford, jointly and severally, $271,717.00 in attorneys' fees through trial against Hartford, and conditional appellate attorneys' fees, jointly and severally, against KWA and Hartford.

Both parties requested findings of fact and conclusions of law. The trial court signed the following relevant findings of fact:

> 16. The decision by the IDM is final and binding subject to unsuccessful mediation under the contract.
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> 17. Mediation is a condition precedent to binding dispute resolution under the contract. Plaintiff did not comply with the terms of the contract concerning the making of a timely demand for mediation.
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> 18. Defendant submitted claims to the IDM during the course of the construction project, and the IDM found in favor of the Defendant as to each claim submitted. In the absence of compliance with the terms of

[3] KWA elected and requested judgment on its breach of contract claim.

> the contract concerning the making of a timely demand for mediation, the IDM's decisions became final as to each of Defendant's claims.
>
> 20. The IDM issued a final binding decision pursuant to the contract as to the cost to repair and complete the construction project, and that Plaintiff is responsible for the costs. Such decision was not challenged according to the terms of the contract and was final at the time of trial.
>
> 25. The IDM's final and binding decision as to the costs and damages due to Defendant under the contract is $12,149,284.27.

The trial court issued the following relevant conclusions of law:

> 1. The decisions and determinations made by the IDM on claims submitted pursuant to the contract became final.
>
> . . .
>
> 6. Plaintiff waived its right to mediation and binding dispute resolution.
>
> 7. Plaintiff waived its right to challenge any initial decisions, decisions, and final decisions under the Contract.

KWA filed a "motion to modify, correct, reform the final judgment or, alternatively, for new trial." The motion was overruled by operation of law. This appeal followed.

Legal Sufficiency of the Actual Damages Award[4]

In its first issue, KWA argues that the evidence is legally insufficient to support the trial court's award of $12,149,284.27 in actual damages because ADC offered no evidence that its repair and completion costs were reasonable and necessary. ADC responds, among other things, that it was not required to prove the reasonableness and necessity of its damages because the IDM's determination was

[4] KWA and Hartford are not challenging the liability finding on ADC's breach of contract claim.

final and binding. ADC also maintains that KWA did not properly challenge the IDM's initial decision under the dispute resolution procedures required in the contract; therefore, the trial court had no power to modify it.

When reviewing a case tried to the bench where findings of fact and conclusions of law have been entered, findings of fact have the same force and effect as jury findings. *Bone-Martin v. Moss*, No. 05-22-00439-CV, 2025 WL 495558, at *9 (Tex. App.—Dallas Feb. 13, 2025, no pet.) (mem. op.). The applicable standard of review is the same as that applied in the review of jury findings. *Id.* When an appellant attacks the legal sufficiency of an adverse finding for which it did not have the burden of proof, it must demonstrate that there is no evidence to support the adverse finding. *Id.* A challenge fails if there is more than a scintilla of evidence to support the finding. *Id.* Evidence does not exceed a scintilla if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists. *Id.* We review conclusions of law de novo, affording them no deference. *K. Hovnanian Homes-DFW, LLC v. Powdermaker First Family Ltd. P'ship*, No. 02-15-00339-CV, 2016 WL 3198679, at *3 (Tex. App.—Fort Worth June 9, 2016, no pet.) (mem. op.).

We must first interpret provisions of the parties' contract before we consider the sufficiency of the evidence supporting the damages award. We review questions of contract interpretation de novo. *Id*. Thus, we begin by analyzing the terms of the contract and whether the parties agreed that the IDM's decision would be "final and binding" under the facts presented. It is undisputed that the following contract provisions are controlling:

> § 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefore; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.
>
> § 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.
>
> § 15.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

KWA argues that the trial court grossly misinterpreted the contract and the dispute resolution provisions when it accepted ADC's contention that the IDM's decision was "final and binding" because KWA "did not comply with the terms of the contract concerning the making of a timely demand for mediation."[5] It maintains that ADC's interpretation of the relevant contract provisions imposes a mandatory, time-based requirement for mediation that does not exist under the facts here. We agree.

[5] Quoted portions are included in Findings of Fact 16 and 17.

Section 15.2.6.1 provides an optional procedure that either party may choose to invoke. It specifically states that "either party *may*, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision." (Emphasis added.) There is no evidence in the record that ADC or KWA made a written demand that the other party file for mediation following any IDM decision. During trial, ADC conceded that it never demanded that KWA file for mediation. Anderson testified that although KWA filed for mediation, she did not recall the mediation request "being related to any IDM decision in particular." Without such a demand, neither party "fail[ed] to file for mediation within the time required" or "waive[d] their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision." As such, section 15.2.6.1 did not apply, and the trial court's findings and conclusions to the contrary were in error.

Because the parties did not invoke section 15.2.6.1, the controlling contractual provision was section 15.2.6, which states in part that "[e]ither party may file for mediation of an initial decision at any time." KWA complied with section 15.2.6 when it later filed requests for mediation, and it is undisputed that both parties voluntarily participated in mediation on three occasions: May 2018, December 2019, and September 2022. After the mediations were unsuccessful, KWA retained the authority under the contract to then challenge the IDM's decision in court.[6] Thus, the IDM's October 7, 2021 decision was not final and binding, the trial court was not bound by it, and KWA did not lose its right to challenge it in a judicial proceeding.

There are two measures of damages for breach of a construction contract: (1) remedial damages, which are the cost to complete or repair less the unpaid balance on the contract price; and (2) difference-in-value damages, which is the difference between the value of the building as constructed and its value had it been constructed according to the contract. *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012). A party seeking to recover remedial damages must prove that the damages sought are reasonable and necessary. *Id.*; *see also Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004) (per curiam). To establish that, the plaintiff must show more than simply "the nature of the injuries, the character of and need for the services rendered, and the amounts charged therefor." *McGinty*, 372 S.W.3d at 627 (quoting *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (1956)). Instead, some other "evidence showing that the charges are reasonable" is required. *Id.*

[6] Section 15.3 of the contract provides in relevant part that "[c]laims, disputes, or other matters in controversy arising out of or related to the Contract . . . shall be subject to mediation as a condition precedent to binding dispute resolution." Here, the parties chose a judicial proceeding as the binding dispute resolution method.

In *Mustang Pipeline*, the Texas Supreme Court noted that evidence of out-of-pocket costs alone "did not establish that the damages were reasonable and necessary." *Mustang Pipeline Co.*, 134 S.W.3d at 201. Instead, the court concluded that it was "well settled that proof of the amounts charged or paid does not raise an issue of reasonableness, and recovery of such expenses will be denied in the absence of evidence showing that the charges are reasonable." *Id.* Moreover, an expert testifying extensively about how he derived at his pricing estimate for repair costs does not in itself make the figure reasonable. *McGinty*, 372 S.W.3d at 628.

In *Insurance Alliance v. Lake Texoma Highport, LLC*, this Court considered evidence that supported the reasonableness of repair and replacement costs to support a jury's damages award. In that case, the general manager submitted an uncontroverted affidavit addressing the costs and necessity of the services. 452 S.W.3d 57, 70 (Tex. App.—Dallas 2014, pet. denied). Attached to the affidavit was an itemized summary of the services provided by various vendors to Highpoint as a result of flood damage, along with copies of the corresponding invoices. *Id.* The general manager explained that the amounts charged for the services were "reasonable at the time and place that the services were provided." *Id.* We concluded that more than a scintilla of evidence supported the reasonableness of the damages awarded. *Id.*

The record before us contains no evidence of reasonableness or necessity. Anderson was the only witness to testify on ADC's behalf. She provided no testimony regarding the reasonableness or necessity of the repair and replacement costs. Instead, ADC relied on the six-page spreadsheet prepared by J4, purporting to support the $12,149,284.27 in remedial costs. Although the IDM adopted J4's spreadsheet, there is no indication in the record of how J4 arrived at its estimates, that Pollacia adopted the spreadsheet as an expert, or that he believed any of the costs were reasonable and necessary. Rather, Pollacia acknowledged that he did not have "any knowledge or understanding as to how these unit prices and extended prices or quantities were developed." He testified that the spreadsheet was "their work product" and "not my bid," and he did not know what plans or changes were incorporated into J4's bid to increase the amount from his twelve-month warranty report.

Conversely, KWA provided unrebutted testimony disproving the reasonableness and necessity of J4's proposal. John Holstead (Holstead), an expert in construction management, identified "gross errors" and multiple instances in which calculations were "based off of quantities that aren't supported" in the proposal. For example, Pollacia valued a fence at $78,296.76, whereas J4's proposal was approximately $600,000. J4 valued other items at nine times the costs for the same scope of work determined by Pollacia in his twelve-month warranty report.

Holstead emphasized that it was improper for the IDM to rely on a "change in scope" for certain items because the items did not change. For example, he testified that building exterior work totaled $2.3 million, and any alleged exterior damage resulted from design issues, not construction defects from work performed by KWA. He also explained why J4's proposal did not support the cost to repaint the exterior:

> [T]here was a broad statement saying that the buildings needed to be repainted because there was some fanning in some areas. There was some discoloration in some areas. Those areas were not quantified. They weren't identified. And for the purpose of determining damages, for the work performed, I would expect to see a defined quantity or area of that damage that needed to be replaced. That wasn't done here. It was just a general broad statement that we need to repaint the whole building, with no evidence of why it needed to be repainted.

Holstead disagreed with ADC's argument that general increases in construction costs justified J4's proposal. "[T]o say that in three years since the warranty report has been issued, cost of construction went up nine times is absolutely not correct." J4 also did not provide any evidence to substantiate such a general increase in costs.

Likewise, Bill Ross, an expert in construction cost estimates, testified J4's proposal contained "absolutely no evidence" for any person to determine "whether or not any portion or all of that J4 estimate constitutes reasonable costs." It was "not even close to being evidence sufficient to prove reasonable or necessary costs."

After reviewing the record, we conclude that KWA met its burden of demonstrating that there is no evidence to support the adverse finding. ADC offered no evidence satisfying the requirements of *Mustang Pipeline* or *McGintry*. Further, ADC provided no evidence explaining how J4 determined which items to include in the bid, how it derived its estimates for quantities and pricing, and whether those estimates were reasonable and necessary. Thus, the trial court's award of

$12,149,284.27 in actual damages is legally insufficient. We sustain KWA's first issue, reverse the trial court's award of actual damages against KWA and Hartford, jointly and severally, and render a take-nothing judgment on ADC's breach of contract claim against KWA and Hartford.[7]

ADC's Motions for Partial Summary Judgment

In its second issue, KWA argues that the trial court erred by granting ADC's second motion for partial summary judgment and ADC's first amended second no-evidence motion for partial summary judgment, thereby dismissing KWA's breach of contract claim against ADC and extinguishing its lien (the September 17, 2020 Order). KWA specifically contends that the trial court erroneously concluded that the IDM's approval of its payment application was a condition precedent to ADC's obligation to pay and that the IDM's rejection of its payment application was "final and binding."

In ADC's second motion for partial summary judgment, it argued that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law because it could not be held liable for failing to pay under the contract when the IDM did not certify or approve KWA's applications for certain payments. ADC contended that the IDM's contractual obligations to certify or approve such payments was a condition precedent to trigger KWA's obligation to pay. ADC

[7] Having reached this conclusion, we need not address KWA's alternative arguments challenging the award of damages. TEX. R. APP. P. 47.1.

attached to its motion KWA's admissions that the IDM (1) withheld certifications of payment; (2) provided written reasons for withholding certifications; and (3) identified incomplete work or work performed that was not in conformity with the contract's requirements. ADC maintained that "[it] cannot be held responsible for a breach of contract for not making payments to [KWA] when the contract requires that the [IDM] approve [KWA]'s applications for payment."

KWA responded, in part, that the provisions ADC relied on were covenants, not conditions precedent. KWA attached thousands of pages of documents to its response, which ADC objected to on multiple grounds.

In a subsequent first amended second no-evidence motion for summary judgment, ADC similarly argued that there was no evidence that the IDM found KWA's work acceptable and fully performed, thereby triggering ADC's obligation to pay. KWA responded and attached the same evidence it had submitted in its response to ADC's second motion for partial summary judgment.

The trial court's September 17, 2020 order sustained ADC's objections to KWA's summary judgment evidence and granted the motions without specifying the grounds. The order dismissed KWA's breach of contract claim against ADC and extinguished KWA's lien on the property.

We review both traditional and no-evidence summary judgments de novo. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017); *Melton v. Randall Mgmt., LLC*, No. 05-23-01315-CV, 2025 WL 2597415, at

*2 (Tex. App.—Dallas Sept. 8, 2025, no pet.) (mem. op.). We take as true all evidence favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts in the nonmovant's favor. *Parker*, 514 S.W.3d at 219.

When, as here, a trial court does not specify the ground on which it granted the motion for summary judgment, we must affirm if any ground asserted in the motion is meritorious. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017); *Melton*, 2025 WL 2597415, at *2. Similarly, when the summary judgment order does not specify the ground on which it is based, the appellant must negate each ground upon which the judgment could have been based. *Rosetta Res. Operating, LP v. Martin*, 645 S.W.3d 212, 226 (Tex. 2022); *Melton*, 2025 WL 2597415, at *2.

Also, when the motions for summary judgment include both no-evidence and traditional grounds, we often first review the no-evidence grounds. *Hansen*, 525 S.W.3d at 680. If the nonmovant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion, as it necessarily fails. *Parker*, 514 S.W.3d at 219.

Although not presented as a separate issue, KWA argued in a footnote that the trial court abused its discretion by sustaining ADC's objections to its summary judgment evidence. We review the trial court's admission or exclusion of summary judgment evidence under an abuse of discretion standard. *Rana Shipping Transp.*

Indus. & Trade, Ltd. v. Calixto, No. 05-22-00337-CV, 2023 WL 4360982, at *2 (Tex. App.—Dallas July 6, 2023, no pet.) (mem. op.). "A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* (quoting *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002)).

An appellant has the burden to present a record that is sufficient to show the trial court abused its discretion in sustaining the objections to summary judgment evidence. *Id.* at *3; *see also Beinar v. Deegan*, 432 S.W.3d 398, 402–03 (Tex. App.—Dallas 2014, no pet.). As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a). "Our precedent dictates that '[w]hen a party fails to object to the trial court's ruling that sustains an objection to [its] summary judgment evidence, [the party] has not preserved the right to complain on appeal about the trial court's ruling.'" *XS Heavy Haul, Inc. v. Com. Credit Grp., Inc.*, No. 05-22-01263-CV, 2023 WL 8183271, at *4 (Tex. App.—Dallas Nov. 27, 2023, no pet.) (mem. op.) (quoting *Beinar*, 432 S.W.3d at 402); *see also Calixto*, 2023 WL 4360982, at *3.[8] KWA did not object in the trial court. To

[8] KWA argues our precedent is "in doubt" because of the Texas Supreme Court's holding in *Browder v. Moree*, 659 S.W.3d 421, 423 (Tex. 2022). In that case, the court concluded that "neither our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review." *Id.* The statement, however, was in the context of whether a jury demand was timely perfected and did not involve any procedural requirements related to summary judgment practice. Accordingly, *Browder* did not consider whether a party must object when the trial court sustains an objection to summary judgment evidence to preserve its issue for review; therefore, we remain bound by our precedent.

the extent that KWA challenges the trial court's evidentiary rulings, it has not preserved its issue for review. *Id.*

When the trial court sustained ADC's objections, no evidence remained to oppose the motion. Therefore, we conclude the no-evidence motion was properly granted. In reaching this conclusion, we reject KWA's assertion that the trial court "necessarily admitted all the summary judgment evidence" when it signed an order on September 9, 2020, granting it leave to file a late response incorporating its evidence. The trial court subsequently signed the September 17, 2020 order, in which it sustained ADC's objections and granted the "second evidentiary and first amended second no-evidence motions for partial summary judgment." This is the order KWA challenges on appeal.

Because KWA failed to meet its burden to overcome ADC's no-evidence motion for summary judgment, there is no need to address its challenge to the traditional motion, which necessarily fails. *Parker*, 514 S.W.3d at 219. We overrule KWA's second issue.

Attorneys' Fees

The trial court awarded ADC $419,725.00 in attorneys' fees, jointly and severally against KWA and Hartford, incurred through the September 17, 2020 order. It also awarded ADC an additional $271,717.00 in attorneys' fees incurred through trial in prosecuting its claims against Hartford. KWA challenges these awards on multiple grounds in its third issue.

A. $419,725.00 Award

At the time the suit was filed, section 38.001 of the Texas Civil Practice and Remedies Code did not allow the recovery of attorneys' fees against KWA because of its limited partnership status. *See, e.g.*, *CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *25 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.). Thus, to recover its fees, ADC relied on property code section 53.156, which provides that "in any proceeding . . . to declare that any lien or claim is invalid or unenforceable in whole or in part, the court shall award costs and reasonable attorney's fees as are equitable and just." TEX. PROP. CODE ANN. § 53.156.

KWA argues that the $419,7245.00 in attorneys' fees must be reversed or, alternatively, reduced because they are excessive and ADC failed to properly segregate its fees between recoverable and unrecoverable claims. KWA maintains that because section 53.156 provides the only bases for the award, the award "could only be justified to the extent it represented the reasonable and necessary fees that ADC incurred in declaring KWA's lien to be invalid or unenforceable on summary judgment" and that most of the fees billed prior to the September 17, 2020 order had nothing to do with defeating KWA's lien on the property.

ADC responds that it was required to review thousands of pages of evidence and multiple summary judgment responses filed by KWA. It also presented extensive evidentiary objections to KWA's evidence, all of which the trial court sustained. ADC relies heavily on the fact that it "offered a generous 25% reduction in the fees sought, which accounted for any duplicate work and any unrecoverable claims." It maintains that the reduction, along with all of its billing statements admitted into evidence, is sufficient to support its segregation analysis and the trial court's fee award.

Appellate courts review an award of attorneys' fees under an abuse of discretion standard. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018); *Hoang v. MacKenzie Meadows HOA, Inc.*, No. 05-24-00246-CV, 2025 WL 2495047, at *12 (Tex. App.—Dallas Aug. 29, 2025, no pet.) (mem. op.). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without regard to guiding legal principles, or if its ruling is not supported by legally or factually sufficient evidence. *Hoang*, 2025 WL 2495047, at *12 (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)); *see also Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501–02 (Tex. 2019).

When claims allowing recovery of fees are brought with claims that do not allow such recovery, any attorneys' fees relating solely to a claim for which fees are not recoverable must be segregated from the fees relating to recoverable claims. *Hizar v. Heflin*, 672 S.W.3d 774, 802 (Tex. App.—Dallas 2023, pet. denied) (citing *Tony Gullo Motors, I, L.P v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006)). The parties agree that segregation was required and ADC segregated to some extent.

However, KWA maintains that ADC did not provide legally sufficient evidence to determine how its counsel arrived at its segregated estimate.

The standard for evaluating the segregation of fees is a “relaxed standard.” *Lederer v. Lederer*, No. 14-21-00012-CV, 2022 WL 11551156, at *5 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.) (mem. op.). “An attorney’s opinion that a certain percentage of the total time was spent on the claim for which fees are recoverable will suffice.” *Centurion Logistics LLC v. Brenner*, No. 05-23-00578-CV, 2024 WL 5244618, at *20 (Tex. App.—Dallas Dec. 30, 2024, pet. denied) (mem. op.). However, time estimates cannot be based on generalities. *See Tex. Champps Americana, Inc. v. Comerica Bank*, 643 S.W.3d, 738, 755 (Tex. App.—Dallas 2022, pet. denied) (remanding fees issue because despite a detailed time record generally supporting the attorney’s fees award and the attorney testifying that he had reduced the amount sought by twenty hours to account for unrecoverable time, the court’s review of the record indicated that counsel’s estimate was incorrect).

During the bench trial, ADC’s attorney testified that “all of the claims asserted, including counterclaims, were necessary in order to defeat the lien claim” on summary judgment and that the majority of the work performed before the September 17, 2020 order was to defend against KWA’s breach of contract claim and to attempt to foreclose the lien KWA filed. He explained that the fees expended through September 17, 2020, totaled $717,484.26; however, he “summarily” made a twenty-five percent reduction "to reflect any duplicative work that somehow didn't attack the theories of attacking the liens."

During cross-examination, counsel conceded that his twenty-five percent reduction was "an estimate" and not based on any specific deduction for duplicative fees. He could not recall the specific work performed on the summary judgments because he reviewed the billing "at some point, but it was sometime last year." He admitted, "I'm not fresh." Counsel agreed that some entries, like preparing corporate minutes for an entity unrelated to the lawsuit, had nothing to do with the removal of the lien but that "factored into why [he] summarily [subtracted] 25 percent." Counsel conceded that some of the billing entries were heavily redacted hindering his ability to determine whether they related to the lien and the summary judgment proceedings.[9]

A suggested reduction in fees must be based on more than generalities, and "conclusory testimony devoid of substance will not support a fee award." *Desio v. Del Bosque*, No. 05-21-00022-CV, 2022 WL 500025, at *5 (Tex. App.—Dallas Feb. 18, 2022, no pet.) (mem. op.) (invalidating fee award where attorney "summarily opined that 95% of all the legal work performed" was for overlapping recoverable and nonrecoverable claims, without specifying which overlapping tasks were involved) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)). Given

[9] Q: So there is no way we can even tell whether those redacted entries would apply to the lien, correct?
A: Yeah. Looking at the redacted, you would be correct.

ADC's counsel's admission that his twenty-five percent reduction was "an estimate" and not based on making any specific deductions because of duplicative fees and that he had not reviewed any of the bills within the last year, we cannot conclude that ADC met even the "relaxed standard" for evaluating the segregation of attorneys' fees. *See Lederer*, 2022 WL 11551156, at *5. *But see Kelly v. Isaac*, No. 05-19-00813-CV, 2020 WL 4746589, at *9 (Tex. App.—Dallas Aug. 17, 2020, pet. denied) (mem. op.) (concluding segregation analysis satisfied "relaxed standard" when attorney testified he had reviewed the bills and believed that fifteen percent of the fees were allocated to defending against a civil theft claim). Thus, ADC failed to satisfy its burden supporting the attorneys' fee award.

We sustain KWA's third issue to the extent it challenges the $419,725.00 in attorneys' fees awarded to ADC against KWA and Hartford, jointly and severally, in the September 17, 2020 order. Because a failure to segregate attorneys' fees does not preclude recovery of such fees and the record indicates ADC is entitled to some attorneys' fees,[10] we remand to the trial court for further proceedings. *Chapa*, 212 S.W.3d at 314; *Kinsel*, 526 S.W.3d at 428.

B. $271,717.00 Award

Hartford contends that the evidence is factually insufficient to support the $271,717.00 award of attorneys' fees against it for the period between the summary

[10] During the hearing on entry of judgment, KWA's counsel argued that after reviewing the billing statements, highlighting the entries involving preparation and drafting of the summary judgments, and giving credit for block billing and heavily redacted portions of the bills, his total came to $46,837.75.

judgment and trial. In addition to arguing that the fees are improper and excessive, Hartford maintains the fees should be eliminated entirely because there is no basis for allowing ADC to recover any fees from Hartford. ADC responds that the trial court had two alternative bases for awarding fees: (1) the terms of the performance bond and (2) chapter 38 of the civil practice and remedies code. It asserts that the evidence is factually sufficient to support the fee award under either basis.

1. The Performance Bond

Section 4 of the performance bond states:

> If the Contractor performs the Contract and fully indemnifies and saves harmless Obligees from all costs and damages which they may suffer by reason of failure to do so, and fully reimburses and repays Obligees all expenses which any Obligee may incur in making good any such default, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Hartford emphasizes that section 4 requires it to "fully reimburse and repay . . . all expenses which any Obligee may incur in making good any such default." It relies on the proposition that, under Texas law, courts have consistently held that attorneys' fees are not costs or expenses. *See In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 175 (Tex. 2013) (orig. proceeding) (stating that costs or expenses are generally fees and charges required by law to be paid to courts or to their officers, such as filing fees and service fees); *see also State Farm Mut. Auto. Ins. Co. v. Nicastro*, No. 05-23-00362-CV, 2025 WL 399674, at *13 (Tex. App.—Dallas Feb. 5, 2025, pet. denied) (mem. op.) (recognizing attorneys' fees are not costs).

ADC asserts that Hartford has cited no authority examining similar language in the performance bond context, and that "a more reasonable construction of the bond's plain language" is that because the same paragraph includes "costs and damages," then the word "expenses" includes attorneys' fees. ADC seems to encourage the Court to read section 4 as requiring Hartford to "fully reimburse and repay . . . all expenses *and damages* which any Obligee may incur in making good any such default."

When interpreting a contract, we ascertain and give effect to the parties' intent expressed in the text and not in the abstract but in the context in which the words appear and were written. *Bd. of Regents of Univ. of Tex. Sys. v. IDEXX Labs., Inc.*, 691 S.W.3d 438, 445 (Tex. 2024). Courts may not rewrite the parties' contract, nor should courts add to its language. *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (orig. proceeding). We must enforce the contract as written. *Id.* When the terms are plain, definite, and unambiguous, as they are here, the court cannot vary the terms. *Id.* at 457–58.

We reject ADC's invitation to read language into section four of the performance bond that does not exist. Accordingly, the general rule that expenses do not include attorneys' fees controls, and, therefore, the terms of the performance bond could not provide the basis for the trial court's award.

2. Texas Civil Practice and Remedies Code Chapter 38

ADC filed a third-party petition against Hartford for "suit on performance bond" and alleged that "KWA has defaulted on its obligations under the Contract by failing to prosecute the work in a timely manner, failing to perform in accordance with the Contract, and failing to remedy defective and nonconforming work as required by the Contract." ADC requested attorneys' fees under chapter 38 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (attorneys' fees recoverable for written contract); *see also Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 427 (Tex. 1995) (discussing surety's liability for attorneys' fees as a result of its breach of the performance bond).

Although Hartford agrees that a surety may be liable to an obligee for attorneys' fees under certain circumstances, it maintains that ADC is not entitled to such fees under these facts because of the nature of its claim against Hartford. We agree.

"[T]he obligation of a surety to a bond obligee is secondary to the obligation owed by its principal." *Great Am., Ins. Co.*, 908 S.W.2d at 418–19. A surety's liability is derivative in nature and depends on the principal's liability. *See Great Am. Ins. Co. of N.Y. v. Williamson Cnty.*, No. 03-24-00162-CV, 2025 WL 2080381, at *6 (Tex. App.—Austin July 24, 2025, no pet.). Unless a cause of action exists against the principal, it cannot exist against the surety. *See Girard Fire & Marine*

Ins. Co. v. Koenigsberg, 65 S.W.2d 783, 786 (Tex. Civ. App.—Dallas 1933, no writ) (cited by *Great. Am. Ins. Co.*, 908 S.W.2d at 419).

Here, ADC did not allege that Hartford breached its duties or defaulted on the terms of its performance bond. Instead, it only claimed that KWA allegedly "defaulted on its obligations" under it thereby triggering Hartford's obligation to pay on the performance bond. Because Hartford's liability is derivative of KWA's, ADC cannot recover anything (including attorneys' fees) from Hartford that it could not recover from KWA.

As discussed previously, ADC could not recover attorneys' fees from KWA because KWA is a limited partnership. At the time suit was filed, section 38.001 did not allow the recovery of attorneys' fees against a limited partnership. *See CBIF Ltd. P'ship*, 2017 WL 1455407, at *25; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8).[11]

To the extent the trial court may have awarded attorneys' fees to ADC under section 53.156 of the property code because the September 17, 2020 order indicated such fees would be considered "in an amount to be determined at a later date," the trial court erred. Once the trial court granted summary judgment and extinguished the lien, ADC could not recover any additional fees from KWA. *See* TEX. PROP. CODE ANN. § 53.156 (allowing a party to recover reasonable attorneys' fees in a

[11] The statute was later amended to allow the recovery of attorneys' fees from a limited partnership. *See* Act of June 6, 1979, 66th Leg., R.S., ch 314, 1979 Tex. Gen. Laws 718, 719 (amended 2021) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(a), (b)(8)).

proceeding declaring a lien invalid or unenforceable). Because ADC could not recover fees from KWA after the trial court granted summary judgment, the trial court could not rely on property code section 53.156 to support an award of fees against Hartford post-summary judgment.

ADC has not established a basis for recovering fees against Hartford. We sustain Hartford's third issue to this extent and reverse the $271,717.00 in attorneys' fees awarded to ADC at trial.

Conclusion

We reverse the trial court's award of $12,149,284.27 in actual damages against KWA and Hartford, jointly and severally, and render judgment that ADC take nothing on its breach of contract claim. We reverse the $419,725.00 in attorneys' fees awarded to ADC against KWA and Hartford, jointly and severally, and remand for further proceedings. We reverse the $217,717.00 in attorneys' fees awarded against Hartford and render judgment that ADC take nothing in this respect. In all other regards, the judgment of the trial court is affirmed.

/Cynthia Barbare/
CYNTHIA BARBARE
JUSTICE