NUMBER 13-15-00529-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

HECTOR E. MENDEZ AND ALL OTHER OCCUPANTS, **Appellants,**

v.

REMANENTE LLC, **Appellee.**

On appeal from the County Court at Law No. 5 of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras,[1] and Longoria
Memorandum Opinion by Justice Longoria

Appellant Hector Mendez challenges a judgment against him in a forcible detainer action brought by appellee Remanente L.L.C. *See* TEX. PROP. CODE ANN. § 24.002(a)

[1] Justice Dori Contreras, formerly Dori Contreras Garza. *See* TEX. FAM. CODE ANN. § 45.101 *et seq.* (West, Westlaw through 2015 R.S.).

(West, Westlaw through 2015 R.S.). We reverse and remand with a suggestion of remittitur.

I. BACKGROUND

A. Remanente Purchases the Warehouse Where Mendez is a Tenant

This case concerns Suite C of a commercial warehouse property located in McAllen, Texas. Remanente purchased that property in November of 2014 from Jerry Box of Aztec Realty. The purchase agreement reflects that Remanente took the property subject to all of Box's outstanding leases, written or unwritten. At the time of the purchase, Mendez was the tenant in possession of Suite C.

After the purchase was complete, Gerardo Davalos, the president of Remanente, visited each tenant to discuss a rent increase. Davalos offered to continue to rent Suite C to Mendez for the sum of $850 per month starting in January if Mendez would "comply with all the rules." Davalos charged $850 in rent per month to all long-term tenants. For a reason which does not appear in the record, Davalos later told Mendez that he must pay the $1,250 rent applicable to new tenants starting in January 2015.

Davalos testified at trial that he and Mendez eventually came to an agreement where Mendez would pay $850 a month in rent through May with the understanding that Mendez would vacate Suite C by May 31, 2015. Davalos and Mendez partially memorialized their agreement by writing in Spanish on a door inside Suite C: "Last Day for Mr. Mendez 5/31/15." Both men signed underneath it.[2] The wording makes no mention of the rent Mendez would pay until May. Mendez paid $500 a month in rent from January until May and attempted to pay the same amount in June. Davalos accepted the

[2] The trial court admitted a photograph of the wording on the door as Plaintiff's Exhibit 40.

rent payments from January through May but refused to accept Mendez's payment for June.

Mendez maintained throughout trial that he had a written lease with Box to rent Suite C for the sum of $500 a month for the period between August 1, 2014 and February 1, 2016. Neither Box nor Aztec Realty is mentioned in the text of that lease; the parties to it are Mendez and Homero Rodriguez. Mendez testified at trial that Rodriguez rented Suite C from Box prior to Mendez and that Rodriguez worked for Box. Mendez explained that he knew Rodriguez worked for Box because Rodriguez took him to Aztec Realty to pay the rent on Suite C for November of 2014 and informed them that Mendez would now be paying the rent for Suite C.

B. Letters from Davalos to Mendez

Davalos later sent two letters to Mendez to remind him that he must vacate Suite C by May 31, 2015. Davalos sent the first letter on April 11, 2015 via certified mail, return receipt requested, addressed to Mendez at Suite C ("the First Letter"). The First Letter stated that it is Mendez's "final notice" to vacate and repeated that he must leave Suite C by May 31, 2015. Davalos sent a second letter to Mendez on April 24, 2015 in the same manner ("the Second Letter"). The Second Letter repeated that Mendez must vacate Suite C by May 31, 2015, and stated that if Mendez stayed beyond May 31 without signing a lease, the rent would be $75 per day, and failure to pay would result in Remanente filing a forcible detainer lawsuit seeking rent, attorney's fees, and court costs. The Second Letter was addressed to Mendez both at Suite C and at a residential address in McAllen. Copies of the Second Letter were sent to both addresses.

The trial court admitted copies of both letters for the limited purpose of showing that the letters were sent. The court refused to admit the letters to show that Mendez received either letter because Remanente's counsel did not possess the return receipts. Remanente's counsel then introduced two tracking reports printed from the website of the United States Postal Service. The tracking numbers on the reports correspond to the First Letter and the copy of the Second Letter which was sent to Suite C and reflect that both were delivered. The trial court admitted both reports over Mendez's objections.

Mendez explained during his testimony that he obtained copies of the green card return receipts from the post office. The return receipt for the First Letter reflects that it was signed for by Julio Palacios at Suite C. Palacios is the brother of Davalos. The green card for the copy of the Second Letter sent to Suite C reflects that it was signed for by Davalos himself at Suite A of the warehouse. The green card for the copy of the Second Letter that was sent to Mendez's home address was signed for by Maria de Anda at Suite A of the warehouse.[3] The trial court admitted all three receipts into evidence.

Davalos agreed that Palacios signed for the First Letter and explained that he and Palacios immediately delivered it to Mendez in person at Suite C. According to Davalos, Mendez ripped up the letter in front of them. Davalos denied signing for the Second Letter and speculated that Mendez forged his signature. Regarding the copy of the Second Letter that was signed for by de Anda, Davalos testified without objection that de Anda told him that she signed for the letter and gave it to Mendez.

[3] There is no explanation in the record regarding why the letter that was addressed to Mendez's home address was delivered to the warehouse.

C. Eviction Petition and Appeal

Mendez remained in possession of Suite C after May 31, 2015, and Remanente filed a forcible detainer action against Mendez in the justice court of Hidalgo County. Remanente alleged that Mendez broke his agreement by paying less than $850 in rent each month from January to May. As a result, Remanente sought an award of the full $1,250 per month in rent from November 2014 through May 2015, and $75 per day starting June 1, 2015. Remanente also sought an award of court costs and $2,400 in attorney's fees. The justice court rendered judgment in Remanente's favor and awarded it possession of Suite C, $4,575 in unpaid rent, and $2,400 in attorney's fees.

Mendez appealed to the county court at law for a trial de novo. *See* TEX. R. CIV. P. 510.10(c). The parties reached a settlement agreement which they read into the record. The agreement called for Remanente to allow Mendez two and a half weeks to vacate the property, while Mendez would pay the sum of $6,000 to Remanente within eleven days. Mendez vacated Suite C in the last week of July 2015, but the case proceeded to trial.

Although Mendez filed a jury demand, the case was tried to the bench without objection on August 6 and 7. The trial court heard testimony and received evidence on the matters discussed above as well as the damage to Suite C that Mendez allegedly caused before vacating the property. Specifically, Davalos testified that when he recovered possession of Suite C he discovered that the fuse box "was destroyed and incomplete, missing parts"; there was a hole in the door of the unit which had not been there in December; the garage door had been pushed off of its tracks; a pipe had been

rigged between the faucet and the toilet in the bathroom and the water left running; and pieces of trash had been left inside the suite.

The county court rendered judgment for Remanente. The county court's amended judgment awarded unpaid rent in the amount of $4,575 "through the month of May 2015 as awarded by the justice court"; unpaid rent for June, July, and August 2015 in the amount of $3,750; $11,653.86 in actual damages "for the repair and cleaning of the premises"; damages for the increased water bill (allegedly resulting from the pipe in the bathroom) in the amount of $463; $6,310 in reasonable and necessary attorney's fees; court costs; and $5,000 in contingent appellate attorney's fees for prosecuting this case on appeal.[4] This appeal followed.

D. Appellate Issues

Mendez argues in four issues, which we address as nine, that: (1) the Second Letter should not have been admitted because it was not properly authenticated; (2) the Second Letter contained inadmissible hearsay; (3) the trial court abused its discretion in admitting the printout from the website of the United States Postal Service; (4) the evidence is legally and factually insufficient that Mendez received the required statutory notice to vacate; (5) the evidence is legally and factually insufficient that Remanente had the superior right of possession over Suite C; (6) the evidence is legally and factually insufficient that Remanente fulfilled the statutory requirements for an award of attorney's fees; (7) the evidence is legally and factually insufficient to support the trial court's award of unpaid rental damages for June through August 2015; (8) the award of damages for

[4] The county court's original judgment also held Mendez in contempt of court until he paid the award of actual damages and the damages for the increased water bill. Mendez filed a combined motion to reconsider, motion to modify, and motion for new trial. The trial court stated orally that it was denying the motions but issued an amended judgment removing the contempt language.

repairing and cleaning Suite C was unsupported by the pleadings; (9) the court erred by not submitting the case to a jury.

II. Admission-of-Evidence Issues

Mendez argues in his first issue that the trial court abused its discretion in admitting the Second Letter because it was not properly authenticated. In his second issue, Mendez asserts the Second Letter was inadmissible hearsay. In his third issue, Mendez argues that the trial court abused its discretion when it admitted the printouts from the website of the United States Postal Service.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court abuses its discretion when it acts without reference to guiding rules or principles. *Id*. We will uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012).

B. Was the Second Letter Properly Authenticated?

During trial, Remanente's counsel questioned Davalos regarding the Second Letter and moved to admit a copy of it into evidence. Mendez's counsel then received permission to take Davalos on voir dire regarding the letter. The following exchange ensued:

[Counsel]: Now, do you speak English?

[Davalos]: I do, but I prefer Spanish.

[Counsel]: Do you write English?

[Davalos]: At the moment with the help of John.

[Counsel]: So you didn't write this letter yourself?

[Davalos]: I did it with the attorney. The attorney put it together professionally.

[Counsel]: Did you—

[Davalos]: The attorney did.

[Counsel]: Okay. So it's not yours, correct?

[Davalos]: The writing, the idea, the principle is.

Mendez objected that the letter had not been properly authenticated and was inadmissible hearsay. The trial court overruled both objections and admitted the letter.

Mendez first argues that Davalos could not testify "to what the [Second Letter] is when it clearly showed that [Davalos] did not speak English and the letter was written in English." Mendez also argues that Davalos lacked personal knowledge because he testified that his attorney composed the letter. Remanente responds that Davalos had sufficient personal knowledge to authenticate the letter and enough of a command of English to recognize it. We agree with Remanente.

Evidence must be authenticated to be admissible. *United Rentals, Inc. v. Smith*, 445 S.W.3d 808, 813 (Tex. App.—El Paso 2014, no pet.). To satisfy this requirement, the proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). One means of authenticating evidence is direct testimony from a witness with knowledge that a matter is what it is claimed to be. *Id.* R. 901(b)(1); *Nicholas v. Envtl. Sys. (Int'l) Ltd.*, 499 S.W.3d 888, 900 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). At trial, Remanente's counsel showed Davalos a copy of the Second Letter and asked, "[w]ho made this letter?" Davalos replied: "I made it with the help of my attorney." He also testified that he personally mailed the letter to

Mendez. During the voir dire by Mendez's counsel, Davalos reiterated that he wrote the letter with his attorney, who "put it together professionally." When Mendez's counsel challenged him during voir dire, Davalos insisted that the "writing, the idea, the principle" of the Second Letter was his own. Mendez argues that Davalos had no personal knowledge of the Second Letter because "his attorney put the letter together," but Davalos's testimony reflects that he was intimately involved with creating it. The trial court did not abuse its discretion in concluding that Davalos had the knowledge to authenticate the Second Letter. *See* TEX. R. EVID. 901(b)(1).

Furthermore, on this record, Davalos's command of the English language was not so poor that he would be unable to testify that the document proffered by Remanente's counsel was the Second Letter. Mendez argues that the record "clearly showed that [Davalos] did not speak English and the letter was written in English." Davalos did testify at trial that he prefers to speak in Spanish.[5] However, Davalos also testified he speaks some English and can write it "with the help of John." Based on this testimony, the trial court did not abuse its discretion in concluding he had sufficient command of English to identify whether the document offered by Remanente's counsel was the Second Letter. *See id*. We overrule Mendez's first issue.

C. Was the Second Letter Inadmissible Hearsay?

Mendez asserts in his second issue that the Second Letter was inadmissible hearsay because Davalos's counsel drafted the letter, but Remanente introduced it through Davalos to show the truth of its contents. Remanente responds that the Second

[5] Both Davalos and Mendez testified at trial through an interpreter.

Letter is not hearsay because it was not offered to prove the truth of any matter asserted within it. We agree with Remanente.

The rules of evidence define hearsay as a statement which the declarant did not make while testifying at the current trial or hearing and which the party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). "Out-of-court statements are not hearsay if offered for a purpose other than to prove the truth of the matter asserted." *San Pedro Impulsora de Inmuebles Especiales, S.A. de C.V. v. Villarreal*, 330 S.W.3d 27, 44 (Tex. App.—Corpus Christi 2010, no pet.) (quoting *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992)). The record reflects that Remanente introduced the Second Letter to prove "[o]nly that it's been mailed, not accepted." Whether the Second Letter was mailed was an issue because Remanente needed to show that it sent a demand-to-vacate letter to Mendez to comply with the statutory notice requirements applicable to forcible detainer suits. *See generally* TEX. PROP. CODE ANN. §§ 24.002, 24.005 (West, Westlaw through 2015 R.S.). Remanente's counsel did not offer the letter to prove that Mendez was obligated to vacate the premises or for any other matter asserted within the letter. We conclude the trial court did not abuse its discretion in concluding that the Second Letter was not hearsay. *See McCraw*, 828 S.W.2d at 757; *Villarreal*, 330 S.W.3d at 44. We overrule Mendez's second issue.

D. Were the Printouts Properly Authenticated?

In his third issue, Mendez argues that the trial court abused its discretion in admitting the printouts from the postal service's website. Mendez asserts that the printouts were not self-proving business records as Remanente asserted in the trial court. *See* TEX. R. EVID. 902(10). Remanente does not contest that matter but responds that

Mendez waived this issue because it does not comport with his objection in the trial court. In the alternative, Remanente argues that the printouts were self-authenticating as official publications. *See id.* R. 902(5).

Assuming that Mendez's objection in the trial court comports with his issue on appeal, we agree with Remanente that the printouts were admissible under Texas Rule of Evidence 902(5). *See id.* Mendez is correct that the printouts were not admissible under subsection 10 of Rule 902 because Remanente's counsel did not accompany the printouts with an affidavit. *See id.* R. 902(10) (requiring that business records offered under that subsection be accompanied by an affidavit). That conclusion does not end our inquiry because we must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *See Enbridge Pipelines*, 386 S.W.3d at 264. One of the other types of self-authenticating evidence is "[a] book, pamphlet, or other publication purporting to be issued by a public authority." TEX. R. EVID. 902(5). In *Williams Farms Produce Sales, Inc. v. R & G Produce Co.*, this Court held "that documents printed from government websites are self-authenticating under Texas Rule of Evidence 902(5)." 443 S.W.3d 250, 259 (Tex. App.—Corpus Christi 2014, no pet.) (addressing a docket sheet printed from uscourts.org and a printout from the website of the South Carolina Secretary of State). In this case, Remanente presented two printouts entitled "USPS Tracking" which reflect that they were printed from the website of the United States Postal Service—www.usps.com—on June 4, 2015. Each report contains tracking information from the United States Postal Service regarding letters with a tracking number assigned by the Postal Service. Because both reports indicate that they were printed from the website of a government entity, each report was self-authenticating under Texas Rule of Evidence 902(5). *See id*. The trial

court did not abuse its discretion by admitting the reports. We overrule Mendez's third issue.

III. Sufficiency of the Evidence

In his fourth through seventh issues, Mendez challenges the legal and factual sufficiency of various parts of the trial court's judgment.

A. Sufficiency Standards of Review

In a bench trial in which the trial court did not file findings of fact, we imply all findings of fact necessary to support the judgment.[6] *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). When the appellate record includes the clerk's and reporter's records, the trial court's findings are not conclusive and can be challenged on appeal for legal and factual sufficiency. *Id.* We review the sufficiency of the evidence supporting the court's findings by the same standards that we review the sufficiency of the evidence supporting a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

When a party attacks the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, the party must demonstrate that "no evidence" supports the adverse finding. *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). We will sustain a legal sufficiency challenge if, among other things, "the evidence offered to prove a vital fact is no more than a scintilla." *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." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. &*

[6] The trial court did not respond to Mendez's request for findings of fact and conclusions of law or his notice of past due findings and conclusions. We do not address the trial court's failure to act because Mendez does not raise it as a point of error.

Research Corp., 299 S.W.3d 106, 115 (Tex. 2009) (internal quotation marks omitted). We review the record and consider evidence favorable to the finding if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We view the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that supports it. *Id.* The final test for legal sufficiency is always "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

When reviewing for factual sufficiency, we consider all of the evidence in a neutral light and will set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 311 (Tex. App.—Corpus Christi 2012, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). In this review we "consider, weigh, and compare all of the evidence that supports and that which is contrary to the finding." *Sembera v. Petrofac Tyler, Inc.*, 253 S.W.3d 815, 824 (Tex. App.—Tyler 2008, pet. denied).

B. Was There Sufficient Evidence of Proper Notice?

Mendez argues in his fourth issue that the evidence is insufficient to support the trial court's implied finding that Remanente gave him the required notice to vacate. Remanente replies that there is sufficient evidence to show that Mendez received the Second Letter in person, which satisfies the governing statute. We agree with Remanente.

A tenant or subtenant who refuses to surrender possession of real property "on demand" commits a forcible detainer. TEX. PROP. CODE ANN. § 24.002(a)(1). The demand for possession must be in writing by a person entitled to possession of the property and comply with the requirements for a notice to vacate in section 24.005. *Id.* § 24.002(b). As relevant here, section 24.005 requires that "the notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant." *Id*. § 24.005(f) (West, Westlaw through 2015 R.S.). Mendez argues that the return receipts demonstrate that he did not receive proper notice because none of the letters were delivered to him; instead, Davalos, Palacios, and de Anda signed for the various letters. To support his argument, Mendez cites cases where notice was sent by mail but there was evidence that it was not received by the addressee. *E.g. Gore v. Homecomings Fin. Network, Inc.*, No. 05-06-01701-CV, 2008 WL 256830, at *2 (Tex. App.—Dallas Jan. 31, 2008, no pet.) (mem. op.). We agree that the return receipts reflect that the letters were not delivered to Mendez by mail, but mail is not the only permissible form of delivery. Notice may also be given in person "by personal delivery to the tenant." TEX. PROP. CODE ANN. § 24.005(f). Davalos testified that after Palacios signed for the Second Letter, both Davalos and Palacios immediately went to Suite C and handed the letter to Mendez in person.

Based on the above, we conclude there is legally and factually sufficient evidence to support the trial court's implied finding that Mendez received proper statutory notice. We overrule Mendez's fourth issue.

C. Was There Sufficient Evidence to Prove Remanente's Right of Possession?

Mendez argues in his fifth issue that the evidence is legally and factually insufficient to establish that Remanente had the superior right to possess Suite C. *See id.* § 24.002(a)(1) (providing that a tenant commits a forcible detainer if he holds over "after the termination of the tenant's right of possession"). Mendez reasons that his own right of possession of Suite C had not terminated because he had a lease which did not expire until February 1, 2016. Remanente responds that there is legally and factually sufficient evidence that it had the superior right of possession because Mendez was on an unwritten month-to-month lease.

We decline to address this issue because it is moot. Appellate courts are prohibited from deciding moot controversies. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). A justiciable controversy must exist between the parties at every stage of the litigation, including the appeal, or the case is moot. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). The Texas Supreme Court has explained that when the defendant in a forcible detainer action gives up possession, the issue of possession becomes moot unless the defendant holds and asserts "a potentially meritorious claim of right to current, actual possession." *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). Both Mendez and Davalos testified that Mendez had vacated the premises by the last week of July 2015.[7] The lease Mendez points to as giving him the right to possess Suite C expired on February 1, 2016, and the record does not reveal any other basis for Mendez to claim a right to actual possession after that date.

[7] Davalos testified that Mendez moved out of Suite C on July 26, 2015. Mendez testified that he gave up possession of Suite C on July 28, 2015.

We conclude that the issue of possession is moot. *See id.* (holding that the issue of possession was moot when the tenant's lease expired before the case reached the court of appeals and she had no other basis for claiming a right of possession); *Daftary v. Prestonwood Mkt. Square, Ltd.*, 399 S.W.3d 708, 711–12 (Tex. App.—Dallas 2013, pet. denied) (holding in a forcible detainer action that the issue of possession became moot when the defendants vacated the property before the trial in the county court). Because the issue of possession is moot, we are prohibited from deciding it.[8] *See Jones*, 1 S.W.3d at 86.

D. Was There Sufficient Evidence Remanente Was Entitled to an Award of Attorney's Fees?

Mendez argues in his sixth issue that the evidence is legally and factually insufficient to support the trial court's implied finding that Remanente fulfilled the statutory notice requirements to receive an award of attorney's fees. *See* TEX. PROP. CODE ANN. § 24.006(a) (West, Westlaw through 2015 R.S.). He argues that the evidence was insufficient because the Second Letter did not include the necessary statutory language. Remanente responds that the text of the Second Letter fulfilled the purpose of section 24.006 and there is no requirement that a demand letter contain precisely the same language as the statute. We agree with Mendez to the extent that the Second Letter did not meet the statutory requirements.

[8] We address Mendez's remaining issues because each of them relates to Remanente's claims for damages and attorney's fees. Claims for damages and attorney's fees are live controversies which can prevent the entire case from becoming moot. *See Daftary v. Prestonwood Mkt. Square, Ltd.*, 399 S.W.3d 708, 711–12 (Tex. App.—Dallas 2013, pet. denied) (holding in a forcible detainer action that claims for damages and attorney's fees were live claims even though the issue of possession had become moot); *see also Allen-Mercer v. Roscoe Prop.*, No. 03-15-00674-CV, 2016 WL 4506294, at *2 (Tex. App.—Austin Aug. 25, 2016, no pet.) (mem. op.) (same).

To be eligible for attorney's fees in a forcible detainer action, a landlord

> must give a tenant who is unlawfully retaining possession of the landlord's premises a written demand to vacate the premises. The demand must state that if the tenant does not vacate the premises before the 11th day after the date of receipt of the notice and if the landlord files suit, the landlord may recover attorney's fees. The demand must be sent by registered mail or by certified mail, return receipt requested, at least 10 days before the date the suit is filed.

Id. Mendez argues that to comply with section 24.006 the demand letter must repeat the exact statutory language beginning with "if the tenant does not does not vacate the premises before the 11th day" and that the Second Letter did not. We disagree because this requirement is nowhere in the plain language of the statute. *See id.*; *see also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (observing that courts interpret a statute according to the plain meaning of its language).

But even though the demand letter need not parrot the statutory language, the demand must still inform the tenant that the landlord may recover attorney's fees if the tenant does not vacate the premises before the eleventh day after the date he received the notice and the landlord files suit. *See* TEX. PROP. CODE ANN. § 24.006(a); *Washington v. Related Arbor Court, LLC*, 357 S.W.3d 676, 681–82 (Tex. App.—Houston [14th Dist.] 2011, no pet.). The First Letter did not mention attorney's fees at all. The Second Letter mentioned attorney's fees but did not demand that Mendez vacate within any number of days after the date he received the notice. Instead, the Second Letter informed Mendez that he would be liable for attorney's fees if he stayed past May 31, 2015 without signing a new lease. Remanente responds that the purpose of section 24.006 is to give the tenant an opportunity to take action to avoid liability for attorney's fees and that the Second Letter fulfilled this purpose by notifying him of the possibility of attorney's fees

and giving him thirty days to vacate. *Cf. Canine, Inc. v. Golla*, 380 S.W.3d 189, 193 (Tex. App.—Dallas 2012, pet. denied) (observing that the purpose of a similar presentment requirement was to allow a claim to be paid without incurring attorney's fees). We do not disagree regarding the purpose of section 24.006, but we are not free to ignore the requirement that the notice to vacate "must state" the tenant will be liable for attorney's fees if he does not vacate before the eleventh day after the date the tenant receives the notice and the landlord files suit. *See* TEX. PROP. CODE ANN. § 24.006(a). The Second Letter simply did not comply with this requirement.[9] Because the Second Letter did not give Mendez the statutorily-required ten days to vacate after receiving it, we conclude that the evidence is legally insufficient to support the award of attorney's fees. *See Washington*, 462 S.W.3d at 682 (concluding the evidence was insufficient to support an award of attorney's fees when the demand letter gave the tenant three days to vacate). We sustain Mendez's sixth issue.

E. Was There Sufficient Evidence to Support the Awards of Damages?

Mendez argues in his seventh issue that the evidence is legally and factually insufficient to support the trial court's award of $4,575 in actual unpaid rental damages "through the month of May 2015 as awarded by the justice court" and $3,750 in actual unpaid rental damages from June through August 2015.

1. Unpaid Rental Damages of $4,575 for January-May 2015

Mendez's first argument is that the trial court was wrong to award $4,575 in actual rental damages "as awarded by the justice court." Pointing to this language, Mendez

[9] We note that May 31, 2015 was not within ten days of the date either copy of the Second Letter was received. The first copy of the Second Letter was signed for on May 28, 2015, and the second copy was signed for on June 2, 2015.

argues that the trial court improperly used the justice court judgment as evidence even though it should have conducted a complete trial de novo. *See* TEX. R. CIV. P. 510.10(c) (stating that a trial de novo "is a new trial in which the entire case is presented as if there had been no previous trial"). Mendez reasons that there is actually no evidence in the record that he was required to pay more than $500 per month in rent from January to May. Mendez emphasizes the part of Davalos's testimony where he agreed that the "Balance Due" section of the receipts he gave Mendez each month for his rent payments are blank. Remanente replies that the justice court judgment was never entered into evidence, and Mendez ignores other evidence in the record which is sufficient to uphold the trial court's award. We agree with Remanente.

First, the county court did not have the justice court's judgment before it because the judgment was never offered or admitted into evidence. Moreover, the record reflects affirmative evidence of the amount of lost rents. Mendez occupied Suite C from January 2015 to at least May 31, 2015, and Davalos testified that he informed Mendez that the rent starting in January 2015 was $1,250 a month. Davalos explained that he and Mendez eventually agreed that the rent would be $850 a month with the understanding that Mendez would vacate the premises by May 31, 2015. It is undisputed that Mendez paid only $500 a month in rent during this time period. Furthermore, the receipt for January—which Mendez denied receiving—reflects a "balance due" of $300. The "balance due" sections on each of the receipts for February through May are blank, but written in Spanish on those same receipts is "Date of Leaving 5/31/15." Based on the above, we conclude that the evidence on unpaid rent for January through May of 2015 is legally and factually sufficient.

2. Unpaid Rental Damages of $3,750 for June, July, and August 2015

Mendez next challenges the $3,750 in damages for unpaid rent for June through August 2015. He argues that the evidence supporting the award of unpaid rents is legally and factually insufficient because there is no evidence that he occupied Suite C during the pendency of the appeal to the county court.[10] Remanente responds that there is sufficient evidence that he occupied the premises during that period of time. We agree with Remanente in part.

When a forcible detainer case is appealed to the county court at law, a party may "plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal," but only the prevailing party may recover these damages. TEX. R. CIV. P. 510.11. "Damages may include but are not limited to loss of rentals during the pendency of the appeal and attorney fees in the justice and county courts." *Id.* To support an award of lost rents under Rule 510.11, the plaintiff must prove that the defendant occupied the premises during the pendency of the appeal. *See Salaymeh v. Plaza Centro, LLC*, 264 S.W.3d 431, 437 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (addressing the identically-worded predecessor rule). The justice court rendered its judgment on June 15, 2015. Davalos testified at trial that Mendez did not fully move out of Suite C until July 26, 2015, and Mendez himself testified that he gave up possession of Suite C on July 28, 2015. There is no evidence in the record that Mendez continued to occupy or otherwise withhold possession of Suite C in August 2015. Based on this evidence, we conclude the evidence is legally and factually

[10] Mendez repeats under this section that "as stated above, the evidence does not meet the elements of forcible detainer." To the extent he intends this statement as a separate argument, we overrule it for the reasons set out in the previous sections.

sufficient to support the trial court's award of unpaid rents for June and July 2015, but legally insufficient to support the trial court's award of unpaid rent for August 2015.[11]

3. Conclusion

We sustain Mendez's seventh issue in part because we conclude the evidence is legally insufficient to support the award of $1,250 in lost rent for August 2015. *See Salaymeh*, 264 S.W.3d at 437. Mendez's seventh issue is otherwise overruled.

IV. Award of Damages Supported by the Pleadings

Mendez argues in his eighth issue that the trial court's award of $11,653.86 in damages for cleaning and repair of Suite C was unsupported by the pleadings. Remanente does not contest that the issue of repair damages was not pled but argues that it was tried by consent.[12] We agree with Remanente that the issue was tried by consent.

A trial court's judgment must conform to the pleadings. TEX. R. CIV. P. 301. "A party's pleading invokes the trial court's jurisdiction, and, therefore, an order or judgment not supported by the pleadings is void." *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.). However, issues not raised by the pleadings which are tried by express or implied consent "shall be treated in all respects as if they had been raised in the pleadings." TEX. R. CIV. P. 67; *see Guillory*, 442 S.W.3d at 690. We determine whether an issue was tried by consent by examining the record "not for evidence of the issue, but rather for evidence of trial of the issue." *Barras v. Barras*, 396

[11] Because we have found the evidence supporting the award of damages to be legally insufficient in part, we do not address whether it is factually insufficient.

[12] Mendez labeled this issue as a sufficiency challenge, but the substance of his argument is that the award is not supported by the pleadings.

S.W.3d 154, 168 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (internal quotation marks omitted). We will find trial by consent only where evidence regarding an unpled issue "is developed under circumstances indicating that both parties understood the issue was in the case, and the other party failed to make an appropriate complaint." *Guillory*, 442 S.W.3d at 690.

Remanente's counsel announced at the beginning of the trial that "the only thing we want to establish at this point are damages" because Mendez no longer occupied Suite C. Davalos then testified extensively regarding the damage to Suite C that he discovered after Mendez gave up possession. During his testimony, the trial court admitted into evidence thirty-nine photographs taken by Davalos documenting the damage to Suite C as well as an incident where Mendez allegedly flooded Suite C.[13] The trial court also admitted written estimates from various companies of the cost of repairs and disposing of the trash Mendez allegedly left at Suite C, as well as water bills for the warehouse from March through July. None of this evidence is relevant to any issue other than damages for repair and cleaning of Suite C.

Furthermore, the record reflects that Mendez actively challenged Remanente's evidence but not on irrelevance grounds, or that the issue was not pled. Mendez's counsel cross-examined Davalos on his testimony of damages and took him on voir dire twice regarding the repair estimates offered by Remanente's counsel. Mendez's counsel also objected to admitting the water bills into evidence. At the end of the trial, Remanente's counsel spent most of his closing argument reasserting the evidence for Remanente's damages, and Mendez's counsel denied that damages were recoverable

[13] The photograph—Plaintiff's Exhibit 29—depicts Mendez standing in front of Suite C as water (or another liquid) comes from under the door and pours down the step.

in a forcible detainer action at all. We conclude the issue of repair damages was tried by consent because evidence for the issue was developed under circumstances showing that both parties understood the issue was in the case, and Mendez never raised an appropriate complaint. *See Guillory*, 442 S.W.3d at 690. We overrule Mendez's eighth issue.

V. RIGHT TO A JURY TRIAL

Mendez argues in his ninth issue that the trial court erred when it conducted a bench trial because he had perfected his right to a jury trial. *See* TEX. R. CIV. P. 216. Remanente responds that Mendez's jury demand was untimely and that he waived this issue by failing to object when the trial court held a bench trial. We agree with Remanente.

A party who properly perfected his right to a jury trial can waive that right by failing to object when the trial court proceeds with a bench trial. *Puntarelli v. Peterson*, 405 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Rodriguez v. Tex. Dep't of Mental Health & Mental Retardation*, 942 S.W.2d 53, 56 (Tex. App.—Corpus Christi 1997, no writ). Even if we assume that Mendez timely perfected his right to a jury trial, he did not object when the trial court held a bench trial. We hold that Mendez has waived this issue. *See Puntarelli*, 405 S.W.3d at 134; *Rodriguez*, 942 S.W.2d at 56. We overrule Mendez's ninth issue.

VI. CONCLUSION

We conclude that the evidence is legally insufficient to support the whole award of attorney's fees. We also conclude that there is insufficient evidence to support part of the trial court's award of $3,750 in unpaid rental damages for June through August 2015.

Regarding the award for which the evidence is insufficient in part, this Court is prohibited by rule from ordering a separate trial on unliquidated damages when liability is contested. TEX. R. APP. P. 44.1(b)(2); *Rancho La Valencia, Inc. v. Aquaplex, Inc.*, 383 S.W.3d 150, 152 (Tex. 2012) (per curiam). We therefore reverse the trial court's judgment and remand for it to: (1) render judgment that Remanente take nothing in attorney's fees; and (2) hold a new trial on liability and damages regarding the remainder of the case. *See* TEX. R. APP. P. 44.1(b)(2). However, should Remanente within fifteen days of the date of our judgment voluntarily remit the $1,250 in damages awarded as lost rent for August 2015, we will supplement this opinion to affirm the remainder of the trial court's judgment in accordance with the remittitur, thereby removing the need for a new trial. *See id.* R. 46.3; *see also Bos v. Smith*, 492 S.W.3d 361, 393–94 (Tex. App.—Corpus Christi 2016, pet. filed).

Nora L. Longoria
Justice

Delivered and filed the
2nd day of February, 2017.