

Reverse in part; Affirm in part; and Remand; Opinion Filed May 5, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00864-CV

JOHNATHAN HALTON AND CAROLYN HALTON, Appellants

V.

**AMERICAN RISK INSURANCE COMPANY, JOHN T. PARKER CLAIMS-HOUSTON,
INC., JOHN T. PARKER CLAIMS-LONGVIEW, INC., AND AARON MARTIN,
Appellees**

**On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-12-06385-B**

MEMORANDUM OPINION

Before Justices Myers, Stoddart, and Whitehill
Opinion by Justice Stoddart

Appellants Johnathan and Carolyn Halton appeal an adverse summary judgment granted in favor of appellee American Risk Insurance Company (ARIC).¹ The parties dispute whether ARIC properly and fully paid an appraisal award to repair damage to the Haltons' home that was damaged by a tornado. In three issues the Haltons argue summary judgment is improper because: (1) ARIC did not pay the full appraisal award; (2) ARIC violated the Texas Insurance Code; and (3) ARIC failed meet its summary judgment burden on the Haltons' fraud cause of action. We reverse the trial court's judgment in part, affirm the judgment in part, and remand the case to the trial court.

¹ All parties listed as appellees filed a joint motion for summary judgment. However, the Haltons did not appeal the summary judgment granted in favor of John T. Parker Claims-Houston, Inc., John T. Parker Claims-Longview, Inc., and Aaron Martin.

FACTUAL BACKGROUND

The Haltons' home was damaged by a tornado. Carolyn Halton held a homeowners insurance policy with ARIC. ARIC issued several checks to Carolyn for damages and expenses arising from her claim. The dates and amounts of the checks are as follows:

- April 19, 2012: \$1,000
- April 24, 2012: \$39,683.87
- June 28, 2012: \$200
- July 27, 2012: \$600
- August 31, 2012: \$600

In October 2012, appellants sued ARIC alleging several causes of action. After litigation began, the parties engaged an umpire to determine the damages to the Haltons' home pursuant to the terms of the insurance policy. The appraisal award, which was rendered in January 2015, stated the replacement cost value for the damage was \$180,273.92 and the actual cash value of the loss was \$163,613.92. ARIC argues the \$16,660 difference between the replacement cost value and actual cash value reflects depreciation. The appraisal award states it was made "without consideration of any deductibles or prior payments," which "will be subtracted from any payments due and owing." The Haltons' deductible was \$1,631.89.

On February 9, 2015, ARIC issued three checks totaling \$102,548.04. At the request of appellants' counsel, ARIC re-issued the checks on March 16, 2015, for the same amount.

In March 2015, the Haltons amended their petition and asserted, among other things, that ARIC breached the insurance policy by failing to pay adequate compensation under the contract, ARIC violated the Texas Insurance Code, and ARIC committed fraud. ARIC filed a traditional motion for summary judgment on all of the Haltons' claims to which the Haltons responded. Three days before the summary judgment hearing, ARIC filed a reply to the response and

attached two additional affidavits and additional evidence. The trial court granted ARIC's motion and this appeal followed.

LAW & ANALYSIS

A. Standard of Review

We review the grant of traditional summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). When a party moves for traditional summary judgment, the movant must prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in United States Currency (\$90,235)*, 390 S.W.3d 289, 292 (Tex. 2013). If the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact precluding summary judgment. *Espalin v. Children's Med. Ctr.*, 27 S.W.3d 672, 682 (Tex. App.—Dallas 2000, no pet.).

In our review, we must consider the entire summary-judgment record in the light most favorable to the nonmovant and indulge reasonable inferences and resolve doubts in the nonmovant's favor. *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 296 (Tex. 2010). More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). When the trial court does not specify the ground for its ruling, the nonmovant must show on appeal that each independent ground alleged was insufficient to support the summary judgment. *Merriman*, 407 S.W.3d at 248.

B. Payment of Appraisal Award

In their first issue, the Haltons assert the trial court erred by granting summary judgment because ARIC did not pay the full appraisal award. The parties dispute whether ARIC is

required to pay the replacement cost value or the actual cash value as shown in the appraisal. We need not resolve that dispute here. If we assume without deciding that ARIC was required to pay the lesser amount of the actual cash value awarded by the umpire minus the Haltons' deductible, we conclude ARIC failed to meet its summary judgment burden to show it fully paid the award.

Using this calculation, ARIC was obligated to pay the Haltons \$161,982.03 (\$163,613.92 for the actual cash value minus \$1,631.89 for the deductible). However, based on the summary judgment record, ARIC paid a total of \$144,631.91 to appellants (\$102,548.04 + \$1,000 + \$39,683.87 + \$200 + \$600 + \$600). The difference between the amount owed and the amount paid based on the summary judgment evidence is \$17,350.12.

When ARIC filed its reply to appellants' response to ARIC's motion for summary judgment, ARIC attached two affidavits and additional evidence. Through those affidavits, ARIC sought to prove it paid a third party, Stanley Restoration, \$17,350.12 for cleaning and remediation services that Stanley Restoration provided to the Haltons following the tornado. However, these affidavits and documents showing payment to Stanley Restoration were not part of the original motion for summary judgment; they were only included in ARIC's reply. The reply was filed three days before the trial court held the hearing on ARIC's motion for summary judgment.

Rule 166a(c) states that except "on leave of court, with notice to opposing counsel, the [summary judgment] motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." TEX. R. CIV. P. 166a(c). When summary judgment evidence is not timely filed and the trial court did not grant leave, we do not consider that evidence in our review of the summary judgment record. *See Booklab Inc. v. Konica Minolta Bus. Sols., Inc.*, No. 05-10-00095-CV, 2012 WL 3893521, at *4 (Tex. App.—

Dallas Sept. 7, 2012, pet. denied) (mem. op.) (citing *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996)). When the trial court allows the late filing of evidence, it must affirmatively indicate in the record acceptance of the late filing. See *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, at *4 (Tex. App.—Dallas Dec. 2, 2014, pet. denied) (mem. op.) (citing *Benchmark Bank*, 919 S.W.2d at 663). Absent any indication leave was granted, we must presume the trial court did not consider the late-filed evidence. *Id.*

The record does not affirmatively show the trial court granted leave for ARIC to file the affidavits and evidence attached to its reply. Because the affidavits and supporting evidence were filed three days before the summary judgment hearing without leave of court, they were not timely and we do not consider them in our review of the summary judgment record.

The record shows ARIC did not meet its burden to prove there is no genuine issue of material fact to show that it paid the full appraisal award and it was entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c); *Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in United States Currency (\$90,235)*, 390 S.W.3d at 292. We sustain the Haltons' first issue to this extent.

The Haltons also argue in their first issue that the payments made directly to Stanley Restoration were improper. In their second issue they assert that ARIC violated chapter 542 of the Texas Insurance Code by failing to promptly pay Stanley Restoration. We do not address these arguments because these issues were not raised in the summary judgment motion or the Haltons' response. The arguments surrounding payments to Stanley Restoration became relevant once ARIC filed its reply, which included the untimely filed affidavits and evidence. Because the evidence was not properly before trial court and the arguments were not made below, we do not consider them on appeal.

C. Fraud

In their third issue, the Haltons argue the trial court erred by granting summary judgment on their fraud claim. In its motion for summary judgment, ARIC argued the Haltons' fraud claim failed because ARIC satisfied its obligations under the terms of the policy by fully paying the appraisal award and, because the Haltons could not establish any independent injury in their fraud claim against ARIC, the economic loss rule barred their fraud claim. Although the Haltons have successfully shown that ARIC did not meet its summary judgment burden to prove it satisfied its obligations under the terms of the insurance policy, the Haltons make no argument about why the economic loss rule does not bar their fraud claim. When, as here, the trial court does not specify the ground for its ruling on summary judgment, the nonmovant must show on appeal that each independent ground alleged was insufficient to support the summary judgment. *Merriman*, 407 S.W.3d at 248. Because the Haltons did not challenge each independent ground alleged in the motion for summary judgment and the trial court did not specify the ground for its ruling, we overrule the Haltons' third issue.

CONCLUSION

We reverse the trial court's judgment in favor of ARIC on the Haltons' breach of contract claim and remand that claim to the trial court. We affirm the trial court's judgment in favor of ARIC on the Haltons' fraud claim.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JOHNATHAN HALTON AND CAROLYN
HALTON, Appellant

No. 05-15-00864-CV V.

AMERICAN RISK INSURANCE
COMPANY, JOHN T. PARKER CLAIMS-
HOUSTON, INC., JOHN T. PARKER
CLAIMS-LONGVIEW, INC., AND
AARON MARTIN, Appellee

On Appeal from the County Court at Law
No. 2, Dallas County, Texas
Trial Court Cause No. CC-12-06385-B.
Opinion delivered by Justice Stoddart.
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment granting summary judgment in favor of appellee American Risk Insurance Company on the breach of insurance contract claim brought by appellants Johnathan and Carolyn Halton.

We **AFFIRM** the trial court's judgment granting summary judgment in favor of appellee American Risk Insurance Company on the fraud claim brought by appellants Johnathan and Carolyn Halton.

We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 5th day of May, 2016.