Affirmed and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00488-CV

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ANNIE F. LAAS AND EVERETT A. LAAS, Appellants

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. No. 96-36414

O P I N I O N

Appellants appeal from a judgment on their suit against appellee State Farm denying them all the relief they claimed was due under their underinsured motorist coverage. In seventeen points of error, appellants contend: (1) the trial court erred in allowing the appraisal process pursuant to their policy with State Farm (points one, two, three, four, five, six, seven, and eight); (2) the trial court erred by severing their Texas Insurance Code claim, under section 21.55, and entering judgment without interest and attorney's fees for their Insurance Code claim (points nine, ten, and eleven); (3) the trial court erred in failing to allow evidence and a jury issue on appellants' breach of contract claim (points twelve and thirteen); and (4) the trial

court erred in failing to award appellants' attorney's fees, court costs, and prejudgment and post-judgment interest on their property damage award (points fourteen, fifteen, sixteen, and seventeen). We affirm.

BACKGROUND

In March 1992, Stanley Lee (Lee) ran a red light and struck Annie Laas's 1990 Oldsmobile Delta 88, which the Laases had purchased new for $21,286.00. The collision totaled the Oldsmobile, and Lee's insurance paid his property damage policy limits of $10,000.00. Because this amount did not cover the value of their car, the Laases made a claim on their underinsured coverage with State Farm. They reported the accident to State Farm immediately after it occurred, but the record does not show what activity, if any, occurred in the year after the accident.

As part of appellants' bill of exceptions, the record contains appellants' letters to State Farm seeking $6,590.95 ($16,590.95 less the $10,000.00 paid by Lee's insurance) for the Oldsmobile and State Farm's replies to appellants (shown as "plaintiffs' exhibits" in the reporter's record). Appellants' first demand letter is dated July 2, 1993. State Farm responded to appellants' demand letter with their letter of July 20, 1993, requesting documentation supporting their evaluation. Appellants responded with their valuations, and increased their offer to settle the disputed claim for $6,914.95. State Farm replied on August 3, 1993, and offered $2,309.13. On September 3,1993, appellants sent another demand letter to State Farm to substantiate the $6,914.95 they sought for the car. Appellants sent two more demand letters to State Farm dated September 27, 1993 and October 6, 1993 for $6,914.95. On October l5, 1993, State Farm sent a letter to appellants stating that they disagreed with appellants' valuations and they "would like to comply with the appraisal portion" of its policy with the Laases. In their brief, appellants claim this request for an appraisal, timed eighteen months after the accident, should have been sought immediately after the accident.

Although the record is silent about further action or inaction on the Laases's claim, they filed suit against State Farm in June 1996 for the underinsured benefits and for violation of

article 21.55 of the Texas Insurance Code. In August 1996, State Farm moved to abate the pending lawsuit and compel the appraisal process. In December 1996, the trial court granted the motion to compel and appointed an umpire for the appraisal process. No record was made of the hearing on State Farm's motion to compel. The property damage portion of appellants' lawsuit was severed from the remaining personal injury case and their Prompt Payment of Claims action under section 21.55, Texas Insurance Code.

The briefs indicate that there was no evidentiary hearing set for the umpire's award, and that appellants were not given any notice of a hearing if one was held. In their briefs, the parties indicate that in May 1997, the two appraisers could not agree on a value for the car. There is nothing in the record to support these statements other than exhibits attached to appellants' motion to disregard the umpire's award. As indicated in the trial court's judgment, the umpire chosen by the trial court issued a valuation for the Oldsmobile in the sum of $11,846.50 (a copy of the award is attached as Exhibit E to appellants' motion to disregard the umpire's award). Based on the umpires evaluation, the trial court entered judgment for appellants for $1,746.50 (the award less Lee's insurance payment of $10,000.00, and less appellants' deductible). Finally, a jury awarded the Laases a verdict for their personal injury claim in the sum of $9,410.60. Because the jury's award was less the $15,000.00 paid to appellants by the Lee's liability insurance, the trial court entered final judgment on the jury's verdict that appellants take nothing on their personal injury claim against State Farm on their underinsured motorist coverage.

The Laases appeal in seventeen points of error, which can be generally grouped in four topics. First, the Laases appeal the valuation of their car by an umpire appointed by the trial court. Second, the Laases appeal the severance and subsequent judgment without interest and attorney's fees for their Insurance Code claim. Third, the Laases appeal the exclusion of evidence of and a jury question about their breach of contract claim. Fourth, the Laases appeal the trial court's refusal to grant them attorney's fees, pre-and post-judgment interest, and costs of court.

THE UMPIRE'S PROPERTY VALUATION

In points of error one through eight, the Laases assert the following errors: (1) the trial court abused its discretion in appointing an umpire to appraise the Laases's totaled car; (2) the trial court erred in allowing an umpire to appraise the Laases's car when State Farm had waived such appraisal rights; (3) the trial court erred in allowing an umpire to appraise the Laases's car when State Farm provided no evidence that it had complied with the terms of the insurance contract regarding appointment of an umpire; (4) the trial court erred in awarding property damage in the judgment where there was no evidence of the umpire's award; (5) the trial court erred in awarding property damage in the judgment where there was factually insufficient evidence of the umpire's award; (6) the trial court erred in approving the umpire's decision without the Laases's participation and in denying the Laases an amendment to their pleadings for a violation of the insurance Code which took place the day before trial; (7) the trial court erred in awarding property damage for the Laases's car because the umpire's award was the result of fraud, accident, or mistake; and (8) the trial court violated the Laases's federal and state procedural due process rights and the Texas Civil Practice and Remedies Code when it awarded property damage in a hearing that the Laases were not allowed to attend and which was set without notice. We address each point of error in turn.

1. Court's Authority to Appoint an Umpire

In their first point of error, the Laases contend that the trial court has no authority to appoint an umpire to determine their property damage. By appointing an umpire, the Laases claim that the trial court essentially wrote a new term into the insurance policy. This insurance policy reads:

> If we and you do not agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraisers will state separately the actual cash value and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

The policy does not address the steps to be taken if neither appraiser can agree to an umpire.

Whether the appraisal provision of the contract authorizes the trial court to appoint an umpire when the appraisers cannot agree to an umpire, is a question of interpretation of the contract. Insurance policies are construed by the same rules of construction that are applicable to contracts generally. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). The determination of whether the terms of a contract are ambiguous is a question of law. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918 (Tex. App.--Fort Worth 1988, writ denied). A provision or term in a contract will only be held ambiguous when an application of the general rules of contract construction renders the writing capable of at least two reasonable yet different meanings. *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 147 (Tex. App.--Houston [1st Dist.] 1986, no writ). When a dispute arises from the terms of a contract and the contract is not ambiguous, we can determine the parties' rights and obligations under the agreement as a matter of law, *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997), and where there is no ambiguity, it is the courts' duty to give the words used their plain meaning. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984).

Because the provision with which we are concerned is, in its essence, one requiring arbitration, cases considering such clauses are instructive to us in making our decision. *See Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448, 451 (Tex. App.--Amarillo 1999, no pet.). *See also Childs v. State Farm Fire and Casualty Co.*, 899 F. Supp. 613, 614-615 (S.D. Fla.1995), *affirmed*, 158 F.3d 588 (11th Cir. 1996). A party seeking arbitration must establish the existence of an arbitration agreement, and show that the claims raised fall within the scope of that agreement. *See Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996). Once the party establishes a claim within the arbitration agreement, the trial court must compel arbitration and stay its own proceedings. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999).

This court has held that a trial court had authority to order an insurance company to appoint an appraiser within seven days of the date of the judgment, and retained jurisdiction of the cause pending an award in order to appoint an umpire if the appraisers failed to agree as

provided in the policy. *See Standard Fire Ins. Co. v. Fraiman*, 514 S.W.2d 343, 344-346 (Tex. Civ. App.--Houston [14th Dist.] 1974, no writ). We determined that the majority and better reasoned opinions of courts in other jurisdictions have held that appraisal provisions in insurance contracts are specifically enforceable by either the insurer or the insured. *Id.*

In *Saba v. Homeland Ins. Co.*, 159 Ohio St. 237, 241, 112 N.E.2d 1, 3 (1953), the insured demanded an appraisal under a clause in substantially the same language as the one in *Fraiman*. Upon the insurer's refusal to appoint an appraiser, the insured brought suit to have the court appoint an umpire. *Id.* After the insured's appraiser and the umpire made an award, suit was brought to recover it against the insurer. *Id.* The Ohio Supreme Court held that either party to the insurance contract was entitled to demand an appraisal. *Id.* The majority based this conclusion in part on the language in the appraisal clause (". . .*each shall* select a competent and disinterested appraiser . . .," "Appraisers are to be selected on the demand of *either* party . . ."), which was clearly drafted to mean that the provision was mandatory and not revocable by either party. *Saba*, 112 N.E.2d at 2-3; *Fraiman*, 514 S.W.2d at 345. The Ohio Supreme Court further noted that even though the insured may file suit on the policies, he has been led to believe that by paying premiums he is purchasing the right to an appraisal and a prompt settlement of his loss. *Saba*, 112 N.E.2d at 3; *Fraiman*, 514 S.W.2d at 345.

This court then cited other cases in agreement with *Saba*. *Fraiman*, 514 S.W.2d at 346. In *Drescher v. Excelsior Ins. Co.*, 188 F. Supp. 158 (D.N.J.1960), the court followed the holding in *Saba*, and granted the insured's motion for summary judgment on the issue of whether the insurer could be compelled to appoint appraisers. In *Hala Cleaners, Inc. v. Sussex Mut. Ins. Co.*, 115 N.J.Super. 11, 277 A.2d 897 (N.J. Ch.1971), the court followed the two cases just previously mentioned; but, instead of appointing an umpire upon the insurers refusal to appoint appraisers, the court ordered them to do so, retaining jurisdiction in case the appraisers failed to agree. *Id.* at 898. In *Ice City, Inc. v. Insurance Co. of North America*, 314 A.2d 236 (1974), the Pennsylvania Supreme Court granted specific enforcement of an appraisal clause against the insurer, partly because the clause is a benefit paid for by premiums, and also because the clause must be included in insurance contracts by statute. *Id.* at 242.

In this case, the parties each appointed an appraiser, and the appraisers could not agree as to the value of appellants' car. Appellants' appraiser did not designate an umpire. Instead, the trial court's appointed umpire decided the value of appellants' car. Section 171.003, Texas Civil Practice and Remedies Code (now, section 171.041, effective September 1, 1997) was applicable to this case because the order appointing the umpire was dated December 18, 1996, before section 171.041 became effective. This section provided, in pertinent part:

> If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on the qualifications of the proposed arbitrators shall appoint one or more qualified arbitrators.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.003 (Vernon 1997).

We hold that the trial court was authorized to appoint an umpire because the agreement was silent with respect to appointment of an umpire when one of the appraisers fails to act. Such appointment was clearly authorized by section 171.003, and the appraisal requirements of an insurance policy are now generally considered to be a form of arbitration. We overrule appellants' point of error one.

2. Waiver of Appraisal Rights

In their second point of error, the Laases claim that State Farm waived appraisal rights through its delay in implementing the appraisal process. Specifically, appellants assert that State Farm "waived the appraisal rights by delaying over eighteen months in requesting the appraisal process." Accordingly, the Laases contend the appraisal award, which the trial court enforced, is void for lack of authority.

Appellants made a claim under the underinsured portion of their policy whereby State Farm would only be liable in the event Lee's insurance was "not enough to pay the full amount" Annie Laas would be entitled to recover. There is nothing in the record to indicate when appellants filed their initial report of the accident to State Farm to show what they were

demanding under their policy. The first "claim" appellants made for payment under the provisions of their policy was by their letter of July 2, 1993, demanding $6,590.95 under the underinsured portion of their policy ($16,590.95 less the $10,000.00 policy limits of Lee's policy). On July 16, 1993, State Farm orally notified appellants they would require documentation for appellants' evaluation. The oral notification was confirmed in writing by State Farm with their letter to appellants dated July 20, 1993. Appellants raised their demand to $6,914.95 by letter to State Farm dated July 22, 1993. Twelve days later, on August 3, 1993, State Farm advised appellants they would pay $2,309.13 under appellants underinsured property damage coverage. This offer was rejected by appellants in their letter dated September 3, 1993 to State Farm and they again demanded $6,914.95. Appellants' sent two more letters to State Farm in September 1993 demanding payment. Finally, on October 6, 1993, appellants wrote State Farm making a final demand for payment of $6,914.95. Nine days later, on October 15, 1993, State Farm wrote appellants stating they were in disagreement as to the value of appellants' vehicle and asked them to comply with the appraisal portion of the policy.

The policy provides that either party may demand an appraisal of the loss upon disagreement as to the amount of loss, but sets no specific deadline for the appraisal demand. Appraisal provisions in an insurance policy may be waived by the insurance company. *See International Service Ins. Co. v. Brodie*, 337 S.W.2d 414, 415 (Tex. Civ. App.–Fort Worth 1960); *Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S.W. 375 (Tex. Civ. App. 1898, no writ). An insurance company cannot merely wait its own time to make a demand for appraisal, but must make it "in a seasonable and reasonable time." *Boston Ins. Co. v. Kirby*, 281 S.W. 275, 276 (Tex. Civ. App.–Eastland 1926, no writ); *see also Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227, 232 (Tex. Civ. App.–Waco 1959, no writ)(jury found that delay of four months and one day from date of loss was unreasonable time to demand appraisal). "Where any act is to be performed under a contract, and no time is specified therein for the performance, a reasonable time is always allowed . . . ." *Lion Fire Ins. Co. v. Heath*, 29 Tex. Civ. App. 203, 68 S.W. 305, 306 (Tex. Civ. App. 1902, no writ).

Because no time limits were specified to perform the appraisal in the policy, the demand for appraisal must be made with a "reasonable time." *Lion Fire Ins. Co.*, 68 S.W. at 306. We find no Texas authority determining what is reasonable under facts such as presented in this case, and the older Texas cases indicate that "what is a a reasonable time, under given facts and circumstances," is a fact question. *Id*. We have found the decisions of courts in other jurisdictions construing similar policies to be persuasive.

In a recent case in the United States District Court for the Northern District of Iowa, the court wrote a comprehensive opinion on the appraisal process, waiver of appraisal by an insurer, and stays of litigation pending appraisal. *See Terra Industries, Inc., v. Commonwealth Insurance Company of America,* 951 F. Supp. 581 (N.D. Iowa 1997). In that case, the policy was a property insurance policy on a fertilizer plant with an appraisal provision that provided for an appraisal demand to be made when "the insured and the Companies shall fail to agree as to the actual cash value or the amount of loss." *Id.* at 597. Because the deadline provisions in other parts of the policy did not specifically provide for the deadlines when an appraisal demand is to be made, the court determined that these deadline provisions do not provide time limits in which to demand an appraisal. *Id*. at 596-596. The *Terra Industries* court cited numerous cases in other jurisdictions supporting the same views, but none from Texas. The court concluded that the time for an appraisal demand was determined by the terms of the policy, as follows:

> Thus, according to the terms of the policy, an appraisal demand is timely if it is made when the parties cannot agree as to the actual cash value and amount of loss. Although the "appraisal" provision, read literally, would permit an appraisal demand to be made at any time after the parties reached impasse, decisions of various courts interpret an appraisal clause lacking a specific time for demand to be made to require that the demand be made within a "reasonable" time.

Terra Industries, 981 F. Supp. at 597.

As to the waiver of appraisal by waiting an unreasonable time after impasse was reached on the amount of the loss, the *Terra Industries* court cited *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982) for the definition of "waiver", as follows:

> We have defined waiver as "the voluntary or intentional relinquishment of a known right." Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver.

Scheetz, 324 N.W.2d at 304 (citations omitted); *Terra Industries,* 981 F. Supp. at 601.

This court has similarly defined "waiver" as it applies in insurance policy defenses:

> "Waiver" requires the voluntary and intentional relinquishment of a known, existing right, or intentional conduct inconsistent with claiming that right.

Emscor Mfg., Inc. v. Alliance Ins. Group. 879 S.W.2d 894, 917 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

Whether a waiver has occurred is generally a question of fact for the jury. However, "[w]hen the evidence is undisputed . . . the issue is one of law for the court." *Scheetz,* 324 N.W.2d at 304; *Terra Industries,* 981 F. Supp. at 601-602. The trial court may determine whether an appraisal has been waived as a matter of law at the preliminary stages of litigation (as was the case here). *Terra Industries,* 981 F. Supp. at 602.

The undisputed facts in this case show that the parties negotiated the value of appellants' car from July 2, 1993, until appellants made their final demand in their letter to State Farm dated October 6, 1993. State Farm replied nine days later, on October 15, 1993, telling appellants that they are "in disagreement as to the value of your" vehicle, and demanding an appraisal. As was stated in *Terra Industries*, "the proper point of reference [to determine when to demand an appraisal] is . . . when impasse was reached." *Id*. at 603. Appellants had the burden of proof to establish that State Farm waived its right to an appraisal. *Emscor Mfg., Inc.,* 879 S.W.2d at 917. Appellants argue State Farm should have demanded appraisal when they

first filed their claim, or eighteen months earlier. As outlined above, there was no disagreement until appellants' final demand letter of October 6, which State Farm answered nine days later stating they were in disagreement and demanding appraisal. The weight of authority indicates that the "point of reference" for determining a reasonable time in which to demand appraisal is the date of the disagreement. Appellants have not met their burden of proof demonstrating a waiver of their rights to demand an appraisal under these circumstances. We hold that State Farm made a timely and reasonable demand for appraisal nine days from the date of disagreement, and did not waive their right to demand an appraisal. Appellants' point of error two is overruled.

3. State Farm's Failure to Comply with Appraisal Clause to Appoint Umpire

In point three, appellants assert the trial court erred in allowing an umpire to appraise the Laases's car when State Farm provided no evidence that it had complied with the terms of the insurance contract regarding appointment of an umpire. Specifically, appellants contend the policy requires the appraisers, not the court, to appoint an umpire to determine valuation. Because the umpire was not appointed by the appraisers, appellants assert the award was without authority and void.

Under our discussion and holding under point one, we found that the trial court had the authority to appoint the umpire under section 171.003, Texas Civil Practice and Remedies Code, providing for court-appointed arbitrators. Therefore, we find that the umpire's court appointment was valid and the award was valid. Appellants' point of error three is overruled.

4. & 5. No Evidence of Umpire's Award

In points four and five, appellants contend the trial court granted State Farm's motion for judgment without evidence of an umpire award and confirmation of the award. The record shows the trial court held a hearing on State Farm's motion for judgment and appellants' motion to disregard on October 4, 1997, after the jury trial on appellants' personal injury claim. Attached to appellants' motion to disregard is a copy of the umpire's award in the sum of $11,846.50. Appellants did not request a court reporter to record the hearing at which their

motion to set aside the umpire's award was heard by the trial court. With no record of the proceedings, we cannot address appellants' point of error because we do not know if the trial court received evidence of the award.

By failing to request that the court reporter take notes of the testimony at the hearing on their motion to disregard the umpire's award, appellants waived any complaint with respect to error occurring during those proceedings. *Piotrowski v. Minns*, 873 S.W.2d 368, 370-371 (Tex. 1993). We indulge every presumption in favor of the trial court's findings in the absence of a statement of facts. *Bryant v. United Shortline Inc. Assur. Services, N.A.*, 972 S.W.2d 26, 31 (Tex. 1998). We overrule appellants' points of error four and five.

6. Abuse of Discretion in Umpire's Award and Denying Leave to Amend

In point six, appellants assert that the trial court erred in approving the umpire's decision without the Laases's participation and in denying the Laases an amendment to their pleadings for a violation of the Insurance Code which took place the day before trial.

Appellant cite no authority to support their conclusory argument that the trial court acted arbitrarily in approving the umpire's award, and this subpoint of error is waived. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983).

As to their subpoint on their amendment to their petition, there is no record of any supplemental or amended petition, motion for leave to amend a petition, nor order denying leave to amend. There is no statement of facts or bill of exceptions to show presentation to the trial court of appellants' supplemental petition or motion for leave to amend.

On appeal, the party complaining of the judge's refusal to consider an amended pleading has the burden to show an abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349 (Tex. 1980); *Clade v. Larsen*, 838 S.W.2d 277, 280 (Tex. App.–Dallas 1992, writ denied). We do not disturb the trial court's ruling unless the complaining party shows an abuse of discretion. *Hardin*, 597 S.W.2d at 349-50. Appellants have not demonstrated any abuse of discretion, and we overrule appellants' point of error six.

7. Fraud, Accident, or Mistake in the Umpire's Award

In point seven, appellants contend the trial court erred in awarding property damage for the Laases's car because the umpire's award was the result of fraud, accident, or mistake. Appellant cites no argument or authority to support his conclusory argument that the umpire's award was the result of fraud, accident, or mistake. Appellant has waived his contentions in point seven. *Trenholm,* 646 S.W.2d at 934. We overrule appellants' point of error seven.

8. Lack of Hearing and Notice of Hearing

In point eight, appellants assert that the trial court violated the Laases's federal and state procedural due process rights and the Texas Civil Practice and Remedies Code when it awarded property damage in a hearing that the Laases were not allowed to attend and which was set without notice.

There is no provision in the policy for a hearing on the appraisers' award. There is nothing in the record indicating appellants requested a hearing before the appraisers or the umpire asking them to permit appellants to come before them and make statements or offer evidence. In their motion to disregard filed *after* the trial and *after* the umpire had established a value on appellants' car, appellants requested the that "the umpire . . . set the matter for hearing . . ." so both parties could present evidence. Under these circumstances, lack of a hearing is immaterial. *Home Ins. Co. v. Walter*, 230 S.W. 723, 725 (Tex. Civ. App.--Dallas 1921, no writ); *see also Security Ins. Co. v. Kelly*, 196 S.W. 874, 876-877 (Tex. Civ. App.–Amarillo 1917, writ ref'd) (there was no provision for notice and hearing; the fact that no notice was given and no opportunity offered to the parties to present evidence did not render the award invalid).

In their brief, appellants contend that they had no notice of any hearing by the appraisers or the umpire and have been denied due process under the federal and state constitutions. They also contend they have been denied due process under the notice requirements in section 171.005, Texas Civil Practice and Remedies Code. Appellants' conclusory argument that they have been denied procedural due process by lack of notice and hearing is not supported by any

authority. Appellants cite numerous federal cases that stand generally for the fact that notice and hearing are required, but they cite no cases in any jurisdiction that require notice and hearing under the appraisal provisions of a policy similar to the one in this case, which makes no provision for a hearing by the appraisers and the umpire. Appellants have waived this claim of error for failure to cite authority to support their conclusions. *Bowles v. Clipp*, 920 S.W.2d 752, 756 (Tex. App.--Dallas 1996, writ denied) (holding appellants' constitutional arguments inadequately briefed and waived). We overrule appellants' point of error eight.

THE ARTICLE 21.55, TEXAS INSURANCE CODE, CLAIM

In points nine, ten, and eleven, appellants assert the trial court erred in denying appellants' claims under article 21.55, Texas Insurance Code, and severing their lawsuit for damages under that statute.

Article 21.55 provides, in pertinent part:

Sec. 1. In this article:

> (5) "Notice of claim" means any notification in writing to an insurer, by a claimant, that reasonably apprises the insurer of the facts relating to the claim.

> Sec. 3. (g) If it is determined as a result of arbitration or litigation that a claim received by an insurer is invalid and therefore should not be paid by the insurer, the requirements of Subsection (f) of this section shall not apply in such case.

TEX. INS. CODE ANN. art. 21.55, § 1(5), 3(g) (Vernon Supp. 2000).

If the insurer fails to comply with the deadlines in Article 21.55 for commencing investigation, acceptance or rejection of the claim, and payment of the claim, then the insurer *liable* under the policy of insurance can be held liable for damages under section 6.

In their brief, appellants contend they filed a claim under their policy in April 1992, and refer to their exhibits 23 and 24. Exhibit 23 is appellants' letter dated July 2, 1993, to State Farm, and the only mention of an April filing of any claim is: "Mr. Lee's insurance has paid the policy limits of $10,000 on April 2, 1993 whereby I am requesting reimbursement under Mrs. Laas's under-insured coverage." Appellants assertion that they gave "notice of claim" in April 1992 is unsupported by any evidence in this record. In their brief, appellants make no reference to any place in the record to support their argument that State Farm has violated the statute. Appellants argument concludes that they submitted their claim immediately after the accident and State Farm failed to process the claim timely. Appellants do not explain how State Farm violated the statute, nor do they make reference to the record where these notices can be found other than assert that exhibits 23 & 24 somehow provide the basis of their claim. Appellants do not demonstrate how the letters from them to and from State Farm in anyway violate the statute. This point is waived for failure to cite to the record where there is evidence to support their allegations, and failure to furnish argument other than conclusions to demonstrate that the statute was somehow violated. TEX. R. APP. P. 38.1(h); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.--Houston [14th Dist.] 1995, no writ). Point of error nine is overruled.

In point ten, appellants contend the trial court erred by severing their 21.55 claim under rule 41, Texas Rules of Procedure. There is nothing in the record to indicate that appellants in any way objected to State Farm's motion for severance; there is no written reply to the motion for severance by State Farm; the motion for severance mentioned in the order granting severance is not in the record; and there is no ruling by the trial court on any complaint by appellants to the motion for severance. Appellants have not preserved error on this contention. TEX. R. APP. P. 33.1; *McCallister v. Samuels*, 857 S.W.2d 768, 779 (Tex. App.–Houston [14th Dist.] 1993, no writ). Appellants' point of error ten is overruled.

In point eleven, appellants assert that the trial court abused its discretion in entering a take nothing judgment on their article 21.55 claims because that portion of the case had been severed. Appellants argue that the trial court lacked jurisdiction of the article 21.55 claim;

therefore, the trial court erred in dismissing the claim because the 21.55 claim was a separate case, and not within the trial court's jurisdiction. Point eleven is waived because appellants cite no authority and no argument to support this contention. TEX. R. APP. P. 38.1(h); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.--Houston [14th Dist.] 1995, no writ). Point of error eleven is overruled.

BREACH OF CONTRACT CLAIM

In points twelve and thirteen, appellants contend the trial court erred in failing to allow evidence and a jury issue on appellants' breach of contract claim.

In point twelve, appellants assert that the trial court erred in not allowing Mr. Laas to testify about his filing of a claim with the State Farm agent. Appellants' attorney asked Mr. Laas if he ever notified his insurance agent about "the injuries." State Farm objected on the grounds of relevancy, which objection was sustained by the trial court. Appellants' attorney then asked if the "insurance agent or adjustor ever follow-up with you regarding a rental car for your vehicle." State Farm objected on the grounds the matter had "been gone over in pretrial," and the trial court sustained the objection. Appellants attorney again asked Mr. Laas if he had asked for a rental car for Mrs. Laas. Another objection was sustained by the trial court.

Appellants did not make an offer of proof in the form of a concise statement nor did they make a bill of exceptions to preserve error as required by rule 103(a)(2), Texas Rules of Evidence. When a trial court excludes evidence, a failure to make an offer of proof waives any complaint about the exclusion on appeal. *Chubb Lloyds Ins. Co. of Texas v. Kizer*, 943 S.W.2d 946, 949 (Tex. App.--Fort Worth 1997, writ denied). We overrule this subpoint of error under point twelve.

Appellants further argue, under point twelve, that the trial court erred in refusing to admit into evidence the "various demand letters to State Farm" and refers us generally to the

record of their bill of exceptions dictated to the court reporter after the jury had retired to deliberate their verdict. Appellants do not cite any place in the record where appellant attempted to offer these "various demand letters" into evidence and obtain a ruling before the court's charge is read to the jury. To complain on appeal that the trial court erroneously excluded evidence, the appellants must show that they attempted to introduce the evidence and obtained an adverse ruling from the judge. *Malone v. Foster*, 956 S.W.2d 573, 578 (Tex. App.-Dallas 1997), *aff'd*, 977 S.W.2d 562 (Tex. 1998). This is true even if the record shows that the appellant made a bill of exceptions concerning the evidence. *Id*. Appellants have failed to preserve error on this subpoint. Appellants point of error twelve is overruled.

In point thirteen, appellants contend that the trial court erred in failing to allow a jury question regarding their breach of contract claim.

The requested question no. 2 that appellants contend was refused by the trial court is not in the record. The record of the charge conference shows that appellants' attorney objected to the trial court's charge because the trial court did not include question no. 2 in it. Counsel then dictated question No. 2, to the court reporter. It is unclear from the record whether this question was requested in writing, in "substantially correct wording," and tendered to the court by appellants. *See* TEX. R. CIV. P. 278. Rule 278 provides, in pertinent part:

> Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment.

TEX. R. CIV. P. 278.

Question no. 2, dictated to the court reporter, asked if State Farm had complied with the policy requirements for various deadlines to act on the claims. Appellants' counsel stated that the trial court "entered an order taking that information out. We will make a bill of exception." The trial court overruled the objection. There is no order "taking that information out" in the record, and there is no bill of exception concerning the omitted question. Although appellants' counsel apparently read question no. 2 into the court reporter's record, the record

does not contain the *written* question indicating precisely what those issues were or that the trial court actually refused them. The only indication of refusal by trial court was counsel's statement that the court denied the question and entered an "order taking that information out." Rule 278 mandates the manner in which requested issues shall be made, and merely dictating a requested issue into the record is not sufficient. *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex.1985). *See also AmSav Group, Inc. v. American Sav. and Loan Ass'n of Brazoria County*, 796 S.W.2d 482, 490 (Tex. App.--Houston [14th Dist.] 1990, writ denied).

The Supreme Court has repeatedly held that a request for issues must be made in writing and a dictation of the requested issue to the court reporter is insufficient. *Woods*, 693 S.W.2d at 378. Additionally, requested issues and instructions must be made separately from the objections to the court's charge. *Id*. at 379. *See also James v. Hill*, 753 S.W.2d 839, 840 (Tex. App.–Fort Worth 1988, no writ). In this case, appellants' attempt to submit his requested question came after the trial court asked counsel if he had any *objections* to the charge. Counsel then "objected" to the charge by dictating question no. 2 to the court reporter, and then said his objection was that the trial court refused to submit the question. Appellants have not preserved error with respect to their claim that the trial court refused to include their question no. 2 in the court's charge.

In any case, there was no evidence in the record of any deadlines violated by State Farm. Rule 278, Texas Rules of Procedure, provides: "The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence." The plaintiffs' exhibits showing letters from appellants to State Farm and from State Farm to appellants were never offered into evidence by appellants. Appellants made a bill of exceptions asking the trial court to include them in the record after the jury retired to deliberate. Neither Mr. Laas nor Mrs. Laas testified as to any dates on which a certain portion of the claim was to be completed. The jury had no evidence of any deadline infractions and to submit such a question would be error. A trial court may refuse to submit an issue only if no evidence exists to warrant its submission. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). We overrule appellants' point of error thirteen.

ATTORNEY'S FEES, COURT COSTS, PRE- AND POST-JUDGMENT INTEREST

In point fourteen, appellant contends the trial court abused its discretion in failing to award appellants their attorney's fees for breach of contract by State Farm under section 38.001, Texas Civil Practice and Remedies Code.

Appellants sued State Farm for unliquidated damages for personal injuries of Mrs. Laas, loss of consortium for Mr. Laas, and unspecified amounts for property damages. The uninsured/underinsured portion of appellants' policy provides for payment of damages to the insureds that they are "legally entitled to recover from the owner or operator of an uninsured motor vehicle" for bodily injury or property damage. In a suit for damages under the uninsured motorist coverage section, this court has previously denied recovery for attorney's fees under section 38.001(8), Texas Civil Practice and Remedies Code, because the insurance company is not liable for any damages until the insureds have proven they are "legally entitled" to damages. *Sprague v. State Farm Mut. Auto. Ins. Co.*, 880 S.W.2d 415, 417 (Tex. App.--Houston [14th Dist.] 1993, writ denied). There must be a determination of the amount the claimant is legally entitled to recover if the claim is unliquidated. *Id*. This claim was made on unliquidated damages and there was no agreement as to an amount due.

Until the jury in the instant case determined liability and the extent of damages due appellant as a result of her injuries, appellee as ultimate insurer was not obligated to accept the demand as the amount appellant was legally entitled to recover, or the just amount owed the claimant. The jury award was under the $15,000.00 paid by Lee's insurance, and State Farm owed nothing under the policy. Appellants were not "legally entitled" to property damages until the appraisal award was determined by the umpire. State Farm tendered payment of the $1,796.30 upon receiving notice of the award. As a result, there has been no failure on the part of State Farm to tender payment of the just amount owed.

The supreme court has held that article 2226 (now section 38.001, Texas Civil Practice and Remedies Code) was not intended to penalize a party for asserting a purported right under

a contract. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983). Therefore, the trial court acted properly in denying attorney's fees because one of the statutory prerequisites had not been met. *See also Sikes v. Zuloaga*, 830 S.W.2d 752 (Tex. App.–Austin 1992, no writ). We overrule appellants point of error fourteen.

In point fifteen, appellants contend the trial court erred in failing to award them costs of court because they recovered damages and are the "successful" party.

Rule 131, Texas Rules of Civil Procedure, provides, "The successful party to a suit shall recover of his adversary all costs incurred therein . . . ." The term "successful party" used in this rule means "one who obtains a judgment of a competent court vindicating a claim of right, civil in nature." *Siepert v. Brewer*, 433 S.W.2d 773, 775 (Tex. Civ. App.–Texarkana 1968, writ ref'd n. r. e.).

State Farm has never disputed its obligation to pay appellants the amount due under the underinsured motorists coverage for property damage, which was determined to be $1,796.30 after invoking the appraisal provisions. State Farm immediately tendered this amount to appellants, and they refused to accept. That obligation was resolved by the appraisal process, and the trial court refused to set it aside in a separate proceeding after the jury trial on appellants personal injuries and section 21.55 of the Insurance Code. The jury awarded appellants less than their payment from Lee's insurance, and the trial court entered a take nothing judgment for these claims. .

"Where plaintiff, suing on an insurance policy, made no prayer for recovery of the lesser amount for which defendant admitted liability and, when it was tendered by the company, it was refused by her, costs should be adjudged against her." *Illinois Bankers' Life Ass'n v. Floyd*, 222 S.W. 967, 971 (Tex. Com. App. 1920, holding approved). Appellants did not pray for a recovery of the "lesser amount" for which State Farm admitted liability, and State Farm's tender of $1,796.30 was refused by appellants. Appellants were not the successful party on either their lawsuit for recovery of personal injury damages or their property damages under their uninsured/underinsured motorist coverage. State Farm succeeded on both. *See also*

Stewart v. Group Health & Life Ins. Co., 555 S.W.2d 531, 534 (Tex. Civ. App.--Waco 1977, no writ) (plaintiff awarded benefits under group health policy, but lost suit for disability benefits, penalty, and attorney's fees; insurance company was "successful party" entitled to costs). We find the trial court did not abuse its discretion in failing to award appellants costs of court. We overrule appellants' point of error fifteen.

In points sixteen and seventeen, appellants assert they should receive prejudgment and postjudgment interest on their award.

In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 554 (Tex. 1985), the supreme court held, in pertinent part: ". . . a *prevailing plaintiff* may recover prejudgment interest . . . ." In our discussion under point of error fifteen, we found appellants were not the successful party. For the same reasons, we find appellants were not the prevailing party under *Cavner*. Appellants contested the umpire's award and lost. Therefore, the award was no more than determined by the appraisal process to be due, and appellants did not *prevail* in the sense that they won the case on the merits. We hold that the judgment for the property damage award did not vindicate "a claim of right, civil in nature." *Siepert*, 433 S.W.2d at 775.

Furthermore, there is no evidence in the record that appellants presented proof to the trial court as to the amount claimed due as prejudgment interest. Both sides have an obligation to provide the court with competent evidence to establish the proper amount of the interest award. *See Quality Beverage, Inc. v. Medina*, 858 S.W.2d 8, 11 (Tex. App.--Houston [1st Dist.] 1993, no writ). That opinion goes on to imply that competent evidence in this context could be stipulations, affidavits, or live testimony at a post-verdict or timely post- judgment hearing. *Id.* Quality Beverage failed to provide competent evidence when its counsel merely attached a letter as an exhibit to a response on a motion to modify the judgment. *Id*.

Because appellants were not the prevailing party and failed to present competent evidence to establish the proper amount of the interest they claim was due, we overrule point of error sixteen.

In point seventeen, appellants contend the judgment should provide for post-judgment interest. State Farm tendered the full amount due and owing under the umpire's award in the sum of $1,795.30 on July 28, 1997, before the judgment for that amount was entered on January 18, 1998. Once the judgment debtor tenders payment, post-judgment interest cannot accrue. *Robberson Steel, Inc. v. J.D. Abrams, Inc.*, 582 S.W.2d 558, 565 (Tex. Civ. App.–El Paso 1979, no writ). We overrule appellants' point of error seventeen.

The judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed August 10, 2000.
Panel consists of Justices Sears, Lee, and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.