**AFFIRMED, IN PART, REVERSED AND REMANDED, IN PART; and Opinion Filed August 15, 2023**

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

**No. 05-22-00685-CV**

**TIFFANY LONG AND ALL OCCUPANTS, Appellants**
**V.**
**PARATHEKE ENTERPRISES, LLC, Appellee**

**On Appeal from the County Court at Law No. 1**
**Grayson County, Texas**
**Trial Court Cause No. 2021-1-195CV**

# MEMORANDUM OPINION

Before Justices Pedersen, III, Garcia, and Kennedy
Opinion by Justice Kennedy

In this forcible-detainer case, Tiffany Long and "All Occupants" of the premises at issue in this case (Tenant) appeal the county court at law's judgment awarding possession of the premises to Paratheke Enterprises, LLC (Landlord). In three interrelated issues, Tenant asserts the evidence is legally insufficient to support the trial court's judgment because Landlord failed to prove it satisfied the applicable notice requirement and that the trial court ignored controlling Texas Supreme Court precedent and misapplied and misinterpreted applicable law, thereby committing fundamental error. By cross issue, Landlord asserts the trial court erred by denying

its request for attorney's fees. We affirm the trial court's judgment awarding possession of the premises to Landlord. We reverse and remand the issue of attorney's fees for further proceedings consistent with this opinion. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

## BACKGROUND

On or about January 11, 2021, Landlord and Tenant entered into a written lease agreement for a residential property located at 102-B E. Main Street, Whitesboro, Texas (the Premises) with a primary term commencing on March 1, 2021, and ending on August 31, 2022. The lease provided for a one-day written notice to vacate by any means permitted by the Texas Property Code. The lease further provided that Tenant will be liable for all of Landlord's costs associated with the eviction of Tenant, including but not limited to attorney's fees, court costs, costs of services, witness fees, and prejudgment interest.

On October 4, 2021, Landlord filed an original petition for forcible detainer in the justice court claiming Tenant breached the lease agreement by, among other things, making unauthorized alterations to the Premises. After a bench trial, the justice court signed a judgment in favor of Landlord awarding it possession of the Premises, court costs and attorney's fees.

Tenant appealed to the county court at law, and that court conducted a trial de novo. During a bench trial, Landlord presented evidence that on September 24, 2021, Landlord's counsel, on behalf of Landlord, prepared and sent one-day notices

to vacate to Tenant using three different means of delivery: personal service, certified mail, return receipt requested, and regular mail. The evidence further established the process server Landlord's counsel engaged to personally serve Tenant was not able to effect personal service, so he posted the notice on the exterior door of the building in which the Premises is located.[1] With respect to the notices that were sent by mail, the evidence established both were sent by first-class mail and were addressed to "Tiffany Long And All Occupants" with the correct address of the leased Premises.[2] The evidence showed the U.S. Postal Service attempted to deliver the certified mail letter on September 29, October 4, and October 14 and returned the letter to Landlord's counsel as "UNCLAIMED" and with a stock printed sticker stating "RETURN TO SENDER INSUFFICIENT ADDRESS UNABLE TO FORWARD." The letter sent by regular mail was not returned to Landlord's counsel.

Tiffany Schierling, formerly Tiffany Long, testified she saw the notice that was posted on the exterior door, but had not received anything in the mail related to the notice. She explained that the tenants in the building where the Premises is located share a mailbox, which is open to the street.

[1] Landlord's counsel acknowledged that this particular service was not permitted under the Texas Property Code. *See* TEX. PROP. CODE ANN. § 24.005(f) ("Notice in person . . . may be by personal delivery to premises and affixing the notice to the inside of the main entry door.").

[2] Landlord's representative testified that individuals, other than Tiffany Long, occupied the Premises at various times.

The trial court rendered judgment in favor of Landlord awarding it possession of the Premises and court costs but denying its request for attorney's fees. The trial court signed written findings of fact and conclusions of law including, but not limited to, the following:

> The court finds that [Landlord] has proved by a preponderance of the evidence that [Tenant] has violated paragraph 17 (C)(1) and (6) of the lease in question and that this violation is a default by the tenant.
>
> The court finds that [Landlord] has proved by a preponderance of the evidence that it complied with the notice to vacate requirement of Texas Property Code § 24.005(f) by regular mail to the premises in question.
>
> As to [Landlord's] claim for attorneys' fees, the court finds that the notice to vacate letter, [Landlord's Exhibit 2], does not satisfy the requirements of Texas Property Code § 24.006(a).[3]
>
> The court finds that [Landlord] should be granted possession of the premises in question, commonly known as 102-B E. Main Street, Whitesboro, TX.
>
> The court finds that insufficient evidence showing eligibility to recover reasonable and necessary attorney's fees pursuant to Texas Property Code § 24.006(a) was presented, and that [Landlord's] request for attorney's fees should be denied.

[3] Section 24.006(a) provides, "Except as provided by Subsection (b), to be eligible to recover attorney's fees in an eviction suit, 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." PROP. § 24.006(a).

Subsection (b) provides, "If the landlord provides the tenant notice under Subsection (a) *or* if a written lease entitles the landlord to recover attorney's fees, a prevailing landlord is entitled to recover reasonable attorney's fees from the tenant." *Id.* § 24.006(b) (emphasis added).

## DISCUSSION

### I. Standards of Review

When, as here, a party challenges the legal sufficiency of the evidence supporting an adverse finding on an issue for which he did not have the burden of proof, he must demonstrate no evidence supports the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011); *Fulgham v. Fischer*, 349 S.W.3d 153, 157 (Tex. App.—Dallas 2011, no pet.). In a legal sufficiency or "no evidence" review, we determine whether the evidence would enable reasonable and fair-minded people to reach the judgment under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We consider the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *Id.* at 807. We will sustain a no-evidence complaint only if the record reveals: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 827.

In a bench trial where the trial court makes findings of fact, those findings have the same force and effect as a jury verdict. *Airpro Mobile Air, LLC v. Prosperity Bank*, 631 S.W.3d 346, 350 (Tex. App.—Dallas 2020, pet. denied). The trial court, as factfinder, is the sole judge of witness credibility and the weight to be

given to testimony. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

## II. Forcible-Detainer Action and Notice to Vacate

A forcible-detainer action is a special proceeding created to provide a speedy, simple, and inexpensive means for resolving the question of right to immediate possession of real property. *In re Am. Homes for Rent Props. Eight, LLC*, 498 S.W.3d 153, 156 (Tex. App.—Dallas 2016, orig. proceeding). A forcible-detainer plaintiff must establish: (1) it owned the property; (2) the occupant was a tenant at will, tenant at sufferance, or a tenant or subtenant willfully holding over after the termination of the tenant's right of possession; (3) it gave proper notice to the tenant to vacate the premises; and (4) the tenant refused to vacate. *Id.* Here, in her first issue, Tenant contends Landlord failed to establish (1) it gave proper notice to vacate and (2) that the requisite period of time passed prior to filing suit. Thus, Tenant challenges the sufficiency of the evidence supporting the trial court's finding Landlord "complied with the notice to vacate requirement of Texas Property Code § 24.005(f) by regular mail to the premises in question."

Chapter 24 of the Texas Property Code requires that a landlord give notice to vacate prior to filing an eviction suit. PROP. §§ 24.002; 24.005. When, as here, the occupant is a tenant under a written lease agreement, the landlord must give a tenant who defaults under the lease at least three days' written notice to vacate the premises before the landlord files a forcible-detainer suit unless the parties have contracted

for a different notice period in a written lease or agreement. *Id.* § 24.005(a). Section 24.005(f), provides:

> Except as provided by Subsection (f–1), [which is not applicable here,] 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 or any person residing at the premises who is 16 years of age or older or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the premises in question.

*Id.* § 24.005(f). The notice period is calculated from the day on which the notice is delivered. *Id.* § 24.005(g). Landlord concedes that it did not give notice by personal service and recognizes that the trial court found it gave notice by regular mail, but not by certified mail. Thus, our review of Tenant's first issue focuses on whether the evidence supports the trial court's finding that Landlord gave notice to vacate by regular mail.

Tenant appears to urge that in order for a notice by regular mail to satisfy the requirements of section 24.005(f), the landlord must prove actual receipt of the notice by the tenant. Tenant's position is contrary to established law. As we recognized in *Smith v. Deusche Bank National Trust Company*, we presume a letter that is properly addressed and mailed with prepaid postage was received by the addressee. *Smith v. Deutsche Bank Nat'l Tr. Co.*, No. 05-17-01022-CV, 2019 WL 211174, at *2 (Tex. App.—Dallas Jan. 16, 2019, no pet.) (mem. op) (citing *Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex. 1994)). When the presumption applies, the

sender does not need to prove the letter was actually received by the addressee. *See Shepherd v. MWS Acquisitions, LLC*, No. 01-22-00293-CV, 2023 WL 2576451, at *4 (Tex. App.—Houston [1st Dist.] Mar. 21, 2023, no pet.) (mem. op.). That is the purpose of the presumption. *Id.* The addressee is free to rebut the presumption by offering proof that the letter was not delivered. *Thomas*, 889 S.W.2d at 238; *Shepherd*, 2023 WL 2576451, at *4; *Smith*, 2019 WL 211174, at *2. Although a denial of receipt may, under certain circumstances, be sufficient to rebut the presumption of receipt, the denial is not conclusive and merely presents a fact issue for the factfinder. *Texaco, Inc. v. Phan*, 137 S.W.3d 763, 767 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also Shepherd*, 2023 WL 2576451, at *4; *Trimble v. Fed. Nat'l Mortg. Ass'n*, 516 S.W.3d 24, 31–32 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *Self v. King*, 05-11-01296-CV, 2013 WL 4859241, at *3 (Tex. App.—Dallas Sept. 11, 2013, pet. denied) (supp. mem. op. on rehearing). The presumption of receipt is overcome conclusively only when "the evidence tending to support the contrary inference is conclusive, or so clear, positive, and disinterested that it would be unreasonable not to give effect to it as conclusive." *Southland Life Ins. Co. v. Greenwade*, 159 S.W.2d 854, 857 (Tex. 1942). And, in fact, an addressee's denial of receipt of a notice to vacate that was properly mailed, without additional evidence that the notice was not delivered, is rarely enough to overturn a finding that the tenant received the notice. *See, e.g.*, *Kaldis v. U.S. Bank Nat'l Ass'n*, No. 14-11-00607-CV, 2012 WL 3229135, at *3 (Tex. App.—Houston [14th Dist.]

Aug. 9, 2012, pet. dism'd) (mem. op.) (holding landlord established delivery of notice to vacate by proving while letters sent to tenant by certified mail were returned unclaimed, letters sent by first-class mail were not, and trial court was free to disbelieve tenant's testimony during bench trial that he did not receive the first-class letters).

Here, Landlord presented evidence that its counsel addressed the notice to vacate to Tenant and sent the notice to the Premises' address, postage prepaid, by regular first-class mail. Thus, a presumption exists that the mailing was duly received by Tenant. *See Thomas*, 889 S.W.2d at 238. Because the presumption exists, Landlord did not need to prove the letter was actually received by Tenant. *See Shepherd*, 2023 WL 2576451, at *4. Tiffany Long's denial of receipt presented the trial court with an issue of fact to resolve. *See Phan*, 137 S.W.3d at 768. Tenant asserts that in addition to her assertion she did not receive the notice Landlord sent by regular mail, her testimony concerning the situation with the mailbox and evidence that the certified mail and regular mail letters were sent to the same address and the certified mail letter was returned with a notation "RETURN TO SENDER INSUFFICIENT ADDRESS UNABLE TO FORWARD" establishes the letter sent by regular mail was not received and was insufficiently addressed. As factfinder, the trial court is given great latitude to believe or disbelieve a witness's testimony, particularly if the witness is interested in the outcome. *Id.* The trial court was entitled to decide whether Tenant had presented evidence so conclusive, or so clear,

positive, and disinterested as to overcome the presumption of receipt, and the court resolved this fact issue in favor of Landlord. *See Brittingham v. Fed. Home Loan Mortg. Corp.*, No. 02-12-00416-CV, 2013 WL 4506787, at *2 (Tex. App.—Fort Worth Aug. 22, 2013, pet. dism'd) (mem. op.) (fact that certified mail envelope contained notation "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD" did not establish notice sent by regular mail was not delivered). Moreover, evidence the letter sent by regular mail was properly addressed and was not returned to Landlord's counsel is sufficient to support the trial court's finding Landlord complied with the notice to vacate requirements of Section 24.005(f) by regular mail. *See Smith*, 2019 WL 211174, at *2 (mem. op.) (landlord sent notice to vacate by regular mail and there was no evidence letter was returned, so even though tenant testified she never received notice, evidence was sufficient to conclude tenant received notice by regular mail); *Farkas v. Fed. Nat. Mortg. Ass'n*, No. 05-11-01416-CV, 2012 WL 5351262, *3 (Tex. App.—Dallas Oct. 31, 2012, no pet.) (mem. op.) (evidence presented that while notice to vacate sent by certified mail was returned unclaimed, notice to vacate sent by first-class mail was not; "the evidence presented, viewed in the light most favorable to the judgment, was legally sufficient to establish that Farkas was given notice to vacate."). Accordingly, we conclude that there is more than a mere scintilla of evidence to support the trial court's finding that Landlord complied with section 24.005(f) by regular mail to the Premises.

In addition to claiming Landlord failed to establish it gave notice to vacate as required by section 24.005(f), Tenant contends Landlord failed to present any evidence establishing actual delivery. So, claims Tenant, without proof of actual delivery, Landlord failed to prove the notice period had expired before suit was filed. The evidence established Landlord's counsel mailed the certified mail and regular mail letters on the September 24, 2021, using the same postal rate (first-class mail). The regular mail letter's receipt, which is in evidence, indicates the ship date as September 24, 2021. Landlord's counsel testified that the certified and regular mail letters were sent from his office at the same time. A reasonable conclusion is that they arrived at the Premises at or near the same time. The return address on both the certified and regular mail envelopes is the same. The first attempt the U.S. Postal Service made to deliver the certified mail letter was September 29, 2021. The trial court could have reasonably concluded from the record evidence that the notice to vacate sent by regular mail was delivered to the Premises on or about September 29, 2021, and certainly by no later than October 3, one day before Landlord filed its forcible-detainer suit. *See, e.g.*, *D'Olivio v. Hutson*, No. 05-20-01118-CV, 2022 WL 2980706, at *1, 3 (Tex. App.—Dallas July 28, 2022, pet. denied) (mem. op.) (notice requirements in § 24.005 satisfied where notice to vacate was sent via mail 5 days before filing forcible-detainer suit); *Quintanilla v. ANG Rental Holdings Series Redeemer*, No. 05-20-00062-CV, 2021 WL 3625075, at *5 (Tex. App.—Dallas Aug. 16, 2021, no pet.) (mem.

op.) (notice requirements in § 24.005 satisfied where notice to vacate was sent via mail 8 days before filing forcible detainer); *Perez v. Fed. Home Loan Mortg. Corp*., No. 08-14-00249-CV, 2016 WL 4538528, at *4 (Tex. App.—El Paso, Aug. 31, 2016, no pet.) (mem. op.) (notice requirements in § 24.005 satisfied where notice to vacate was sent via mail 7 days before filing forcible detainer).

Here, nine days elapsed between the mailing of the notice to vacate and the filing of the forcible-detainer suit. Under these circumstances, we conclude the evidence is sufficient to allow a rational fact finder to conclude that Landlord gave, and Tenant received, the required notice to vacate more than one day prior to Landlord filing its forcible-detainer suit. We overrule Tenant's first issue.

In her second and third issues, Tenant contends the trial court ignored controlling Texas Supreme Court precedent and misapplied and misinterpreted section 24.005(f) of the Property Code by applying a "mailbox rule" standard rather than a delivery standard and thereby committed fundamental error. Tenant has failed to establish that the trial court relied on the mailbox rule in concluding that Landlord complied with Section 24.005(f). Instead, the trial court's finding was based on the reasonable conclusion, as discussed above, that the notice to vacate that Landlord's counsel sent by regular first-class mail was timely delivered to the Premises.

Tenant's contention the trial court ignored controlling Texas Supreme Court precedent obligating the landlord to comply with the statute's procedural

requirements to evict the tenant is likewise without merit given our disposition of Tenant's first issue.

Having found no error, we conclude Tenant's fundamental-error argument lacks merit, and we need not further address same. TEX. R. APP. P. 47.1. We overrule Tenant's second and third issues.

## III. Attorney's Fees

Landlord asserts in a single cross issue that the trial court erred in denying its request for attorney's fees. More particularly, Landlord contends that while it may not have been entitled to recover attorney's fees under Section 24.006(a) of the Property Code, it was entitled to a fee award under Section 24.006(b) (allowing prevailing landlord to recover fees if a written lease provides for the recovery of same). Tenant responds asserting Landlord failed to preserve this complaint for review because it did not make the trial court aware of its complaint by way of a request, objection, or motion. In making this argument, Tenant cites three cases. *See In re J.A.L.*, 630 S.W.3d 249, 251 (Tex. App.—El Paso 2020, no pet.) (Department waived complaint regarding its motion for new trial, which required additional evidence, by not requesting a hearing on its motion); *Solomon v. Steitler,* 312 S.W.3d 46, 60 (Tex. App.—Texarkana 2010, no pet.) (appellant waived complaint an injunction violated the one satisfaction rule by not raising it below); *Pierce v. Tex. Racing Comm'n*, 212 S.W.3d 745, 760 (Tex. App.—Austin 2006, pet. denied) (appellant waived his improper burden shifting argument by failing to bring

it to the attention of the Administrative Law Judge during a State Office of Administrative Hearing). In each of the cases Tenant cites, the complaining party wholly failed to bring the request or complaint to the attention of the trial court. Here, in contrast, the trial court was sufficiently apprised of Landlord's request for an award of attorney's fees through its pleadings and argument at trial,[4] and expressly ruled on the request, denying same. Having alerted the trial court of its request for attorney's fees and argument concerning the grounds therefore prior to judgment, Landlord preserved its complaint regarding same on appeal. *See Anderson Mill Mun. Utility Dist. v. Robbins*, No. 03-04-00369-CV, 2005 WL 2170355, at *5 (Tex. App.—Austin Sept. 8, 2005, no pet.) ("There is no categorial rule requiring a party, after having alerted the trial court to its arguments regarding attorney's fees prior to judgment, to also raise that issue post-judgment in order to preserve error on that issue.").[5]

[4] More particularly, at trial, Landlord's counsel stated, "we're asking for court costs as prevailing party and as provided under the written lease agreement, and we're asking for attorney's fees incurred by my client to get to this point through today," and argued Landlord is entitled to "the attorney's fees that are provided for under the lease, and the court costs." In addition, Landlord introduced the lease and the provision concerning Tenant's liability for Landlord's attorney's fees into evidence.

[5] We recognize that in *In re A.A.F.* and *Air Park-Dallas Zoning Committee v. Crow Billingsley Airpark, Ltd.*, this Court concluded the parties waived error when they failed to bring to the trial court's attention, following the entry of judgment, the lack of an award attorney's fees. *See In re A.A.F.*, 120 S.W.3d 517, 519 (Tex. App.—Dallas 2003, no pet.); *Air Park-Dallas Zoning Committee v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 912 (Tex. App.—Dallas 2003, no pet.). Those cases are distinguishable from the current case because here the trial court addressed the issue of attorney's fees in the final judgment and specifically denied same whereas in *A.A.F.* and *Air Park* it appears the judgments may have been silent on the issue of the complaining party's request for fees. Accordingly, this case is more akin to *Anderson Mill*, and we follow its reasoning here.

With respect to Landlord's assertion it was entitled to fees under Section 24.006(b) of the Property Code, we note that it was entitled to fees under that section if: it prevailed in the lawsuit and the operative lease provided for the recovery of same. PROP. § 24.006(b). The trial court found in favor of Landlord making it the prevailing party and the lease at issue here provided, in part, "If Tenant . . . fails to comply with the lease, Tenant will be in default and . . . will be liable for . . . all Landlord's costs associated with eviction of Tenant, including but not limited to attorney's fees, court costs, costs of service, witness fees, and prejudgment interest," and contained a prevailing-party provision.

Because Landlord established a right to recover attorney's fees under the lease and Section 24.006(b) of the Property Code, the trial court erred in denying its request for an award of attorney's fees. *See Fritz Mgmt., LLC v. Huge Am. Real Estate, Inc.*, No. 05-14-00681-CV, 2015 WL 3958292, at *5 (Tex. App.—Dallas June 30, 2015, pet. dism'd) (mem. op.) (lease provided for award of attorney's fees so landlord was not required to prove it provided notice specified under Section 24.006(a)); *Inwood on the Park Apartments v. Morris*, No. 05-11-01042-CV, 2012 WL 4096236, at *3 (Tex. App.—Dallas Aug. 23, 2012, pet. denied) (mem. op.) ("Pursuant to the lease, [the landlord] provided a contractual basis for an award of attorney's fees as allowed under section 24.006, and the trial court erred by granting summary judgment against [landlord] on its claims for attorney's fees."). We sustain Landlord's cross issue.

## CONCLUSION

We affirm the trial court's judgment awarding possession of the Premises to Landlord and reverse the trial court's denial of Landlord's request for attorney's fees and remand the issue of attorney's fees for further proceedings consistent with this opinion.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| TIFFANY LONG AND ALL OCCUPANTS, Appellants | On Appeal from the County Court at Law No. 1, Grayson County, Texas Trial Court Cause No. 2021-1-195CV. |
| No. 05-22-00685-CV V. | Opinion delivered by Justice Kennedy. Justices Pedersen, III and Garcia participating. |
| PARATHEKE ENTERPRISES, LLC, Appellee | |

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 denying appellee an award of attorney's fees. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** the issue of attorney's fees to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellee PARATHEKE ENTERPRISES, LLC recover its costs of this appeal from appellants TIFFANY LONG AND ALL OCCUPANTS.

Judgment entered this 15th day of August 2023.