

**REVERSE and RENDER in part; REVERSE and REMAND in part and
Opinion Filed June 17, 2025**



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

No. 05-24-00054-CV

**CALITEX, LLC AND VANYARMOUTH, LLC, Appellants
V.
BIG LOTS STORES, LLC, Appellee**

**On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-23-00832**

MEMORANDUM OPINION

Before Justices Miskel, Kennedy, and Rossini
Opinion by Justice Kennedy

This appeal arises from a landlord–tenant dispute. The tenant, Big Lots Stores, LLC, sued the landlord, Vanyarmouth, LLC, and the property manager, Calitex, LLC, for alleged violation of repair and maintenance obligations under the lease agreement. The parties tried their dispute to the trial court, which rendered judgment in favor of Big Lots. Vanyarmouth and Calitex (collectively referred to herein as the “Landlord Parties”) appeal. In their opening brief, the Landlord Parties raise six issues. All parties agreed during oral argument that the Landlord Parties’ fifth and sixth issues concerning injunctive and declaratory judgment relief have

been rendered moot by Big Lot's rejection of the lease in its bankruptcy case and by its vacation of the leased premises.¹ Accordingly, we will not address those issues here. In their remaining issues, the Landlord Parties urge the trial court improperly found Big Lots' repair and deduct requirements were conditions precedent, and they challenge the sufficiency of the evidence to support the damages and attorney's fees awarded. We reverse the trial court's award of damages to Big Lots on its breach of contract claim and render judgment that Big Lots take nothing on that claim. We reverse the award of attorney's fees and costs in favor of Big Lots and remand the issue of attorney's fees and costs for reconsideration by the trial court. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

At all times relevant to the current dispute, Vanyarmouth was the landlord and Big Lots was the tenant under a commercial lease agreement (the "Lease") involving property located at 719 North Hampton Road in DeSoto, Texas (the "Property"). Big Lots utilized the Property to operate a retail store.

The Lease provided that Vanyarmouth, as Landlord, was responsible for the maintenance, repair and replacement of the roof of the building Big Lots occupied at the premises. The Lease further provided:

¹ More particularly, in their fifth and sixth issues, the Landlord Parties asserted the trial court abused its discretion in awarding Big Lots permanent injunctive relief and lacked authority to issue a declaratory judgment because it restated contractual obligations, restated language included in the permanent injunction, attempted to render judgment against controversies that are not yet ripe, and rewrote the lease to deprive Vanyarmouth, LLC of its right to lock out Big Lots.

Tenant shall provide written notice to Landlord of the need for repairs pursuant to the terms of this lease. If landlord fails to commence and diligently complete the making of repairs within fifteen (15) days after such notice, Tenant shall have the right to perform such repairs and to charge landlord the reasonable cost thereof. If the repair is necessary to end or avert an emergency and if Landlord after receiving confirmation via U.S. mail, overnight courier or facsimile from Tenant of such necessity fails to commence repair as soon as reasonably possible, Tenant may do so at Landlord's cost without waiting fifteen (15) days. . . . In performing any such repairs pursuant to this Section, Tenant shall use reputable contractors and perform all such work in a first class and workmanlike manner. Should Landlord refuse to reimburse Tenant the reasonable cost of any such repair work, within thirty (30) days after written notice and copies of paid invoices have been submitted to Landlord, Tenant shall have the right to deduct such cost from the next Rent payment(s) owing; provided, such deduction shall not exceed 25% of the monthly Guaranteed Minimum Rent, but shall be made monthly until such reimbursement is complete.

Beginning in 2018, Big Lots began to experience water intrusion events at the Property and notified the Landlord Parties of the need for repairs.² The water intrusion not only damaged merchandise, drywall and ceiling tiles, but also created slip-and-fall hazards. When the Landlord Parties failed to address the issues Big Lots raised, Big Lots hired RoofConnect National Roofing Services and Medix Facility Solutions in an attempt to resolve same.³ Big Lots requested that Vanyarmouth reimburse it for the expenses incurred. When Vanyarmouth failed to reimburse Big Lots, Big Lots deducted the amounts it incurred from its rent. The

² Big Lots also complained about the condition of the parking lot, specifically the existence of potholes and inadequate lighting, and separation of a cinder block wall, but the primary focus at trial and on appeal is the condition of the roof.

³ The record shows the parties' attempts to repair the roof were for the most part unsuccessful because of the age and condition of same.

Landlord Parties then sent a lockout notice to Big Lots demanding payment of what they claimed was past due rent in the amount of over \$26,000. Big Lots made the payment to avoid the lockout and then filed suit against the Landlord Parties asserting they breached the Lease by failing to properly maintain the Property, by refusing to perform necessary repairs, and by refusing to reimburse Big Lots for the expenses it incurred in making repairs. In addition, Big Lots sought injunctive and declaratory judgment relief and attorney's fees pursuant to the Lease⁴ and Texas statutes. Big Lots further asserted that all conditions precedent necessary to bring suit had been satisfied, waived, or excused. The Landlord Parties generally denied Big Lots' allegations. They did not assert any affirmative defenses and did not specifically deny conditions precedent had been satisfied.

Following an evidentiary hearing on Big Lots' request for injunctive relief, the trial court entered a temporary injunction enjoining the Landlord Parties from violating the Lease by failing to repair, replace, or maintain the Property's roof in such a condition that Big Lots is able to continue operating its retail business without incurring further imminent or irreparable harm.

⁴ The Lease included the following prevailing party provision:

In the event either party commences litigation against the other party as a result of a default by such party, the prevailing party in such litigation shall be entitled to recover its reasonable attorneys' fees from the other party.

In addition, the Lease specifically provided that Tenant and Landlord were entitled to injunctive relief for all violations, actual, attempted, or threatened of any covenant, condition, or provision of the Lease.

A bench trial commenced on October 2, 2023, and concluded the same day. Big Lots' witnesses were Big Lots' district manager, Timothy Cell, who testified about the condition of the Property and about hiring roofers to remediate the problems they were experiencing, and Big Lots' attorney, who testified on the issue of attorney's fees. In addition, Big Lots relied on portions of the video deposition of Calitex's maintenance manager, Simon Gurung. The Landlord Parties' witnesses were Gurung, who testified about the condition of the Property and repairs thereto, and their attorney, who testified on the issue of attorney's fees. Various invoices and photographs of the Property were admitted into evidence.⁵

The trial court rendered judgment in favor of Big Lots, awarding it damages of \$37,903.23,⁶ pre-judgment and post-judgment interest, and attorney's fees, pursuant to the Lease, in the amount of \$132,222.02. In addition, the trial court taxed costs against the Landlord Parties and awarded Big Lots conditional appellate attorney's fees. Further, the trial court awarded Big Lots the permanent injunction and declaratory judgment relief it requested. The judgment itself was amended

⁵ The trial court sustained the Landlord Parties' objections to two invoices offered by Big Lots, one dated May 9, 2023, from RoofConnect in the amount of \$2,408 and the other dated January 22, 2023, from Medix in the amount of \$6,369.99.

⁶ Cell testified Big Lots spent roughly \$38,000 on repairs to the parking lot and the roof since 2018. Various invoices were admitted into evidence, which in total exceed the \$37,903.23 figure. The record before us does not identify the specific invoices and repairs that are included in the \$37,903.23 damages figure.

several times, with the Third Amended Judgment dated February 7, 2024, being the final judgment.⁷ This appeal followed.

DISCUSSION

I. Conditions Precedent

In their first issue, the Landlord Parties assert the trial court erred in concluding the Lease's reimbursement for repairs requirements were conditions precedent, and that the Landlord Parties' failure to specifically deny Big Lots' assertion all conditions precedent had been performed or occurred excused Big Lots from proving the costs of repair were reasonable, and that the repairs were done by a reputable contractor and in a good and workmanlike manner. *See* TEX. R. CIV. P. 54 (when a party pleads all conditions precedent have been performed or have occurred, the party so pleading same is required to prove only those conditions that are specifically denied by the opposing party). In response, Big Lots argues the trial court properly concluded that the Lease's repair and deduct requirements were conditions precedent and that the Landlord Parties' failure to specifically deny its assertion all conditions precedent had been satisfied excused it from having to prove the requirements had been met. For the reasons set forth herein, we conclude the provision at issue is not a condition precedent and that the Landlord Parties' failure

⁷ The Landlord Parties requested findings of fact and conclusions of law. In response, the trial court referred the parties to the findings and conclusions contained in the judgment. *See Guardianship of M.A.L.*, No. 05-24-00205-CV, 2025 WL 1031928, at *4 (Tex. App.—Dallas Apr. 7, 2025, no pet.) (mem. op.) (when trial court includes findings in its judgment and does not issue any separate findings of fact and conclusions of law, the findings in the judgment have probative value on appeal).

to specifically deny all conditions precedent had been satisfied did not excuse Big Lots from establishing it was entitled to reimbursement of the costs it incurred in making repairs to the Property.

A. Standard of Review

In addressing the Landlord Parties' first issue, we employ a *de novo* standard of review. *See Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 141 (Tex. App.—Dallas 2012, no pet.). “A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.” *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). To be a condition precedent, a provision must use conditional language such as “if,” “provided that,” or “on condition that.” *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). Because of their harshness, conditions are not favorites of the law. *Id.* If the parties' intent is doubtful, courts will interpret an agreement to create a covenant rather than a condition. *Id.*

B. Application of Law to Facts

Applying the contract principles stated in the preceding paragraph to the Lease, we conclude that the Lease does not support the trial court's conclusion the right to reimbursement requirements were conditions precedent. Specifically, Section 7 of the Lease, provides, in relevant part:

If Landlord fails to commence and diligently complete the making of repairs within fifteen (15) days after such notice, Tenant shall have the right to perform such repairs and to charge Landlord the reasonable cost

thereof. . . . In performing any such repairs pursuant to this Section, Tenant shall use reputable contractors and perform all such work in a first class and workmanlike manner. Should landlord refuse to reimburse Tenant the reasonable cost of any such repair work, within thirty (30) days after written notice and copies of paid invoices have been submitted to Landlord, Tenant shall have the right to deduct such cost from the next Rent payment(s) owing. . . .

The only conditional language in the provision setting forth Big Lots' right to perform repairs and charge Vanyarmouth pertains to Vanyarmouth's failure to make repairs. There is no conditional language in the portion of the provision addressing Big Lots' actual performance of repairs. Accordingly, we conclude the trial court erred in concluding Big Lots' obligations when exercising its right to repair and be reimbursed were conditions precedent and Big Lots was not excused from proving the costs incurred were reasonable and the repairs were performed by a reputable contractor and in a first class and workmanlike manner. We sustain the Landlord Parties' first issue.

II. Repair Costs

In their second issue, the Landlord Parties challenge the award of damages to Big Lots on its breach of contract claim asserting the evidence is legally and factually insufficient to support a finding the repairs were done by a reputable contractor in a first class and workmanlike manner and that the cost of the repairs, for which Big Lots sought damages, was reasonable. Big Lots responds urging sufficient evidence exists to support the trial court's award of breach of contract damages.

A party seeking to recover remedial damages must prove that the damages sought are reasonable and necessary. *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012) (per curiam); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004) (per curiam); *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 238 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). “Evidence of the amounts charged and paid, standing alone, is no evidence that such payment was reasonable and necessary.” *Mustang Pipeline*, 134 S.W.3d at 200–01 (citing *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382–83 (Tex. 1956)). The plaintiff must show more than the character of the services, the need for the services, and the amounts charged; instead, some other evidence showing that the charges are reasonable and necessary is required. *McGinty*, 372 S.W.3d at 627; *Gossett*, 294 S.W.2d at 383.

The requirements that expenses must be both reasonable and necessary are independent and distinct. *701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193, 2017 WL 3634335, at *9 (Tex. App.—Dallas Aug. 24, 2017, pet. denied) mem. op.). For example, as the court said in *Gossett*, “the fact that treatment is necessary is not proof, or a circumstance tending to prove, the reasonableness of the charges made therefor.” 294 S.W.2d at 382.

Here, the trial court found that Big Lots incurred actual damages of \$37,903.23. This figure was supported principally by the invoices Big Lots received from RoofConnect and Medix Facility Solutions. While the invoices generally

describe the work performed and the amounts charged, and in some instances possibly establish the need for the services, they do not themselves establish the reasonableness of the charges.⁸

⁸ The following is a summary of the invoices from RoofConnect and Medix that were admitted into evidence at trial, the total of which is \$31,002.11.

- February 8, 2019 invoice from RoofConnect in the amount of \$1,002.73 stating “techs repaired seven (7) areas of physical damage using three course and alsan. Technicians repaired four (4) open laps using three course and alsan” and setting forth the labor and material costs and trip charge. Photographs were attached to the invoice.
- February 21, 2019 invoice from RoofConnect in the amount of \$3,869.88 stating “Technicians performed and completed repairs as per approved proposal 1. Open laps: Techs cleaned, patched, and sealed approx. 10 lf. of open laps on the roof surface 2. Improperly flashed pitch pan: Techs torched patches onto 4 pitch pans where improper repairs were previously performed by others 3. Open pitch pan: Techs refilled 3 open pitch pans with new pourable sealer 4. Techs removed all repair related debris from the roof surface upon completion.” Photographs were attached to the invoice.
- January 26, 2022 invoice from RoofConnect in the amount of \$1,358.01 stating “Technicians identified approximately thirty (3) leaks, techs found open laps, open seams and failing patches. Repaired, defects using commercial grade coating, and three course materials. Technicians cleaned are and removed debris generated from repairs performed” and setting forth the labor and material costs and trip charge. Photographs were attached to the invoice.
- January 27, 2022 invoice from Medix Facility Solutions in the amount of \$1,196.83 stating “Demolition and Removal of cracked parts, Clean Out the Cracks, Prepare the Sub Base, Undercutting and Sub Base Repair, Fill in Small cracks, Fill in Deep Cracks, Apply Patching Compound, Let the Asphalt Repair Cure, Apply Sealant to the Repaired Area, and Final Roll” and setting forth the labor and material costs and trip charge.
- March 22, 2022 invoice from RoofConnect in the amount of \$12,930.25 stating “03-14-22 Performed repairs on entrance area of store. 12’ x 50’ coated approximately 500 lf of seams 03-15-22 Performed repairs at front of store by the bed area, coated approximately 500 linear feed of seams 03-16-22 Performed repairs in the middle area of the building three coursed approximately 250 linear feet of failing seams and covered with granules 03-17-22 Performed three course coating on approximately 500 linear on failing seams 03-18-22 Continued three course coating on approximately 250 linear feet of seams in the front of store and completed flashing approximately 150 linear feet of seams with three course cement” and set forth labor and material costs and trip charge. Photographs were attached to the invoice.
- April 19, 2022 invoice from Medix Facility Solutions in the amount of \$435.62 stating “Straighten the metal lid. Securing the lid with bolts and Silicone to prevent leaking. Final testing” and setting forth the labor and material costs and trip charge.
- April 26, 2022 invoice from Medix Facility Solutions in the amount of \$6,428.01 stating “Rearranging of electrical wires[,] Put wiring back into the ceiling[,] Removal and disposal of old insulation[,] Installing Insulation[,] Install the new tiles[,] Patching cracks on 2 walls[,] Adding

The Landlord Parties argue, and we agree, that Big Lots did not adduce any evidence that any of the expenditures listed in the invoices it submitted were reasonable. Big Lots’ representative did not testify that the expenses were reasonable, he simply stated that Big Lots had used the contractors before without incident, and the invoices do not contain any information to support a reasonableness finding. *See, e.g., 701 Katy Bldg.*, 2017 WL 3634335, at * 10.

In sum, there is no evidence that the cost to repair the roof and the parking lot was reasonable. The only evidence about the expenses is the bare fact that they were charged and presumably paid. Under the authorities cited above, this is legally insufficient evidence of reasonableness. *See Mustang Pipeline*, 134 S.W.3d at 200–01 (trial court correctly granted j.n.o.v. against contract claimant because “[e]vidence of the amounts charged and paid, standing alone, is no evidence that such payment was reasonable and necessary.”). In the absence of evidence showing that the charges were reasonable in addition to necessary, recovery of such expenses must be denied. *McGinty*, 372 S.W.3d at 627–29.

tarp on the roof for temporary leaking repair[,] Clean the area” and setting forth the labor and material costs and trip charge.

- April 29, 2022 invoice from Medix Facility Solutions in the amount of \$996.78 stating “Inspection of the area[,] Assessing the roof damage[,] Measuring the size of the damage[,] [Purchasing] a suitable tarp[,] Unrolling and positioning the tarp[,] Clearing all debris on the roof[,] Unrolling the tarp[,] Lay the tarp out[,] Securing the Tarp[,] Final Testing” and setting forth the labor and material costs and trip charge.
- December 30, 2022 invoice from RoofConnect in the amount of \$2,784 stating “Investigated & repaired multiple roof leaks along the store. Sales floor/multiple issues on membrane due to deterioration & improper previous repairs, repaired with mod-bit materials. Cleaned area and removed debris generated from repairs performed” and setting forth labor and material costs and trip charge. Photographs were attached to the invoice.

On the record before us, we are compelled to sustain the Landlord Parties' second issue and hold that Big Lots adduced legally insufficient evidence that its claimed repair expenses were reasonable. Consequently, the trial court erred by assessing them as damages. In light of our holding on the reasonable cost requirement, we need not address the Landlord Parties' additional assertions Big Lots failed to prove the contractors it employed were reputable and that the work was performed in a first-class and workmanlike manner or Big Lots' contention it was not required to prove same in the absence of an assertion of a prior material breach. TEX. R. APP. P. 47.1. In addition, we need not address the Landlord Parties' third issue claiming expert testimony was required to support Big Lots' damages claim. *Id.*

Because we have concluded Big Lots was not entitled to recover damages on its breach of contract claim, we reverse the award of attorney's fees. *See Myers v. Hall Columbus Lender, LLC*, 437 S.W.3d 632, 640 (Tex. App.—Dallas 2014, no pet.). Nevertheless, because Big Lots sought attorney's fees under both the Lease and various statutes, and because the Lease included a prevailing party provision and specifically authorized injunctive relief, we remand to the trial court for reconsideration of the parties' requests for attorney's fees and costs. *See, e.g., Gaedeke Holdings II, Ltd. v. Chait and Henderson, P.C.*, No. 05-20-01048-CV, 2022 WL 17986016, at * 1 (Tex. App.—Dallas Dec. 29, 2022, no pet.) (mem. op.) (entering take nothing judgment on breach of contract, declaratory relief, and

attorney's fees and remanding the issue of attorney's fees to trial court). As a result, we need not address the Landlord Parties' fourth issue challenging the amount of attorney's fees awarded to Big Lots. TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the portion of the trial court's judgment awarding Big Lots damages on its breach of contract claim and render judgment that Big Lots take nothing on that claim. In addition, we reverse the portion of the judgment awarding attorney's fees and costs and remand the issue of fees and costs to the trial court for further consideration in light of this Court's decision.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE



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

JUDGMENT

CALITEX, LLC AND
VANYARMOUTH, LLC, Appellants

No. 05-24-00054-CV V.

BIG LOTS STORES, LLC, Appellee

On Appeal from the 116th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-23-00832.

Opinion delivered by Justice
Kennedy. Justices Miskel and
Rossini participating.

In accordance with this Court’s opinion of this date, the judgment of the trial court awarding Big Lots Stores, LLC damages on its breach of contract claim is **REVERSED** and judgment is **RENDERED** that Big Lots Stores, LLC take nothing on its breach of contract claim. In addition, the portion of the judgment awarding attorney’s fees and costs is **REVERSED** and this cause is **REMANDED** to the trial court for further consideration of the issue of attorney’s fees in light of the Court’s decision.

It is **ORDERED** that appellants CALITEX, LLC AND VANYARMOUTH, LLC recover their costs of this appeal from appellee BIG LOTS STORES, LLC.

Judgment entered this 17th day of June 2025.