NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1017

B.A.M. BUILDERS, L.L.C.

VERSUS

PERRY MILLER AND JUDY WAYNE MILLER

Judgment Rendered: December 23, 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 11,759

Honorable Raymond S. Childress, Judge

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Defendants/Plaintiffs in Reconvention
Perry Miller and Vena Miller

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

WELCH, J.

B.A.M. Builders, L.L.C. (BAM) appeals a judgment ordering BAM to pay plaintiffs in reconvention, Perry Miller and Vena Miller, damages and attorney fees upon finding that BAM failed to perform repairs on the Millers' home in a workmanlike manner. We reverse the award of attorney fees, but affirm the judgment in all other respects.

BACKGROUND

On August 29, 2005, Perry and Vena[1] Miller sustained damage to their home in Lacombe, Louisiana, when several large pine trees fell on the home during Hurricane Katrina. BAM performed repair services to the Millers' home. On April 26, 2006, BAM filed this lawsuit against the Millers, seeking to recover $12,913.02, the balance it claimed was owed for the repair services. In its petition, BAM alleged that it performed construction and repair services contained in an estimate and invoices attached to the petition as exhibits. These documents include: (1) a November 9, 2005 repair estimate submitted to the Millers by "B.A.M. Construction" setting forth the repair costs in the amount of $41,529.02; (2) an invoice dated December 15, 2003, from "B.A.M. Cont." setting forth that the Millers had paid $32,000.00 on the account and owed a balance of $9,529.02; and (3) an invoice dated January 1, 2006, from "B.A.M. Construction" containing a change order in the amount of $3,384.00.

The Millers filed a reconventional demand against BAM and State Farm Fire & Casualty Company (State Farm). Therein, they asserted that BAM's actions and work deficiencies were "atrocious" and "shocking." They further asserted that BAM was State Farm's agent in fact and that State Farm was also liable to them for all damages sustained as a result of BAM's faulty work. The Millers sought to recover, among other items, damages for the loss of the use and enjoyment of their

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[1] Vena Miller was erroneously referred to as "Judy Wayne Miller" in BAM's petition.

home, damage to their home, repair costs, material costs, and attorney fees. The Millers alleged that State Farm and BAM were liable in solido for attorney fees pursuant to La. R.S. 22:658 of the Insurance Code.

On the day of trial, BAM's representative failed to appear and the trial court ordered that BAM's lawsuit be dismissed with prejudice. Trial proceeded on the Millers' reconventional demand. The Millers offered evidence of the deficiencies in BAM's repair work, the cost of remedying those deficiencies, and the damage caused to their home by BAM. Following the conclusion of the evidence, the trial court entered judgment in favor of the Millers, finding that BAM did not perform the repairs in a workmanlike manner. The court awarded the Millers $5,000.00 for materials for home repair/renovation, $7,500.00 for repairing the home, $1,500.00 for additional damage to the home, $10,000.00 for the loss of the use of their home, and $5,000.00 in attorney fees. BAM appealed.

DISCUSSION

BAM asserts four assignments of error in this appeal. In the first, BAM insists that the judgment rendered against B.A.M. Builders, L.L.C. is invalid because the limited liability company did not enter into a contract with the Millers. Instead, it submits, the evidence showed that the contract was entered into between B.A.M. Construction and the Millers. BAM insists that the judgment is erroneous and must be vacated because it is based upon a non-existent contract between BAM in its capacity as a limited liability company and the Millers.

We disagree. BAM filed this lawsuit in its capacity as a limited liability company and declared in its verified petition that it performed the construction and repair services for the Millers on their residence identified in the exhibits attached to BAM's petition. This pleading constitutes a judicial admission that BAM performed the repair services that are the subject of the reconventional demand and the trial court's judgment. See **C.T. Traina, Inc. v. Sunshine Plaza, Inc.**, 2003-

1003, p. 5 (La. 12/3/03), 861 So.2d 156, 159. BAM will not be heard to now say that the contract upon which it sought to recover damages against the Millers was between the Millers and another entity, and BAM is precluded from attacking the judgment on this basis. See **Harrison v. McKoin**, 332 So.2d 890, 892 (La. App. 2nd Cir. 1976) (holding that a defendant, who acknowledged in his answer that he entered into a contract with the plaintiff individually, was bound by his judicial admission that he contracted with plaintiff, and would not be later heard to say that the contract was with a partnership and not the defendant individually).

In its second assignment of error, BAM submits it proved at trial that an "accord and satisfaction" had been reached between BAM and the Millers. It bases this claim on the fact that the December 15, 2003 invoice signed by Mr. Miller bears a notation "Job Done in Full." BAM did not raise this defense at any time in the trial court and did not present this claim to the trial court for adjudication. As a general rule, appellate courts will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal. **Stewart v. Livingston Parish School Board**, 2007-1881, p. 6 (La. App. 1st Cir. 5/2/08), 991 So.2d 469, 474. Because this issue was not raised below, we decline to consider it for the first time in this appeal.[2]

In its third assignment of error, BAM argues that the trial court erred in awarding the Millers damages for the loss of use of their home. It insists that the record establishes that the Millers resided in the home prior to, during, and after the repairs. This assertion is contradicted by the evidence. Mr. Miller plainly testified that he and his wife moved into the garage shortly after the hurricane. Mr. Miller's daughter, Lisa Sargeant, who routinely checked on and visited her parents

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[2] In any event, BAM cannot establish the essential elements of an accord and satisfaction defense, which requires a disputed claim, a tender of payment for less than the amount of the claim by the debtor, and an acceptance of the tender by the creditor. See **McClelland v. Security Industrial Insurance Company**, 426 So.2d 665, 669-70 (La. App. 1st Cir. 1982), writ denied, 430 So.2d 94 (La. 1983).

following the hurricane, attested that her parents were forced to live in the garage for six to eight months after the hurricane. Mr. Miller added that even after BAM completed its repairs, water continued to leak into the living room, necessitating him to hire another contractor to repair the leaks.

The trial court's factual finding that BAM's actions caused the Millers to lose the use of their home is governed by the manifest error standard of review. See **Stobart v. State, Department of Transportation and Development,** 617 So.2d 880, 882 (La. 1993). The trial court's factual determination is entirely reasonable based on our review of the record as a whole, and we find no manifest error in that ruling.

Lastly, BAM contends that the attorney fee award is erroneous because there was no evidence presented at trial that the contract had a provision for attorney fees and there is no statutory basis for the award. The Millers counter that the trial court apparently believed attorney fees were warranted in this case after hearing the evidence against BAM and observing the unscrupulous tactics of BAM's attorney. They also assert that attorney fees were properly awarded as an element of damages under La. R.S. 51:1409, which authorizes an award of attorney fees in a case brought under the Louisiana Unfair Trade Practices Act (LUTPA).

Under Louisiana law, attorney fees are not allowed except where authorized by statute or contract. **Smith v. Albrecht**, 2006-2072, p. 5 (La. App. 1st Cir. 6/8/07), 965 So.2d 879, 882. While the Millers did allege in their petition that State Farm and BAM were liable in solido for attorney fees, they based that liability on a provision of the Insurance Code. They did not assert an independent basis for bad faith in the petition or at trial, and the trial court did not make a finding of bad faith. Instead, the only cause of action set forth by the Millers against BAM in any of their pleadings or at trial was for damages for defective workmanship/negligent repair of their home. At no time did the Millers raise a

claim under the LUTPA in the trial court. Because the Millers did not assert a claim for bad faith breach of contract or for a violation of the LUTPA in the trial court, the attorney fee award cannot be justified under either theory and must be reversed.

CONCLUSION

Based on the foregoing, we reverse the attorney fee award and affirm the judgment in all other respects. All costs of this appeal are assessed to appellant, B.A.M. Builders, L.L.C.

AFFIRMED IN PART; REVERSED IN PART.