**Opinion issued March 3, 2022**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-19-00885-CV**

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**WEST LOOP HOSPITALITY, LLC, JETALL COMPANIES, INC., AND ALI CHOUDHRI, Appellants/Cross-Appellees**

**V.**

**HOUSTON GALLERIA LODGING ASSOCIATES, LLC, RAYMOND MANAGEMENT CO., INC., THE ESTATE OF C.J. RAYMOND, AND BARRY PERKEL, Appellees/Cross-Appellants**

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**On Appeal from the 55th District Court**
**Harris County, Texas**
**Trial Court Case No. 2013-63613**

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## O P I N I O N

This dispute arises out of a property purchase gone wrong with respect to a Galleria-area hotel development. Appellees/cross-appellants Houston Galleria

Lodging Associates, LLC ("HGLA"), Raymond Management Co., Inc., the Estate of C.J. Raymond, and Barry Perkel (collectively, "the developers") sued appellants/cross-appellees West Loop Hospitality, LLC, Jetall Companies, Inc., and Ali Choudhri (collectively, "the sellers") on several claims arising out of the failed sale, including breach of contract and fraudulent inducement. The sellers filed counterclaims, including claims for breach of contract, fraud, and breach of fiduciary duty.

The trial court disposed of the claims in a series of four summary judgment orders. On appeal, the sellers argue that the trial court erred by granting summary judgment in favor of the developers (1) on Choudhri's breach of fiduciary duty claim because Choudhri was not a third-party beneficiary under the contract, and he presented evidence raising a fact issue concerning the existence of a fiduciary relationship between him and the developers; (2) on the sellers' fraud claims because the claims were neither barred by the economic loss rule nor by a disclaimer of reliance; and (3) on West Loop's claim for attorney's fees under Civil Practice and Remedies Code Section 38.001.

The developers filed a cross-appeal. They challenge the trial court's (1) denial of HGLA's motion for summary judgment on its breach of contract claim; (2) denial of HGLA's motion for summary judgment on its claim for attorney fees under Section 38.001; and (3) grant of summary judgment for the sellers on HGLA's

fraudulent inducement claim. Finally, they contend that if the trial court did in fact render a summary judgment in West Loop's favor on its breach of contract claim, then we should reverse and render judgment on West Loop's breach of contract claim against HGLA.

We affirm in part and reverse in part.

## BACKGROUND

### *A. The Parties' Negotiations and the Purchase Agreement*

In 2011, C.J. "Jeff" Raymond, an experienced real estate developer from Wisconsin, sought to develop a hotel in the Galleria area of Houston.[1] Raymond and a company that he owned, Raymond Management Co., Inc., created entity Houston Galleria Lodging Associates, LLC, to pursue development opportunities. Appellee Barry Perkel is the director of real estate for Raymond Management.

The developers engaged a local real estate broker in Houston to assist them in finding a suitable location for a hotel. During this search, the developers discovered a vacant lot ("the subject property") along Interstate 610 Loop, just north of Westheimer Road. The subject property was owned by Mody Group, Ltd. ("Mody"). This lot had access to the frontage road of Loop 610, but it did not have access to Westheimer.

[1] Raymond passed away in 2018 while this case was pending in the trial court. The personal representative of his estate entered an appearance in the lawsuit.

Just south of the subject property was an improved lot, 2425 West Loop South ("the 2425 Property"). In addition to having an office building and a parking garage located on the property, this property had access to Westheimer. The 2425 Property was owned by 2425 West Loop, L.P. The general partner of 2425 West Loop, L.P. was an entity solely owned by Ali Choudhri. Choudhri owns multiple entities involved in the real estate business in Houston, including Jetall Companies, Inc. ("Jetall"). In August 2013, Choudhri created West Loop Hospitality, LLC ("West Loop"), and Jetall assigned its rights under the contract at issue to this new entity. Both entities are controlled by Choudhri.

The developers believed that the subject property would be a desirable location for a hotel if patrons could gain access to Westheimer through the 2425 Property and use the garage on that property. In 2012, the broker hired by the developers introduced Perkel and Raymond to Choudhri. They began discussing the purchase of the subject property from Mody, an access easement to Westheimer through the 2425 Property, and a parking lease agreement for the garage on the 2425 Property.

On February 25, 2013, Mody and Jetall entered into an earnest money contract for sale of the subject property. Jetall agreed to deposit $100,000 as earnest money and agreed to a total purchase price of $7,767,800 for the subject property.

After Jetall entered into the contract with Mody, Choudhri continued negotiating with Raymond and Perkel for purchase of the subject property. In April 2013, Choudhri and Raymond met in person to discuss the transaction. After this meeting, Raymond wired $250,000 to Jetall ("the negotiation fee"). Raymond did not characterize this payment as earnest money, as no contract existed at this time between the developers and the sellers. He testified that the payment was "an investment in good faith trying to get the conversation that we meant business to buy a site." The developers and the sellers continued attempting to reach a deal.

On June 11 and 12, 2013, Jetall and HGLA executed a contract to purchase the subject property ("the Purchase Agreement"). The Purchase Agreement contained two relevant closing dates: the "Contract Closing Date," set for July 1, 2013, and the "Closing Date," set for July 1, 2014. HGLA acknowledged that, at the time the contract was executed, Jetall did not have title to the subject property. Rather, Jetall had the right to purchase the property. If Jetall determined that it could not obtain title to the subject property before the Contract Closing Date but might be able to acquire title before the Closing Date, Jetall could unilaterally extend the Contract Closing Date to any date before July 1, 2014.

The Purchase Agreement required HGLA to pay a total purchase price of $13,321,954. The agreement acknowledged that a $250,000 "negotiation fee" had already been paid. The agreement provided that this fee would be applied to the

purchase price if closing occurred, but also stated that this fee "has already been fully earned by Seller" and "shall not be refundable to Buyer except as otherwise specified herein." HGLA also agreed to pay $750,000 in non-refundable earnest money that would also be applied to the purchase price. It is undisputed that the negotiation fee and the earnest money—totaling $1,000,000—is all that has been paid by the developers to the sellers under the Purchase Agreement.

On the Contract Closing Date, HGLA agreed to pay $3,000,000 to Jetall ("the first payment"), also to be applied to the purchase price. When the negotiation fee, the earnest money, and the first payment were all applied to the purchase price, the unpaid balance of the purchase price would be $9,311,954. The parties agreed to enter into a contract for deed on the Contract Closing Date, with HGLA obtaining possession of the subject property. HGLA agreed to pay $61,952.66 per month following the Contract Closing Date, paid toward the balance of the purchase price. On the Closing Date, HGLA would pay the remainder of the unpaid balance and obtain fee simple title to the subject property.

Jetall agreed to grant HGLA, on the Contract Closing Date, a "perpetual easement allowing access to Westheimer Ave. through the adjacent property owned by Seller and located at 2425 West Loop South (the '2425 Property')." The parties also agreed that, on that date, they would enter into a parking agreement "under which Seller shall grant Buyer for an initial 20 year term subject to renewal at

Buyer's option for three successive 20 year renewal terms the right to park up to 130 cars from 6 p.m. to 7 a.m. in the parking garage located on the 2425 Property" at a specified rate.

Both Jetall and HGLA made express warranties and representations in the Purchase Agreement. Jetall represented, among other things, that it "has all requisite power and authority and has taken all actions required by its organizational documents and applicable law, and has obtained all necessary consents, to execute and deliver this Agreement and perform its obligations hereunder." It also represented that "[t]here is no suit, claim, action, arbitration, investigation or legal, administrative or other proceeding pending against or affecting Seller . . . ." Jetall promised that the warranties and representations made in the Purchase Agreement were "true and correct as of the Acceptance Date and as of the Closing Date."

The Purchase Agreement also contained provisions concerning title insurance. Jetall agreed to cause Independence Title Company to (1) issue a current title commitment showing the status of record title to the property and committing to insure HGLA's title to the property, subject only to certain "permitted exceptions"; and (2) issue a title insurance policy insuring HGLA in the amount of the purchase price on the Contract Closing Date.

HGLA had the right to object to any exception on the title commitment that "shall substantially and materially interfere with [HGLA's] development of a hotel

on the Property." Jetall could either cure the objection by causing the exception to be removed from the title commitment or "insured over," or it could elect not to cure the objection. If Jetall did not cure the objection, HGLA could either waive the objection and proceed to closing, or HGLA could terminate the Purchase Agreement and recover the negotiation fee and earnest money deposit.

The Purchase Agreement also provided that HGLA would obtain possession of the subject property on the Contract Closing Date. The parties further agreed that "[u]ntil the Contract Closing Date, and thereafter Seller shall not, without the prior written consent of Buyer (a) enter into any agreement or take any action, including entering into any leases or amending any current lease, that would encumber the Property after Closing, or that would bind Buyer or the Property after Closing, or that would be outside the normal scope of maintaining and operating the Property." The agreement defined "Closing" as "the transfer of title to the Buyer by means of the Contract for Deed on the Contract Closing Date."

The Purchase Agreement also included specific provisions in the event of default. The parties agreed that if Jetall performed all its obligations and the transaction failed to close due to breach by HGLA, "through no fault of Seller, on or before either the Contract Closing Date or the Closing Date . . . Buyer shall forfeit the Earnest Money, First Payment, and any Monthly Payments that have been made to Seller as liquidated damages as Seller's sole remedy." This provision

acknowledged the parties' agreement that Jetall's damages would be difficult to ascertain "and that the earnest money represents the reasonable estimate by the parties of the amount of the damages that Seller would suffer by reason of Buyer's default." The parties agreed that if Jetall was unable to convey title to the subject property via the contract for deed on the Contract Closing Date due to its inability to acquire the subject property from Mody, then Jetall would immediately return the negotiation fee and the earnest money to HGLA. If Jetall was unable to convey title because HGLA failed to make the first payment, then Jetall was entitled to terminate the Purchase Agreement and retain all amounts already paid to it.

The Purchase Agreement also provided an investment opportunity for Choudhri in HGLA, giving him the option to invest up to $4,000,000 in HGLA and allowing him to serve as a managing member in HGLA, along with Raymond.

Finally, the Purchase Agreement contained a merger clause stating that the Purchase Agreement "contains the entire agreement between the parties with respect to this subject matter and is not subject to any prior or contemporaneous oral or written agreements." The clause further stated: "The undersigned parties affirm that they have not relied on any representations not expressed in this Agreement in deciding to enter into this Agreement. The undersigned parties further affirm that they are relying solely on their own judgment (and the advice of their own counsel)

in deciding to enter into this Agreement." Raymond signed the Purchase Agreement on behalf of HGLA, and Choudhri signed it on behalf of Jetall.

### *B. Events After Signing the Purchase Agreement*

Although the Purchase Agreement obligated Jetall and Independence Title Company to provide a title commitment to HGLA within five days of signing the contract, Jetall did not provide the title commitment until July 1, 2013, the original Contract Closing Date. Ten days later, Gregory Paradise, an attorney for HGLA, sent Jetall a letter raising several concerns and objections to the title commitment. Among other things, this letter acknowledged that Jetall still did not own the subject property, Mody had tax liens that needed to be resolved, and HGLA had not received a draft of the access easement. Furthermore, HGLA had not received comments from Jetall concerning a draft parking agreement. HGLA communicated directly with Independence Title to resolve some of the issues concerning the title commitment.

While HGLA and Independence Title were discussing the title commitment, West Loop sought additional funding to complete the purchase of the subject property from Mody. Choudhri, on West Loop's behalf, approached Graham Mortgage Company and sought a loan to finance the purchase. West Loop intended to borrow $5,000,000 from Graham Mortgage, with a first-priority deed of trust in favor of Graham Mortgage placed on the subject property before the sellers and HGLA executed and recorded the contract for deed. A draft deed of trust proposed

September 1, 2015, as the maturity date for the loan. Choudhri planned to use the $5,000,000 loan from Graham and the $3,000,000 first payment from HGLA to cover the purchase from Mody in a simultaneous closing. West Loop and Graham Mortgage never closed on this transaction.

Additionally, the 2425 Property, which was owned by a separate entity controlled by Choudhri, was subject to a mortgage. The developers requested that the sellers obtain subordination, non-disturbance, and attornment agreements ("SNDAs")[2] from the lender. These would ensure that, if the lender foreclosed on the 2425 Property, HGLA would not lose the access easement or parking agreement relating to the 2425 Property. The parties circulated draft copies of an access easement and parking lease. At one point, the sellers included language in these documents stating that they would use their "best efforts" to obtain SNDAs from the lender, which were not required by the Purchase Agreement. The developers objected to the "best efforts" language, arguing that while the Purchase Agreement

[2] Generally, a valid foreclosure of a lien terminates any leases entered into subject to that lien. *Kimzey Wash, LLC v. LG Auto Laundry, LP*, 418 S.W.3d 291, 294 (Tex. App.—Dallas 2013, pet. dism'd). However, a tenant's rights can be protected through the signing of a subordination, non-disturbance, and attornment agreement with the landlord's lender. "SNDA is an acronym for subordination, attornment, and non-disturbance agreement in which a tenant agrees to subordinate its rights to the lender while the lender agrees not to terminate a lease upon foreclosure unless the lease is in default." *HMC Hotel Props. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp.*, No. 04-10-00620-CV, 2011 WL 5869608, at *12 n.4 (Tex. App.—San Antonio Nov. 23, 2011) (mem. op.), *rev'd on other grounds*, 439 S.W.3d 910 (Tex. 2014).

did not mention SNDAs, it did require the sellers to provide a perpetual access easement and a parking lease. Bruce Merwin, an attorney for the sellers, discussed the SNDAs with the lender, but he could not recall whether the lender ever executed the SNDAs.

On August 26, 2013, Independence Title sent a revised title commitment to HGLA. The title commitment listed HGLA as the proposed insured, acknowledged that HGLA was purchasing the property under an executory contract, and listed a policy amount of $13,321,954. Mody was identified as the owner of record title to the subject property. The title commitment covered several interests in land, including "Fee Simple Determinable under Executory Contract of Sale" to the subject property, an access easement over the 2425 Property, and a leasehold estate concerning parking.

The title commitment listed numerous exceptions from coverage. Relevant here, Exception 10(bb) excepts from coverage "[r]ights and claims of third parties against West Loop Hospitality, LLC and/or any subsequent record-owner of the land which affect the title thereto and arise subsequent to the date of this Policy, including, but not limited to, subsequent mortgages, tax or judgment liens, bankruptcy proceedings, and probate/divorce matters."

HGLA, via a letter from attorney Timothy Umland, objected to Exception 10(bb) on August 28, 2013. In this letter, Umland stated that prior to execution of

the Purchase Agreement, Bruce Merwin and Gregory Paradise had discussed whether a contract for deed is an insurable interest in Texas, and Merwin represented that it was. In reliance on that representation, Paradise responded that HGLA was prepared to enter into the Purchase Agreement with the understanding that it would have an insurable ownership interest in the subject property as of the signing of the contract for deed on the Contract Closing Date.

According to Umland's letter, HGLA learned on August 23, 2013, that to finance purchase of the subject property from Mody, the sellers intended to place a first-priority deed of trust on the property in favor of Graham Mortgage. Because the sellers would retain legal title to the subject property until HGLA paid the balance of the purchase price under the Purchase Agreement and the contract for deed, title to the subject property was vulnerable to actions by the sellers. This was an unacceptable risk to HGLA. HGLA objected both to Exception 10(bb) and to the sellers' plan to place a deed of trust on the property. Umland stated, "This deed of trust must be satisfied as of the Contract Closing Date or a written agreement acceptable to Buyer must be executed and entered into between Buyer and Seller's lender on or before the deadline for Seller to cure the title objections contained in the Purchase Agreement."

The sellers responded to HGLA's objection that same day. In a letter, Merwin stated that the sellers were ready to close on the contract for deed on September 3,

2013.[3] The Purchase Agreement provided that HGLA could only object to exceptions in the title commitment that "substantially and materially interfere with Buyer's development of a hotel on the Property." According to Merwin, the title commitment did not contain any exceptions that would fall into this category. Merwin also stated that the sellers' proposed financing of their purchase of the subject property from Mody would not interfere with development of a hotel on the property.

In a second letter dated September 2, 2013, Merwin again stated that HGLA was not entitled to object to Exception 10(bb) because the exception would not substantially and materially interfere with development of a hotel on the property. Merwin further stated that the sellers' placement of a deed of trust on the subject property would not substantially and materially interfere with development of a hotel because the Purchase Agreement only prohibits the sellers from encumbering the property after closing, referring to the Closing Date, "but the Deed of Trust [in favor of Graham Mortgage] will be released in connection with Buyer's final payment of Contract for Deed, if not sooner." The sellers refused to cure HGLA's objections.

On September 9, 2013, Paradise informed the sellers via letter that because they refused to cure the valid objection to the title commitment, HGLA had the right

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[3] The Contract Closing Date was later extended to September 10, 2013. It is undisputed that the parties did not close on this date, nor did they ever execute the contract for deed.

to either waive the objections and proceed to closing or terminate the Purchase Agreement. HGLA elected to terminate the Purchase Agreement. It demanded that the sellers refund the $250,000 negotiation fee and the $750,000 earnest money deposit. The parties never signed the contract for deed. As a result, HGLA never made the $3,000,000 first payment due on the Contract Closing Date.

### *C. The Parties' Claims in the Trial Court*

HGLA initially filed suit against Jetall and West Loop in October 2013. Choudhri intervened in the lawsuit. All three sellers asserted counterclaims against HGLA and third-party claims against Raymond, Raymond Management, and Perkel. The developers then amended their petition to assert claims against all three sellers.

In their live pleading, HGLA alleged that Jetall and West Loop breached the Purchase Agreement in multiple ways, including by (1) failing to provide a perpetual access easement and parking lease agreement on the 2425 Property; (2) failing to cure defects in the title commitment; (3) refusing to return the negotiation fee and earnest money deposit; (4) failing to identify lawsuits in which Jetall had been involved; and (5) attempting to place a lien on the subject property to finance the purchase from Mody. HGLA also alleged that Jetall committed fraud by misrepresenting that a contract for deed was an insurable interest, that Jetall owned the 2425 Property, that Jetall could grant a permanent access easement and a parking lease on the 2425 Property, that Jetall was not involved in any litigation, and that

Jetall would have title to the subject property at the time of the Contract Closing Date.

HGLA further alleged a fraudulent inducement claim against Jetall, asserting that the same alleged misrepresentations that formed the basis of HGLA's common-law fraud claim induced it to enter into the Purchase Agreement. The developers asserted claims for declaratory relief against the sellers. HGLA sought attorney's fees under Civil Practice and Remedies Code Chapter 38.

In the sellers' live pleading, West Loop asserted a claim that HGLA breached the Purchase Agreement by failing to tender the first payment of $3,000,000 on the Contract Closing Date. West Loop sought liquidated damages under the Purchase Agreement in the amount of $4,000,000, representing the first payment, the negotiation fee, and the earnest money deposit. West Loop sought attorney's fees for this claim under Chapter 38.

The sellers also asserted tort claims. Specifically, Choudhri alleged that when he met with Raymond in person in April 2013, they orally agreed to be partners, with Choudhri acting as a limited member of HGLA. He alleged that Raymond, Raymond Management, and Perkel were all managing members of HGLA and thus all owed him a fiduciary duty. He asserted that the developers breached their fiduciary duties by refusing to make the first payment and repudiating the deal in favor of a more

lucrative hotel deal elsewhere in Houston, causing Choudhri to lose profits that he would have realized had the Galleria deal come to fruition.

The sellers also asserted claims for statutory and common-law fraud. They alleged that the developers promised to perform their obligations under the Purchase Agreement with no present intention to perform, thus requiring the sellers to continue to expend earnest money fees to extend the contract with Mody to purchase the subject property. Raymond allegedly promised Choudhri that he could become a limited partner in HGLA and "would be able to participate at a specific percentage in the partnership," but he never had any intention of making Choudhri a partner and instead tried to call him an "investor." Choudhri allegedly relied upon these representations by entering into the Purchase Agreement. Choudhri sought his percentage of the value of a limited membership in HGLA, out-of-pocket expenses, reliance damages, and lost profits. West Loop and Jetall sought liquidated damages under the contract or, alternatively, reliance damages and lost profits.

### *D. The Trial Court's Summary Judgment Rulings*

Throughout the course of the litigation, all parties filed numerous summary judgment motions on their own claims and the claims of the opposing parties. In one of their summary judgment filings, the developers objected to portions of a declaration filed by Choudhri—and relied on by the sellers—on numerous grounds, including on the basis that the declaration was conclusory. Beginning in February

2016, the trial court issued several summary judgment orders before issuing a final judgment in October 2019.

**1. February 2016 order**

On February 12, 2016, the trial court ruled on five different summary judgment motions in a detailed order.[4] In this order, the trial court noted that the Purchase Agreement was the operative document between the parties and that it contained a merger and disclaimer of reliance clause. The court stated:

> The Purchase Agreement is the source of all duties owed, and encompasses the nature of all remedies. The law and the summary judgment evidence support no duties or breaches independent of the Purchase Agreement. Try as they might, neither side raises anything not encompassed by the Purchase Agreement. The economic loss rule prevents all claims but those for breach of the Purchase Agreement.

The trial court then discussed an additional basis for dismissing the fraud claims, noting that HGLA's fraudulent inducement claims "track closely with actual contractual obligations," and that failure to perform contractual obligations are only fraudulent if the promises were made with no intention or ability to perform. The court ruled that HGLA's assertion that the sellers could not have performed and thus

[4] The motions addressed in this order were West Loop and Choudhri's traditional and no-evidence motion on HGLA's fraud, fraudulent inducement, and negligent misrepresentation claims; West Loop and Jetall's no-evidence motion on HGLA's breach of contract, fraud, fraudulent inducement, negligent misrepresentation, exemplary damages, and money had and received claims; the sellers' traditional and no evidence motion on HGLA's fraudulent transfer, vicarious liability, and attorney's fees claims; the developers' traditional and no-evidence motion on the sellers' counterclaims; and HGLA's traditional motion on its affirmative claims for relief.

had no intention to perform "finds no support in the evidence." The court further ruled that the merger clause also operated to bar HGLA's fraud claim.

Additionally, the trial court ruled that "[t]here is no evidence of any fiduciary duty owed by any party to another, nor do the facts even as alleged create fiduciary duties as a matter of law or fact." The court ruled that Choudhri was an intended third-party beneficiary of the Purchase Agreement as a matter of law, noting that the contract expressly sets out his rights and expectations with respect to obtaining an interest in HGLA. Furthermore, Choudhri "hand wrote himself into Purchase Agreement paragraph 22," referring to a handwritten notation adding Choudhri's name as a managing member of HGLA. To the extent Choudhri alleged that he had an oral partnership agreement with Raymond, this assertion "runs contrary to and is barred by the merger clause, to which he is bound." The court ruled that Choudhri had no claims independent of the Purchase Agreement, and the contract's provisions limiting damages "negate all of his claims." The court sustained HGLA's objections to Choudhri's declaration "to the extent that the Declaration contains legal conclusions that a partnership existed."

The trial court granted the developers' summary judgment motions on Choudhri's breach of fiduciary duty claim and the sellers' fraud claims. The trial court granted the sellers' summary judgment motions on HGLA's fraud, fraudulent inducement, negligent misrepresentation, civil conspiracy, statutory fraud,

exemplary damages, and declaratory relief claims. The court further denied the motions with respect to claims for breach of the Purchase Agreement, the only contract involved in the dispute. The court reserved ruling on whether reliance damages were barred under the Purchase Agreement, but "unequivocally reject[ed] benefit of the bargain, lost profits, and expectation damages."

**2. April 2017 and May 2017 orders**

All parties again filed multiple traditional and no-evidence summary judgment motions on the remaining breach of contract claims. The primary disputes were whether the Purchase Agreement limited the parties' remedies for breach of the agreement, and which party was entitled to the negotiation fee and earnest money deposit.

In an order dated April 13, 2017, the trial court stated its intent to rule as a matter of law that the sellers were entitled to retain the negotiation fee and earnest money deposit and that no party was entitled to attorney's fees. The court issued a separate order ruling that the remedies provision of the Purchase Agreement was "a valid and enforceable sole remedies/limitation of damages agreement that is binding on the parties to this lawsuit." As a result, the sellers were limited to retention of the negotiation fee and earnest money. The Court then ordered that the sellers "shall take nothing of and from [the developers] by reason of any and all of [the sellers']

remaining claims for any other contractual damages, including but not limited to . . . reliance damages."

On May 25, 2017, the trial court issued another summary judgment order on the parties' claims for breach of the Purchase Agreement. The court noted the voluminous summary judgment record, but nevertheless concluded that no material fact issues existed. The court granted the sellers' summary judgment motions and ruled that the negotiation fee and earnest money deposit "are non-refundable under the facts and the Purchase Agreement." The court denied the developers' summary judgment motion, specifically noting that the motion contained a request for attorney's fees. Finally, the court stated that "the Court believes the only unresolved issue is Defendants' claim for attorneys' fees," so "Defendant needs to either non-suit that claim and file a Final Judgment for the Court's signature, or one of the parties needs to file a very simple motion placing the issue of Defendants' attorneys' fees before the Court."

**3. October 2019 order**

Following the court's instructions, the developers filed a traditional and no-evidence summary judgment motion on the sellers' claim for attorney's fees. They argued that West Loop, the only seller which sought attorney's fees under Chapter 38, was not entitled to attorney's fees because it had not been awarded any damages. Specifically, the trial court had not awarded West Loop the $3,000,000 first

payment, which West Loop had sought as damages. Rather, the court ruled only that West Loop could retain the negotiation fee and earnest money, which had already been paid by HGLA prior to the litigation. The sellers did not file a summary judgment motion on their request for attorney's fees.

The trial court granted the developers' summary judgment motion and ruled that the sellers take nothing on their claims for attorney's fees. The order states that "this is a final judgment," and "[a]ll relief not expressly granted by this order is denied." All parties appealed the trial court's summary judgment rulings.

## STANDARD OF REVIEW

We review a trial court's summary judgment ruling de novo. *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021). When a party moves for both traditional and no-evidence summary judgment, we consider the no-evidence motion first. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017). If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address a challenge to the traditional motion, as it necessarily fails. *Id.* Any claims that survive no-evidence review are then reviewed under the traditional standard. *Id.* at 219–20.

After an adequate time for discovery, a party may move for no-evidence summary judgment. *See* TEX. R. CIV. P. 166a(i). No-evidence summary judgment is proper when there is no evidence of one or more essential elements of a claim or

defense on which the adverse party bears the burden of proof at trial. *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021); TEX. R. CIV. P. 166a(i). A proper no-evidence summary judgment motion shifts the burden to the nonmovant to present evidence raising a genuine issue of material fact on each element challenged in the motion. *JLB Builders*, 622 S.W.3d at 864. A no-evidence challenge will be sustained if (1) there is a complete absence of evidence 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 conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

The nonmovant presents more than a scintilla of evidence when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.* When reviewing a summary judgment ruling, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Hillis v. McCall*, 602 S.W.3d 436, 440 (Tex. 2020) (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

To be entitled to traditional summary judgment, the moving party must demonstrate that no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *JLB Builders*, 622 S.W.3d at 864; *see* TEX. R. CIV. P.

166a(c). When a party moves for traditional summary judgment on a claim on which it bears the burden of proof, it must show that it is entitled to prevail on each element of the cause of action. *Pelco Constr. Co. v. Chambers Cty.*, 495 S.W.3d 514, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). If the moving party carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). As with no-evidence summary judgments, we view the evidence in the light most favorable to the nonmovant. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551 (Tex. 2019).

When the trial court grants a summary judgment without identifying the ground upon which it relies, the appealing party must negate all possible grounds upon which the order could have been granted. *See Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 439 n.11 (Tex. 2016); *State v. Ninety Thousand Two Hundred Thirty–Five Dollars and No Cents in U.S. Currency* ($90,235), 390 S.W.3d 289, 292 (Tex. 2013); *Rodriguez v. Lockhart Contracting Servs., Inc.*, 499 S.W.3d 48, 62–63 (Tex. App.—San Antonio 2016, no pet.). By contrast, "when the trial court's summary judgment order specifies the ground or grounds upon which it was granted, we generally limit our consideration with regard to the propriety of the summary judgment to the ground or grounds upon which it was granted." *Rodriguez*, 499 S.W.3d at 63; *see Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625–26

(Tex. 1996). In the interest of judicial economy, this Court may consider those other grounds the trial court did not rule on if the movant has preserved them for appellate review by cross-appeal or cross-point. *Cates*, 927 S.W.2d at 626.

## SELLER'S APPEAL

In three issues, the sellers contend that the trial court erred by granting summary judgment in favor of the developers (1) on Choudhri's breach of fiduciary duty claim because Choudhri was not a third-party beneficiary under the contract and he presented evidence raising a fact issue concerning the existence of a fiduciary relationship between him and the developers; (2) on the sellers' fraud claims because the claims were neither barred by the economic loss rule nor by a disclaimer of reliance; and (3) on West Loop's claim for attorney's fees under Civil Practice and Remedies Code Section 38.001. We affirm.

### Summary Judgment on Breach of Fiduciary Duty Claims

Choudhri contends that the trial court erred by granting summary judgment on the breach of fiduciary duty claim he asserted against Raymond, Raymond Management, and Perkel. He argues that the trial court erroneously determined that he was a third-party beneficiary of the Purchase Agreement, such that the contract was his exclusive source of remedies under the economic loss rule. He further argues that he presented evidence raising a fact issue on whether a fiduciary relationship existed. We address each point in turn.

### *A. Governing Law*

The elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary duty; (2) breach of that duty by the defendant; (3) causation; and (4) damages to the plaintiff. *Parker*, 514 S.W.3d at 220; *Dauz v. Valdez*, 571 S.W.3d 795, 807 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Generally, fiduciaries owe the following duties to their principals: the duty of loyalty and utmost good faith; duty of candor; duty to refrain from self-dealing; duty to act with integrity; duty of fair, honest dealing; and the duty of full disclosure. *Wolf v. Ramirez*, 622 S.W.3d 126, 142 (Tex. App.—El Paso 2020, no pet.). The relationship between partners is fiduciary in character, and this relationship "imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)).

Typically, the benefits and burdens of a contract belong solely to the parties to the contract, and no one may sue on the contract unless he is a party to the contract or in privity. *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017). An exception to this general rule exists if a person qualifies as a third-party beneficiary to the contract. *Id.* Absent statutory or other legal authority providing otherwise, whether

a person is a third-party beneficiary to a contract "depends solely on the contracting parties' intent." *Id.*

To establish third-party beneficiary status, a party must demonstrate that the contracting parties "intended to secure a benefit to that third party" and entered into the contract directly for the third party's benefit. *Id.* It is not enough that the third party would benefit, either directly or indirectly, from performance of the contract, that the contracting parties knew that the third party would benefit, or that the third party intended or expected to benefit from the contract. *Id.* The contracting parties must have intended "to grant the third party the right to be a 'claimant' in the event of a breach." *Id.* The benefit to the third party must be more than incidental. *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 635 (Tex. 2018). However, the contract need not have been executed solely to benefit the third party. *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011).

To determine third-party beneficiary status, we look solely to the language of the contract, construed as a whole. *First Bank*, 519 S.W.3d at 102. The contract must include a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party; any implied intent is insufficient. *Id.* at 103; *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011). The contract need not state "third-party beneficiary" or any similar "magic words." *City of Houston*, 353 S.W.3d at 145. We do not presume intent to create third-party beneficiary status. *First Bank*, 519 S.W.3d

at 103. Instead, we must begin with the presumption that the contracting parties intended to contract solely for themselves, and only a clear expression of intent to create a third-party beneficiary overcomes this presumption. *Id.* If the language of the contract leaves any doubt about creating a third-party beneficiary, we resolve that doubt against conferring third-party beneficiary status. *Id.* The controlling factor in this determination is "'the absence of any sufficiently clear and unequivocal language demonstrating' the necessary intent." *Id.* (quoting *Tawes*, 340 S.W.3d at 428).

A third-party beneficiary "steps into the shoes" of the contracting parties and is subject to and bound by all provisions of the contract. *Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924, 929 (Tex. App.—Dallas 2011, no pet.); *see In re Rangel*, 45 S.W.3d 783, 787 (Tex. App.—Waco 2001, orig. proceeding) (stating that third-party beneficiary is bound by terms of contract, including arbitration provision).

### *B. Whether Choudhri Is a Third-Party Beneficiary to the Purchase Agreement*

In its February 2016 summary judgment order, the trial court ruled that Choudhri was an intended third-party beneficiary of the Purchase Agreement as a matter of law. In making this ruling, the trial court specifically noted that Choudhri's "rights and expectations" with respect to acquiring a membership interest in HGLA were set out in the Purchase Agreement. Choudhri signed the Purchase Agreement, albeit in his capacity as Jetall's president, and his name was handwritten into the

paragraph discussing his right to a membership interest and his right to become a managing member of HGLA.

After examining the language of the Purchase Agreement itself, we agree that the parties intended for Choudhri to be a third-party beneficiary of the Purchase Agreement. The Purchase Agreement included the following provision addressing Choudhri's right to invest in HGLA:

> 75% of Buyer [HGLA] shall be owned by members ("Limited Members") who contribute cash equity for the purpose of acquiring and developing the Property. Ali Choudhri shall have the option to invest up to four million and no/100th dollars ($4,000,000.00) to acquire part of this 75% interest on the most favorable terms extended to any other Limited Member. The remaining 25% of Buyer shall be divided as follows: 18% to Jeff Raymond and 7% to Ali Choudhri. *Jeff Raymond shall serve as managing member of Buyer, and Jeff Raymond and his organization shall have full responsibility for managing the day-to-day operations of the Buyer. On or before the Contract Closing Date, Buyer and Seller shall execute a memorandum of understanding ("MOU") providing for more detailed terms with respect to Ali Choudhri's investment in the Buyer, including, without limitation, his right to become a Limited Member as provided above and his right to own an interest which is the economic equivalent to that of the Managing Member, with certain rights to be consulted by the Managing Member on major issues facing the development as a managing member of Buyer. The MOU will confirm that Ali Choudhri will have voting rights, in accordance with his percentage ownership interest on all decisions voted on by the Limited Members. . . .

The typewritten portion of the Purchase Agreement provided that Raymond would be managing member of HGLA, but a handwritten asterisk and notation—accompanied by Raymond's signature—added Choudhri's name to this provision.

These rights and benefits to Choudhri set out in the Purchase Agreement are more than merely incidental. *See Jody James Farms*, 547 S.W.3d at 645. The parties specifically agreed to allow Choudhri the opportunity to purchase a stake in the ownership of HGLA, the entity that would be developing and constructing the hotel on the subject property. Although Choudhri is not the sole beneficiary of the Purchase Agreement, he is not required to be. *See City of Houston*, 353 S.W.3d at 145. Rather, the relevant inquiry is whether the contracting parties "intended to secure a benefit" to Choudhri and entered into the contract directly for his benefit. *See First Bank*, 519 S.W.3d at 102. Here, the rights and benefits to Choudhri do not arise by mere implication. *See id.* at 103 (stating that implied intent to confer third-party beneficiary status is insufficient). Instead, the plain language of the Purchase Agreement contains "a clear and unequivocal expression of the contracting parties' intent to directly benefit" Choudhri. *See id.* Consequently, Choudhri is an intended third-party beneficiary of the Purchase Agreement who "steps into the shoes" of the contracting parties, subject to and bound by all provisions of the contract. *See Martinez*, 343 S.W.3d at 929.

### ***C. Effect of Merger Clause***

In the summary judgment proceedings and on appeal, Choudhri argues that in April 2013—two months before Jetall and HGLA executed the Purchase Agreement—he and Raymond entered into an oral agreement to be partners with

respect to purchase of the subject property and the development of the hotel. This alleged partnership agreement is the source of the fiduciary duties that Choudhri alleges are owed to him.

The trial court, however, ruled that Choudhri's claim that "he is part of a partnership agreement only partially expressed in the Purchase Agreement runs contrary to and is barred by the merger clause, to which he is bound." As the trial court noted, the Purchase Agreement contained a merger clause providing that the agreement "contains the entire agreement between the parties with respect to this subject matter and is not subject to any prior or contemporaneous oral or written agreements."

"A 'merger clause' is a contractual provision to the effect that the written terms of the contract may not be varied by prior agreements because all such agreements have been merged into the written document." *San Antonio Props., L.P. v. PSRA Invs., Inc.*, 255 S.W.3d 255, 260 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated w.r.m.). As a third-party beneficiary to the Purchase Agreement, Choudhri is bound by the merger clause contained in the contract. *See Martinez*, 343 S.W.3d at 929. He cannot rely on an alleged prior oral agreement with Raymond concerning obtaining a membership interest in HGLA that purportedly varies from the terms of the Purchase Agreement. Instead, as the trial court ruled, the only agreement between the parties is the Purchase Agreement.

The alleged oral partnership agreement with Raymond is the only potential source of fiduciary duties that Choudhri has identified. Because this agreement merged into the Purchase Agreement itself, we look to the terms of the Purchase Agreement to determine whether any fiduciary duties were owed to Choudhri. The Purchase Agreement, however, does not create a partnership between Raymond and Choudhri. Nor does it otherwise provide that Raymond and Choudhri are to be partners. Instead, it grants Choudhri a right to obtain a membership interest and become a managing member, with certain rights such as voting rights, in HGLA.

Given the plain language of the Purchase Agreement, we hold that Choudhri did not present evidence raising a fact issue on the existence of a fiduciary relationship. Consequently, the trial court did not err by ruling that no evidence existed that any party in this dispute owed fiduciary duties to any other party. The trial court correctly granted summary judgment in favor of the developers on Choudhri's breach of fiduciary duty claim. *See JLB Builders*, 622 S.W.3d at 864 (stating that no-evidence summary judgment is proper when no evidence exists of one or more essential elements of claim).

## Summary Judgment on Fraud Claims

Next, the sellers contend the trial court erred by granting summary judgment in favor of HGLA on their fraud claims. Specifically, the sellers argue that their fraud claims were not barred by the economic loss rule. They further argue that the

merger and integration clause in the Purchase Agreement did not disclaim reliance on the developers' alleged misrepresentations.

### *A. Elements of Fraud and Fraudulent Inducement*

To prevail on a claim for common-law fraud, the plaintiff must prove that: (1) the defendant made a material representation that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and suffered injury as a result. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015).

"Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018). Fraudulent inducement is a "species of common-law fraud" that "arises only in the context of a contract." *Int'l Bus. Mach. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019) ("*IBM*"); *Anderson*, 550 S.W.3d at 614. This cause of action shares the same basic elements as a common-law fraud claim, but it requires the existence of a contract as an essential element of proof. *Anderson*, 550 S.W.3d at 614. In a fraudulent inducement claim, the "misrepresentation" can occur when the defendant falsely promises to perform a

future act while having no present intention to perform it. *IBM*, 573 S.W.3d at 228. "The plaintiff's 'reliance' on the false promise 'induces' the plaintiff to agree to a contract the plaintiff would not have agreed to if the defendant had not made the false promise." *Id.*

### *B. Trial Court's Rulings on Sellers' Fraud Claims*

In its February 2016 summary judgment order, the trial court noted that the Purchase Agreement—the "operative document" between the parties—contained a merger clause stating that the parties "have not relied on any representations not expressed in this Agreement." The parties also stated in the Purchase Agreement that they were "relying solely on their own judgment (and the advice of their own counsel) in deciding to enter into this Agreement." The trial court stated:

> The Purchase Agreement is the source of all duties owed, and encompasses the nature of all remedies. The law and the summary judgment evidence support no duties or breaches independent of the Purchase Agreement. Try as they might, neither side raises anything not encompassed by the Purchase Agreement. The economic loss rule prevents all claims but those for breach of the Purchase Agreement.

The court granted the developers' summary judgment motions on the sellers' claims for statutory and common-law fraud.

### *C. Economic Loss Rule*

#### 1. General principles

The "economic loss rule" is a collection of rules that govern the recovery of economic losses in certain areas of the law. *Sharyland Water Supply Corp. v. City*

*of Alton*, 354 S.W.3d 407, 415 (Tex. 2011). Generally, the economic loss rule precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy. *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014) (per curiam); *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A., Inc.*, 403 S.W.3d 360, 365 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("[O]ne general formulation of the economic loss rule, as applicable to this case, is that a party may not recover in tort for purely economic losses suffered to the subject matter of a contract."). This rule does not, however, bar all tort claims that arise out of a contractual setting. *Chapman Custom Homes*, 445 S.W.3d at 718; *see Sharyland Water Supply*, 354 S.W.3d at 418 ("[W]e have applied the economic loss rule only in cases involving defective products or failure to perform a contract.").

Acts of a party may breach duties in tort, duties in contract, or duties in both simultaneously. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). A claim sounds in contract when the only injury is economic loss to the subject of the contract itself. *½ Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 387 (Tex. 2011). A party states a tort claim when the duty allegedly breached is independent of the contract and the harm that is suffered is not merely the economic

loss of a contractual benefit. *Chapman Custom Homes*, 445 S.W.3d at 718. As the Texas Supreme Court has explained:

> Tort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others. If the defendant's conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct—such as failing to publish an advertisement—would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.

*Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (internal quotations omitted).

"[T]he nature of the injury helps determine which duty or duties are breached and, ultimately, which damages are appropriate." *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008); *Jim Walter Homes*, 711 S.W.2d at 618; *see also Lamar Homes, Inc v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007) (stating that focus of economic loss rule is "on determining whether the injury is to the subject of the contract itself"). We look to the substance of the cause of action, not the manner in which it was pleaded, to determine the type of action that is brought. *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 62 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

In *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, the Texas Supreme Court rejected the application of the economic loss rule to bar

claims of fraudulent inducement. *See* 960 S.W.2d 41, 46 (Tex. 1998). The court noted that Texas law "has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Id.* Generally, a party is not bound by a contract that is procured through fraud. *Id.* The legal duty not to fraudulently procure a contract "is separate and independent from the duties established by the contract itself." *Id.*; *see Matlock Place Apartments, L.P. v. Druce*, 369 S.W.3d 355, 378 (Tex. App.—Fort Worth 2012, pet. denied) (holding that plaintiff's statutory fraud claim was based on fraudulent inducement and therefore economic loss rule did not bar plaintiff's statutory fraud tort damages).

Furthermore, the Texas Supreme Court recognized that "a fraud claim can be based on a promise made with no intention of performing, irrespective of whether the promise is later subsumed within a contract." *Formosa Plastics*, 960 S.W.2d at 46. Generally, the failure to perform the terms of a contract constitutes a breach of contract, not a tort. *Id.* However, if one party enters into the contract with no intention of performing, that misrepresentation may give rise to a cause of action for fraud. *Id.*; *see Anderson*, 550 S.W.3d at 614 ("Fraudulent inducement is actionable when the misrepresentation is a false promise of future performance made with a present intent not to perform.").

Tort damages are not precluded simply because a fraudulent representation causes only an economic loss. *Formosa Plastics*, 960 S.W.2d at 47.

> Allowing the recovery of fraud damages sounding in tort only when a plaintiff suffers an injury that is distinct from the economic losses recoverable under a breach of contract claim is inconsistent with this well-established law, and also ignores the fact that an independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement.

*Id.* Therefore, if a plaintiff presents legally sufficient evidence of each element of a fraudulent inducement claim, any damages suffered as a result of the fraud sound in tort. *Id.*

### 2. Whether the sellers' fraud claims are barred under the economic loss rule

In their live pleading, the sellers asserted common-law and statutory fraud claims against the developers. They alleged the following misrepresentations:

- The developers "made false representations of fact and/or made promises to perform under the Contract with no present intent to perform";
- Raymond and Perkel falsely promised that "Choudhri would be made a limited partner in HGLA and that he would be able to participate at a specific percentage in the partnership";
- The developers "made representations about doing the Galleria Deal" and "repeatedly promised they were going to close on the Galleria Deal" even when they had no intention of closing the transaction; and
- The developers represented that they would "close on the deal," but HGLA "simply needed additional time."

Choudhri alleged that he relied upon the representations concerning his proposed ownership interest in HGLA in deciding to sign the Purchase Agreement. The sellers further alleged that, in reliance on the developers' representations that

they were going to perform under the Purchase Agreement, the sellers expended earnest money fees to extend the closing date under the contract with Mody.

As damages, Choudhri sought the value of his promised percentage ownership interest in HGLA, reliance damages, and "damages stemming from the fraud," including lost profits from the sale of the subject property and the value of the property as developed. West Loop and Jetall sought liquidated damages under the Purchase Agreement, reliance damages, lost profits, the value of the property as developed, and "out-of-pocket damages not to exceed $4 million." All the sellers sought attorney's fees for their statutory fraud claim[5] and exemplary damages.

With respect to Raymond's and Perkel's alleged misrepresentations concerning Choudhri's ownership interest in HGLA, Choudhri alleged that he "relied upon the representations in entering into the agreement with HGLA, Raymond, Raymond, Inc. and Raymond Investments, to purchase the Galleria Property from the Owner [Mody]."[6] He further alleged that had he known that this

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[5] *See* TEX. BUS. & COM. CODE § 27.01(e) (providing that any person who violates statute prohibiting fraud in real estate transaction is liable to person defrauded for reasonable and necessary attorney's fees).

[6] On appeal, the developers argue that this allegation "does not pertain to the Purchase Agreement; it pertains to Choudhri's execution of the Mody Contract." We disagree. Choudhri alleged that he relied on the representations in "entering into the agreement with HGLA" and the other developers. The only agreement signed by Choudhri and HGLA was the Purchase Agreement. Furthermore, Jetall entered into the earnest money contract with Mody in February 2013, two months before Raymond allegedly made representations concerning Choudhri obtaining an interest in HGLA.

was a misrepresentation, he would not have entered into the agreement. Although Choudhri labeled this claim as a fraud claim in his pleadings, these allegations assert a claim for fraudulent inducement. *See Peterson Grp.*, 417 S.W.3d at 62 (stating that we look to substance of cause of action, not manner in which claim was pleaded, to determine type of action asserted).

The Texas Supreme Court has carved out an exception to the economic loss rule for fraudulent inducement claims, reasoning that an independent legal duty exists not to fraudulently procure a contract. *See Formosa Plastics*, 960 S.W.2d at 46. A fraudulent inducement plaintiff is not required to establish an injury independent from damages under the contract. *See, e.g.*, *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998) (per curiam) (noting that while court in *Formosa Plastics* rejected independent injury requirement for fraudulent inducement claims, that rejection did not extend to claims for negligent misrepresentation or negligent inducement); *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 798 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (noting that exception to economic loss rule for fraudulent inducement claims created in *Formosa Plastics* was "very limited"). Instead, if the plaintiff can present legally sufficient evidence of all elements of a fraudulent inducement claim, the plaintiff's damages sound in tort, not contract. *Formosa Plastics*, 960 S.W.2d at 47. As such,

the trial court erred to the extent that it dismissed Choudhri's fraudulent inducement claim based on the economic loss rule.

The remainder of the sellers' fraud claims are all based on alleged misrepresentations that occurred after the parties signed the Purchase Agreement and caused the sellers to expend additional earnest money fees to extend the closing date on the contract with Mody. Because these claims all concern representations allegedly made *after* execution of the Purchase Agreement, these claims are not claims for fraudulent inducement of the contract. Thus, these claims do not fall within the exception to the economic loss rule for fraudulent inducement claims. *See Heil Co. v. Polar Corp.*, 191 S.W.3d 805, 816–17 (Tex. App.—Fort Worth 2006, pet. denied) (declining to extend *Formosa Plastics* to case in which plaintiff asserted claim for fraud but not fraudulent inducement and requiring plaintiff to establish injury independent from contract damages for fraud claim to not be barred by economic loss rule); *Hooker v. Nguyen*, No. 14-04-00238-CV, 2005 WL 2675018, at *7 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (mem. op.) (declining to extend *Formosa Plastics* "to include fraud that allegedly occurs after the formation of a contract and that results only in loss to the subject of the contract"); *Classical Vacations, Inc. v. Air France*, No. 01-01-01137-CV, 2003 WL 1848247, at *3 (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, no pet.) (mem. op.) (same).

In their fraud claims, the sellers alleged that the developers promised that they would perform their obligations, "do the Galleria deal on the terms agreed to," and close if they obtained additional time. These are representations that the developers would perform their contractual obligations under the Purchase Agreement. These representations thus arise from the Purchase Agreement itself and are not independent of that contract. *See DeLanney*, 809 S.W.2d at 494; *see also Chapman Custom Homes*, 445 S.W.3d at 718 ("[A] party states a tort claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit."). The trial court properly dismissed the fraud claims.

***D. Disclaimer of Reliance***

Although we conclude that the economic loss rule does not bar Choudhri's fraudulent inducement claim, the trial court stated another reason for dismissing all the parties' fraud-based claims: the merger/disclaimer of reliance provision contained in the Purchase Agreement. We therefore turn to whether the trial court properly concluded that this clause bars Choudhri's fraudulent inducement claim.

A merger clause in a contract, standing alone, does not prevent a party from suing for fraudulent inducement. *IBM*, 573 S.W.3d at 229; *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 327 (Tex. 2011). Similarly, a contract clause that merely recites that the parties have made no representations other

than those stated in the written contract itself is also not effective to bar a fraudulent inducement claim. *IBM*, 573 S.W.3d at 229; *Italian Cowboy*, 341 S.W.3d at 334 (noting that standard merger clauses "often contain language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all"). However, a clause that clearly and unequivocally expresses the party's intent to disclaim reliance on the specific misrepresentations at issue can preclude a fraudulent inducement claim. *IBM*, 573 S.W.3d at 229.

Not every disclaimer of reliance is effective, and we must always examine the contract language itself and the totality of the surrounding circumstances when determining if the waiver of reliance provision is binding. *Id.* (quoting *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008)). We consider factors such as whether:

> (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;
>
> (2) the complaining party was represented by counsel;
>
> (3) the parties dealt with each other at arm's length;
>
> (4) the parties were knowledgeable in business matters; and
>
> (5) the release language was clear.

*Id.*; *Italian Cowboy*, 341 S.W.3d at 337 n.8; *Forest Oil*, 268 S.W.3d at 60. "[W]hen sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively

negating the element of reliance in a suit for fraudulent inducement." *Italian Cowboy*, 341 S.W.3d at 332.

The sellers contend that the trial court erred by ruling that the merger clause in the Purchase Agreement barred their fraud claims. They argue that the developers did not present any evidence that when the parties negotiated the Purchase Agreement, they "discussed the issue which has become the topic of dispute." They further argue that there is no evidence that the parties intended to disclaim or release any fraud claims.

As the basis for his fraudulent inducement claim, Choudhri alleged that Raymond and Perkel made material oral misrepresentations to him concerning his potential ownership interest in HGLA, and he relied upon these representations in entering into the Purchase Agreement. The Purchase Agreement contained the following clause:

> This Agreement contains the entire agreement between the parties with respect to this subject matter and is not subject to any prior or contemporaneous oral or written agreements. The undersigned parties affirm that they have not relied on any representations not expressed in this Agreement in deciding to enter into this Agreement. The undersigned parties further affirm that they are relying solely on their own judgment (and the advice of their own counsel) in deciding to enter into this Agreement.

The trial court ruled that this clause barred the parties' fraud claims.

In determining whether a disclaimer of reliance clause bars a fraudulent inducement claim, we examine the language of the provision itself. *See IBM*, 573

S.W.3d at 229; *Forest Oil*, 268 S.W.3d at 60. Contrary to the sellers' argument on appeal, the clause in the Purchase Agreement is more than merely a merger clause that does not express a clear intent to disclaim reliance or waive fraudulent inducement claims. *See Italian Cowboy*, 343 S.W.3d at 334–36 (noting, in concluding that merger clause did not bar fraudulent inducement claim, that clause simply stated that no representations other than those in agreement were made and did not mention reliance at all).

In this clause, the parties specifically agreed that they "have not relied on any representations not expressed in [the Purchase Agreement] in deciding to enter into this Agreement." They further agreed that, in entering into the Purchase Agreement, they were "relying solely on their own judgment (and the advice of their own counsel)."

This contractual language is similar to language that the Texas Supreme Court has held constitutes a valid disclaimer of reliance that bars fraudulent inducement claims. *See IBM*, 573 S.W.3d at 228–29, 232–33 (holding that provisions stating that, in entering into contract, party "is not relying upon any representation made by or on behalf of IBM that is not specified in the Agreement" and that parties are not "relying upon any representation that is not specified" in contract clearly and unequivocally stated that parties were not relying upon representations other than those stated in contract); *Forest Oil*, 268 S.W.3d at 59–61 (holding that provision

stating that no party is "relying upon any statement or any representation of any agent of the parties" refuted element of reliance in fraudulent inducement claim); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180–81 (Tex. 1997) (holding that contractual language stating that "none of us is relying upon any statement or representation of any agent of the parties being released hereby[, e]ach of us is relying on his or her own judgment" clearly and unequivocally disclaimed reliance on representations and barred fraudulent inducement claim).

In addition to the language of the contractual provision, we must also look to the totality of the surrounding circumstances in determining whether the disclaimer of reliance provision is binding. *See IBM*, 573 S.W.3d at 229; *Forest Oil*, 268 S.W.3d at 60. The developers presented evidence that this was an arm's length transaction between two individuals—Raymond and Choudhri, as well as their respective entities—who are experienced in real estate transactions. Both parties were represented by counsel. And the developers presented evidence—specifically, excerpts from Choudhri's deposition—that during the negotiations leading up to execution of the Purchase Agreement, the parties discussed the possibility of Choudhri investing and obtaining a membership interest in HGLA.

We conclude that the trial court correctly determined that the disclaimer of reliance provision in the Purchase Agreement is valid and binding on the sellers. *See IBM*, 573 S.W.3d at 229, 232–33; *Forest Oil*, 268 S.W.3d at 59–61; *Schlumberger*

*Tech. Corp.*, 959 S.W.2d at 180–81. This provision thus negated the reliance element of Choudhri's fraudulent inducement claim as a matter of law. *See IBM*, 573 S.W.3d at 233; *Forest Oil*, 268 S.W.3d at 61; *Schlumberger Tech. Corp.*, 959 S.W.2d at 181. We hold that the trial court correctly rendered summary judgment against Choudhri on his fraudulent inducement claim.

**Summary Judgment on Claim for Chapter 38 Attorney Fees**

West Loop challenges the trial court's order that it take nothing on its claim for attorney fees under Chapter 38 of the Civil Practice and Remedies Code. The Civil Practice and Remedies Code provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3278–79 (amended 2021) (current version at TEX. CIV. PRAC. & REM. CODE § 38.001). To obtain an award of attorney fees under Section 38.001, "a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *Peterson Grp.*, 417 S.W.3d at 60.

West Loop alleged that HGLA "breached the Contract by failing to tender the First Payment by the Contract Closing date." As explained below with respect to the developers' cross-appeal, we hold that HGLA's duty to tender the First Payment

never arose because HGLA rightfully elected to terminate the Purchase Agreement before September 10, 2013—the date that the First Payment was due. Because we hold that HGLA established its breach of contract claim as a matter of law, and thus the trial court erred by granting the sellers' summary judgment motion and ruling that the sellers were entitled to retain the negotiation fee and earnest money deposit, there is no ruling that can support an award of attorney's fees to West Loop under Chapter 38. We therefore affirm the trial court's summary judgment ruling in favor of HGLA on this issue.

## THE DEVELOPERS' CROSS-APPEAL

### Summary Judgment on Breach of Contract Claims

In its first issue, HGLA contends that the trial court erred by granting summary judgment in favor of the sellers on HGLA's breach of contract claim because it presented evidence conclusively establishing each element of the claim. HGLA argues that the sellers materially breached the Purchase Agreement, entitling it to recover the negotiation fee and the earnest money deposit.

HGLA also argues that, to the extent the trial court's summary judgment rulings can be construed as granting summary judgment in favor of the sellers' breach of contract claims, the court erred because the evidence conclusively establishes that the sellers materially breached the Purchase Agreement and had no

actual damages. For the reasons below, we reverse and render judgment that HGLA proved its breach of contract claim as a matter of law.

### *A. Governing Law*

A plaintiff asserting a claim for breach of contract must prove: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages as a result of the breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019); *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 180 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A breach of contract occurs when a party fails or refuses to do something that he has promised to do. *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Although both HGLA and the sellers assert claims that the contract was fraudulently induced, "[a] contract that is the product of fraudulent misrepresentations is merely voidable, not void from its inception." *Willacy Cty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 52 (Tex. 2018). Aside from the fraudulent inducement contentions, neither party disputes that the Purchase Agreement is a valid contract. *See, e.g.*, *Prime Prods., Inc. v. S.S.I.*

*Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (stating elements of valid contract).

When a party to a contract commits a material breach of the contract, the other party is discharged or excused from future performance. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). If, however, the breach is not material, the other party is not excused from future performance but may sue for damages caused by the breach. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (per curiam). If the non-breaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance. *Long Trs. v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006) (per curiam); *Henry v. Masson*, 333 S.W.3d 825, 840 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

The Texas Supreme Court, relying on the Restatement (Second) of Contracts, has outlined several factors that are "significant in determining whether a failure to perform is material":

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances; and
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

*Mustang Pipeline*, 134 S.W.3d at 199 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)). When both parties have allegedly breached the contract, the issue is not just whether the parties committed a material breach, but also which party materially breached the contract *first*. *See id.* at 200. Typically, materiality of a breach is a question of fact, but it may be decided as a matter of law if reasonable jurors could reach only one verdict. *Bartush-Schnitzius Foods*, 518 S.W.3d at 436.

Repudiation, or anticipatory breach, is a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance. *CMA-CGM (Am.), Inc. v. Empire Truck Lines, Inc.*, 416 S.W.3d 495, 519 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). "It is conduct that shows a fixed intention to abandon, renounce, and refuse to perform the contract." *Id.*; *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("A party repudiates a contract if the party manifests, by words or actions, a definite and unconditional intention not to perform the contract according to its terms."). To constitute a repudiation, the party must have "absolutely repudiated the contract without just cause." *N.Y. Party Shuttle, LLC v. Bilello*, 414

S.W.3d 206, 216 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). When a party asserts repudiation as an affirmative defense, that party bears the burden to prove that the opposing party unconditionally refused to perform the contract. *Id.*

When construing a contract, we must look to the language of the parties' agreement. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). We must give effect to the parties' intentions as expressed in their agreement. *Id.*; *Pathfinder Oil & Gas*, 574 S.W.3d at 888 (stating that "primary objective" when construing contract is "to give effect to the written expression of the parties' intent"). When discerning the contracting parties' intent, we examine the entire agreement and give effect to each provision so that none is rendered meaningless. *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015) (quoting *Tawes*, 340 S.W.3d at 425).

We give contract terms their plain and ordinary meaning unless the contract indicates that the parties intended a different meaning. *Id.* (quoting *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009)). We do not give any single provision, taken alone, controlling effect; rather, we consider all provisions with reference to the entire instrument. *Id.* (quoting *Tawes*, 340 S.W.3d at 425). "A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.'" *Great Am. Ins. Co. v. Primo*, 512

S.W.3d 890, 893 (Tex. 2017) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)).

### *B. Whether HGLA Was Excused from Performance of the Purchase Agreement*

The trial court addressed HGLA's breach of contract claim in several of its summary judgment orders. It denied all parties' summary judgment motions "as to breach of contract claims as relating only to the Purchase Agreement" in the February 2016 order. After the parties filed additional summary judgment motions, in an April 2017 order, the trial court stated its intent to rule, as a matter of law, that the sellers were entitled to retain the earnest money and negotiation fee.

In a separate order signed that month, the trial court partially granted the developers' summary judgment motion and ruled that paragraph 18A of the Purchase Agreement "is a valid and enforceable sole remedies/limitation of damages agreement that is binding on the parties to this lawsuit." The court further ruled that, under paragraph 18A, the sellers' remaining damages claims were "limited to potential retention, if at all, of the $750,000 Earnest Money and $250,000 Negotiation Fee already paid on behalf of HGLA." The sellers were not entitled to any other contractual damages, such as reliance damages.

In its May 2017 order, the trial court stated:

> Given the volume of summary judgment evidence ("there must be a fact issue in there somewhere") the Court first notes that for all practical purposes there are no material issues of fact. To the extent there are any,

> and none come to mind, the Court takes the facts in the light most favorable to the non-movant. What is in dispute are the many conclusions reached by the Plaintiff [HGLA] from those facts. As this Court has pointed out in prior rulings, Plaintiff's conclusions were unfounded, unjustified, premature and speculative. Had Plaintiff really believed any of what it argues in this case, Plaintiff and its principals would have simply waited until closing to be proven right. They did not do so and as a matter of law cannot now say that [the sellers'] anticipated breaches were destined to happen.

The court granted the sellers' summary judgment motion on HGLA's breach of contract claim and denied HGLA's motion. The court ruled that "[t]he Earnest Money and Negotiation Fee which are the subject of the Motion are non-refundable under the facts and the Purchase Agreement."

In arguing that the trial court erred in its summary judgment rulings, HGLA contends that it rightfully terminated the Purchase Agreement before the scheduled Contract Closing Date on September 10, 2013 due to Title Policy Exception 10(bb). If Exception 10(bb) was an exception that would have a "substantial, material adverse impact on [HGLA's] development of a hotel on the Property," then the Purchase Agreement allowed HGLA to object to the exception and terminate the Agreement absent failure to cure, "in which event the Earnest Money and Negotiation Fee shall be refunded to [HGLA]."

Alternatively, HGLA argues that it was excused from performing under the Purchase Agreement—specifically, that it was excused from signing the contract for

deed and paying the $3,000,000 first payment at the Contract Closing Date—because Jetall and West Loop materially breached the contract.

### 1. Termination of the Purchase Agreement due to the sellers' refusal to cure an objection to the title commitment

The parties dispute whether HGLA properly terminated the Purchase Agreement on September 9, 2013. HGLA argues that it did, pointing out that Section 9 of the Purchase Agreement allowed it to (1) object to an exception on the title commitment that "substantially and materially" interfered with development of a hotel on the property, and (2) terminate the Purchase Agreement and recover the negotiation fee and earnest money deposit if Jetall did not cure the objection. HGLA argues that Title Commitment Exception 10(bb) satisfied these criteria and justified HGLA's termination of the agreement. The sellers respond by arguing that Exception 10(bb) did not substantially and materially interfere with development of a hotel, and therefore HGLA could not permissibly terminate the Purchase Agreement on this basis.

In Section 9 of the Purchase Agreement, Jetall agreed that it would cause Independence Title Company to issue on the Contract Closing Date a "standard coverage owner's policy of title insurance, on the most current State of Texas form, insuring in [HGLA] in the amount of the Purchase Price for the Property, title to the Property pursuant to the Contract for Deed." The parties agreed that, within five days after execution of the Purchase Agreement, Jetall would cause Independence Title

to issue a current title commitment showing the status of record title to the property and committing to insure HGLA's title to the property, subject only to certain "permitted exceptions."

The parties further agreed that if any exception on the title commitment "shall substantially and materially interfere with [HGLA's] development of a hotel on the Property," HGLA had ten days to object to the exception. Jetall then would have five days to either cure the objection by causing the exception to be removed from the title commitment or "insured over," or by electing not to cure the objection. If Jetall did not cure the objection, HGLA then would have five days to either waive the objection or terminate the Purchase Agreement, "in which event the Earnest Money and Negotiation Fee shall be refunded to [HGLA]." This provision again stated that HGLA "may only object to an exception if the exception shall have a substantial, material adverse impact on [HGLA's] development of a hotel on the Property."

HGLA terminated the Purchase Agreement in part due to Exception 10(bb) on the title commitment issued by Independence Title on August 26, 2013. This exception stated that the title insurance policy would not cover "[r]ights and claims of third parties against West Loop Hospitality, LLC and/or any subsequent record-owner of the land which affect the title thereto and arise subsequent to the date of this Policy, including, but not limited to, subsequent mortgages, tax or judgment liens, bankruptcy proceedings, and probate/divorce matters."

HGLA objected to this exception on August 28, 2013, and requested that it be removed from the title commitment. HGLA argued that the presence of this exception exposed it to risks that the sellers could sell or place debt on the subject property during the executory period of the contract for deed. After Timothy Umland complained about Exception 10(bb) to Independence Title and escrow agent Erwin Wilbanks, Wilbanks forwarded Umland's concerns to Richard Black with Stewart Title Company, the underwriter for the title insurance policy on the subject property. Black replied:

> Future claims against the seller are risks that this purchaser assumes by entering into this form of purchase (Contract for Deed) which leaves the seller in legal/record title as opposed to being divested from title. The value of the Owner's Policy will be the assurance that the Seller had good and indefeasible title at the time the Contract for Deed was entered into. We will not insure against future tax liens against the seller, the effect of seller's future insolvency or bankruptcy, future abstracted judgments against the seller that attach to the legal title, etc. The exception remains. Otherwise, we would decline to insure the title.

Wilbanks later testified in his deposition that it was not permissible for title companies to insure against future events. The sellers refused to cure or insure over this objection. HGLA sent a formal notice of termination on September 9, 2013.

HGLA argues on appeal that Exception 10(bb) substantially and materially interfered with its development of a hotel on the property. For evidentiary support, HGLA's summary judgment evidence included an affidavit from Gregory Paradise, an attorney representing the developers during the negotiation of the Purchase

Agreement. Paradise averred that Exception 10(bb) would interfere with the development of a hotel on the subject property because the risk arising from this exception would prevent HGLA from soliciting equity investors to finance the development. He further averred that HGLA would have spent significant sums in developing the hotel, but if an intervening lien on the subject property defeated HGLA's title under the contract for deed, then HGLA would not realize the benefits of those investments.

HGLA also submitted the affidavit of David Berins, who owns a lodging industry consulting practice in Atlanta. Berins opined that Exception 10(bb) would have substantially and materially interfered with development of a hotel on the subject property by impacting HGLA's ability to (1) raise equity for the proposed development; (2) "obtain reasonable terms for the debt component of the capital stack for the development of a hotel on the Property"; (3) obtain a timely franchise commitment from a major hotel; (4) prepare development budgets; and (5) retain a design team and prepare conceptual plans.

HGLA also attached the deposition of Wilbanks, a fee attorney and the escrow agent with Independence Title who handled the title commitment and insurance issues with respect to the proposed contract for deed. In his deposition, Wilbanks testified that the purpose of Exception 10(bb) was to put the parties on notice that the title company would not insure "anything after the execution of the contract for

deed," such as any subsequent liens placed on the subject property or a subsequent sale of the property to another purchaser. He did not believe that a reasonable developer would enter into this kind of agreement. In his experience, he had never seen a developer agree to develop a property with an exception like 10(bb) in place, nor had he seen a lender willing to lend money to purchase a property with such an exception.

In the trial court, the sellers did not put on any contrary evidence that a developer would agree to develop a property with an exception like 10(bb) in place. Nor did they put on proof that a lender would in fact lend money to purchase a property in the face of such an exception. Rather, they argued that HGLA could not object to Exception 10(bb) because Texas law required the Title Commitment to contain such an exception, lest the insurance policy become a policy for liability insurance as opposed to title insurance.

Under Texas law, a title insurance policy creates only a duty on the part of the insurer to "indemnify the insured against losses caused by defects in title as of the date the policy is issued." *Chicago Title Ins. Co. v. Alford*, 3 S.W.3d 164, 168 (Tex. App.—Eastland 1999, pet. denied). Title insurance "covers the condition of the title only as of the policy's date, and defects arising afterwards cannot be the basis of a claim" against the title company. *Id.*; *Martinka v. Commonwealth Land Title Ins. Co.*, 836 S.W.2d 773, 777 (Tex. App.—Houston [1st Dist.] 1992, writ denied)

("[T]he title insurance company is not employed to examine title, rather it is employed only to guarantee the status of title and to insure against existing defects."). Applying this distinction, the sellers argue that HGLA's "objection" to the Title Commitment was a request to illegally transform the policy into one for liability insurance. Consequently, it could not be a valid basis for objecting and ultimately terminating the Purchase Agreement.

Because we are bound by the plain terms of the Purchase Agreement, we agree with HGLA that HGLA was entitled to terminate the Purchase Agreement and recover its negotiation fee and earnest money under Purchase Agreement Section 9. The Purchase Agreement unambiguously entitles HGLA to terminate if "any exception shown on the Title Commitment shall substantially and materially interfere with [HGLA's] development of a hotel on the property." HGLA presented undisputed evidence that Exception 10(bb) would, in fact, substantially and materially interfere with that goal.

We disagree with the sellers that the only option was for Independence Title to remove the exception from the policy, thereby transforming the policy into a liability insurance policy. As an alternative to removal, the Purchase Agreement gave Jetall the option to "insure over" the offending exception "in a manner satisfactory to Buyer in the reasonable exercise of Buyer's discretion." Jetall could have paid to insure against the risk created by the exception, but it did not do so.

The sellers also argue that Exception 10(bb) cannot be a qualifying trigger for Section 9's termination provision because it is part of a "standard coverage owner's policy of title insurance," and Section 9 required the issuance of a "standard coverage owner's policy of title insurance." This does not follow. Section 9 expressly contemplated that exceptions in such a standard policy might "substantially and materially interfere" with the development of a hotel on the property. Section 9 gave HGLA the express right to terminate the Purchase Agreement if Jetall did not cause the exception to be eliminated or insured over.

Because Jetall and West Loop did not cure, we hold that HGLA had the right to "terminate" the Purchase Agreement, "in which event the Earnest Money and Negotiation Fee shall be refunded to Buyer." We therefore remand HGLA's breach of contract claim for a determination of damages.[7]

Relatedly, HGLA sought attorney's fees under Chapter 38 in its live pleading, and it moved for summary judgment on its entitlement to attorney's fees. The trial court denied HGLA's summary judgment motion. Because HGLA is a prevailing party entitled to recover damages, we reverse the summary judgment for the sellers

[7] The prayer in the developers' opening brief requests a remand for determination of damages, so we are limited to such relief. *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) (declining to remand case to determine whether landowner in condemnation case was entitled to fees and expenses as sanctions because landowner did not seek remand and "[a] party generally is not entitled to relief it does not seek").

on HGLA's claim for attorney fees under Section 38.001. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3278–79 (amended 2021).

**Summary Judgment on Fraudulent Inducement Claims**

Both HGLA and the sellers moved for summary judgment on HGLA's claims for fraudulent inducement. The trial court granted the sellers' motion and dismissed these claims. In its third issue, HGLA argues that the trial court erred by dismissing its fraudulent inducement claims instead of rendering summary judgment in its favor. We reverse and remand to the trial court.

***A. Trial Court's Ruling on HGLA's Fraudulent Inducement Claims***

As with the sellers' fraud claims, the trial court addressed HGLA's fraud and fraudulent inducement claims in the February 2016 summary judgment order. The court first ruled that the economic loss rule barred all claims except those for breach of the Purchase Agreement. The court then stated:

> While the fraud claims fail due to the economic loss rule, the Court will discuss an additional basis for dismissing these claims. They may appear on the surface to contain disputed issues of fact, but they do not. The claims of "fraudulent inducement" track closely with actual contractual obligations. Failure to perform them are breaches of contract, not fraud, unless there is evidence that there was no intent or ability to perform. This is what the Court would like to address.
>
> Plaintiffs [the developers] assert that Defendants could not have performed, and therefore could not have intended to perform. This argument finds no support in the evidence. Rather, it is based upon some disingenuous gamesmanship when it comes to the fact that the parties used a variety of entities relating to the subject transaction. For example, all promises were supposed to be fulfilled by Jetall as "Seller"

> under the Purchase Agreement. If Jetall promised under the Purchase Agreement to grant an easement, but a related entity named 2425 West Loop L.P.'s ("2425") permission was needed to grant the easement, Plaintiffs argue that Jetall promised an impossible thing. But the summary judgment evidence points conclusively to the fact that WLH, Jetall and 2425 are all controlled by Choudhri. There is no evidence that Choudhri could never sort it out before Closing, even if permission of a lender was required. Thus, the Court could have granted summary judgment on a no evidence basis as to fraud in the inducement. Fraud, or fraud in the inducement simply does not fit this real estate "flip" factual scenario.
>
> The rest of the "fraud" is further excluded by the merger clause. Again, in the context of a real estate flip, most of the "fraud" relates to events which simply had not occurred yet with absolutely no way of knowing whether a contracting party could or could not perform. The Purchase Agreement clearly states that the Seller does not yet own the property being sold, so the existence of related contingencies simply cannot constitute fraud.

The trial court granted summary judgment in favor of the sellers on HGLA's claim for fraudulent inducement.

### *B. Whether the Economic Loss Rule Bars HGLA's Fraudulent Inducement Claims*

A plaintiff alleging that it has been fraudulently induced to enter into a contract need not demonstrate an injury independent from losses under the contract but may instead recover damages in tort. *See Formosa Plastics*, 960 S.W.2d at 46–47.

Here, HGLA asserted a claim for fraudulent inducement against Jetall. Specifically, HGLA alleged that Jetall, through Choudhri, misrepresented that a contract for deed was an insurable interest in Texas; Jetall owned the 2425 Property;

Jetall could grant a permanent access easement through the 2425 Property; Jetall could grant a parking lease on the 2425 Property; Jetall was not involved in any litigation at the time the parties executed the Purchase Agreement; and Jetall would have title to the property at the Contract Closing Date when the parties signed the contract for deed. HGLA alleged that it relied upon these representations by paying the earnest money deposit and entering into the Purchase Agreement, and that Jetall made the representations with the intent that HGLA rely on them and enter into the contract.

HGLA's live pleading states a claim for fraudulent inducement of the Purchase Agreement. The economic loss rule does not bar the claim. *See id.* at 47 (acknowledging "independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement" and disapproving of cases holding "that tort damages cannot be recovered for a fraudulent inducement claim absent an injury that is distinct from any permissible contractual damages").

### *C. Whether Claims are Barred by Merger and Disclaimer of Reliance Clause*

HGLA further argues that the trial court erred to the extent that it dismissed the fraudulent inducement claim on the basis of the merger and disclaimer of reliance clause contained in the Purchase Agreement.

The disclaimer of reliance provision in the Purchase Agreement stated:

> This Agreement contains the entire agreement between the parties with respect to this subject matter and is not subject to any prior or

> contemporaneous oral or written agreements. The undersigned parties affirm that they have not relied on any representations *not expressed in this Agreement* in deciding to enter into this Agreement. The undersigned parties further affirm that they are relying solely on their own judgment (and the advice of their own counsel) in deciding to enter into this Agreement.

(Emphasis added.) This clause clearly expressed the parties' agreement that, in entering into the contract, they were not relying on any representations not expressed in the Purchase Agreement itself.

HGLA based its fraudulent inducement claim in part on express representations that are contained within the Purchase Agreement itself: representations that Jetall owned the 2425 Property; Jetall "has all requisite power and authority" and has "obtained all necessary consents, to execute and deliver this Agreement and perform its obligations hereunder"; and no lawsuit or other proceeding was pending against Jetall at the time it signed the Purchase Agreement. The Purchase Agreement included a provision stating that Jetall's representations, warranties, and covenants "shall be true and correct as of the Acceptance Date and as of the Closing Date," and that HGLA's rights to enforce such representations and warranties survived Closing for six months.

When considering the plain language of the disclaimer of reliance provision, as well as the Purchase Agreement as a whole, we conclude that the parties did not intend to disclaim reliance on representations that are contained in the contract itself. *See Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 615 S.W.3d 144, 148 (Tex.

2020) (stating that ultimate goal in construing contract is to "determine the parties' intent as objectively expressed in the words of their agreement"). We reverse the summary judgment with respect to HGLA's fraudulent inducement claim based upon allegations that appear in the contract.

***D. Basis of the Developers' Fraudulent Inducement Claim***

A promise of future performance constitutes an actionable misrepresentation if, at the time the promise was made, the promisor had no intention to perform. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (per curiam); *Formosa Plastics*, 960 S.W.2d at 48; *see also IBM*, 573 S.W.3d at 228 (stating that, in fraudulent inducement claim, misrepresentation can occur when defendant falsely promises to perform future act while having no present intention to perform it).

Although a fraudulent inducement claim may be premised on a promise of future performance made with no present intention to perform, that is not the only way in which a plaintiff can establish a fraudulent inducement claim. Instead, the Texas Supreme Court has acknowledged that fraudulent inducement claims can be based on "direct [false] representations of present facts." *See Trenholm v. Ratcliff*, 646 S.W.2d 927, 931 (Tex. 1983); *Edward Thompson Co. v. Sawyers*, 234 S.W. 873, 874 (Tex. 1921) ("Promises made without intention of fulfillment, in order to induce others to make contracts, are as culpable and as harmful as are willful

misrepresentations of existing facts. Hence contracts may be avoided alike for such fraudulent promises and for such misrepresentations.”).

HGLA alleged that Jetall made misrepresentations that induced it to sign the Purchase Agreement, including misrepresentations that a contract for deed was an insurable interest in Texas; Jetall owned the 2425 Property; Jetall could grant a permanent access easement through the 2425 Property; Jetall could grant a parking lease on the 2425 Property; Jetall was not involved in any litigation at the time the parties executed the Purchase Agreement; and Jetall would have title to the property at the Contract Closing Date when the parties signed the contract for deed.

Three of these representations closely related to Jetall’s obligations under the Purchase Agreement—its ability to grant a permanent easement and parking lease on the 2425 Property and its possession of title to the subject property on the Contract Closing Date. Two of the representations—Jetall’s ownership the 2425 Property and its non-involvement in litigation—are alleged to be representations of existing facts. HGLA’s fraudulent inducement claim is thus based on more than allegations that Jetall made promises to perform contractual obligations with no present intent to perform. Thus, the trial court erred in concluding that the claim consisted only of false promises of future performance. We reverse the judgment on HGLA’s fraudulent inducement claim and remand for further proceedings.

To summarize, in its February 2016 summary judgment order, the trial court specified multiple grounds for rendering summary judgment against HGLA on its fraudulent inducement claim: the economic loss rule, the merger clause contained in the Purchase Agreement, and the court's belief that HGLA's fraudulent inducement claim was predicated on false promises of future performance without evidence that the sellers did not intend to perform when they made the alleged representations. In its cross-appeal, HGLA challenges each of these grounds. We have addressed each ground and determined that none of them are meritorious. *See Cates*, 927 S.W.2d at 626 ("We hold that courts of appeals should consider all summary judgment grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal when reviewing a summary judgment.").

HGLA also argues that it conclusively established all elements of its fraudulent inducement claim. Under *Cates*, because HGLA preserved these grounds for our review via its cross-appeal, we have discretion whether to review them in the interest of judicial economy. *See id.* ("We further conclude that the appellate court may consider other grounds that the movant preserved for review and trial court did not rule on in the interest of judicial economy."). In light of the fact that we must remand a portion of this case so the trial court can determine HGLA's damages and reasonable attorney's fees with respect to its breach of contract claim, we decline to exercise our discretion to review the additional grounds raised by HGLA. Instead,

we remand HGLA's fraudulent inducement claim for the trial court to determine, in the first instance, whether HGLA either established its fraudulent inducement claim as a matter of law.

## CONCLUSION

We reverse the summary judgment order dismissing HGLA's breach of contract claim and ruling that the sellers were entitled to retain the earnest money deposit and negotiation fee. We render judgment that Jetall and West Loop materially breached the Purchase Agreement and remand the claim for further proceedings, including a determination of damages caused by the material breach. We also reverse the trial court's summary judgment order dismissing HGLA's claim for Chapter 38 attorney's fees and remand the claim for further proceedings. We further reverse the trial court's summary judgment order dismissing HGLA's fraudulent inducement claim against Jetall and remand the claim for further proceedings. We affirm the judgment in all other respects.

April L. Farris
Justice

Panel consists of Justices Kelly, Hightower, and Farris.