Opinion issued April 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00104-CV

PROSPER FLORIDA, INC., Appellant

V.

SPICY WORLD OF USA, INC., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 1109348

O P I N I O N

Prosper Florida, Inc. sued Spicy World of USA, Inc., alleging that Spicy World failed to pay for a bulk shipment of black pepper. After a bench trial, the trial court entered a final judgment in which it ordered that Prosper Florida take nothing

by way of its claims and pay Spicy World's costs and attorney's fees. Prosper Florida appeals, asserting the trial court erred in:

(1) rendering a take-nothing judgment against Prosper Florida because it conclusively proved a right to recover in contract;

(2) awarding Spicy World its attorney's fees even if the take-nothing judgment against Prosper Florida is not erroneous;

(3) failing to enter findings of fact and conclusions of law in accord with Prosper Florida's request that the court do so; and

(4) sanctioning Prosper Florida's counsel $1,000 for discovery abuse.

We agree the trial court erred in awarding Spicy World its attorney's fees but reject the remainder of Prosper Florida's appellate issues. We modify the trial court's judgment to delete the fee award and affirm the judgment as modified. We dismiss Prosper Florida's challenge of the discovery sanction, which the trial court imposed on Prosper Florida's counsel in a post-judgment order, for lack of jurisdiction.

BACKGROUND

Introduction

Prosper Florida sold Spicy World a bulk shipment of black pepper. It is undisputed that Spicy World accepted and paid for the shipment. But there is a twist: Spicy World's payment, made by wire transfer, was fraudulently misdirected to an unauthorized party. Prosper Florida asserts that though the identity of the defrauder is unknown, Spicy World still must pay Prosper Florida for the shipment. Spicy

World, in turn, maintains that since Prosper Florida's manager provided the wire instructions, he must be the defrauder and Prosper Florida has to bear the loss.

Bench Trial

The parties tried their claims to the bench. Prosper Florida called four witnesses: its owner and president, a computer expert who analyzed the e-mail communications between the parties, the vice president of Spicy World, and the manager of Spicy World who communicated with Prosper Florida's manager about the pepper sale. Spicy World recalled Prosper Florida's owner and president.

Prosper Florida sold pepper in bulk to Spicy World twice. The first sale was uneventful. Prosper Florida sold 3,000 pounds of pepper for $9,300, which Spicy World paid for by check through the mail. The second sale went awry. Prosper Florida sold 6,000 pounds for $16,950 but did not receive the payment. When its manager, Brahma Prathi, inquired about payment, Spicy World's manager, Sachin Agrawal, responded that payment was made by wire transfer per Prathi's request. Whether Prathi actually requested payment by wire transfer is one of the disputes at the heart of this case.

At trial, the parties introduced e-mails Prathi ostensibly sent to Agrawal requesting that Spicy World pay for the second shipment of pepper by wire transfer to an offshore account due to a problem with Prosper Florida's usual bank account. Within a month's time, Agrawal received three sets of wire instructions purportedly

from Prathi. Each set of instructions involved a different bank in the United Kingdom. The final set of instructions directed Spicy World to transfer funds to Barclays Bank, which is the account to which Spicy World wired the $16,950 it owed. But Prosper Florida does not have an account with Barclays Bank.

Prathi denied sending the wire-transfer e-mails. In the final e-mail exchange between him and Agrawal, Prathi explained: "[I]t seems someone is using my name, my email and my telephone number and unfortunately they provided a bank account number which is in the UK, which has no connection with me or Prosper Florida." Prathi asserted that Spicy World had been defrauded and that Spicy World should pursue the matter with law-enforcement authorities and its own bank. Prathi also requested payment by check. Agrawal responded, "I have told you multiple times that I have received phone calls from you. There were multiple emails sent within the past two weeks, many of which you confirmed to me that they were in fact from you. You may be the fraudulent person in all of this, I don't know." Agrawal asserted that this was Prosper Florida's problem, and he stated that Spicy World would not be making "any additional payment" for the second shipment of pepper.

Despite the pivotal role Prathi played in the underlying sales of pepper, he neither attended trial nor testified. Instead, Mohammed Farooq Khan, Prosper Florida's owner and president, took the stand on the company's behalf.

Khan testified that Prosper Florida is a Florida company that imports spices and other products from Brazil and distributes them in the United States. At the time of the two pepper sales to Spicy World, Khan resided in Brazil. Thus, he was not involved in these sales other than internally approving the price. Instead, Prathi, who was the company's general manager at the time, handled both sales and interacted directly with Spicy World. Khan testified that, as general manager, Prathi was in charge of the day-to-day operations of Prosper Florida and had the authority to make sales on the company's behalf.

By the time litigation began, Prathi was no longer employed by Prosper Florida. Khan testified he terminated Prathi's employment but denied he did so due to the events underlying this suit. At his deposition, however, Khan had stated the contrary, testifying he had fired Prathi at least in part due to the loss Prosper Florida suffered in the second sale to Spicy World. When confronted with his deposition, Khan admitted "it was one of the reasons" but denied it was "a major factor for the termination."

Khan contacted the company that hosts Prosper Florida's internet domain to inquire whether it had been hacked. He testified the hosting company told him the domain had not been hacked. Khan also testified there had not been an information-technology breach at Prosper Florida. Khan nevertheless did not think Prathi participated in any fraud. When asked if he had investigated the possibility that

Prathi was involved, Khan testified, "There's no way for me to find out. I mean, from my understanding he was not involved. I don't think he was involved. He is an honest person."

Contrary to Agrawal's statement about phone calls from Prathi in the final e-mail between the parties, Khan testified that Prathi said he never got a call from Agrawal about the alleged wire instructions before the transfer. Prathi also told Khan that he did not speak with Agrawal by phone after the payment dispute arose. Prathi told Khan that he assumed an imposter had been on any such call imitating Prathi's voice.

Khan testified that Prosper Florida informed local law enforcement about the fraud. He stated that he thought Prathi had contacted the Federal Bureau of Investigation as well. One of Prosper Florida's exhibits confirmed that Prathi filed an online internet-crime complaint with the Bureau.

Adrian Alba, a computer systems administrator at the University of Miami, testified as an expert for Prosper Florida. Prosper Florida hired him to examine two separate batches of data to ascertain how the fraud in this case occurred: Prosper Florida's .pst files and Spicy World's .eml files, which he described as two different formats in which e-mails are stored. His examination focused on e-mail headers, which are present in all e-mails but are not normally visible to those sending and receiving them. These headers contain various data, such as internet protocol

addresses, the time of sending, and the way in which the message was accessed. According to Alba, while most people do not know what an e-mail header is, it does not take any particular expertise to access a header and examine it.

Based on his examination, Alba concluded that Prosper Florida did not send the wire instructions contained in the e-mails sent from Prathi's e-mail address to Agrawal at Spicy World. He opined that Prosper Florida's account had been phished by an unknown party. That is, Alba concluded that someone had fraudulently accessed and used Prosper Florida's account by obtaining Prathi's login credentials through some online subterfuge and then used this illicit access to send e-mails to Spicy World. Alba could not identify the party who fraudulently accessed Prathi's account, nor could he say whether this party was associated with Spicy World. But he did conclude that the phisher could not have been Prathi himself.

Spicy World's data contains many e-mails between the parties that Prosper Florida's data lacks. These included the e-mails ostensibly from Prathi transmitting wire instructions to Agrawal as well as an e-mail from Agrawal to Prathi notifying the latter that Spicy World had wired payment to the Barclays Bank account. Alba stated that he thought these e-mails may have once existed in Prosper Florida's data but had been deleted by the party who phished Prathi's account to conceal the fact that the account had been compromised. That said, Alba acknowledged there is "no way" he could personally ascertain whether these e-mails had once existed in but

since been deleted from Prosper Florida's data. Alba testified there are professionals who have the expertise necessary to determine whether e-mails had been deleted from Prosper Florida's data but that he does not possess this expertise. Alba's conclusions therefore rested on the data he had, but he admitted he could not verify the data's completeness.

Alba also found that Prathi received and responded to multiple e-mails purporting to be from or to Agrawal, but which were in fact from or to an imposter account with an e-mail address that was identical to Agrawal's but for the transposition of two letters. Alba concluded that the same person or persons, if multiple people were involved, controlled or had access to both Agrawal's legitimate account and its imposter. He based this conclusion on an examination of almost identical duplicate messages with minor differences that were sent from both Agrawal's legitimate account and its imposter account, which, in Alba's opinion, indicated that some of this duplicate material had been copied from messages sent from one account and then pasted into messages sent from the other one.

In addition, Alba discussed an e-mail chain between Prathi and Agrawal about the number of pallets being shipped. Alba described this chain as showing the imposter account e-mailing Prathi, Prathi responding to the imposter, and Agrawal's legitimate account then replying to Prathi's response. Alba opined that this chain

likewise showed that the same person or persons had access to Agrawal's legitimate e-mail account and its imposter.

Alba excluded Prathi as a perpetrator of the fraud based on "some anomalies" in the data. First, there were time-zone differences in e-mails, including the ones about wire transfers, "where an e-mail would come in and be replied to and the time stamp would change indicating that it was sent in a different zone five hours ahead, indicating it was somewhere in the UK." He further noted that most of the e-mails from the Agrawal imposter account "came from a central European time zone." In Alba's opinion, these time-zone differences made it unlikely that Prathi sent the e-mails in question, including the ones with wire instructions, because Prathi was located in Florida, which is not in the same time zone as the UK or central Europe.

Second, Alba opined that all the e-mails ostensibly from Prathi that appeared in Spicy World's data but were absent from Prosper Florida's data were sent via webmail rather than an e-mail application like Microsoft Outlook. In contrast, Alba stated that Prathi almost never used webmail with respect to his undisputed e-mails.

But on cross-examination, Alba conceded that Prathi sent legitimate e-mails via webmail in addition to the ones Alba described as illegitimate. Alba maintained that Prathi rarely used webmail in his legitimate e-mails, but Alba also acknowledged that he did not review all the e-mails between the parties that existed in Prosper Florida's data. In addition, Alba acknowledged that, in general, he did not

review internal e-mails between Prosper Florida's own personnel. So Alba did not know how many internal e-mails there were about the events underlying the suit, but he agreed that some of Prathi's internal e-mails to Khan were sent via webmail.

Moreover, though Alba agreed the time-zone anomaly was one of the significant patterns he relied on for his opinions, he conceded this particular anomaly showed up in e-mails ostensibly from Prathi and Agrawal alike. Alba also conceded that time-zone data is not a foolproof indication of an e-mail's origin. A person e-mailing from the United States can effectively falsify this data to give the appearance of being elsewhere in the world. For example, someone who wants to obscure their location can use a virtual private network, or VPN, to make it appear that they are e-mailing from another place. Alba agreed that the person or persons committing fraud could have used a VPN to mask themselves, and he conceded that there is no way to ascertain whether this was done with respect to the e-mails sent via webmail. Alba further agreed that use of a VPN could account for the time-zone anomaly. According to Alba, VPNs are inexpensive and commonplace.

Finally, Alba testified that the phishing attempts did not cease after the second sale. Long after the parties ceased communicating with one another, Prosper Florida received another e-mail from the Agrawal imposter account. Though it came from the imposter e-mail account, it was masked to appear as though it came from HSBC

Bank and contained a hyperlink that, while dead by the time Alba found it, presumably linked to some type of malicious software.

Agrawal testified that Spicy World buys between 40,000 to 50,000 pounds of black pepper per year and resells about 1,000 pounds per week. He buys and sells on the company's behalf. In the purchases Agrawal made from Prosper Florida, he communicated solely with Prathi. Agrawal has met Prathi in person. Agrawal testified that Prathi has been to Spicy World's Houston office and that he is familiar with Prathi's voice because the two spoke on the telephone "almost every week" during the relevant timeframe.

According to Agrawal, he initially balked at paying for the second pepper shipment by wire transfer. E-mails from Agrawal's legitimate e-mail account seem to corroborate Agrawal's testimony. For example, Agrawal asked why Prathi was asking him to transfer funds "to an offshore account when we are being billed by a USA company?" Unsatisfied with the explanation Prathi ostensibly provided about difficulties with Prosper Florida's usual bank account, Agrawal protested that he could not "be billed from one entity and pay another, especially when it is offshore." Agrawal testified the request to wire funds to an account in the United Kingdom made him suspicious. He stated he only agreed to wire the funds as instructed after speaking with Prathi on the telephone. According to Agrawal, Prathi explicitly

confirmed during the call that Prosper Florida wanted Spicy World to pay by wire transfer to a bank in the United Kingdom.

Agrawal conceded he did not confirm the specific bank or account information with Prathi during the phone call. Agrawal explained that he had not realized the multiple e-mails conveying wire instructions identified three different banks in the United Kingdom. He testified he did not examine the bank information in these e-mails closely as "they all looked the same" from casual inspection. Accordingly, Agrawal pulled up the most recent e-mail—the one requesting funds be transferred to Barclays Bank—and asked his brother, Ashish, to wire the funds to it. Agrawal agreed that he would have noticed that there was information for three distinct banks if Spicy World had updated its payment records each time it received one of these wire-transfer e-mails ostensibly from Prathi.

Agrawal testified he only learned that Prosper Florida did not receive payment after Prathi called and e-mailed him about the issue. Agrawal then confirmed that Barclays Bank had received the funds.

Agrawal further testified that he is not computer savvy and has not had any advanced computer training. He denied having any association with or control over the Agrawal imposter e-mail account. Agrawal said he did not know the imposter account existed until after this suit was filed.

Ashish Agrawal, who is Spicy World's vice president, briefly took the stand. He confirmed he made the wire transfer at his brother's request. His brother gave him the necessary wire instructions. At the time, Ashish did not know Spicy World had received wire instructions for three different banks in the United Kingdom.

Trial Court's Judgment

After the parties rested, the trial court stated it did not think the evidence "established or identified who the bad actor may have been." And because Prathi did not testify at trial, the trial court was of the opinion that there "was no evidence" contradicting Sachin Agrawal's testimony that he confirmed payment was to be made by wire transfer to a bank in the United Kingdom in a telephone conversation with Prathi before wiring the funds. The trial court later signed a take-nothing judgment as to Prosper Florida's claims and ordered it to pay $2,120.40 in costs and $55,594.50 in attorney's fees to Spicy World.

PROSPER FLORIDA'S CONTRACT CLAIM

Prosper Florida asserted multiple causes of action against Spicy World. On appeal, however, the issues have narrowed. Prosper Florida contends the trial court erred in rendering judgment for Spicy World because Prosper Florida conclusively proved its right to recover under Section 2.709 of the Uniform Commercial Code, which authorizes a suit to recover the price and incidental damages when a buyer "fails to pay the price." TEX. BUS. & COM. CODE § 2.709.

Under Section 2.709, Prosper Florida argues, a buyer must pay the seller for any goods accepted no matter what transpires. According to Prosper Florida, "any failure to pay—even if the buyer acted in good faith—constitutes a breach that is inexcusable." Prosper Florida maintains that Section 2.709 supplants the common law of contracts and disallows any defense to payment under all circumstances. Because the undisputed evidence shows Spicy World accepted the second shipment of pepper but did not pay Prosper Florida, Prosper Florida maintains the evidence conclusively proves Spicy World's liability for the agreed price.

In addition, Prosper Florida argues that even if Section 2.709 permitted Spicy World to assert some contractual defense to payment, the UCC imposes an obligation of good faith that would defeat any such defense as a matter of law. According to Prosper Florida, substantial evidence shows Spicy World failed to act in good faith by disregarding its own concerns about paying by wire transfer under the circumstances, which include conflicting wire instructions to multiple offshore bank accounts despite having paid by check in the preceding pepper sale.

Finally, Prosper Florida further argues that even if Section 2.709 permitted Spicy World to assert some contractual defense to payment, Alba's expert testimony conclusively established Prosper Florida did not send the wire instructions that Spicy World received. Prosper Florida maintains Alba's testimony on this subject was uncontradicted and therefore conclusively established Prosper Florida was not the

party that defrauded Spicy World, a fact which the trial court improperly disregarded in rendering a take-nothing judgment.

Standards of Review

To the extent we must interpret provisions of the Uniform Commercial Code, statutory interpretation presents a question of law subject to de novo review. *Regent Care of San Antonio v. Detrick*, 610 S.W.3d 830, 834 (Tex. 2020). In general, when interpreting a statute, we try to ascertain and give effect to the Legislature's intent, which we discern from the plain meaning of the statute's words, unless a different meaning is supplied, is apparent from context, or the plain meaning of the words leads to absurd or nonsensical results. *El Paso Educ. Initiative v. Amex Props.*, 602 S.W.3d 521, 531 (Tex. 2020). However, when a statute is silent on a particular subject, we may consider the statute's purpose for guidance. *PPG Indus. v. JMB/Houston Ctrs. Partners Ltd. P'Ship*, 146 S.W.3d 79, 84 (Tex. 2004).

At trial, Prosper Florida sought to recover the contract price for the second sale of pepper from Spicy World. Prosper Florida therefore bore the burden to prove by a preponderance of the evidence the affirmative of the issue or issues upon which it relied for recovery. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings*, 572 S.W.3d 213, 221 (Tex. 2019); *see also Nazareth Int'l v. J.C. Penney Co.*, 287 S.W.3d 452, 457–58 (Tex. App.—Dallas 2009, pet. denied) (plaintiff bore burden of proof in action for price of goods).

When, as here, a party with the burden of proof loses at trial and asks us to render judgment in its favor, the party must show that the evidence conclusively proves its entitlement to judgment. *Barnes v. Mathis*, 353 S.W.3d 760, 762 (Tex. 2011) (per curiam). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). In general, we recognize several types of evidence as being conclusive, including undisputed evidence that allows just one logical inference, undisputed evidence of undeniable physical facts, undisputed evidence admitted to be true, and disputed evidence that definitively negates contrary proof in some fashion, such as a scientifically reliable diagnostic test establishing paternity in the face of contrary testimony. *Id.* at 814–16. Unless the evidence is conclusive, the factfinder is entitled to weigh the evidence and to assess witness credibility. *See id.* at 816–17.

Applicable Law

Under the Uniform Commercial Code, a seller may recover the price of goods accepted, together with any incidental damages, if the buyer fails to pay the price when due. TEX. BUS. & COM. CODE § 2.709(a)(1). An official comment to Section 2.709 specifies that it "is intended to be exhaustive in its enumeration of cases where an action for the price lies." *Id.* § 2.709 cmt. 6. Though official UCC comments like this one are not legally binding, they are persuasive authority concerning

interpretation of the statute's language. *Fetter v. Wells Fargo Bank Tex.*, 110 S.W.3d 683, 687 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

The UCC mandates that unless displaced by its provisions, "the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." TEX. BUS. & COM. CODE § 1.103(b). Consistent with this directive, we have held that the UCC supplants the common law solely when the common law conflicts with the provisions of the UCC. *Contractors Source v. Amegy Bank Nat'l Ass'n*, 462 S.W.3d 128, 138 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Analysis

On its face, Section 2.709 does not address the circumstances before us. In relevant part, the statute merely states the obvious: a buyer must pay for the goods it accepts, and the seller may sue for the price when the buyer fails to pay the price as it becomes due. TEX. BUS. COM. CODE § 2.709(a)(1); *see also id.* § 2.301 (buyer's obligation "is to accept and pay in accordance with the contract"); *id.* § 2.607(a) ("The buyer must pay at the contract rate for any goods accepted."). Section 2.709 ensures that both parties honor the terms of sale so that neither suffers a loss: the buyer gets the goods, and the seller gets paid. *See, e.g.*, *Genender v. USA Store Fixtures*, 451 S.W.3d 916, 923–24 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

(buyers received and accepted shelving and their failure to pay seller was breach of contract under UCC). But Section 2.709 does not purport to allocate losses between a seller and buyer of goods caused when someone fraudulently misdirects payment for the goods to an unauthorized party. And consistent with its official comments, we should not extend Section 2.709's reach beyond its express terms. *See* TEX. BUS. & COM. CODE § 2.709 cmt. 6 (statute exhaustively identifies situations in which it applies and is intended to limit action for price to these situations).

In our case, it is undisputed that Spicy World accepted the black pepper and that Spicy World paid the contract price. But someone—the evidence is disputed as to this someone's identity—fraudulently misdirected Spicy World's payment to an unauthorized party. Under these circumstances, either Prosper Florida or Spicy World will suffer a loss. If we hold that Spicy World must pay Prosper Florida, Spicy World will have to pay twice for the same pepper. If we hold that Spicy World does not have to pay Prosper Florida, Prosper Florida will go unpaid for pepper it sold and delivered. Section 2.709 does not address how to allocate this loss, particularly in a case like this one in which both sides suggest the other—or one of their respective employees—was a party to the fraud.

Given the silence of Section 2.709 on the issue, who does the law saddle with this loss and why? There does not appear to be a Texas decision addressing these questions on similar facts. But in *J.F. Nut Co. v. San Saba Pecan*, the United States

District Court for the Western District of Texas confronted a scenario like our own. No. A-17-CV-00405-SS, 2018 WL 7286493 (W.D. Tex. July 23, 2018).

In *J.F. Nut*, a Mexican wholesale nut supplier made several sales to a Texan pecan reseller. *Id.* at *1. The reseller bought pecans from the supplier several times and paid for them without incident using wire instructions sent by the supplier via e-mail. *Id.* The reseller later received revised wire instructions via e-mail and made payments totaling over $1 million using the revised instructions. *Id.* But the supplier claimed it never received the payments and that an unauthorized third-party hacked its e-mail account and was responsible for sending the revised and fraudulent wire instructions. *Id.* After the reseller refused to pay the supplier the amounts the supplier claimed not to have received, the supplier filed suit alleging several causes of action, including breach of contract. *Id.*

Both sides moved for summary judgment on various grounds. *Id.* at *2–4. In particular, the supplier moved for summary judgment on its breach of contract claim, which was governed by the parties' contract and the UCC, including Sections 2.301, 2.607, and 2.709. *Id.* at *2. In the absence of Texas authority on the subject, the district court found persuasive two other federal district court decisions that "determined liability for the misdirected payment should turn on the respective fault of the parties for the same." *Id.* at *3 (relying on *Arrow Truck Sales v. Top Quality Truck & Equip.*, No. 8:14-CV-2052-T-30TGW, 2015 WL 4936272, at *5–6 (M.D.

Fla. Aug. 18, 2015), and *Meritdiam, Inc. v. Facets Fine Jewelry*, No. CV-14-07041-MWF, 2015 WL 12660377, at *6 (C.D. Cal. Apr. 27, 2015)). As the respective fault of the supplier and reseller for the misdirected payments presented a question for a factfinder to decide given the summary-judgment evidence, the trial court denied the supplier's summary-judgment motion as to the contract claim. *Id.*

We likewise are persuaded that the correct rule is that any loss resulting from fraudulently misdirected payments should be placed on whichever party to the contract the factfinder finds to be most at fault for the misdirection. This rule comports with Texas common law, which generally holds that when allocating a loss between two parties resulting from another's fraud, the loss should fall on the one who enabled the fraud to happen. *See Morgan v. Harper*, 236 S.W. 71, 73 (Tex. Comm'n App. 1922, holding approved) (when one of two innocent parties must suffer due to fraud of another, loss should fall on person whose negligence enabled wrongdoer); *see also Luse v. Crispin Co.*, 344 S.W.2d 926, 932 (Tex. App.—Houston [1st Dist.] 1961, writ ref'd n.r.e.) (when one of two people entitled to equal consideration must suffer due to third-party's misconduct, loss should fall on person who had knowledge and means to protect himself but failed to do so).

This fault-based rule, which finds expression in various forms depending on the context in which it is applied, has a substantial pedigree, having been recited with approval by our Supreme Court at least as far back as the middle of the

nineteenth century. *See Kesler v. Zimmerschitte*, 1 Tex. 50, 56 (1846) (stating that "he who trusts most, where one of two innocent persons is to suffer, shall lose most"). Texas appears to have inherited this general principle from England's common law, which Texas adopted not long before *Kesler* was decided. *See Lickbarrow v. Mason* (1787) 2 T.R. 63, 70 (Ashhurst, J.) ("We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."); George C. Butte, *Early Development of Law & Equity in Texas*, 26 YALE L.J. 699, 700 (1917) (Republic of Texas in 1840 adopted English common law so far as it was not inconsistent with Texas's constitution and statutes).

While there is not a modern Texas decision applying this fault-based rule to a sale of goods, there is at least one older decision applying it on facts reminiscent of our fraudulently misdirected wire transfer. In *Western Union Telegraph Co. v. Cosby*, the appellee, Cosby, and a good friend, Langlois, were occasional business partners. 99 S.W.2d 662, 662 (Tex. App.—Fort Worth 1936, writ dism'd). Now and again, Langlois would send Cosby money in connection with some venture. *Id.* On the occasion at issue, an imposter telephoned Langlois, represented he was Cosby, and asked Langlois to send him $400 through Western Union. *Id.* at 662–63. Langlois believed the imposter and sent the money, which the imposter collected. *Id.* The contract between Langlois and Western Union allowed Langlois to require

the company to positively identify the payee or ask the payee a test question, but Langlois waived these security measures and assumed the risk that the funds might be erroneously paid to someone other than the intended payee. *Id.* Despite the waiver, a Western Union employee made the imposter answer several questions as well as a test question, devised by Langlois and correctly answered by the imposter, before paying the imposter the $400. *Id.* at 663–64. Cosby sued Western Union to recover the $400, claiming Langlois had sent the money to him and Western Union had been negligent in paying the money to the imposter. *Id.* at 663. Because Langlois had waived positive identification of the payee and Western Union had exercised ordinary care to identify the payee, the court of appeals held there was no issue to submit to the jury. *Id.* at 664. The court explained that Langlois and Western Union were both innocent parties defrauded by the imposter and that under these circumstances "the loss must be borne by the one who primarily made such loss possible," who was Langlois. *Id.* Thus, Western Union was not liable to Cosby. *Id.* And, by extension, Langlois could not have recovered from Western Union either.

In our case, the trial court effectively applied this fault-based rule without explicitly articulating it by evaluating whether Prosper Florida or Spicy World bore the most blame or responsibility for the fraudulent misdirection of payment to an unauthorized party. Though the trial court made no formal findings of fact or conclusions of law, it stated on the record that:

- Agrawal testified he confirmed by telephone with Prathi that payment should be wired to an account in the United Kingdom; and
- as these two were the only parties to the telephone call and Prathi did not testify, there was no evidence contradicting Agrawal's account.

Based on Agrawal's call to Prathi, the trial court implicitly found Prosper Florida bore the most blame or responsibility for the fraudulently misdirected payment and rendered a take-nothing judgment on Prosper Florida's claims.

The trial court misspoke in part when it described the state of the evidence. Some evidence does contradict Agrawal's version of events—namely, Khan's testimony that Prathi told Khan this call did not happen. Though Khan's testimony is hearsay, Spicy World did not object to its admissibility. Hence, the trial court was not free to deny Khan's testimony probative value merely because it was hearsay. TEX. R. EVID. 802. But the trial court, sitting as factfinder, was entitled to weigh the evidence as a whole and find Agrawal's firsthand account more persuasive than Khan's secondhand one. *Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 53 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Hence, the trial court could have reasonably found Agrawal called Prathi to confirm the wire instructions, and that in doing so, Spicy World did what was reasonably within its power to prevent the loss. *Cf. Jetcrete N. Am. v. Austin Truck & Equip.*, 484 F. Supp. 3d 915, 920–91 (D. Nev. 2020) (finding after bench trial that buyer had been in best position to prevent fraudulent misdirection of payment to unauthorized third-party because buyer had

opportunity to verify new wire instructions with seller by telephone and holding that buyer thus could not recover second payment made to seller after original payment was misdirected because buyer did not verify new wire instructions); *Arrow Truck Sales*, 2015 WL 4936272, at *4–6 (finding after bench trial that would-be buyer had been in best position to prevent fraudulent misdirection of payment to unauthorized third-party because conflicting wire instructions should have prompted buyer to verify correct instructions but buyer did not make any effort to do so).

At trial, both Prosper Florida and Spicy World agreed that the latter's payment was fraudulently misdirected to an unauthorized party. Prosper Florida maintains that Agrawal should have detected that fraud was afoot beforehand and acted to prevent the misdirection based on e-mails conveying conflicting wire instructions for payment. But if one credits Agrawal's account about his telephone call to Prathi confirming the wire instructions, as the trial court did and was entitled to do as factfinder, Agrawal's testimony shows that he took steps to guard against the possibility of fraud and necessarily gives rise to an inference that Prathi was the perpetrator of the fraud or a party to it. Even though there is no evidence in the record suggesting that Khan himself was or reasonably should have been aware of the fraud, the evidence established that Prathi, as Prosper Florida's general manager, was responsible for interacting directly with Spicy World about the sale of pepper. In the context of the facts presented here, "where one of two innocent persons must sustain

a loss, he must bear it who is most in fault, and, if by misplaced confidence he enables another to commit a fraud, it is but just that he should pay the penalty of his own indiscretion." *Erwin v. Curtis*, 5 S.W.2d 547, 549 (Tex. App.—Eastland 1928, writ ref'd) (quoting treatise); *see also, e.g.*, *Tex. Bank & Tr. in Wichita Falls v. Helmcamp*, 506 S.W.2d 667, 670–71 (Tex. App.—Fort Worth 1974, no writ) (as between two innocent parties, one who enabled wrongdoer to misappropriate funds by giving wrongdoer unlimited access to them had to bear loss resulting from misappropriation); *State v. Mason*, 362 S.W.2d 419, 420–21 (Tex. App.—Austin 1962, writ ref'd n.r.e.) (as between two parties innocent of wrongdoing, one who empowered third-party to acquire disputed funds by placing them in registry of court and thereby making them available to third-party had to bear resulting loss). Thus, absent a showing that Spicy World was more responsible for enabling Prathi's wrongdoing than Prosper Florida, the trial court did not error in rendering a take-nothing judgment on Prosper Florida's claims.[1]

[1] The common-law rule we apply "is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person, whose acts or negligence have enabled such third person to occasion the loss, and that the party has been held responsible for the acts of those in whom he had trusted, upon grounds analogous to those which govern the relation of principal and agent." *Landon v. Foster Drug Co.*, 186 S.W. 434, 435–36 (Tex. App.—Dallas 1916, no writ). But the parties have not framed their disputes in terms of the law governing agents and principles, so we do not address or apply agency principles in our opinion.

Based on the evidence at trial, the trial court implicitly found Prosper Florida was most at fault for the loss. And, on the record before us, we cannot say Prosper Florida conclusively proved otherwise or proved that no evidence supports the trial court's implicit finding.[2]

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[2] Prosper Florida asks us to reverse the trial court's judgment and render judgment in its favor for the contract price, incidental damages, and attorney's fees.

When an appellant seeks reversal and rendition, the standard of review varies depending on whether he or his adversary bore the burden of proof at trial. If the appellant had the burden of proof at trial, then he must show that the evidence conclusively proves the findings required to support the judgment he seeks. *Barnes*, 353 S.W.3d at 762. If the other side had the burden of proof at trial, then the appellant must show that no evidence supports the findings he challenges on appeal. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 162 (Tex. 2012) (rendition against party who bore burden of proof at trial is proper when no evidence supports trial court's judgment); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011) (when appellant attacks legal sufficiency of evidence supporting adverse finding on issue for which he did not have burden of proof at trial he must show that no evidence supports finding); *see also Carrasco v. Stewart*, 224 S.W.3d 363, 367 (Tex. App.—El Paso 2006, no pet.) (explaining how standard of review varies depending on burden of proof below when appellant seeks reversal and rendition of judgment in his favor after trial).

At trial, Prosper Florida claimed it was entitled to payment under the contract, arguing that Spicy World bore the blame for the fraudulent misdirection of payment to an unauthorized party. We acknowledge that there does not appear to be any authority squarely addressing who, as between two innocent parties, carries the burden to prove which side was more responsible for the loss when a payment is fraudulently misdirected to an unauthorized party. And we need not, and do not, definitively resolve this issue today, because it would not alter the outcome.

Assuming Prosper Florida bore the burden of proof, it failed to show the evidence conclusively establishes Spicy World was more at fault for the fraudulent misdirection. Assuming Spicy World bore the burden of proof at trial, Prosper Florida would have to show no evidence supports the trial court's finding to obtain reversal and rendition on appeal. *See Nat. Gas Pipeline Co. of Am.*, 397 S.W.3d at 162; *Exxon Corp.*, 348 S.W.3d at 215; *see also Carrasco*, 224 S.W.3d at 367. Agrawal's testimony that he called Prathi to confirm the wiring instructions is some evidence from which the trial court could

Prosper Florida tries to avoid this outcome on several grounds. It argues that the outcome is instead controlled by *American Railway Express Co. v. Voelkel*. In *Voelkel*, the facts were complicated, but the issue was not. The buyer contracted to buy some oil-drilling machinery cash on delivery. 252 S.W. 486, 487 (Tex. Comm'n App. 1923). Before delivery, the buyer resold part of this machinery to another oilman, who accepted delivery of this part when it arrived. *Id.* at 487. By mistake, the delivery company did not collect payment when the other oilman took delivery even though the shipping documents stated payment was due at that time. *Id.* Having paid the original buyer (or rather having received a credit with an oil company for whom both men worked), the other oilman was not aware the part had been shipped cash on delivery until months after the fact, though the shipping documents would have disclosed that payment was due on delivery had he examined them. *Id.* at 487–88, 491. In other words, neither the original buyer nor the other oilman paid the seller for this part. *Id.* at 487, 489. As a result, the delivery company paid the seller, was assigned the seller's rights, and then sued the oilman who took delivery. *Id.* at 487–88. On these facts, the Commission of Appeals held for the delivery company, sensibly observing that the original buyer and other oilmen could not defeat the delivery company's right to recover by their dealings with one another. *Id.* at 491.

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have reasonably found that Prosper Florida was more responsible for the loss. Thus, Prosper Florida could not secure reversal and rendition of judgment in its favor even under a no-evidence standard.

Voelkel bears no resemblance to our case. There, the facts were "largely without dispute." *Id.* at 488. Though the delivery company sued for conversion, it did not allege fraud or wrongdoing other than nonpayment. *See id.* at 488–90. Nor did an imposter or defrauder interpose himself between buyer and seller to misdirect payment to an unauthorized party. *See id.* While the intermediary sale between the original buyer and the other oilman complicated the court's analysis, the case at bottom was one in which nobody ever tried to pay the seller for the part at issue at any point. *Id.* at 487. The court's ruling essentially turned on the other oilman's constructive notice of the cash-on-delivery terms of sale based on the shipping documents and his inability to have greater rights with respect to the part than the original buyer, who had none, due to nonpayment. *Id.* at 490–91. Thus, *Voelkel* was decided on facts and principles that materially differ from ours.

Citing *Glenn Thurman, Inc. v. Moore Construction*, Prosper Florida also argues that the UCC displaces the common law entirely and thus precludes application of the fault-based rule we apply as well as any common-law defense. 942 S.W.2d 768 (Tex. App.—Tyler 1997, no writ). *Glenn Thurman* stated that when the UCC "applies, it displaces all common law rules regarding breach of contract." *Id.* at 771. But the UCC *applies*, in the sense in which *Glenn Thurman* used the word, only when the UCC is both applicable to a claim in general and addresses that claim in a manner inconsistent with the common law. *See id.* at 771–72 (holding common-

law contract rule that one party's breach of contract automatically excuses performance by the other party was inapplicable because UCC provisions provide otherwise). *Pacific Products v. Great Western Plywood*, the authority on which *Glenn Thurman* relied for this proposition, explicitly said so. *See* 528 S.W.2d 286, 291 (Tex. App.—Fort Worth 1975, no writ) (common law remains applicable to extent not displaced by specific provisions of UCC); *see also ETC Intrastate Procurement Co. v. JSW Steel (USA)*, 620 S.W.3d 168, 174 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (stating that conflicting common-law principles are inapplicable when UCC applies but that common-law principles that do not conflict with UCC complement it); *Williams v. Gillespie*, 346 S.W.3d 727, 734 (Tex. App.—Texarkana 2011, no pet.) (holding UCC preempts common law when they conflict); *Plano Lincoln Mercury v. Roberts*, 167 S.W.3d 616, 624 (Tex. App.—Dallas 2005, no pet.) (stating that common-law contract rules are inapplicable when UCC applies but clarifying that common-law principles complement UCC to extent they do not conflict with UCC's provisions). In sum, consistent with how our court has stated the law in the past, when the UCC generally applies to a claim, as it does in this suit for breach of a contract concerning the sale of goods, the UCC bars the application of conflicting common-law principles. *Contractors Source*, 462 S.W.3d at 138. But common-law principles complement the UCC to the extent they do not conflict with the UCC and supplement its provisions unless displaced by particular provisions of

the UCC. *Id.*; *see also AMX Enters. v. Bank One*, 196 S.W.3d 202, 207–08 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (UCC preempts inconsistent common-law principles).

Accordingly, we have no quarrel with *Glenn Thurman* when it is properly understood. Consistent with that decision, we agree that when Chapter 2 of the UCC addresses an issue concerning a contract for the sale of goods in a manner that conflicts with the common law, Chapter 2 displaces the common law to the extent of that conflict. *Contractors Source*, 462 S.W.3d at 138. But a threshold question is whether Chapter 2 addresses the issue before us in a manner that conflicts with the common law. *See id.* (UCC displaces common law to extent they conflict). As we have already noted, Chapter 2 does not purport to allocate losses between a seller and a buyer of goods when the losses are caused by the fraudulent misdirection of payment to an unauthorized party. Chapter 2 of the UCC is silent on this issue.

When, as here, the UCC is silent on an issue, the UCC itself mandates that courts supplement its provisions with common-law principles. TEX. BUS. & COM. CODE § 1.103(b); *see 1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 387 (Tex. 2011) (observing that "UCC explicitly provides that it is to be supplemented by principles of law" unless these principles are "displaced by the UCC's specific provisions"). There is no conflict between Chapter 2 of the UCC, which is silent on the issue of fraudulently misdirected payments to unauthorized

parties, and the fault-based rule we adopt and apply today. Our resort to common-law principles is both necessary and proper under the circumstances of this case. *See* TEX. BUS. & COM. CODE § 1.103(b); *1/2 Price Checks Cashed*, 344 S.W.3d at 387; *see also Austin Hill Country Realty v. Palisades Plaza*, 948 S.W.2d 293, 295 (Tex. 1997) (looking to common law because no statute addressed issue before court). In resorting to common-law principles, we are doing so because that is what the UCC requires.

Prosper Florida also argues that the UCC's obligation of good faith precludes Spicy World from avoiding payment based on notions of fault because Spicy World failed to exercise good faith. We disagree.

"Every contract or duty" within the UCC "imposes an obligation of good faith in its performance and enforcement." TEX. BUS. & COM. CODE § 1.304. In this context, good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing." *Id.* § 1.201(b)(20). Thus, the standard has both a subjective element requiring actual honesty and an objective one requiring commercial reasonableness. *See Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 433 n.3 (Tex. 2004). Prosper Florida's argument turns on the latter. It argues that Agrawal's failure to update Spicy World's payment records each time he received an e-mail containing wire instructions was commercially unreasonable because

doing so would have revealed the e-mails were fraudulent and had not been sent by Prathi.

But Prosper Florida fails to identify any contract term (the parties' transactions were conducted by e-mail and invoice) or UCC provision that imposes an obligation to update payment records upon receipt of an e-mail transmitting payment instructions rather than doing so when payment is being made. This failure is fatal because the UCC's obligation of good faith is not a freestanding mandate that imposes duties or confers rights independent of the terms of the contract or UCC. *See* TEX. BUS. & COM. CODE § 1.304 cmt. 1. That is, any alleged breach of the duty of good faith must be tied to "a specific duty or obligation under the contract" or the UCC to render "a remedial right or power" unavailable. *Id.*; *see N. Nat. Gas. Co. v. Conoco, Inc.*, 986 S.W.2d 603, 606–07 (Tex. 1998) (UCC's good-faith requirement had no bearing on dispute over cancellation of gas-purchase contracts because contract at issue did not impose duty or obligation to maintain contracts and good-faith requirement must be tied to a specific contractual duty or obligation to apply); *see also Fetter*, 110 S.W.3d at 689 (UCC's good-faith requirement operates only to make contract's stated commitments effective and cannot be used to rewrite contract to include additional commitments contract lacks in name of fairness).

Of course, the trial court, as factfinder, was entitled to consider Agrawal's failure to update Spicy World's payment records as he received each e-mail on the

subject in assessing which party was most to blame for the fraudulently misdirected payment. But Agrawal testified that on casual inspection all the wire-transfer e-mails seemed the same. Agrawal further testified that his concerns about paying by wire transfer were allayed when he spoke with Prathi by telephone to confirm that Prosper Florida desired Spicy World to transfer funds to a bank in the United Kingdom. Given these circumstances, the trial court could have reasonably found that Agrawal's failure to carefully review e-mails upon receipt and contemporaneously update Spicy World's payment records was not especially blameworthy, particularly in light of Prosper Florida's own contention that Prathi did not notice that some of the e-mails he ostensibly received from Agrawal were instead from an imposter account. Both sides claim to have overlooked details in electronic correspondence that would have made a reasonable person suspicious had they been noticed.

Finally, Prosper Florida argues that Alba's expert testimony conclusively proves Prathi did not send the wire-transfer e-mails Agrawal received. Prosper Florida appears to assert this conclusively disproves Agrawal's testimony that he spoke with Prathi by telephone to confirm the propriety of the wire transfer.

In general, the opinions of expert witnesses are not binding on the factfinder even when they are uncontroverted, unless the subject is one for experts alone such that a judge or jury is incapable of forming a correct opinion about the matter based on the evidence as a whole and aided by their own experience and knowledge.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 338 (Tex. 1998). Whether a particular subject is one solely for experts is a question of law, which we review de novo. *FFE Transp. Servs. v. Fulgham*, 154 S.W.3d 84, 89–90 (Tex. 2004).

The admissibility of Alba's opinion testimony is not at issue. It is undisputed that Alba is qualified by knowledge, skill, experience, training, or education to testify about certain technical issues relating to computers and e-mails and that his testimony helped the trial court "to understand the evidence." TEX. R. EVID. 702. Nor is it disputed that some of Alba's trial testimony reflects his knowledge, skill, experience, training, or education as an expert, such as his testimony about the different formats in which e-mails are stored. But we disagree that his key opinions in this case, which all depend on e-mail header data accessible to and understandable by any computer user, concern a subject that is one solely for experts.

Alba's key opinions rested almost exclusively on his review of e-mail header data. Alba opined that most people do not know what an e-mail header is, a proposition that we accept as true on appeal because it is undisputed. But he also testified that accessing and examining an e-mail header requires no particular expertise. Thus, Alba disclaimed the notion that this subject is one solely for experts.

Moreover, the header data on which Alba based his key opinions is evaluable by laymen. Alba testified that he primarily relied on time-zone discrepancies in concluding that Prathi did not send the wire-transfer e-mails. But time zones, and

their significance as to the location and identity of a sender, can be evaluated by laymen based on the evidence as a whole and aided by their experience and knowledge. The notion that a time stamp showing a time significantly different from the time zone where the ostensible sender is located could indicate that something is amiss is not the kind of conclusion that is the exclusive domain of experts.

Nor were Alba's key opinions conclusive in the sense of being indisputable. Alba acknowledged that the time-zone discrepancies had more than one possible explanation. He agreed that such discrepancies could result from the use of a VPN and thus might not reflect actual differences in time or location. The same is equally true of other patterns in the data that Alba identified. For example, Alba noted that the wire-transfer e-mails are absent from Prosper Florida's data, but he conceded that e-mails missing from its data could have been deleted and that he lacked the expertise necessary to ascertain whether they had been deleted. Similarly, Alba testified that Prathi did not usually use webmail, which is how the e-mails absent from Prosper Florida's data had been sent, but Alba agreed that Prathi did so sometimes and that he did not review all the e-mails between the parties in Prosper Florida's data. Nor did Alba claim to have reviewed a random sample of the data that could reasonably be relied on as being representative of the data as a whole.

On this record, the trial court, in its role as factfinder, was free to accept or reject Alba's testimony based on its evaluation of the evidence on which Alba relied

and its assessment of his credibility. Alba's opinion that Prathi did not send the wire-transfer e-mails was not conclusive evidence and did not bind the trial court.

Lastly, we note that even if the evidence had conclusively proved that Prathi did not e-mail the wire instructions Agrawal received, this would not compel a reasonable factfinder to conclude that Agrawal did not verify these wire instructions with Prathi by telephone. As previously noted, if one credits Agrawal's testimony about his call to Prathi, as the trial court did and was entitled to do, this circumstance necessarily raises an inference that Prathi either committed the fraud or was a party to it. Prathi need not have sent the instructions himself to be a party to the fraud.

We hold that Prosper Florida did not conclusively prove its right to recover in contract. Thus, we cannot reverse the trial court's take-nothing judgment.

ATTORNEY'S FEES

Prosper Florida does not challenge the trial court's award of attorney's fees in the section of its brief identifying the issues presented. But in the body of its brief, Prosper Florida cites pertinent authority and argues that the trial court erred in awarding Spicy World its fees because Spicy World merely defeated a contract claim, which cannot support a fee award in this case.

Our appellate rules require an appellant to concisely state all issues presented for review in a separate section of its brief. TEX. R. APP. P. 38.1(f). But forfeiture of the right to appellate review based on harmless defects of form or technical

noncompliance with the rules of appellate procedure is disfavored. *Weeks Mar. v. Garza*, 371 S.W.3d 157, 162 (Tex. 2012). Thus, when an appellant omits an issue from the statement of the issues presented but raises and adequately argues the issue in the body of its brief, we must review the issue. *See id.* at 162–63 (court of appeals erred in deciding that appellant waived no-evidence challenge based on omission of issue from issues presented when appellant raised and adequately argued no-evidence challenge in body of brief); *Perry v. Cohen*, 272 S.W.3d 585, 587–88 (Tex. 2008) (per curiam) (court of appeals erred in deciding that appellant waived challenge to trial court's order on special exceptions based on omission of issue from issues presented when appellant raised and argued challenge to special-exceptions order in body of brief). Because Prosper Florida raised Spicy World's entitlement to attorney's fees in the body of its brief and included adequate argument, we will review the issue even though Prosper Florida did not include the issue in its separate statement of the issues presented. *See, e.g.*, *Baumgart v. Archer*, 581 S.W.3d 819, 827 n.5 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (reviewing issue adequately briefed but omitted from issues presented).

If Spicy World is to recover attorney's fees, it must do so under Section 38.001(8) of the Texas Civil Practice and Remedies Code, which provides for recovery of fees on a contract claim. The availability of attorney's fees under a given

statute is a question of law, which we review de novo. *Arrow Marble v. Est. of Killion*, 441 S.W.3d 702, 705 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

We have held that Section 38.001(8) allows a party who prevails on a contract claim, but not a party who defeats a contract claim, to recover its fees. *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 490–91 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Thus, Spicy World is not entitled to an award of attorney's fees.

We hold that the trial court erred as a matter of law in awarding attorney's fees to Spicy World. We modify the judgment to delete the fee award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prosper Florida argues that the trial court erred in refusing to make findings of fact and conclusions of law. Prosper Florida maintains that the trial court's failure to do so prevented it from properly presenting the case to the court of appeals.

Prosper Florida requested findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296. The trial court failed to make the requested findings of fact and conclusions of law within 20 days as required. TEX. R. CIV. P. 297. When, as here, a trial court does not timely make findings of fact and conclusions of law, the requesting party must file a notice that they are past due within 30 days of the original request. *Id.* But Prosper Florida did not file this past-due notice.

A party's failure to file the past-due notice required by Rule 297 waives any appellate complaint as to the trial court's failure to make findings of fact and

conclusions of law. *APMD Holdings v. Praesidium Med. Prof'l Liab. Ins. Co.*, 555 S.W.3d 697, 706 n.5 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Thus, Prosper Florida has not preserved this issue for our review.

Prosper Florida argues that this case is different because the Supreme Court of Texas entered an order tolling certain deadlines due to the pandemic. *See* Order, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020) ("First Emergency Order Regarding the COVID-19 State of Disaster"). But the Court entered this order after Prosper Florida's deadline for filing a past-due notice had expired. Moreover, the order did not toll any deadlines; it authorized Texas courts to modify or suspend deadlines and required them to do so when necessary to avoid risk to staff, parties, counsel, jurors, and the public. Prosper Florida does not contend the trial court modified or suspended the deadline for filing a Rule 297 notice based on the emergency order. We therefore reject Prosper Florida's argument that it did not waive this issue.

At any rate, even if Prosper Florida had preserved this issue for review, we disagree with the premise of its argument. The absence of findings of fact and conclusions of law did not probably prevent Prosper Florida from presenting the case on appeal and thus could not be reversible error. *See* TEX. R. APP. P. 44.1(a)(2).

SANCTIONS

Prosper Florida argues the trial court abused its discretion in entering a $1,000 sanction against its trial counsel for pretrial discovery abuse. But we cannot review this complaint because we lack subject-matter jurisdiction to hear it.

The trial court's final judgment does not reference the $1,000 discovery sanction. Instead, the trial court sanctioned Prosper Florida's trial counsel, not Prosper Florida itself, in a separate order after the entry of judgment.

Prosper Florida filed a notice of appeal, which refers to the trial court's final judgment alone, not the order imposing the $1,000 discovery sanction. Prosper Florida's trial counsel did not file a separate notice of appeal. Nor does her client's notice of appeal identify counsel as an additional appellant.

"The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from." TEX. R. APP. P. 25.1(b). "A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal." TEX. R. APP. P. 25.1(c). The notice of appeal must state "the date of the judgment or order appealed from" and "the name of each party filing the notice." TEX. R. APP. P. 25.1(d)(2), (5). A party can correct any defects in its notice of appeal via an amended notice before it files its brief, but it can do so afterward only with leave of court. TEX. R. APP. P. 25.1(g).

Our court has held that an attorney must file her own notice of appeal, or join her client's notice of appeal, to challenge a sanction imposed on counsel. *See Phillips v. Am. Bankers Ins. Co. of Fla.*, 01-18-00375-CV, 2019 WL 3121856, at *9 n.8 (Tex. App.—Houston [1st Dist.] July 16, 2019, pet. denied) (mem. op.). The rationale for this rule is that the client lacks standing to challenge a sanction that is imposed solely on its attorney. *See id.*; *see also Matbon, Inc. v. Gries*, 287 S.W.3d 739, 740 (Tex. App.—Eastland 2009, no pet.). And when a party lacks standing, we, in turn, lack subject-matter jurisdiction to hear its complaint. *Matbon*, 287 S.W.3d at 740; *see also Walker Sand v. Baytown Asphalt Materials*, 95 S.W.3d 511, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (appellate court must ensure it has jurisdiction, even on its own motion, and cannot ignore unchallenged jurisdictional defects).

We hold that we do not have subject-matter jurisdiction to address Prosper Florida's challenge to the discovery sanction. We dismiss this challenge.

CONCLUSION

We modify the trial court's judgment to delete the award of $55,594.50 in attorney's fees to Spicy World and affirm the judgment as modified.

We dismiss Prosper Florida's challenge to the discovery sanction entered against its trial counsel for lack of subject-matter jurisdiction.

Because each party prevailed in part on appeal and the parties' primary dispute concerns a novel issue, we order each side to bear its own appellate costs.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Hightower, and Rivas-Molloy.