Affirmed and Memorandum Opinion filed February 22, 2018.

In The

Fourteenth Court of Appeals

NO. 14-16-00869-CV

JON JESSEN, Appellant

V.

JOHN P. DUVALL AND BLUEWATER FINANCIAL SERVICES, LLP, Appellees

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2013-58328

M E M O R A N D U M O P I N I O N

Appellant Jon Jessen, who had established trusts to purchase life insurance policies, brought an action against insurance agent John P. Duvall and Bluewater Financial Services for fraud, aiding and abetting and conspiracy to breach a fiduciary duty, Texas Insurance Code violations, unjust enrichment and money had and received. The trial court granted summary judgment against Jessen. We affirm.

I. BACKGROUND

Jessen was told by his long-time tax attorney and financial advisor, Joseph Bond, that insurance investments on Jessen's life would provide specified tax benefits and estate planning protections in the event of Jessen's premature death. Jessen maintains that Bond told him the investments were a safe place to deposit substantial sums for a few years and that the policies could be sold, allegedly for a "considerable profit," on a secondary or "viatical" market.

Jessen established and funded several life insurance trusts[1] that purchased $70,000,000 worth of life insurance policies[2] between May 2008 and September 2008. Two life insurance agents, appellee Duvall and Ladd Tanner, were involved in procuring the life policies for Jessen.[3] Tanner communicated with Jessen directly. Duvall, on the other hand, did not have oral or written communications with Jessen.[4]

After the trusts purchased the life insurance policies, Duvall received commissions paid by the life insurance companies in the amount of 40% of the first year premiums. Also, after the policies were purchased, Duvall paid a referral fee to Bond's son, Bond, Jr., a licensed insurance agent.

The financial markets collapsed in September 2008.

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[1] On January 1, 2013, the trustee for the trusts assigned to Jessen any and all rights, claims, and causes of action which the trust may have against any person or entity involved in the purchase or sale of the insurance policies on Jessen's life.

[2] The insurance policies were issued by American National Insurance Company, John Hancock Life Insurance Company, Reliastar Life Insurance Company, and Transamerica Life Insurance Company. Jessen sued a number of parties and insurance companies in this case; however, this appeal is limited to his claims against Bluewater Financial Services, LLP and John P. Duvall.

[3] Tanner allegedly specialized in getting people over the age of 70 years old, like Jessen, insured.

[4] Bond died before this suit was filed.

The trusts resold the policies in 2010 and 2011. Jessen did not make a return on his investment. Rather, Jessen lost more than $3,200,000 by the time the last policy was sold in late 2011.

Jessen asserts that in 2012 he realized that he had been taken advantage of. Jessen filed suit on September 30, 2013, against Bond and his law firm, every insurance company that sold the policies, as well as Tanner and Duvall, claiming a conspiracy was involved. In his sixth amended petition, Jessen asserted the following claims against Duvall: fraud, fraudulent inducement, and fraudulent concealment (Count I); aiding and abetting and conspiracy to breach fiduciary duty (Count II); violation of Texas Insurance Code (Count III); and equitable theories of unjust enrichment and money had and received (Count IV).

On February 26, 2015, Duvall filed a traditional and no-evidence motion for summary judgment, which was granted by order of the trial court on July 10, 2015. The trial court did not state the grounds on which it relied. At the time, the trial court's order granting summary judgment to Duvall was interlocutory. On May 26, 2016, Jessen filed a motion for rehearing of the earlier ruling, which was denied by the trial court by Order dated August 18, 2016.[5]

The only remaining claims in the case against other defendants were dismissed with prejudice by Orders dated September 23, 2016, making the trial court's July 10, 2015 Order with respect to Duvall and Bluewater Financial Services, LLP,[6] a final summary judgment. Jessen timely filed this notice of appeal.

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[5] The Order granting Appellees' summary judgment was signed by the Hon. Brent Gamble; whereas, the Order denying rehearing was signed by the Hon. Erin Lunceford.

[6] In Jessen's sixth amended petition, Bluewater Financial Services is sued only on vicarious liability claims for the alleged actions of Duvall. Consequently, if Duvall was entitled to summary judgment on the claims, Bluewater Financial Services also was entitled to summary judgment.

II. ANALYSIS

Jessen claims the trial court erred in granting Duvall's motion for summary judgment. Jessen argues that the trial court erred because none of his claims require direct communication between Duvall and Jessen.[7] He further argues that Duvall did not conclusively establish any right to judgment based on the statutes of limitation, arguing that the applicable statutes of limitation did not expire.

A. Standard of Review

We review de novo the trial court's order granting summary judgment. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam); *Wyly v. Integrity Ins. Sols.*, 502 S.W.3d 901, 904 (Tex. App. (Tex. App.—Houston [14th Dist.] 2016, no pet.). Where a trial court's order granting summary judgment does not specify the grounds relied upon, summary judgment will be affirmed if any of the grounds are meritorious. *FM Props. Operating Co., v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

We consider the evidence in the light most favorable to the non-movant, and indulge reasonable inferences and resolve all doubts in its favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Wyly*, 502 S.W.3d at 904. "We credit evidence favorable to the non-movant if reasonable fact finders could and disregard contrary evidence unless reasonable fact finders could not." *Wyly*, 502 S.W.3d at 904.

[7] Jessen presents no appellate issue or argument in his opening brief with respect to the trial court granting summary judgment on his claims under the Texas Insurance Code. As such, Jessen has waived appellate consideration of these claims. *See DeWolf v. Kohler*, 452 S.W.3d 373, 388 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (issues not raised in appellant's original brief are waived).

When both no-evidence and traditional grounds for summary judgment are asserted, we first review the trial court's order under the no-evidence standard. *PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.). To prevail on a no-evidence summary judgment, the movant must allege that no evidence exists to support one or more essential elements of a claim for which the non-movant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i); *Kane v. Cameron Int'l Corp.*, 331 S.W.3d 145, 147 (Tex. App.—Houston [14th Dist.] 2011, no pet.). A no-evidence motion may not be conclusory, but must instead give fair notice to the non-movant as to the specific element of the non-movant's claim that is being challenged. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310–11 (Tex. 2009). The non-movant must then present evidence raising a genuine issue of material fact on the challenged elements. *Kane*, 331 S.W.3d at 147. A fact issue exists where there is more than a scintilla of probative evidence. *See Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam). More than a scintilla of evidence exists if the evidence rises to a level that would allow reasonable and fair-minded people to differ in their conclusions as to the existence of a vital fact.

Under the traditional summary-judgment standard, the movant has the initial burden of conclusively negating at least one essential element of a claim or defense on which the non-movant has the burden of proof or conclusively establishing each element of a claim or defense on which the movants have the burden of proof. *See* Tex. R. Civ. P. 166a(c); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Once the movant has done so, and only if it does, the burden shifts to the non-movant to produce evidence creating a genuine issue of material fact as to the challenged element or elements in order to defeat the summary judgment. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

B. Standing

Because standing is a component of the court's subject matter jurisdiction, we will review Jessen's standing first—*i.e.*, whether summary judgment was proper because Jessen lacked standing to bring this suit. Duvall maintains that the trusts purchased, owned and later sold the policies; hence, only the trustees are authorized to bring claims affecting the trusts' property. Duvall further contends that Jessen's lack of standing was not rectified by the trustees' assignment of any legal claims of the trusts to Jessen.

Subject matter jurisdiction can be raised at any time, including for the first time on appeal. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). A party's standing is determined at the time suit is filed. *Id*. at 446. Whether subject matter jurisdiction exists is a question of law subject to de novo review. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

To have standing a party must have a "sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome." *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (quotation omitted). A plaintiff must affirmatively show, through pleadings and other evidence pertinent to the jurisdictional inquiry, a distinct interest in the asserted conflict, such that the defendant's actions have caused the plaintiff some particular injury. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *see County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

Here, while it is undisputed that the trustees purchased and sold the insurance policies, Jessen does not pursue claims based on duties created by the policies (contractual claims). Rather, Jessen asserts claims arising under state law (extra-contractual claims). Specifically, Jessen's claims for fraud, aiding and abetting and conspiracy to breach a fiduciary duty, and equitable theories remain viable because

he seeks redress for misrepresentations made to him prior to the trusts being created and policies purchased. There is no indication here that Jessen assigned or relinquished the extra-contractual causes of action to the trustees. As such, Jessen has standing to assert them in this litigation. *See Lee v. Rogers Agency*, 517 S.W.3d 137, 144-153 (Tex. App.—Texarkana 2016, pet. filed) (op. on rehearing).

C. Summary Judgment

Duvall sought a no-evidence motion for summary judgment with respect to fraud and fraudulent concealment on the element that defendant made an actionable misrepresentation of material fact. Duval contends there is no evidence that he made any misrepresentation as to the resale value of the policies. With respect to aiding and abetting and conspiracy to breach fiduciary duty, Duvall attacked the element of breach by the defendant of a fiduciary duty to the plaintiff. Duvall argues he had no duty to disclose the referral fee made to Bond's son. Duvall also moved for no-evidence summary judgment on the equitable claims of unjust enrichment and money had and received, attacking the damages element. Duvall argues that the amount Jessen paid for the policies did not vary on commissions; thus, there was no evidence that Jessen was damaged by the failure to disclose the commission structure.

In the traditional summary judgment portion of the motion, Duvall contended as to all fraud claims, breach of fiduciary obligations, and equitable causes of action, that each of the causes of action relies upon alleged misrepresentations or nondisclosures. Duvall argued that there is no factual support of any actionable misrepresentation or nondisclosure by Duvall. Duvall pointed to deposition testimony as evidence of no oral or written communications between Jessen and Duvall. With respect to the nondisclosure of the commissions, Duvall argues there is no factual evidence that the failure to disclose the commission structure was

material to the transaction and that the failure caused Jessen was damaged by the failure to disclose the commissions. Duvall referenced deposition testimony in support, an affidavit, and a trade article. On the aiding and abetting and conspiracy to breach fiduciary duty claim, Duvall asserted that he had no disclosure obligation because the referral fee was paid to Bond's son, an insurance agent. If there was a disclosure obligation on the part of Bond (even though the referral fee was given to Bond's son), that obligation was Bond's and Duvall had neither the right nor the responsibility to insert himself in the middle of an attorney-client relationship. Finally, Duvall argued that there is nothing inherently wrong or illegal in paying Bond's son a referral fee; thus, where the act itself (payment of the referral fee) is permitted, he cannot be liable for participation in such an act.

1. Fraud claims[8]

In his first issue, Jessen contends that summary judgment was improperly granted, arguing that direct communication between Duvall and Jessen is not required to establish claims for fraud and misrepresentation.[9] In his brief, Jessen alleges that "Duvall, Tanner, Bond and the insurance company defendants and

[8] In Count I of his Sixth Amended Petition, Jessen asserts fraud, fraudulent inducement, and fraudulent concealment. As a preliminary matter, we note that Jessen pled fraudulent concealment. Fraudulent concealment is an equitable doctrine that provides an affirmative defense to the statute of limitations. *See Weaver v. Witt*, 561 S.W.2d 792, 793 (Tex. 1977) (per curiam). Like the discovery rule, proof of fraudulent concealment tolls accrual of limitations. *See Kanon v. Methodist Hosp.*, 9 S.W.3d 365, 368 (Tex. App.—Houston [14th Dist.] 1999, no pet.). It is not an independent cause of action. *Mayes v. Stewart*, 11 S.W.3d 440, 452 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Thus, we are construing his cause of action as fraud by nondisclosure, which requires proof of the same elements as fraud. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997).

[9] In his brief, Jessen opines that Tanner was denied summary judgment, albeit by a different trial judge, because there was direct communication between Tanner and Jessen. On this basis, Jessen speculates that Duvall was granted summary judgment because there was no direct communication between Duvall and Jessen. Jessen attacks the judgment on this basis, maintaining his claims do not require direct communication to be viable.

individuals conspired with each other to defraud Jessen out of his hard-earned money." According to Jessen, he "submitted evidence that Duvall directly orchestrated and participated in the conduct that damaged [Jessen]."

To prove common law fraud, Jessen must establish proof of each of the following elements: (1) a material representation was made; (2) the representation was false; (3) at the time it was made, Duvall knew the representation was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) Duvall made the representation with the intent that Jessen would act on it; (5) Jessen acted in reliance on the representation; and, (6) Jessen suffered injury. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011); *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 185 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). A plaintiff may use direct or circumstantial evidence to prove a defendant knew of the falsity of a representation. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 526 (Tex. 1998).

"Fraudulent inducement ... is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *see also Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 423 (Tex. 2015) (per curiam). Thus, to prevail on a fraudulent inducement claim, Jessen not only must establish all of the elements of a fraud claim, but must establish those elements "as they relate to an agreement between the parties." *See Zaidi v. Shah*, 502 S.W.3d 434, 441 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (quoting *Haase*, 62 S.W.3d at 798–99).

The elements of fraud by non-disclosure are: (1) Duvall concealed from or failed to disclose certain facts to Jessen; (2) Duvall had a duty to disclose the facts to Jessen; (3) the facts were material; (4) Duvall knew (a) Jessen was ignorant of the

facts and (b) Jessen did not have an equal opportunity to discover the facts; (5) Duvall was deliberately silent when he had a duty to speak; (6) by failing to disclose the facts, Duvall intended to induce Jessen to take some action or refrain from acting; (7) Jessen relied on Duvall's nondisclosure; and (8) Jessen was injured as a result of acting without the knowledge of the undisclosed facts. *See Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001). Fraud by omission or non-disclosure is simply a subcategory of fraud because the omission or non-disclosure may be as misleading as a positive misrepresentation of fact when a party has a duty to disclose. *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners*, 237 S.W.3d 379, 385 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). A claim of conspiracy necessarily implicates liability for an underlying tort. *See Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 635 (Tex. 1997); *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979). Where summary judgment is proper on fraud as the underlying tort, it is likewise proper on conspiracy to commit fraud. *See Wolstein v. Aliezer*, 321 S.W.3d 765, 775 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Jessen's common-law-fraud, fraudulent-inducement, fraud by nondisclosure, and conspiracy to commit fraud claims therefore rest on what Duvall communicated or failed to communicate to Jessen. Three events form the cornerstone of each of Jessen's causes of action in this case: Duvall mispresented the resale value of the policies; he failed to disclose the commission structure of the policies; and he failed to disclose that he paid a referral fee to Bond's son.

Resale Value of Policies on Future Life-Insurance Market

Jessen claims that at the time he was applying for the policies, around 2008, he was told there would be a secondary life-insurance market two years later, in 2010, at which he could sell the policies for a "substantial profit." Jessen asserts that in 2010, the policies did not sell for a profit but rather at a loss. Thus, Jessen maintains that Duvall misrepresented the future market conditions concerning the policies.

The record, however, is devoid of any evidence that Duvall misrepresented any market conditions to Jessen. There is no evidence of any written communications by Duvall to Jessen concerning the secondary market. Further, Jessen testified at his deposition that he cannot recall any verbal communications with Duvall regarding the market. In Duvall's deposition, Duvall testified that he never spoke with Jessen prior to the policy sales. As such, no evidence exists that Duvall made any misrepresentations regarding the resale value to Jessen.

Jessen fails to provide evidence that Duvall made any representations, indirectly, regarding the future market value; caused the reduced market value of the policies; or caused Jessen to receive a reduced value by some fraud or conspiracy. Rather, only Duvall, in conjunction with his traditional motion for summary judgment, offered an explanation as to why the policies were sold at a loss in 2010, by submitting the uncontroverted affidavit of Shane McGonnell, the vice president of a company that trades in life policies on the secondary market. McGonnell attested to the financial collapse in the life insurance industry in 2008 and the negative financial impact it had on the resale market for life insurance policies. Jessen proffered no evidence that the reduced resale value of the policies was the result of anything more than unforeseen market conditions. There is no evidence that Duvall made any representations regarding the future market value, directly or

indirectly, or in conspiracy with others to deceive Jessen.

Commission Structure Received by Duvall

Jessen asserts that the nondisclosure of the commission structure to Duvall was fraudulent. Jessen asserts that "the policies were worth much less than he had paid, since Duvall, Tanner, and the insurance company Defendant utilized the money largely to pay themselves exorbitant fees and commission."

As an initial matter, there is no evidence that either Jessen or the Trusts paid Duvall's commission. Rather, Duvall presented uncontroverted summary judgment evidence that the insurance companies, not Jessen, paid the commissions. Additionally, Jessen assumed there would be a commission paid to Duvall. At deposition, Jessen testified he never asked about Duvall's commission structure because he "didn't think it would be good business." He "just assumed that there would be a reasonable commission." Jessen does not object to the commission itself, but objects to the nondisclosure of what he perceives to be an "unreasonable" amount of commission paid by the insurance companies. According to Jessen, 40% of the first-year premium is unreasonable. Jessen provides no evidence to support his conclusory testimony. He further admits he does not know whether the amount Duvall received was in line with industry standards. Finally, there is no evidence that the amount of the commission received by Duvall changed the amount Jessen or the Trusts paid for the policies. Thus, Duvall's nondisclosure of the commission structure was not material to the transaction.

Moreover, there is no evidence that Duvall had a duty to disclose the commission structure to Jessen or that the commissions received by Duvall were the result of a conspiracy to defraud. The evidence of record demonstrates that Duvall's commission was in line with industry standards. McGonnell, in his uncontested affidavit, averred that the commission structure received by Duvall was historically

typical. Commissions in the first year of a life policy are high because the agents will receive little to no commission on renewals over the insured's life. Additionally, McGonnell's affidavit references an attached journal article which provides that it is not unusual for agents to be paid a commission of as much as 65-70% of the premium paid for the first year of a policy. In this case, the summary judgment evidence shows Duvall was paid 40%. The commissions were high due to the amount of insurance bought—$70 million. The amount was dictated by Jessen's estate plan. Consequently, there is no evidence that Duvall had a duty to disclosure the commission structure that was within industry norms or that high commission received was a result of a conspiracy to defraud Jessen.

Finally, in terms of damages, Jessen cannot show he was damaged by Duvall receiving a commission. Jessen's damages are based upon the decreased resale value of the life policies. Jessen does not argue and there is no evidence that the decreased market value in 2010 was due to the amount of commissions the insurance companies paid Duvall.

Referral Fee Paid by Duvall

Jessen maintains the nondisclosure of the referral fee paid by Duvall to Jessen's son was fraudulent. It is undisputed that referral fees are customary in the insurance industry and that Duvall gave up part of his compensation to pay a referral fee Bond's son, Joe Bond, Jr. It also is undisputed that Bond, Jr., is a licensed insurance agent, and under the Texas Insurance Code referral fees to a licensed insurance agent are permitted. *See* Tex. Ins. Code Ann. § 4001.101. There is no evidence that Jessen or the Trusts paid more for the policies due to the referral fee. There is no evidence that Duvall had any duty to disclose the referral fee; thus, Duvall's nondisclosure of the referral fee cannot support an actionable fraud claim.

In sum, Jessen failed to raise evidence of actionable misrepresentation or

fraudulent nondisclosure of material information—essential elements of his claims for fraud, fraudulent inducement, fraudulent concealment or fraud by nondisclosure, and/or conspiracy to commit fraud.[10] As such, the trial court did not err in granting summary judgment on these claims. Jessen's first issue is overruled.

2. Aiding and abetting and conspiracy to breach fiduciary duty claim and equitable claims

Jessen's second issue addresses his claims against Duvall for aiding and abetting and conspiracy to breach fiduciary duty and equitable claims of unjust enrichment and money had and received. Jessen maintains that direct communication between Duvall and Jessen is not required to establish these claims.

Aiding and abetting and conspiracy to breach fiduciary duty claims

Jessen alleges that Duvall's nondisclosure of the referral fee provided substantial assistance in Bond's breach of his fiduciary duty to Jessen by "secretly agreeing to and then paying Bond's son a part of the commission generated from the sale of the insurance policies to Plaintiff."

To establish aiding and abetting, the plaintiff must demonstrate that the defendant, with unlawful intent, substantially assisted and encouraged a wrongdoer in a tortious act. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). Aiding and abetting is a dependent claim which is premised on an underlying tort. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001). Therefore,

[10] Civil conspiracy is a derivative tort. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). "[A] defendant's liability for civil conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id*. Because we find the trial court properly granted summary judgment on Jessen's fraud claims, summary judgment also is proper on the conspiracy claims related to fraud. *See id.*; *see also Allstate Ins. Co. v. Rehab Alliance of Tex., Inc.*, No. 14-13-00459-CV, 2015 WL1843249, at *8 (Tex. App.—Houston [14th Dist.] Apr. 21, 2015, pet denied) ("Given that Allstate's conspiracy claim depended on its fraud claim, summary judgment was also proper on the conspiracy claim").

if the underlying tort fails, an aiding and abetting claim related to the failed tort likewise fails. *See id*.

As set forth above, an actionable civil conspiracy is a combination of two or more persons; an object to be accomplished; a meeting of minds on the object or course of action; one or more unlawful, overt acts; and damages. *See Tilton*, 925 S.W.2d at 681. A conspiracy claim is derivative; thus, it necessarily implicates liability for an underlying tort. *See Trammell Crow Co. No. 60*, 944 S.W.2d at 635; *Carroll*, 592 S.W.2d at 925. Where summary judgment is proper on breach of fiduciary duty claim, it will be proper on conspiracy to breach fiduciary duty claim. *See Wolstein*, 321 S.W.3d at 775.

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). An attorney and client relationship give rise to fiduciary duties as a matter of law. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998).

Jessen met the first element of a breach of a fiduciary duty claim because it is undisputed that Bond, as Jessen's attorney, was a fiduciary. With respect to the second element, Jessen contends "Jessen has submitted evidence that Bond breached that fiduciary duty by enticing Jessen to participate in the scheme alleged, while knowing that Jessen would not be able to sell the policies for a substantial profit in the manner intended." Jessen further claims "there is evidence that Duvall paid Jessen's attorney Bond a kickback in order to induce him to recommend that Jessen invest in the insurance policies at issue."

In appellant's brief, the only evidence referenced by Jessen is Duvall's

deposition testimony wherein he acknowledges having a conversation with Bond, Sr., before he died, around 2009, about paying a referral fee to Bond, Jr., because Bond, Sr., did not have an insurance license. Jessen, however, did not make this argument in his response to Duvall's motion for summary judgment. Jessen cannot raise an argument on appeal that was not expressly presented to the trial court. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979). We are not "free to search . . . materials not cited to or relied on by the trial court." *Blake v. Intco Invs. of Tex., Inc.*, 123 S.W.3d 521, 525 (Tex. App.—San Antonio 2003, no pet.). Thus, we cannot review the merits of this argument on appeal. *Harris v. Harbour Title Co.*, No. 14-99-00034-CV, 2001 WL 1249730, at *2 (Tex. App.—Houston [14th Dist.] Oct. 18, 2001, no pet) (not designated for publication).

Jessen makes no reference to any part of the Texas Disciplinary Rules of Professional Conduct or case law to support his claim that Bond breached his fiduciary duty. Without the underlying tort being established, there can be no claims of aiding and abetting a breach of Bond's fiduciary duty and/or conspiracy to breach Bond's fiduciary duty. *See Tilton*, 925 S.W.2d at 681.

Moreover, even assuming, *arguendo*, that Jessen could establish the underlying tort, there is no evidence of Duvall knowingly aiding and abetting Bond, Sr. with such a breach. Similarly, there is no evidence of any meeting of the minds between Duvall and Bond to breach Bond, Sr.'s, fiduciary duty to Jessen.

Because Jessen failed to raise any evidence to support his claim of aiding and abetting and conspiracy to breach fiduciary duty claim, summary judgment was proper.

a. Equitable claims

Jessen also lodged equitable claims against Duvall for unjust enrichment and

money had and received. In his brief, Jessen asserts that he "submitted evidence tending to establish that Appellee Duvall, by and through his association with Bond, Tanner and the insurance company defendants, misrepresented factual issues known to Duvall and the other defendants in an effort to defraud Plaintiff and obtain his hard-earned money in the form of fees and commissions." Jessen contends "it is irrelevant whether Appellee Duvall was in direct communication with Jessen as part of the alleged scheme."

"A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Unjust enrichment occurs when a person has wrongfully secured or passively received a benefit which would be unconscionable to retain. *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied).

"An action for money had and received is an equitable doctrine that courts apply to prevent unjust enrichment." *London v. London*, 192 S.W.3d 6, 13-14 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). This cause of action arises when a party obtains money that, in equity and good conscience, belongs to another. *Hunt v. Baldwin*, 68 S.W.3d 117, 132 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A claim for money had and received is not based on wrongdoing; rather, the only question is whether the defendant holds money that, in equity and good conscience, belongs to another. *See London*, 192 S.W.3d at 13.

As an initial matter, Jessen fails to cite the court to any evidence in the record to support his equitable claims. An appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to the record. Tex. R. App. P. 38.1(h). We must interpret this requirement reasonably and liberally.

Republic Underwriters Ins. Co. v. Mex–Tex, Inc., 150 S.W.3d 423, 427 (Tex. 2004). However, parties asserting error on appeal must put forth some specific argument and analysis showing that the record and the law supports their contentions. *See* Tex. R. App. P. 38(h); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). To the extent Jessen's equitable claims are based on the same alleged misrepresentations that he based his fraud claims, we need not reanalyze the claims. For the reasons set forth previously in concluding the trial court did not err in granting summary judgment on Jessen's fraud claims, we conclude the trial court did not err in granting summary judgment on Jessen's equitable claims.

In sum, Jessen failed to raise a genuine issue of material fact on his claims for aiding and abetting and conspiracy to breach a fiduciary duty and there is no evidence to support his equitable claims for unjust enrichment and money had and received. As such, the trial court did not err in granting summary judgment on these claims. Jessen's second issue is overruled.

3. Statutes of Limitations

Jessen's third issue addresses summary judgment based on the statutes of limitation. Jessen argues that the trial court erred in granting summary judgment on this basis because Duvall did not conclusively establish that the applicable statutes of limitation had expired.

Because we have found the trial court properly granted summary judgment on Jessen's claims on other bases, we do not address whether the applicable statutes of limitation had expired.

III. CONCLUSION

The judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.