Affirmed as Modified in Part and Reversed in Part and Remanded and Memorandum Opinion filed August 17, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-01020-CV

K. GRIFF INVESTIGATIONS, INC. D/B/A K. GRIFF INVESTIGATIONS & CIVIL PROCESSING AND KATHY GRIFFIN, Appellants

V.

JOHN CRONIN, MARK RIORDAN, HANK WHITMAN, CRONIN, RIORDAN & WHITMAN SECURITY CONSULTANTS, LLC, KYLE FINANCIAL GROUP, LLC, WILLIAM "BILL" TAYLOR, AND BRANDI TAYLOR, Appellees

and

KYLE FINANCIAL, LLC, WILLIAM "BILL" TAYLOR, BRANDI TAYLOR, AND MARK RIORDAN, Cross-Appellants

V.

K. GRIFF INVESTIGATIONS, INC. D/B/A K. GRIFF INVESTIGATIONS & CIVIL PROCESSING AND KATHY GRIFFIN, Cross-Appellees

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2016-09407

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

The parties before us were involved in a proposed asset purchase sale that never closed. The sellers, plaintiffs below and appellants in this court, sued the buyer and its principals, as well as the buyer's financer. The trial court disposed of most of appellants' claims on summary judgment, which appellants challenge in three issues on appeal. Because we conclude that appellants have not demonstrated the trial court erred in granting summary judgment in appellees' favor, we affirm the trial court's summary judgment rulings.

The claims surviving summary judgment proceeded to trial, where a jury found against appellants on all claims except one. The jury found that two defendants made a negligent misrepresentation, which proximately caused a portion of appellants' damages. One of the responsible defendants filed bankruptcy and is not a party here; the other, William "Bill" Taylor, received a take-nothing judgment in his favor due to a settlement credit. After the trial, some defendants moved for sanctions against appellants, claiming that appellants lacked authority to pursue the claims. The defendants also asked the court to tax costs in their favor. The trial court denied both requests.

Several defendants challenge these rulings in a cross-appeal. Bill Taylor attacks the evidentiary sufficiency of the adverse jury findings referenced in the judgment. We agree, and we modify the judgment to state that the jury findings are unsupported by legally sufficient evidence. Regarding costs, though a trial court acts within its discretion in refusing to tax costs in favor of a successful

party, it must state good cause for doing so. Tex. R. Civ. P. 141. Here, the defendants were successful, but good cause for refusing to tax costs in their favor is not stated on the record. We remand the cause for a re-determination of costs to be awarded to defendants, if any. We affirm the remainder of the judgment as modified.

Background

Kathy Griffin owned K. Griff Investigations, Inc. ("K. Griff"), an investigative agency that performed services such as background checks, surveillance, and service of civil process. In March 2015, Griffin advertised her desire to sell K. Griff and received a response from Cronin, Riordan & Whitman Security Consultants, LLC ("CRW"). The principals in CRW were John Cronin, Mark Riordan, and Hank Whitman. CRW, a start-up company founded in 2014, was funded by a line of credit extended by Kyle Financial Group, LLC ("Kyle Financial"), which was owned by Bill and Linda Taylor. The Taylors' daughter, Brandi, worked at Kyle Financial as the company's vice-president.

Griffin, Cronin, and Riordan communicated several times regarding a possible asset sale. Griffin provided financial documents to CRW's accountant. According to Griffin, Cronin repeatedly represented to her that the sale was a "done deal" and that Cronin had the check "ready to go." Griffin also contends that Cronin and Riordan told Griffin to incur certain costs, such as hiring additional employees and upgrading K. Griff's servers, in anticipation of the deal closing.

Cronin and Griffin, on behalf of their respective companies, ultimately executed a Letter of Intent ("LOI") on July 9, 2015, in which CRW offered to purchase K. Griff's assets and business operations for $725,000, if certain conditions occurred. Those conditions were: (1) CRW's completion of a due diligence examination of K. Griff to CRW's absolute satisfaction; (2) execution of

an Asset Purchase Agreement; (3) execution of an employment agreement and non-compete agreement between Griffin and CRW; and (4) CRW obtaining financing for the transaction "satisfactory to CRW in its sole discretion."

The parties anticipated closing would occur on July 15, 2015, but Cronin told Griffin that the closing had to be rescheduled to July 31, 2015, due to a scheduling conflict with CRW's lawyer.

CRW sought financing for the proposed purchase from Kyle Financial, to which CRW was already indebted.[1] Bill, however, told Cronin, Riordan, and Whitman on July 27, 2015 that Kyle Financial would not provide financing. Bill then called Griffin on July 27 and told her that the deal was not going to close as planned. According to Griffin, Bill told her that he was not comfortable with CRW's management and finances and did not want to extend any more money to the company. On July 30, CRW's lawyer informed Griffin that "the transaction is not going to close tomorrow, because the lender is not satisfied with the information provided in the due diligence process, there are no funds here, or expected here tomorrow."

Griffin and K. Griff sued among others CRW, Cronin, Riordan, Whitman, Kyle Financial, Bill, and Brandi, asserting claims for breach of contract, promissory estoppel, fraud, negligent misrepresentation, conspiracy, and negligence. Appellants also asserted a tortious interference claim against Kyle Financial, Bill, and Brandi.

After appellants filed suit in February 2016, Griffin sold K. Griff to a third party, KGI Holdings, LLC, in May 2016. KGI then filed a petition in intervention and claimed that, as part of that sale, K. Griff sold its claims in this suit to KGI.

[1] CRW owed Kyle Financial at least $500,000, which consisted of an initial $250,000 line of credit, as well as a $250,000 renewal or extension, neither of which were paid as of trial.

According to KGI, it owned the claims asserted by K. Griff in this lawsuit, and K. Griff no longer owned or controlled those claims. Following an arbitration, KGI assigned the claims back to K. Griff and nonsuited its intervention.

The defendants filed various motions for summary judgment. At the summary judgment stage, the trial court: (1) dismissed appellants' claims for breach of contract, fraud, and negligence against CRW, Cronin, and Riordan; (2) dismissed appellants' claims for tortious interference, negligence, and fraud against Kyle Financial, Bill, and Brandi; and (3) dismissed all of appellants' claims against Whitman. These summary judgment rulings left for jury determination appellants' claims for promissory estoppel, negligent misrepresentation, and conspiracy against CRW, Cronin, Riordan, Kyle Financial, Bill, and Brandi. The jury found in all the defendants' favor on promissory estoppel and conspiracy. However, the jury also found that CRW and Bill each made a negligent misrepresentation to both K. Griff and Griffin, and that the misrepresentations caused K. Griff $21,098.29 in damages (for which CRW, Bill, and K. Griff, respectively, were 33%, 34%, and 33% responsible) and Griffin $750 in damages (for which CRW and Bill were each 50% responsible).

After trial, Kyle Financial, Bill, Brandi, and Riordan moved for sanctions against appellants, arguing that K. Griff had sold its interest in the pleaded claims to KGI (per KGI's representation in its intervention) and that appellants had thus pursued "frivolous" claims they did not own. The trial court denied the motion for sanctions without a hearing.

Consistent with its prior summary judgment rulings and the jury verdict, the trial court signed a take-nothing judgment in favor of Cronin, Riordan, Kyle Financial, and Brandi. The judgment also recited that the jury found in K. Griff's and Griffin's favor and against CRW and Bill on the negligent misrepresentation

claims, but, due to a settlement credit, the court ordered that both plaintiffs take nothing from CRW and Bill. The trial court also struck through proposed language that would have awarded taxable costs to the defendants.

Issues Presented

Appellants present four issues for review, all of which challenge the trial court's summary judgment rulings:

1. Did the trial court err in granting partial (traditional or no-evidence) summary judgment in favor of CRW, Cronin, Riordan, and Whitman on plaintiffs' breach of contract, negligence, and fraud claims?
2. Did the trial court err in granting partial summary judgment on no-evidence grounds in favor of Kyle Financial, Bill, and Brandi on plaintiffs' negligence and fraud claims?
3. Did the trial court err in granting traditional summary judgment in favor of Whitman on plaintiffs' remaining claims?
4. Should the entire judgment be set aside, including the portions of the final judgment effectuating the jury verdict, because all issues are so interwoven with one another that they cannot be separated from the challenged summary judgment rulings?

In their cross-appeal, Kyle Financial, Bill, Brandi, and Riordan challenge the denial of sanctions and taxable costs. Bill also challenges on legal insufficiency grounds the jury findings against him recited in the judgment.

Appeal

I. Summary Judgment for CRW, Cronin, Riordan, and Whitman

CRW, Cronin, Riordan, and Whitman (collectively, for this issue, the "CRW defendants") moved for traditional and no-evidence partial summary judgment on appellants' breach of contract, negligence, and fraud claims, which the trial court granted. Appellants challenge the court's ruling in their first issue. The trial court

granted summary judgment without specifying the grounds, so we begin by reviewing the no-evidence grounds. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

A. Standard of Review

We review de novo the trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We apply a legal sufficiency standard when reviewing a no-evidence summary judgment. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). A no-evidence summary judgment will be sustained when: (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of a vital fact. *See id.* at 751 (citing *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006) (per curiam).

B. Breach of Contract

Appellants alleged that the CRW defendants breached the LOI by refusing to close the sale. In their summary judgment motion, the CRW defendants argued that appellants could produce no evidence for any element of their breach of contract claim: the existence of a valid contract; appellants' performance; CRW's breach; or appellants' damages. *See Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 804 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (setting forth elements for breach of contract claim).

Cronin, Riordan, and Whitman were not parties to the LOI, so no viable breach of contract claim exists against them. The trial court did not err in granting summary judgment in the individual defendants' favor on this claim. *See C&A Invs., Inc. v. Bonnet Res. Corp.*, 959 S.W.2d 258, 262 (Tex. App.—Dallas 1997, writ denied) (action for breach of contract cannot be maintained against person not party to contract); *Bernard Johnson, Inc. v. Cont'l Constructors, Inc.*, 630 S.W.2d 365, 369 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (same).

As for appellants' contract claim against CRW, the parties' central dispute is whether the LOI is a valid and legally enforceable contract. The LOI provides, in relevant part:

> The purpose of this letter is to outline the general framework for an agreement pursuant to which Cronin, Riordan & Whitman Security Consultants, LLC ("CRW" or "Buyer"), will purchase the assets and business operations of K. Griff Investigations, Inc. d/b/a K. Griff Investigations & Civil Processing (the "Business") from K. Griff Investigations, Inc. ("Seller" or the "Company"). This letter is intended to evidence our mutual understanding regarding the transaction and our mutual intent to negotiate in good faith to enter into a definitive purchase agreement and close the transaction as described below. Upon satisfaction of the conditions below, the agreement to purchase the Business will be evidenced by a definitive asset purchase agreement ("Asset Purchase Agreement") to be negotiated and agreed upon by both CRW and Company. Subject to the conditions herein, the execution of the Asset Purchase Agreement (the "Closing") will occur within 30 days from the date this letter is executed by Company. . . .
>
> Closing of the transaction will be conditioned upon:
>
> (a) Completion of CRW's due diligence examination of Company to its absolute satisfaction;
>
> (b) The drafting, negotiation, and execution of an Asset Purchase Agreement and related documents, including mutually agreeable representations, warranties and indemnifications;

(c) The drafting, negotiation and execution of a mutually agreeable and binding employment and non-compete agreement between Kathy Griffin and CRW;

(d) CRW obtaining financing for the transaction satisfactory to CRW in its sole discretion. . . .

As an inducement to CRW to engage in additional discussions, negotiations, and investigations with respect to the proposed acquisition . . . Company hereby covenants and agrees that until the expiration of a 30 day period . . . Company will [not], directly or indirectly, make contact whatsoever with or engage in any written or oral discussion, negotiations, or agreements with any person other than CRW, the purpose or the result of which would be the sale, transfer or disposition of any of the stock or assets of the Business.

Thus, there are two types of covenants in the LOI: those relating to the anticipated sale and those relating to the negotiation process. We first address whether the LOI constitutes a valid sales contract.

To be enforceable, a contract must, among other things, address all its essential and material terms with "a reasonable degree of certainty and definiteness."[2] *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016); *Altech Controls Corp. v. Malone*, No. 14-17-00737-CV, 2019 WL 3562633, at *4 (Tex. App.—Houston [14th Dist.] Aug. 6, 2019, no pet.) (mem. op.). "[A] contract must at least be sufficiently definite to confirm that both parties actually intended to be contractually bound." *Fischer*, 479 S.W.3d at 237; *Altech Controls*, 2019 WL 3562633, at *4. Appellants argue that the LOI contained all essential and material

[2] A contract requires the following elements: (1) offer; (2) acceptance; (3) meeting of the minds; (4) consent to the terms by both parties; and (5) execution of the contract with the intent to be bound by its terms. *Plotkin v. Joekel*, 304 S.W.3d 455, 476 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We review questions of contract construction de novo. When the parties' intent is clear and unambiguous on the face of the agreement, it may be determined as a matter of law. *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 666 (Tex. App.—Dallas 2004, pet. denied). However, if the parties' intentions as expressed in the document are indefinite and unclear, ambiguity exists, and the issues of contract formation and intent to be bound become questions of fact. *Id.*

terms to establish a sales agreement, specifically asserting that the LOI set forth the assets to be purchased, the sale price, the parties' liabilities, and the time constraints for performance. Appellants also point to language in the LOI evincing the parties' "mutual understanding regarding the transaction." Finally, appellants argue that, although the LOI contemplated further documentation, such language does not undermine the enforceability of the LOI. *See, e.g., McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013) (per curiam) ("Agreements to enter into future contracts are enforceable if they contain all material terms.").

We disagree that the LOI is an enforceable sales contract, and we find the El Paso Court of Appeals' opinion in *Karns v. Jalapeno Tree Holdings, L.L.C.*, 459 S.W.3d 683 (Tex. App.—El Paso 2015, pet. denied), analogous to the present case. In *Jalapeno Tree*, the parties signed a letter of intent that: identified assets to be sold and their proposed valuation; demonstrated an agreement that, in consideration of an earnest money deposit and mutual promises to negotiate confidentially and in good faith, the seller agreed to refrain from entertaining other offers for a certain period; and conditioned completion of the underlying transaction on the achievement of a subsequent, definitive agreement. *Id.* at 692-93. Negotiations stalled after the letter of intent, and one party terminated the LOI, prompting the other party to sue for breach of the LOI. However, the court concluded that the letter of intent was not sufficient to establish a sales contract because the letter lacked a mutual intent to be bound. *Id.* at 693. The court assumed for the sake of argument that the letter of intent listed all the essential sales terms, but ultimately held that the sales provisions were unenforceable because they were conditional. *Id.* The letter of intent clearly indicated that the parties intended to go through with the sale only if they reached a "definitive agreement" within 20 days of the LOI's execution. *Id.* In other words, the court

reasoned, both parties conditioned acceptance of the sale on completion of a final agreement. *Id.* Because the letter of intent included a condition precedent that "absolutely must be fulfilled before either party is bound to the sale," the sales provisions were not binding. *Id.* at 693-94.

The same is true here. Assuming the LOI contained all terms essential to a purchase agreement, the sale was contingent upon certain conditions precedent. The LOI clearly stated that closing was "conditioned upon" satisfactory due diligence and financing, "mutually agreeable representations, warranties and indemnifications" in an executed Asset Purchase Agreement, and a "mutually agreeable and binding" employment and non-compete agreement between Griffin and CRW. These were conditions precedent that must be fulfilled before either party was bound to the sale covenants in the LOI. *E.g., Schwarz-Jordan, Inc. of Hous. v. Delisle Constr. Co.*, 569 S.W.2d 878, 881 (Tex. 1978) ("Terms such as 'if,' 'provided that,' or 'on condition that,' usually indicate an intent that the provision be a condition precedent rather than a promise."). Because the record demonstrates conclusively that one or more of these conditions never occurred,[3] no enforceable sales contract ever formed, and appellants cannot recover on their breach of contract claim premised on CRW's failure to purchase the company. *See, e.g., Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, 595 S.W.3d 668, 673 (Tex. 2020) ("A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied.").

We next consider the negotiation covenants in the LOI. Although appellants did not plead their breach of contract claim based on a theory that CRW breached

[3] In a declaration attached to appellants' summary judgment response, Griffin stated, "All of those conditions were met. The parties drafted and negotiated the contemplated APA and employment agreement. Both agreements were fully drafted, negotiated, and complete." Griffin did not testify that the asset purchase agreement was *executed*, as required by condition (b) in the LOI. The record includes a seventeen-page asset purchase agreement, but it is unsigned.

the LOI by failing to negotiate in good faith, appellants articulated that theory in their summary judgment response. Agreements like the LOI to negotiate toward a future contract are not legally enforceable. *See Fischer*, 479 S.W.3d at 242 ("To be sure, contracting parties' 'agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action.'") (quoting *Radford v. McNeny*, 104 S.W.2d 472, 474 (Tex. 1937)). And Texas courts have held that this is true "even if the party agreed to negotiate in good faith." *Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 371 (Tex. 2019); *John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 21 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("By contrast, under Texas law, an agreement to negotiate in the future is unenforceable, even if the agreement calls for a 'good faith effort' in the negotiations.").

For these reasons, the trial court did not err in dismissing appellants' breach of contract claim against the CRW defendants.

C. Negligence

Appellants broadly alleged that "Defendants through their acts and omissions were negligent." The CRW defendants argued that appellants could produce no evidence of: a legal duty; a breach of that duty; or damages. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (setting forth essential elements of negligence claim).

In their summary judgment response, appellants argued that "Texas law imposes a common-law duty on parties to a contract," citing *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 & n.1 (Tex. 1991), and "[t]hus, as parties to the LOI, Defendants owed Plaintiffs a duty to perform their contractual obligations with care, skill, reasonable expedience[,] and faithfulness."

DeLanney does not extend as far as appellants suggest. Rather, *DeLanney* and like cases simply stand for the well-accepted principle that the acts of a contracting party may breach duties in tort or contract or simultaneously in both. If the defendant's conduct would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may sound in tort. *DeWitt Cnty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 105 (Tex. 1999); *DeLanney*, 809 S.W.2d at 494. Conversely, if the defendant's conduct would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract. *DeWitt Cnty. Elec. Coop.*, 1 S.W.3d at 105. But there is not, as appellants suggest, a tort duty "to go about compliance with the contract in a prudent manner"; any such complaint would sound solely in contract. *See id.*; *see also Univ. of Tex. Med. Branch at Galveston v. Harrison*, No. 14-02-01276-CV, 2003 WL 21803314, at *3 n.5 (Tex. App.—Houston [14th Dist.] Aug. 7, 2003, pet. denied) (subst. mem. op.) ("However, if an independent negligence duty does not otherwise exist, we can find no authority or rationale for holding that a negligent breach of contract somehow transforms the associated contract claim into a tort claim or creates a new tort claim.").

Appellants argue nonetheless that, because the CRW defendants defeated appellants' breach of contract claim, it necessarily follows that appellants should be allowed to recover under a general negligence theory. This argument incorrectly assumes that appellants' claims against the CRW defendants must be viable in negligence if not in contract. This proposition is not correct, and appellants offer no support for it. Moreover, appellants' position ignores, among other things, the sundry causes of action that an allegedly injured party may pursue after a commercial transaction fails to close, including a negligent

misrepresentation claim—which appellants successfully presented to the jury, as to CRW at least.

At any rate, appellants' negligence claim against the CRW defendants suffers a more fundamental problem: they have not identified a legal duty the CRW defendants owed and subsequently breached. Appellants' main complaint is that the CRW defendants did not comply with the purported contract—i.e., close the sale—but they had no contractual duty to do so, as discussed above, and appellants have not established that the CRW defendants owed them any common-law duty to consummate the sale. Appellants also argued in their response below that the CRW defendants "did not negotiate the parties' transaction in good faith," but there "is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998).

We hold that the trial court did not err in dismissing appellants' negligence claim against the CRW defendants.

D. Fraud

Appellants alleged that the CRW defendants fraudulently misrepresented that CRW intended to follow through on the parties' agreement to close the transaction. The CRW defendants argued that appellants could produce no evidence of: a material representation by defendants; that was false; that was known to be false when made or was made recklessly as a positive assertion without knowledge of its truth; that was intended to be relied upon; that was relied upon; or damages. *See JPMorgan Chase Bank, N.A. v. Orca Assets, G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (setting forth elements of fraud claim). If the alleged representation involves a promise to do an act in the future, the plaintiff must also prove that, at the time the defendant made the promise, the defendant

had no intent of performing the act. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992).

On appeal, appellants identify the following allegedly false representations: that CRW is an established, viable company and had the money for the deal; and that the deal would "go through."

Appellants do not cite any portion of the record supporting these assertions. They cite to "Appendix 2," which is an attorney-prepared compilation of various emails, to support their claim that the CRW defendants' "partial disclosures conveyed a false impression." But appellants do not cite to material parts of specific emails to establish the falsity of any misrepresentation or the CRW defendants' knowledge of the falsity. For this reason alone, appellants have not shown that they are entitled to reversal. *See* Tex. R. App. P. 38.1.

Further, in the trial court appellants did not rely on the purported misstatement that CRW was an established, viable company and had money for the deal. In their response below, appellants argued solely that, in executing the LOI, the CRW defendants "falsely represented they intended to close the subject sale." But appellants provided no evidence that the CRW defendants signed the LOI intending not to close the sale. *See T.O. Stanley Boot*, 847 S.W.2d at 222 (if alleged representation involves a promise to do an act in the future, plaintiff must prove defendant had no intent of performing the act). Appellants pointed to Bill's statement on July 27, 2015 that the deal was not going to close as scheduled, but that is no evidence that the CRW defendants intended not to close when the LOI was signed several weeks earlier. *See, e.g.*, *MTM Elec. Corp. v. Bechtel Int'l, Inc.*, No. 14-00-01469-CV, 2001 WL 1474495, at *5 (Tex. App.—Houston [14th Dist.] Nov. 21, 2001, no pet.) (not designated for publication) (evidence that defendant denied making promise and failed to perform as promised is not evidence of intent

not to perform at time of representation; affirmed summary judgment on fraud claim); *see also T.O. Stanley Boot*, 847 S.W.2d at 222. Appellants also asserted that, despite Bill's July 27th rejection of financing, "the Defendants continued to assure Griffin the deal would go through . . . [by claiming] [t]he Taylors are working to get their arms around all the numbers concerning CRW [] and the proposed acquisition. They will consider picking up the conversation with you in a month or so after digesting the numbers in total and evaluating the extent of their current and future investments." Nothing in that alleged statement amounts to an assurance that the transaction would occur.

The trial court did not err in dismissing appellants' fraud claim against the CRW defendants.

We overrule appellants' first issue.

II. Summary Judgment for Kyle Financial, Bill, and Brandi

The trial court granted partial summary judgment on no-evidence grounds in favor of Kyle Financial, Bill, and Brandi (collectively, the "Kyle Financial defendants") on appellants' claims of negligence, fraud, and tortious interference. In their second issue, appellants challenge this ruling in part.

A. Negligence

Appellants broadly alleged that "Defendants through their acts and omissions were negligent." The Kyle Financial defendants argued that appellants could produce no evidence of: a legal duty they owed to appellants; a breach of that duty; or damages. *See Doe*, 907 S.W.2d at 477.

On appeal, appellants argue simply that the summary judgment "should be reversed for the same reasons . . . regarding the negligence claim against CRW Security, John Cronin, Mark Riordan and Hank Whitman." Appellants do not

expand on this argument, direct the court to any pertinent portions of the record, or provide relevant authority. *See* Tex. R. App. P. 38.1.

Given our conclusion above that the trial court did not err in granting summary judgment on appellants' negligence claim in favor of the CRW defendants, we hold that appellants likewise have failed to show that the trial court erred in dismissing appellants' negligence claim against the Kyle Financial defendants. *See, e.g.*, *Ward v. Portillo*, No. 12-08-00377-CV, 2009 WL 4983797, at *2 (Tex. App.—Tyler Dec. 23, 2009, no pet.) (mem. op.) ("Ward's first argument presupposes that we have sustained his first issue. . . . However, this premise is incorrect, and we have concluded the opposite. Therefore, this argument need not be considered on its merits.") (citing Tex. R. App. P. 47.1).

B. Fraud

Appellants alleged that the Kyle Financial defendants fraudulently represented to appellants that CRW intended to follow through on the parties' agreement to close the transaction. The Kyle Financial defendants argued that appellants could produce no evidence of: a material representation by defendants; that was false; that was known to be false when made or was made recklessly as a positive assertion without knowledge of its truth; that was intended to be relied upon; that was relied upon; or damages. *JPMorgan Chase Bank*, 546 S.W.3d at 653; *T.O. Stanley Boot*, 847 S.W.2d at 222.

As with their negligence claim, appellants' sole argument on appeal is that the summary judgment "should be reversed for the same reasons . . . regarding the fraud claim against CRW Security, John Cronin, Mark Riordan and Hank Whitman." Again, given our determination that the trial court did not err in dismissing appellants' fraud claim against the CRW defendants, this argument is likewise unmeritorious, as briefed. We hold that the trial court did not err in

granting the Kyle Financial defendants summary judgment on appellants' fraud claim. *See Ward*, 2009 WL 4983797, at *2.

C. Tortious Interference

Appellants do not challenge the trial court's dismissal of their tortious interference claim against Kyle Financial, Bill, or Brandi, so we leave it undisturbed. *See Enter. Crude GP LLC v. Sealy Partners, LLC*, 614 S.W.3d 283, 310 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

We overrule appellants' second issue.

III. Summary Judgment for Whitman on Remaining Claims

As discussed above in Part I, the trial court granted a partial summary judgment disposing of appellants' claims of breach of contract, negligence, and fraud against Hank Whitman (among others), leaving pending appellants' claims of promissory estoppel, negligent misrepresentation, and conspiracy. Whitman later moved for summary judgment on the remaining claims against him, arguing that he was a member of CRW, a limited liability company, during the relevant time period and therefore could not be individually liable for appellants' alleged claims.[4] Whitman relied on the Texas Business Organizations Code, which provides that "[e]xcept as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court." Tex. Bus. Org. Code § 101.114. The trial court granted Whitman's motion and dismissed appellants' remaining

[4] Griffin acknowledged in deposition testimony that she was "not basing [the] claims against Hank Whitman, individually, on any actions or inactions outside his scope of employment with CRW."

claims against Whitman. In appellants' third issue, they argue that the trial court erred in doing so.

To prevail on a traditional motion for summary judgment, the movant has the burden of establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort*, 289 S.W.3d at 848. To be entitled to traditional summary judgment, the defendant must conclusively negate at least one element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 676 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Once the defendant establishes its right to summary judgment, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Id.*

Appellants concede that section 101.114 means that a member may be individually liable only upon proof that the member "use[d] the LLC for the purpose of perpetrating an actual fraud for the member['s] . . . personal benefit," citing *Metroplex Mailing Service, LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.), *abrogated on other grounds by Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Appellants argue, however, that they raised a fact question whether Whitman perpetuated a fraud for his own benefit.

In their brief, appellants refer to their argument regarding the trial court's ruling on their fraud claim against the CRW defendants to support their assertion that Whitman can be held individually liable for perpetuating a fraud for his own benefit. We have already concluded that the trial court did not err in granting summary judgment on appellants' fraud claim in favor of the CRW defendants, including Whitman. Because appellants rely solely on their briefed argument

regarding the CRW defendants' alleged fraud to contend that a fact question remains whether Whitman should be shielded by section 101.114, we conclude that appellants' argument as briefed presents no basis for us to conclude that Whitman can be held individually liable for CRW's actions or omissions. *See Ward*, 2009 WL 4983797, at *2.

Appellants also argue that section 101.114 "does not apply to an employee," that Whitman was an employee of CRW, and thus the statute does not shield him from liability for appellants' promissory estoppel, negligent misrepresentation, and conspiracy claims. Appellants do not cite to any evidence in the record that establishes that Whitman was an employee of CRW. Accordingly, to the extent their asserted legal proposition is correct, a question we need not reach, appellants did not present evidence creating a fact issue that would preclude summary judgment.

We overrule appellants' third issue.[5]

Cross-Appeal

I. Sanctions

The Kyle Financial defendants and Riordan filed a counterclaim against appellants, arguing that appellants were prosecuting frivolous claims they did not own. According to the Kyle Financial defendants and Riordan, K. Griff sold or assigned its right to bring this lawsuit when KGI purchased the company in May 2016. The counterclaim did not proceed to the jury. The Kyle Financial defendants and Riordan moved for sanctions after trial, based on their argument

[5] Given our disposition of appellants' first three issues, we need not reach their fourth, in which appellants seek to set aside the entire judgment, including the portions of the final judgment effectuating the jury verdict, because all issues are so interwoven with one another that they cannot be separated from the challenged summary judgment rulings. *See* Tex. R. App. P. 47.1.

that appellants' claims were frivolous. The trial court declined to assess sanctions. In their cross-appeal, the Kyle Financial defendants and Riordan challenge the trial court's denial.

A. Applicable Law and Standard of Review

The Kyle Financial defendants and Riordan moved for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code chapters 9 and 10.

To impose sanctions under rule 13, the proponent must establish that the challenged pleading, motion, or other paper was groundless and brought (1) in bad faith or (2) for purposes of harassment. Tex. R. Civ. P. 13. A pleading, motion, or other paper is groundless when it has no basis in law or in fact. *Id.* A lawsuit is "groundless," as used in rule 13, if "there is no arguable basis for the cause of action." *Att'y Gen. of Tex. v. Cartwright*, 874 S.W.2d 210, 215 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Bad faith means "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose[s]." *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 71 (Tex. App.—El Paso 1994, writ denied); *see also Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Improper motive is an essential element of bad faith. *Elkins v. Stotts-Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.). Bad faith does not exist when a party exercises bad judgment or negligence. *Id.*; *see also Mattly*, 19 S.W.3d at 896. Rule 13 provides that courts shall presume that pleadings, motions, and other papers are filed in good faith. Tex. R. Civ. P. 13. The burden is on the party moving for sanctions to overcome the presumption that the pleading was filed in good faith. *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993).

Chapter 10 provides, among other things, that the signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry: the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. Tex. Civ. Prac. & Rem. Code § 10.001. Although rule 13 requires a party to have filed a groundless pleading brought in bad faith or a groundless pleading for harassment, sanctions under chapter 10 can be awarded if the suit was filed for an improper purpose, even if the suit was not frivolous. *Save Our Springs All., Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 321 (Tex. App.—Texarkana 2006, pet. denied). We construe the phrase "improper purpose" as the equivalent of "bad faith" under rule 13. *Id.*

Chapter 9 of the Texas Civil Practice and Remedies Code also addresses frivolous pleadings and claims, but its application is limited to proceedings in which neither rule 13 nor chapter 10 applies. *See* Tex. Civ. Prac. & Rem. Code § 9.012(h); *see also Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (noting "Chapter 9 of the Texas Civil Practice and Remedies Code only applies in proceedings in which neither Rule 13 nor Chapter 10 applies"). The Supreme Court of Texas has observed that "[c]hapter 9 has largely been subsumed by subsequent revisions to the code." *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 362 n.6 (Tex. 2014) (citing Cynthia Nguyen, *An Ounce of Prevention is Worth a Pound of Cure?: Frivolous Litigation Diagnosis Under Texas Government Code Chapters 9 and 10, and Texas Rule of Civil Procedure 13*, 41 Tex. L. Rev. 1061, 1083-84 (2000) (theorizing "it would be difficult to conceive of a scenario in which Chapter 9 would be applicable," and noting that "there are only a handful of

cases that even cite Chapter 9, and these date from before the 1999 amendment to Section 9.012")).

We review a trial court's award or denial of sanctions for an abuse of discretion. *Low*, 221 S.W.3d at 614. In matters committed to a district court's discretion, the test is whether the ruling was unreasonable or arbitrary or whether the court acted without reference to any guiding rules or principles. *Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 462 (Tex. App.—Austin 2006, no pet.). In deciding whether the denial of sanctions constitutes an abuse of discretion, we examine the entire record, reviewing the conflicting evidence in the light most favorable to the trial court's ruling and drawing all reasonable inferences in favor of the court's judgment. *In re C.Z.B.*, 151 S.W.3d 627, 636 (Tex. App.—San Antonio 2004, no pet.).

B. Application

The Kyle Financial defendants and Riordan do not identify a specific pleading, motion, or other paper that K. Griff filed in bad faith or for harassment. Rather, they complain about K. Griff's general prosecution of the lawsuit in light of KGI's purported ownership of the claims asserted. The trial court did not hold an evidentiary hearing, and so we review the pleadings and evidence in the record.[6]

The record shows the following:

- February 15, 2016: Appellants filed suit.

[6] The Kyle Financial defendants and Riordan complain that the trial court erred in not conducting a hearing on their motion for sanctions, but neither rule 13 nor chapter 10 requires an evidentiary hearing before denying, as opposed to granting, a motion for sanctions. *See Skinner v. Levine*, No. 04-03-00354-CV, 2005 WL 541341, at *3 (Tex. App.—San Antonio Mar. 9, 2005, no pet.) (mem. op.); *Breault v. Psarovarkas*, No. 01-01-00122-CV, 2003 WL 876651, at *6 (Tex. App.—Houston [1st Dist.] Feb. 28, 2003, pet. denied) (mem. op.).

- May 10, 2016: K. Griff sold to KGI "all of [K. Griff's] owned property . . . [including] the trade, business name, telephone number and listing, goodwill, and all other intangible assets . . . ."
- February 20, 2017: KGI filed a petition in intervention, arguing that "all other intangible assets" included the claims in this lawsuit.
- May 22, 2017: After K. Griff and KGI participated in arbitration on the issue of ownership of any purported claims asserted in this litigation, the arbitrator found that K. Griff conveyed its claims in this litigation to KGI by virtue of the May 10, 2016 asset purchase agreement.
- July 18, 2017: KGI subsequently assigned to K. Griff the right to prosecute the current claims.

No party disputes that K. Griff possessed standing to institute this suit in February 2016. Furthermore, although the arbitrator found that K. Griff conveyed its claims to KGI, the arbitrator did not so find until May 2017. And, within two months of that finding, KGI assigned the right to prosecute the claims back to K. Griff. Thus, the trial court reasonably could have found that Griffin honestly, though perhaps erroneously, believed that she had the right to prosecute K. Griff's claims on the company's behalf until May 2017. And there is no dispute that from July 2017 forward, after KGI assigned the claims back to K. Griff, K. Griff possessed authority to prosecute the current claims.

The Kyle Financial defendants and Riordan did not present any evidence that Griffin or K. Griff committed a "conscious wrong for dishonest, discriminatory, or malicious purpose[s]." *Elkins*, 103 S.W.3d at 669; *see also Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 194 (Tex. App.—Texarkana 2011, no

pet.) (when there was a dispute as to the application of the discovery rule, fact that petition was time-barred, standing alone, did not justify sanctions in absence of evidence of bad faith or improper motive). On this record, we cannot say that the trial court abused its discretion in denying the motion for sanctions on the basis that appellants prosecuted groundless claims brought in bad faith or for the purpose of harassment.[7]

We overrule this issue on cross-appeal.

II. Court Costs

In the final judgment, the trial court did not award costs to any defendant. In another part of their issues presented on cross-appeal, the Kyle Financial defendants and Riordan argue the trial court erred in failing to tax costs in their favor.

Rule 131 provides that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." Tex. R. Civ. P. 131. However, a trial court may, for good cause, assess costs differently than required by law or the rules. *See* Tex. R. Civ. P. 141; *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001). If, pursuant to rule 141, the court opts to deviate from the rules in taxing costs, then good cause must be "stated on the record." Tex. R. Civ. P. 141. Otherwise, the court abuses its discretion. *Marion v. Davis*, 106 S.W.3d 860, 869 (Tex. App.—Dallas 2003, pet. denied).

[7] The Kyle Financial defendants and Riordan moved for sanctions under chapter 9 for the same reasons they sought sanctions under rule 13 and chapter 10 and requested the same types of sanctions. Chapter 9 therefore does not apply by its terms, and the trial court did not abuse its discretion by denying the motion for sanctions under chapter 9. *See Dinkins v. Calhoun*, No. 02-17-00081-CV, 2018 WL 2248572, at *6 (Tex. App.—Fort Worth May 17, 2018, no pet.) (mem. op.).

Here, cross-appellants were the successful parties. Kyle Financial, Brandi, and Riordan were unequivocally successful, because the jury found in their favor. While the jury found that Bill made a negligent misrepresentation that caused damage to appellants, the court signed a take-nothing judgment in his favor due to a settlement credit. Further, as we discuss below, the jury's findings against Bill are not supported by legally sufficient evidence. Thus, all four defendants are entitled to recover their court costs under rule 131 unless the trial court finds good cause to deny them in accordance with rule 141. *See Dear v. City of Irving*, 902 S.W.2d 731, 739 (Tex. App.—Austin 1995, writ denied) ("Under the definition of successful party adopted in the cases construing Rule 131, a prevailing party is one who is vindicated by the judgments rendered.").

Although the trial court struck language in the judgment that would have awarded costs to the successful defendants, we have not located a "statement on the record" of good cause for doing so. *See* Tex. R. Civ. P. 141. Thus, the court abused its discretion. *Sparks v. Booth*, 232 S.W.3d 853, 872 (Tex. App.—Dallas 2007, no pet.) (trial court abuses its discretion when its judgment does not assess costs or state any basis for varying from rule 131); *Clovis Corp. v. Lubbock Nat'l Bank*, 194 S.W.3d 716, 720-21 (Tex. App.—Amarillo 2006, no pet.).

We sustain this issue on cross-appeal.

III. Negligent Misrepresentation Finding Against Bill

In his cross-appeal, Bill asks that we review the jury's findings against him on appellants' negligent misrepresentation claim. Specifically, Bill asserts that no evidence supports the jury's findings that he made a negligent misrepresentation to Griffin or K. Griff or that any misrepresentation caused appellants' damages. Bill prays that we modify the judgment to delete reference to these findings, even

though, due to a settlement credit, the judgment ordered that appellants take nothing from Bill.

A. Standard of Review and Applicable Law

In a legal sufficiency challenge, we consider whether the evidence at trial would enable a reasonable and fair-minded fact finder to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence is legally insufficient to support a jury finding when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *See Bustamante v. Ponte*, 529 S.W.3d 447, 455-56 (Tex. 2017); *King Ranch*, 118 S.W.3d at 751. The record contains more than a mere scintilla of evidence when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *King Ranch, Inc.*, 118 S.W.3d at 751. Conversely, the record contains less than a scintilla when the evidence offered to prove a vital fact's existence is "so weak as to do no more than create a mere surmise or suspicion." *Id.* All the record evidence must be considered "in the light most favorable to the party in whose favor the verdict has been rendered," and "every reasonable inference deducible from the evidence is to be indulged in that party's favor." *Bustamante*, 529 S.W.3d at 456 (internal quotation omitted).

To establish a claim for negligent misrepresentation, the plaintiff must prove: (1) the defendant made a representation in the course of its business or in a transaction in which it had a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the

information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *JPMorgan Chase Bank*, 546 S.W.3d at 653-54. The term "false information," as used in the elements of a negligent misrepresentation claim, means a misstatement of existing fact, not a promise of future conduct. *See Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 379 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Consistent with the above elements of a negligent misrepresentation claim, the jury was asked:

> Did any of those named below make a negligent misrepresentation on which K. Griff justifiably relied?
>
> You are instructed that negligent misrepresentation occurs when
>
> 1. a party makes a representation in the course of his business or in a transaction in which he has a pecuniary interest, and
> 2. the representation supplies false information for the guidance of others in their business, and
> 3. the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information.
>
> In order to find that a party supplied "false information," you must find that the party supplied a misstatement of existing fact, not a promise of future conduct.
>
> In order to find justifiable reliance, you must find
>
> 1. that K. Griff actually relied on the information, and
> 2. the reliance was reasonable. Whether the reliance is justifiable depends on the nature of the parties' relationship and K. Griff's intelligence and experience.

The jury was asked the same question regarding Griffin and answered both questions affirmatively as to Bill.

B. Application

Appellants/cross-appellees did not respond to Bill's cross-appeal issue on negligent misrepresentation, so it is unclear what fact or facts appellants believe that Bill misrepresented or what damages those representations caused.[8]

We have reviewed the reporter's record, which we summarize in relevant part. Griffin testified that, as early as April 28th or 29th, Cronin told her that the sale was a "done deal." Cronin met with Griffin's employees in April and discussed those employees' future employment with CRW, including details regarding salary and office location. CRW was going to take over K. Griff's payroll obligations after the deal closed. No one ever told Griffin that there was any issue with the due diligence performed regarding K. Griff. Griffin hired additional personnel at CRW's request, because CRW was going to have a lot of work post-closing, and CRW "needed everything up and running . . . all hands on deck." Griffin upgraded K. Griff's computer servers at Riordan's request.

According to Cronin, Bill told him that "funds were available" for the sale, as of May 29 or 30. Cronin operated at Bill's direction and signed the LOI with Bill's permission.

Griffin testified that CRW told her on July 9 that the closing date needed to be rescheduled from July 15 to July 31. Although initially she was led to believe that the change was due to a lawyer's scheduling conflict, emails showed that it was actually Bill's idea. Bill acknowledged that he may have told Cronin to push the closing date because July 15 "was premature and it was moving too fast." When asked at trial whether Bill had decided on July 9 that the deal was not going

[8] In their live pleading, appellants alleged, without specification, that "Defendants made misrepresentations and omissions of material facts to Plaintiffs regarding their ability to close the transaction. These representations were material and induced Plaintiffs to proceed with the transaction for months, incurring considerable expenses."

to close, Bill denied it. Griffin's attorney impeached him with prior deposition testimony:

> Question: "You weren't going to fund it on July 9th?"
>
> Answer: "Correct. Don't know if I rendered my decision at that time. . . . But I made my mind up."

Bill's attorney read additional deposition testimony, under the rule of optional completeness:

> Question: "[M]ade your mind up on July 9th you weren't going to fund it?"
>
> Answer: "I believe. Can't recall the timeframes. That's my problem. I'm sure there's an e-mail somewhere."

In late July, Bill and Brandi began having concerns over a number of aspects of the proposed transaction, including an alleged lack of necessary documentation from both CRW and K. Griff and suspicious expenses incurred by CRW, such as personal rent payments and leased property for art storage.

Griffin testified that, during the July 27th call from Bill, Bill told her that "we're not going to be closing this deal, and I don't trust them boys over there [at CRW]." According to Griffin, Bill told her, "I'm not saying it is over," but he needed to "get [his] arms around this." Bill assured her that the problem was not with K. Griff, that everything with K. Griff was "perfect," and that he would "make it right."

During closing argument, appellants' counsel did not identify a specific misrepresentation made by Bill to Griffin or K. Griff. Rather, appellants' counsel argued "[The defendants] should have told [Griffin] they never intended to do this even if they say, 'Well, we didn't know,' that's what the word 'negligent' is. You should have said something. You should have said something to her. You strung her along, and she spent money because you all asked her to." Counsel also stated

that "Certainly [Bill] had the right to pull out. Absolutely. But reimburse her for the costs that you asked her to incur while you guys wanted to ramp up and before you had your internal issues that nobody bothered to tell her about."

Based on our review of the record, we agree there is no evidence that Bill made a negligent misrepresentation to K. Griff or Griffin upon which they justifiably relied. It is undisputed that Bill did not speak to Griffin until July 27, which was four days before the rescheduled closing. Griffin conceded that the "first and only time [she] spoke with Mr. Taylor" was when he called on July 27 and that Bill never made any representations to Griffin prior to that date. Everything that Griffin testified she did in reliance upon an understanding that the sale was a "done deal," such as upgrading her computer servers and hiring additional personnel, occurred before July 27 and at CRW's request.[9] In the absence of evidence that Bill made a statement of existing fact on which Griffin or K. Griff justifiably relied, the jury's findings against Bill as to both Griffin and K. Griff cannot stand. *See*, *e.g.*, *Baskin v. Mortg. & Tr., Inc.*, 837 S.W.2d 743, 748 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (plaintiffs could not recover on negligent misrepresentation claim when they testified that defendant "made no representations, promises, guarantees, warranties, or statements to them").

Similarly unavailing is any suggestion that the jury could find Bill liable for negligent misrepresentation based on statements made by Cronin or Riordan. According to Griffin's testimony at trial, Cronin told her that the proposed sale was a "done deal." Cronin also told Griffin to hire several employees, with the anticipation that there would be sufficient business post-closing, and that Griffin would be reimbursed for these costs. Riordan told Griffin that she needed to

[9] This break in the causal link between Bill's alleged misrepresentations and cross-appellees' damages also fatally undermines any recovery against Bill on that claim.

upgrade her computer systems, also to facilitate the sale. Even crediting testimony that Cronin and Riordan were operating at Bill's behest, these were not representations regarding an existing fact. Rather, Cronin's and Riordan's statements to Griffin, at most, amounted to a promise of future conduct—i.e., that the sale would close and that Griffin would be reimbursed for her expenses. Such statements cannot support a negligent misrepresentation claim. *See, e.g.*, *Lindsey Constr., Inc. v. AutoNation Fin. Servs., LLC*, 541 S.W.3d 355, 366 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (defendants' promise to purchase truck despite damaged engine and failure to disclose that sale was contingent upon engine being repaired constituted promises of future conduct rather than misstatements of existing fact and could not form the basis of a viable negligent misrepresentation claim); *see also Bexar-Mar Int'l, LLC v. Combi Lift GmbH*, No. 01-19-00171-CV, 2020 WL 4979527, at *10 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) (mem. op.).

In sum, there is no evidence that Bill affirmatively supplied false information regarding a statement of existing fact to K. Griff or Griffin, or that any statement by Bill to Griffin or K. Griff proximately caused the damages found by the jury. Because we conclude that no legally sufficient evidence supports the jury's findings against Bill on Griffin's and K. Griff's negligent misrepresentation claims, they cannot recover from Bill irrespective of a settlement credit. We sustain Bill's issue on cross-appeal.

Conclusion

We reverse the part of the trial court's judgment refusing to award costs to cross-appellants, and we remand the cause to the trial court for a re-assessment of costs, if any, to be awarded to Kyle Financial, Bill Taylor, Brandi Taylor, and Mark Riordan. We also modify the judgment to state that no evidence supports the

jury's findings on negligent misrepresentation and damages against Bill Taylor, and we affirm the remainder of the judgment as modified. *See* Tex. R. App. P. 43.2(b).

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Bourliot, and Hassan.