In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-21-00391-CV

DENISE BROUSSARD, Appellant

V.

KAREN E. VICKNAIR AND KRISTINA K. DUBOIS, Appellees

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 20-03-04066-CV

MEMORANDUM OPINION

In 2019, Appellant Denise Broussard ("Broussard," "Appellant," or "Defendant") sold Omnibus Home Health Care, Inc. ("Omnibus")—a home health care business—to the Appellees Karen Vicknair ("Karen") and Kristina Dubois ("Kristina") (collectively "Appellees" or "Plaintiffs") for $950,000. Broussard owned 100% of the shares in Omnibus at the time of the sale, and she sold all her shares to Karen and Kristina as outlined in a Stock Purchase Agreement. After purchasing Omnibus, Karen and Kristina discovered the financial condition of the

company was not what Broussard had represented, and they filed a lawsuit against Broussard. The trial court granted partial relief by cross motions for summary judgment, and thereafter the case went to trial on the Plaintiffs' claims for breach of contract, common law fraud, fraud by nondisclosure, conversion, negligent misrepresentation, fraudulent inducement, and money had and received, and on the Defendant's counterclaim for breach of contract. After a bench trial, the trial court rendered judgment in favor of Karen and Kristina, denied all counterclaims filed by Broussard, and the trial court made Findings of Fact and Conclusions of Law in support of the Judgment. On appeal, Appellant states she has seven issues. We construe issues two through seven as a challenge of either the legal and factual sufficiency of the evidence to support the trial court's judgment, and we construe her first issue as a claim that the trial court erred in denying her Motion for New Trial. As explained below, we overrule all of her issues and affirm.

Background

In May 2019, Karen and Kristina purchased Omnibus, a home health care business, from Broussard. Karen and Kristina paid Broussard $500,000 cash at closing, and Karen and Kristina executed promissory notes for the balance, with Karen to pay an additional $405,000 and Kristina to pay an additional $45,000. The business was conveyed by a Stock Purchase Agreement, which provided in relevant part that Broussard agreed to be responsible for and to indemnify Karen and Kristina

for all expenses, debts, and liabilities that arose before the closing date. In March 2020, after purchasing the business, Karen and Kristina sued Broussard, alleging that Broussard had "grossly misstated" the income and liabilities of the business. In their Original Petition, Plaintiffs asserted claims for breach of contract, common law fraud, fraud by nondisclosure, and conversion. Broussard filed a general denial in her Original Answer.[1]

Plaintiffs filed a First Amended Petition, adding claims for negligent misrepresentation and fraudulent inducement. Plaintiffs filed a Second Amended Petition, adding a claim for money had and received. Plaintiffs also filed their Third Amended Petition adding a claim under the Texas Deceptive Trade Practices Act.

Broussard filed a counterclaim against Plaintiffs and Mitchell Vicknair ("Mitchell"), asserting claims for breach of contract, promissory estoppel, common law fraud, fraud by nondisclosure, conspiracy, and money had and received.[2] Broussard argued that the Plaintiffs were vicarious liable for Mitchell's actions because he served as their agent or had apparent authority to act as their agent and that he, together with Plaintiffs, had misrepresented the Stock Purchase Agreement

[1] Broussard filed a Motion to Transfer Venue, which the trial court denied.

[2] Plaintiffs also argued that Broussard had failed to serve Mitchell Vicknair with the counterclaim, Plaintiffs' counsel had never entered an appearance for Mitchell, and Mitchell "may not be served process simply by notifying counsel for Karen Vicknair and Kristina Dubois." Later, Broussard filed an Affidavit of Service of her counterclaim on Mitchell Vicknair.

to Broussard and that the Stock Purchase Agreement actually executed did not include several changes Broussard and Mitchell had previously negotiated.

Broussard amended her counterclaim but did not add or delete claims previously asserted. Plaintiffs filed a motion to strike Broussard's counterclaim and amended counterclaim, which the trial court denied.

The parties filed cross motions for summary judgment and the trial court granted Broussard's Motion for Partial Summary Judgment on Plaintiffs' claims under the DTPA. The trial court then granted the Plaintiffs' No-Evidence Motion in part, ordering that Broussard take nothing on her claims for promissory estoppel, common law fraud, fraud by non-disclosure, conspiracy, and money had and received. And the trial court denied the No-Evidence Motion for Summary Judgment as to Broussard's claim for breach of contract, which then left the remaining claims as asserted in the Plaintiffs' Third Amended Petition—claims for breach of contract, common law fraud, fraud by non-disclosure, conversion, negligent misrepresentation, fraudulent inducement, and money had and received—as well as Broussard's counterclaim for breach of contract.

Relevant Contract Provisions

The Stock Purchase Agreement (the "Agreement") states that it is an agreement between Karen E. Vicknair and Kristina K. Dubois (together, the "Buyer"), and Denise Broussard ("Seller")." The Stock Purchase Agreement is 22

pages in length not including the signature pages and attachments. The Agreement contains terms including but not limited to the following:

- 1.2 Pre-Closing Debts and Liabilities. At Closing, with the exception of Ordinary Trade Payables, Seller shall have paid or caused Company to have paid all outstanding debts and liabilities of Company ("*Pre-Closing Debts*"). To the extent any Pre-Closing Debt is not satisfied in full on or prior to the Closing Date, Seller hereby assumes responsibility and liability for all Pre-Closing Debts. Pre-Closing Debts shall include, but not be limited to, any expense, debt, recoupment, overpayment assessment, audit finding, tax, or liability which arises out of or relates to any period, transaction, or event which occurred prior to the Closing Date, not including Ordinary Trade Payables. Seller does hereby agree to indemnify and hold harmless Buyer, Company, and the Subject Business for any such Pre-Closing Debt, including reasonable attorneys' fees. "*Ordinary Trade Payables*" shall include ordinary accounts payable, salaries and wages incurred in the normal course, and unpaid but not yet due payroll taxes.
- 1.3 Post-Closing Accounts Receivable. On the Closing Date, Buyer shall acquire the exclusive right to all receivables, including any accounts receivable, refunds, and deposits of the Company. After the Closing Date, in the event that any receivables of the Company are deposited into accounts controlled by Seller or Seller otherwise receives any payments due to Company, including receivables earned by Company prior to the Closing Date, Seller shall pay and remit such funds to Buyer no later than 3 business days after Seller's receipt of the funds.
- 2.1. Payment of Purchase Price. Buyer shall pay Seller a total Purchase Price of $950,000.00. The Purchase Price shall be payable by check or wire transfer as follows: (a) On the Closing Date, the Buyer shall collectively pay the sum of $500,000.00 to Seller. (b) On the Closing Date, each Buyer shall execute and deliver a Promissory Note for their respective portion of the balance of the Purchase Price (together, the "*Notes*"), with the total principal amount of the Notes equaling $450,000.00, payable in accordance with the terms therein.
- 2.2 Post-Closing Adjustment. (a) After Closing, on the one year anniversary of Closing or more often as determined by Buyer, Buyer

shall prepare an updated accounts receivable report and updated accounts payable report for the Company reflecting the accounts receivable existing on the Closing Date which have been collected by Company since the Closing Date and the accounts payable existing on the Closing Date which have been paid by Company since the Closing Date (together, the "*Closing AR/AP Report*"). Buyer shall prepare the final Closing AR/AP Report of the Company (the "*Final Closing AR/AP Report*") upon the occurrence of the following events: (i) all Pre-Closing Debts, Ordinary Trade Payables, and any other expenses or liabilities incurred by Company or relating to events prior to the Closing Date have been paid in full; and (ii) all Accounts Receivable relating to services rendered prior to Closing have been collected or are more than 150 days past due. (b) Based on the Final Closing AR/AP Report, Buyer shall calculate the actual Closing Net Working Capital of the Company as of the Closing Date. Buyer shall then calculate the post-Closing cash adjustment, which shall equal the amount, if any, by which the Closing Net Working Capital is less than the Required Net Working Capital (the "*Post-Closing Adjustment*"). Buyer shall submit the Final Closing AR/AP Report, along with its calculation of the Post-Closing Adjustment to Seller and if Seller does not object to the amount of the Post-Closing Adjustment within twenty (20) days of receipt thereof, Buyer may deduct from the Purchase Price, including from the balance of the Notes, an amount equal to the Post-Closing Adjustment. . . . (d) In the event that any amount is owed to the Buyer as a result of the Post-Closing Adjustment, Buyer shall have the right to deduct such amount from the Purchase Price and amounts due under the Notes and adjust payments under the Notes in accordance with updated amortization schedules, in lieu of seeking payment from Seller.

- Article IV of the Agreement is styled "Warranties and Representations of Seller[,]" and states:

  "[t]o the best of her knowledge, Seller hereby warrants and represents to each Buyer, which warranties and representations shall survive the Closing for a period of three (3) years, as follows:

  …

  4.4. Due Diligence. Prior to the Closing Date, Seller has made and will make certain documents relating to the Company available to Buyer. Seller represents and warrants that any and all documents provided to Buyer relating to Company were, are and will be true,

correct, and complete in all material respects. Seller shall notify Buyer of any material adverse change that would properly be reflected in these documents immediately upon learning of such material adverse change. . . .

4.7 Financial Statements. Seller has furnished to Buyer Company's (i) Statement of Accounts Payable dated February 7, 2019, (ii) Statement of Accounts Receivable dated February 7, 2019, (iii) Statement of Income and Expense as of September 30, 2018, and (iv) Balance Sheet as of September 30, 2018 (the "*Pre-Entry Balance Sheet*" as of the "*Balance Sheet Date*"); (the financial statements referenced in clauses (i) through (iv) are collectively referred to as the "*Financial Statements*"). The Financial Statements are complete and accurate in all material respects, fairly present the financial position and results of operations of the Company at the indicated dates and make full provision for all established, deferred or contingent liabilities, whether liquidated or unliquidated, except that the interim financial statements may be subject to normal, year-end adjustments. . . .

4.9 Undisclosed Commitments or Liabilities. There are no commitments, liabilities or obligations relating to the Subject Business, whether accrued, absolute, contingent or otherwise, for which specific and adequate provisions have not been made on the Financial Statements, except those set forth on Schedule 4.9. . . .

4.20 Accounts Receivable. The accounts receivable set forth on the Financial Statements and those accounts receivable accruing through such date represent valid and bona fide sales to third parties incurred in the ordinary course of business consistent with past practice, subject to no defenses, set-offs or counterclaims and are collectible in full at their recorded amounts in the ordinary course of business, subject to any reserves for doubtful accounts established therefore but not in excess of the amount of the reserve reflected in the pre-Closing Balance Sheet. . . ."

- Article VII is entitled "Indemnification" and subpart 7.1 provides:
  "7.1 Indemnification of the Buyer. Beginning on the Closing Date and continuing for a period of 3 years following the Closing Date, Seller agrees to indemnify the Buyer, Company, and its employees, officers, agents and representatives (collectively, the "*Buyer Indemnitees*") and to hold the Buyer Indemnitees harmless from and against any and all damages, losses, recoupment, overpayment, deficiencies, actions, demands, judgments, costs and expenses

> (including attorneys' and accountants' fees) (collectively, "*Losses*") of or against any Buyer Indemnitee resulting from: (i) any false representation or breach of warranties and representations contained herein on the part of the Seller or Company; (ii) any nonfulfillment by the Seller or Company of any agreement or covenant contained herein or in any Seller Document; (iii) any Pre-Closing Debt; (iv) any claim by a patient, customer, supplier or employee of Company based on actions or omissions of Company on or before the Closing Date; (v) any fees or payments for any broker or finder retained by the Seller or Company prior to the Closing Date; (vi) any other obligation or liability whatsoever of Company or Seller related to the Stock or the Subject Business incurred or accruing prior to the Closing Date, with the exception of ordinary trade payables; and (vii) any act or omission of Seller or Company occurring prior to the Closing Date."

Evidence at Trial

Testimony of Mitchell Vicknair

Mitchell Vicknair testified that he is Karen Vicknair's husband and Kristina Dubois's cousin. Mitchell explained that he had worked in banking, commercial lending, and commercial real estate banking. According to Mitchell, he learned that Omnibus was for sale on a website posting that indicated the business showed "a lot of cash flow[]" and the business "looked like [] a good value." Mitchell testified that marketing materials for Omnibus reflected a net profit of $80,000 for one quarter in 2018 and $593,684 distributed to Broussard for six months, which annualized would yield "over $1 million a year in profit in 2018. And [] to be able to buy a business for 950,000 that's generating over a million in cash flow would be a bargain, so that's what interested me." Mitchell also testified that he was provided financial

statements for the second quarter of 2018 and for 2017, but tax returns for 2018 were not provided to him, and he was told they had not been prepared yet.

Mitchell recalled that Broussard had a business broker who provided information and set up a meeting with Mitchell, Kristina, Karen, and Broussard. According to Mitchell, the purchase was structured as a stock purchase because the license needed to stay with the company. Mitchell testified that the business broker recommended an attorney to prepare the stock purchase agreement and other necessary documents. Mitchell further testified that, before closing, he reviewed "all the financial statements, the tax returns and financials that were provided, the payables [and] all the licenses[.]" He also testified that his attorney reviewed everything and he relied on the information Broussard provided.

Mitchell agreed that Exhibit 4 is an offer to purchase that was submitted to Broussard, Exhibit 5 is a copy of the offer redlined by Broussard, and that the purchasers did not agree to Broussard's redlines. Mitchell identified Exhibit 6—which was admitted over no objection—as the final stock purchase agreement signed by Broussard, and he testified that the parties signed the documents at a bank and the bank provided a notary. Mitchell explained that in the final agreement, Broussard represented that Omnibus's pre-closing debts and liabilities totaled $61,643.58, and that amount was reduced by certain debts the buyers did not assume, for a total of about $58,000. Mitchell further explained that the agreement provided that

Broussard would assume responsibility and liability for all pre-closing debts and "[s]he was responsible for paying everything above what was disclosed to me[]" and she failed to do so. According to Mitchell, the actual pre-closing liability was about $130,000—about $71,000 higher than represented. Mitchell testified that after purchasing the business, physical therapists then came forward and said they had not been paid for about five months, and Broussard had not disclosed that to the buyers. Mitchell also testified that Broussard had failed to pay the electricity bill, and after they purchased the business, the buyers were informed the electricity would be shut off because Broussard had failed to pay the bills. Mitchell identified Exhibit 58 as a summary of all the liabilities the buyers paid compared with what Broussard had disclosed, and the summary shows $130,258.11 in pre-closing liabilities actually paid versus $58,931.63 disclosed—a difference of $71,326.48. When Mitchell asked Broussard about the difference, Broussard told him, "I don't do numbers."

Mitchell testified that the buyers acquired the business's accounts receivable, which Broussard had represented would be worth about $670,000 with an allowance of about $11,000 for bad debts. The buyers were only able to collect a little more than $40,000 on receivables—about $620,000 less than represented. Mitchell also testified that the agreement provided that the buyers would receive closing net working capital of about $225,000, however the actual net working capital received at closing was approximately a negative $90,000. According to Mitchell, a business

should write off as bad debt the difference between the amount billed and amount received, but Broussard had not been writing off bad debt, so instead the accounts receivables were inflated. Mitchell also testified that certain payments were being deposited to Broussard's bank account by ACH even after the sale closed, and Broussard was unwilling to let the buyers take over the bank account, she required the buyers to invoice her, and the buyers' collections were delayed by a week or more. At one point, Broussard told the buyers she could not send payment because she had hurt her hand and could not sign checks, and she would not let her husband sign the checks even though his name was on the account.

Mitchell agreed that the purchase agreement provided for a post-closing process reconciling the actual receivables and payables after the sale. According to Mitchell, when the buyers met with Broussard to discuss the problems they discovered after the closing, they told Broussard of the problems and then also asked for a reprieve of three months on the promissory notes because the buyers were "trying to stop the bleeding [and] had already injected $200,000 to cover payroll" and other expenses. Initially Broussard agreed to a three-month suspension, but after talking with her husband, she changed her mind.

Mitchell testified that Omnibus rented space from property that Broussard owned, and after Broussard's daughter Natasha resigned, Broussard and Natasha entered the property and removed some items of personal property that belonged to

Omnibus, including notebooks and a computer, and that Broussard had not listed these items in the sales agreement as "personal property" she was to retain.[3]

Mitchell testified that he, Karen, and Kristina together paid $500,000 to Broussard as a "down payment" on the purchase of Omnibus. Kristina executed a promissory note for $45,000 and Karen executed a promissory note for $405,000. Mitchell also testified that the buyers paid about $21,000 on the promissory notes and then stopped making further payments.

According to Mitchell, the buyers relied on Broussard's representations in the financial statements when purchasing the business, but the information Broussard provided in the financial statements was not correct. Mitchell testified that the financial statements the buyers were given showed a net profit for Omnibus of $300,000, but the tax return showed a loss of $7,000, and the buyers would not have purchased Omnibus had they been provided accurate information, and they "would have walked away." Mitchell believed that they overpaid for the business, and instead of paying $950,000 they should have paid only $350,000. According to Mitchell, Kristina and her staff have turned the business around, however they had to get bank loans and contribute a couple hundred thousand dollars of their own money to make payroll.

[3] The sales agreement only listed a Dodge Durango vehicle and a Mercedes Benz vehicle as "Seller Personal Property" that Broussard was to keep after the sale of Omnibus.

According to Mitchell, under the terms of the purchase agreement, Broussard represented that the financial statements were accurate, there were no undisclosed liabilities, and accounts receivable were accurate. However, Mitchell testified that the financial statements were not accurate, there were undisclosed liabilities, and the accounts receivables were not accurate. Mitchell also testified that there should have been a post-closing adjustment of at least $315,000 to account for the difference between the promised net working capital of $225,000 and the actual net working capital of negative $90,000, which should have been deducted from the amount owed on the promissory notes.

Mitchell also testified that he prepared a document that includes his analysis of the 2018 tax return he received after Karen and Kristina had purchased Omnibus and a comparison of what he initially received from DFW Business Exchange ("DFW"). The document portrays net income after taxes of $306,753.89 based on December 31, 2018 financial statements, but it would actually be a negative $7,194 based on the 2018 tax return.

Mitchell testified further as a rebuttal witness for the Plaintiffs and agreed that, when the parties convened to execute the Stock Purchase Agreement, all pages were present for everyone to read and sign. He recalled that a copy of "all the final documents[]" were also emailed to Broussard, Broussard's bookkeeper, Ginger Jones, and Don Harman, a broker with DFW, prior to closing. Mitchell indicated

that Broussard represented that Omnibus had a working capital amount of $225,000 prior to closing.

Testimony of Denise Broussard

Denise Broussard testified that before she sold the business, she was the sole owner of Omnibus. She reached out to Don Harman, who worked for DFW, about selling Omnibus because she wanted to retire. According to Broussard, the $950,000 sales price listed in the marketing materials "came from DFW Business Exchange." Broussard agreed that DFW was working on her behalf and Don Harman was her agent. She also agreed that potential buyers would rely on the information she provided to them, although she stated, "I didn't review the marketing materials[]" and "I don't know what marketing material was used."

Broussard testified, "I didn't do the finances[]" and that she had relied on a bookkeeper to compile the numbers used in the marketing materials, and she did not do any investigation into the numbers. Broussard denied that she took any distributions from Omnibus other than her salary of about $172,000 a year, even though one of the financial statements listed additional distributions of $108,119 a year. Broussard agreed that the pages in the DFW marketing materials that listed these distributions were false. She also agreed that if she inflated profits, she would be the only person who would benefit when the business was sold. Broussard

testified that she did not know whether the amounts given for net profit, accounts receivable, or owner takeout were correct because "she did not do the bookkeeping."

Broussard identified her signature on Exhibit 6, the Stock Purchase Agreement for the sale of Omnibus, and stated that she "signed the notary page in front of a notary[.]" However, she could not say what the document provided for, and she explained, "I've never seen that particular document before[]" and according to Broussard, it was not the agreement that she and Mitchell agreed upon. She also testified that the copy of the executed Stock Purchase Agreement that was admitted into evidence was "not the document that I signed or that I agreed to." Broussard did not agree that the Stock Purchase Agreement required her to be responsible for paying pre-closing debts and liabilities. Broussard testified that an exhibit attached to the Stock Purchase Agreement titled "Accounts Payable at 02/07/19" was not something she disclosed, and she did not know who created it.

When asked about whether she furnished the buyers a statement of accounts payable as of February 2019, a statement of income and expense as of September 2018, and a balance sheet as of September 2018, Broussard stated that she did not remember what was furnished, but she agreed the Stock Purchase Agreement admitted at trial stated that the seller furnished it. Broussard did not recall representing that the financial statements presented were complete and accurate. When asked whether the financial documents attached to the Stock Purchase

Agreement were correct and accurate, Broussard testified, "I didn't do the accounting, so I wouldn't know." When asked whether a statement of liabilities attached to the Stock Purchase Agreement initialed by her was accurate, Broussard identified her initials, but she testified that she could not say whether it was accurate because she did not have "anything in front of [her] to verify or clarify that particular page." Broussard testified that, to make sure the financial information presented was accurate, she talked with the bookkeeper, who told Broussard that everything was accurate. However, Broussard also agreed that she asked no questions of the bookkeeper, and she did not review the information before it was attached to the Stock Purchase Agreement.

Broussard testified that the bookkeeper provided the 2018 tax return to the buyers, but Broussard did not look at it before it was provided to the buyers. Broussard stated she did not know how Omnibus determined that a debt was a bad debt. When asked how she would respond to the accounts receivable being $40,000 instead of $600,000 and accounts payable being $130,000 instead of $58,000, Broussard testified "I can't respond to that [] because I don't know."

Broussard testified that "the document says" she agreed to indemnify the buyers for deficiencies, losses, or expenses resulting from false representation or breach of warranties. Broussard testified that she had received a demand letter for payment of losses and damages from the buyers and she turned it over to her

attorney. When asked about Omnibus's profitability from 2015 through 2018, Broussard responded, "I don't remember." Broussard agreed that, as administrator of Omnibus, she was responsible for keeping accurate records for state licensing.

Broussard also testified during her case in chief. She testified that, when she decided to sell Omnibus, she hired a broker, Don Harman, to help. Broussard explained that she had retained Harman as her broker for four or five years before Omnibus sold. She further testified that her bookkeeper, Ginger Jones, provided information to Harman. According to Broussard, she personally provided the business's license and some historical information to Harman. Broussard testified that she did not review the marketing materials Harman used and the first time she saw those materials was in discovery during this lawsuit. Broussard testified that she did not knowingly provide any false information to Mitchell.

Broussard testified that, when she signed the Stock Purchase Agreement, she only had the signature page, and she did not have an opportunity at closing to review the agreement in full. The signature page states, "In witness whereof, the parties have executed this Stock Purchase Agreement as of the day, month and year first above written." Broussard agreed that the copy of the Stock Purchase Agreement admitted as Exhibit 5 includes her handwritten notes that she discussed with Mitchell, but she explained that Mitchell did not tell her he was not going to make the changes she marked.

Broussard agreed that she sent Mitchell a list of current payables a week or two before closing, and her list was admitted as Exhibit 12. According to Broussard, after Omnibus was sold, when Medicare made payments into her account, the buyers would tell her what amount was paid, and she would then write a check for that amount to the buyers.

On cross-examination, Broussard denied that her bookkeeper, Ginger Jones, was her agent but she agreed that she told Mitchell that he should communicate with Jones about accounting and finances. She also agreed that everything Jones said about finances was with Broussard's approval or instruction. Broussard testified that she did not ever review the tax returns for Omnibus while she was the owner.

<u>Testimony of Kristina Dubois</u>

Kristina testified that she was Mitchell's cousin and Karen is married to Mitchell. Kristina explained that after she graduated from nursing school, she worked in various settings, including home health and case management. Kristina is a managing partner and administrator for Omnibus.

According to Kristina, she "[a]bsolutely[]" relied on information Broussard and Don Harman provided in deciding whether to purchase Omnibus and she would not have bought Omnibus if she had known that the receivables were about $600,000 less than they were represented.

Kristina explained that certain documentation is required by the state and to get services rendered by Omnibus paid, but after purchasing the business she had discovered that certain documents were missing, particularly signed doctor's orders. She also testified that she had learned the nurses' notes were about a month behind, and these items must also be signed by the doctor and are an issue for payment, licensing, and compliance. According to Kristina, Omnibus was out of compliance when the new buyers took over and the buyers had to hire an outside service to help bring the business back into compliance. On cross-examination, Kristina admitted that she did not audit charts before buying Omnibus and she thought it was not possible because of HIPAA.

Testimony of Karen Vicknair

Karen Vicknair testified that she is married to Mitchell Vicknair, and she and Kristina purchased Omnibus. Karen testified that she attended a few meetings with Broussard before buying Omnibus and that she relied on the information that Mitchell had received about the business. Karen agreed that her decision to purchase Omnibus was based on the financial information provided to Mitchell by Broussard and that she relied on Broussard to provide correct and accurate information about the business's liabilities and accounts receivable. According to Karen, she would not have bought Omnibus for $950,000 if she had known the receivables were $600,000 less than what Broussard represented.

Testimony of James Tillman

James Tillman testified for the Plaintiffs that he had worked for Broussard at Omnibus as a billing and IT manager. Tillman testified that at some point, Broussard knew that therapists were not being paid, and Broussard encouraged him not to transfer calls from the therapists to her or to tell the therapists that "the check was in the mail[.]" Tillman also testified that he did not think the accounts receivable at Omnibus could have ever been as high as $600,000.

On cross-examination, Tillman agreed that Omnibus's total billing for a year would have been more than $600,000. On redirect, Tillman clarified that accounts receivable is what is outstanding and not total billing.

Testimony of Jacob Tompkins

Jacob Tompkins testified for the Plaintiffs that he is a CPA and a partner with Baker Tilly. Tompkins agreed he confirmed that the schedule of accounts payable attached to the Stock Purchase Agreement has a shortfall of about $71,000 as compared with the schedule admitted as Exhibit 58. He also testified that the accounts receivable had been overstated by about $580,000 and the working capital was supposed to be $225,000, but it was actually a negative $90,000.

According to Tompkins, an allowance for bad debt is usually adjusted on a monthly or annual basis. He agreed that if a business owner incorrectly represented there are owner takeouts of more than $200,000 a quarter, such a misstatement would

have to be negligent, reckless, or intentional. He agreed that, if an owner overstates the accounts receivable, it could affect the value of the company. Tompkins agreed that the value of Omnibus at the time of the purchase when based on the correct financial figures was "no more than $350,000." According to Tompkins, a debt that is truly uncollectible should not be included in the "accounts receivable." Tompkins agreed that it is common in the sale of a business to have a "lookback" provision whereby bills are reconciled later after the purchase. Tompkins explained that the difference between accrual and cash accounting would be "simply a matter of timing[]" and that a company should be able to reconcile accrual with cash accounting. He further testified that Omnibus used "modified accrual[]" accounting. According to Tompkins, $350,000 sounded like a reasonable valuation for Omnibus at the time it was purchased, based on his experience.

On cross-examination, Tompkins testified that he did not believe a CPA had reviewed or audited Omnibus's financials. He also testified that, in the prospective purchase of a business such as Omnibus, he would recommend a "mini version of an audit[]" wherein accounts receivable and payable are verified as well as profit and loss. Tomkins admitted he is not an expert on valuation of a business.

Testimony of Ginger Jones

Ginger Jones testified as a witness for the defense, and she explained that she was a bookkeeper for Omnibus until it was sold. Jones agreed that she participated

in discussions with Mitchell that led to the sale of Omnibus. She testified that she provided financial information to Don Harmon in connection with the sale of Omnibus. She also agreed that all the information she prepared she got from Broussard. According to Jones, she used a computerized bookkeeping system to generate "the financials[,]" including accounts receivable and revenue. Jones testified that she did not knowingly provide false information to Mitchell. In looking at a page in the marketing materials for Omnibus that showed $108,119 distributions to Broussard in the first quarter of 2018, Jones stated that she had no idea whether it was correct information. Jones also did not know whether the total owner takeout of $357,245 for the second quarter of 2018 was correct, but she thought the figure "seem[ed] to be incorrect." Jones testified that, in the last couple of years that Broussard owned Omnibus, Jones would go over the financial statements "[p]robably quarterly[]" with Broussard.

Testimony of Amy Knight

Amy Knight testified as a witness on behalf of Broussard. Knight explained that she has been a CPA since 1998 working with home health, hospice, and nursing homes. Knight testified that, in her experience with the sale of health care businesses, she had never seen an acquisition where clinical records were not reviewed. Knight explained that accounts receivable are "a moving target[,]" and in her experience, to

narrow down that moving target, she focuses on billing records directly to figure out what is collectible and what is not.

On cross-examination, Knight agreed that one alternative to doing a detailed analysis of patient charts and medical records is to include representations in a purchase agreement that the seller warrants the accuracy of the numbers. She also testified that to compare the financial statements to the tax returns, "you would have to adjust from accrual to cash[]" and that a home healthcare company should review and adjust its accounts receivable on a quarterly basis if they were recorded on an accrual basis. Knight also testified that it is a clinical consultant, not a CPA, who would perform chart reviews. Knight did not believe that it was reasonable for a small business such as Omnibus to have accounts receivable of $600,000 when its revenue was about $1.5 million.

Testimony About Attorney's Fees

Kenna Seiler, attorney for the Plaintiffs, testified that the Plaintiffs' attorney's fees through trial totaled $77,000. And Troy Brooks testified that Defendant's attorney's fees through trial were about $55,000. Monthly invoices and billing information were referenced and provided in exhibits that were then admitted into evidence.

Final Judgment

Following the trial, the trial court entered a Final Judgment finding for the Plaintiffs and ordering that Broussard take nothing on her counterclaims against Karen, Kristina, and Mitchell. The court awarded Karen and Kristina a recovery of $649,000 in economic damages as well as pre- and post-judgment interest, court costs, and $77,000 in attorney's fees.

Broussard filed a Motion for New Trial, arguing that there was insufficient evidence to support the judgment and that the damages were excessive. The trial court denied the motion without a hearing, and Broussard filed her notice of appeal.

The trial court signed Findings of Fact and Conclusions of Law, which we quote below:

> FINDINGS OF FACT
>
> A. BREACH OF CONTRACT
>
> 1. Karen Vicknair and Kristina Dubois, as Buyers, entered into a Stock Purchase Agreement on May 15, 2019 (the "Agreement") with Denise Broussard, as Seller, to purchase all of the interests in Omnibus Home Health Care, Inc. ("Omnibus").
> 2. The purchase price for the sale of Omnibus was $950,000.00 based on detailed financial data of Omnibus provided by Broussard to Karen and Kristina and represented as true and correct.
> 3. The $950,000 purchase price was to be paid in two components: a $500,000.00 cash portion paid by Buyers to Seller at closing, and $450,000.00 of promissory notes executed by Buyers for the benefit of Seller at closing (the "Promissory Notes").
> 4. Broussard agreed to adjust the purchase price to the extent the financial data was not correct.
> 5. Broussard agreed to indemnify Karen and Kristina to the extent the financial data was not correct.

6. Section 1.2 of the Agreement required that Broussard pay Karen and Kristina for all preclosing liabilities of Omnibus in excess of the amount disclosed in the Agreement.
7. In the Agreement, Broussard represented that there were $58,931.63 in pre-closing liabilities.
8. After closing, Karen and Kristina found there were actually $130,258.11 in pre-closing liabilities.
9. Broussard failed to reimburse or pay Karen and Kristina the amount of $71,326.48 as required by the Agreement.
10. Section 2.2 of the Agreement required that Broussard leave a minimum of $225,000.00 in Required Net Working Capital for Karen and Kristina.
11. Broussard failed to leave a minimum of $225,000.00 in Required Net Working Capital for Karen and Kristina as required by the Agreement.
12. After conducting the Post-Closing Adjustment under Section 2.2 of the Agreement, Karen and Kristina found a shortfall of $312,044.00.
13. Broussard failed to pay Karen and Kristina the amount of $312,044.00 as required by Section 2.2 of the Agreement.
14. Section 2.2 of the Agreement provides that Karen and Kristina may deduct from the purchase price, including from the balances of the Promissory Notes, an amount equal to the Post-Closing Adjustment.
15. Section 7.1 of the Agreement provided that Broussard shall indemnify Karen and Kristina for any false representations or breach of warranties contained in the Agreement.
16. At closing, Broussard represented that the accounts receivable of Omnibus were $659,262.20.
17. The actual accounts receivable of Omnibus were $40,535.37, a shortfall of $618,726.83.
18. Broussard failed to pay Karen and Kristina the amount of $618,726.83 as required by Section 7.1 of the Agreement.

B. FRAUD, FRAUDULENT INDUCEMENT, FRAUD BY NON-DISCLOSURE

19. Broussard made false, material representations to Karen and Kristina when she misstated the pre-closing liabilities, receivables and annual income generated by Omnibus.
20. When Broussard made the representations, she knew the representations were false, or made the representations recklessly as a positive assertion, and without knowledge of their truth.

21. Broussard made the representations with the intent that Karen and Kristina would act upon them.
22. Karen and Kristina justifiably relied on the representations when they signed the Agreement, paid the purchase price, and executed the Promissory Notes.
23. Karen and Kristina were injured by paying an inflated purchase price for Omnibus, and by entering into Promissory Notes.
24. Karen and Kristina would not have signed the Agreement, paid the purchase price, or executed the Promissory Notes if they had received accurate financial information from Broussard.
25. Broussard had a duty to disclose accurate financial information of Omnibus.
26. Broussard concealed from or failed to disclose material and accurate financial information from Karen and Kristina.
27. Broussard knew that Karen and Kristina did not know the real facts or have an equal opportunity to discover the facts, and Broussard was deliberately silent when she had a duty to speak.
28. Broussard took these actions intending to induce Karen and Kristina to enter into the Agreement, pay the purchase price, and execute the Promissory Notes.
29. Karen and Kristina relied upon Broussard's non-disclosure.
30. Karen and Kristina were injured when they agreed to pay an inflated purchase price, execute the Promissory Notes, and overpay for Omnibus which was not as profitable as Broussard represented.

D.[4] NEGLIGENT MISREPRESENTATION
31. Broussard made extensive financial representations about Omnibus.
32. Broussard made these representations in the course of her business and in a transaction in which Broussard had an interest.
33. Broussard supplied false information for the guidance of Karen and Kristina, in connection with their entering into the purchase and sale transaction with Broussard.
34. Broussard did not exercise reasonable care or competence in obtaining or communicating the information about Omnibus to Karen and Kristina.
35. Karen and Kristina justifiably relied on Broussard's representations, when they carried out the transaction with Broussard based on those representations.

[4] The Findings of Fact and Conclusions of Law did not include a section C.

36. By carrying out that transaction, Karen and Kristina were injured because of Broussard's negligent misrepresentations.

E. MONEY HAD AND RECEIVED

37. As a result of the foregoing, Broussard holds money that belongs to Karen and Kristina in equity and good conscience.

CONCLUSIONS OF LAW

1. Broussard breached the Agreement.
2. Broussard committed common law fraud.
3. Broussard committed fraud by non-disclosure.
4. Broussard committed fraudulent inducement.
5. Broussard did not commit conversion because there was no identifiable source for the $225,000.00 in net working capital (e.g., a certificate of deposit, a particular bank account, or similar), and money cannot be converted.
6. Broussard committed negligent misrepresentation.
7. Broussard holds money that in equity and good conscience belongs to Karen and Kristina.
8. Karen and Kristina are entitled to actual damages in the amount of $649,000.00 calculated as shown [below]:**
9. Karen and Kristina are entitled to cancellation of the Promissory Notes. []
10. Karen and Kristina are entitled to recover their reasonable and necessary attorney's fees in the amount of:

   a. $77,000.00 through the time of trial; with the following additional amounts to be awarded if these stages of appeal occur and if Plaintiffs are successful at each stage:

   b. $15,000.00 should a judgment in this case be appealed to the Court of Appeals;

   c. $7,500.00 should a Petition for Review be filed in the Texas Supreme Court;

   d. $10,000 should the Texas Supreme Court grant a Petition for Review and/or request full briefing on a Petition for Review.

11. Karen and Kristina are entitled to post-judgment interest at the rate of five percent (5%) per annum.
12. Broussard shall take nothing on her claims and causes of action against each of the Plaintiffs. . . .

**

The accounts payable were $471,000.00 more than represented.

The accounts receivable were $578,000.00 less than represented.
To make both sides of the equation equal to the amounts as represented, Plaintiffs are entitled to damages of $649,000.00 ($71,000.00 + $578,000.00 = $649,000.00).
When this damages award is made, then Omnibus is worth what the contract envisioned, thereby making the Plaintiffs whole.

Issues

Appellant states in her brief that she has seven issues on appeal, which we quote below:

> Issue 1: Whether the trial court erred in denying Defendant/Appellant Broussard's motion for new trial.
>
> Issue 2: Whether the trial court ignored the legal and factual sufficiency of the evidence.
>
> Issue 3: Whether the trial court erred in finding in favor of Appellees' breach of contract claim where there was insufficient evidence to support the finding.
>
> Issue 4: Whether the trial court erred in finding in favor of Appellees' fraud, fraudulent inducement, and fraud by non-disclosure claims where there was insufficient evidence to support the finding?
>
> Issue 5: Whether the trial court erred in finding in favor of Appellees' negligent misrepresentation claim where there was insufficient evidence to support the finding.
>
> Issue 6: Whether the trial court erred in finding in favor of Appellee's money had and money received claim where there was insufficient evidence to support the finding?
>
> Issue 7: Whether the trial court erred in dismissing Appellants counterclaims where there was sufficient evidence to support appellants counterclaims?

Appellant contends that Appellees relied on information provided by "a broker who was never called as a witness[]" that Broussard "was never given an opportunity to review the [broker's] brochure . . . for accuracy or contents[,]" "Broussard did not handle her financial records and relied on her bookkeeper and CPA for the task of financials[,]" and "[t]here can be no fraud or misrepresentation if the document relied upon by Appellees were from a 3rd party not called as a witness at trial." Appellant also argues that the Stock Purchase Agreement should be construed against the maker and that Appellees did not offer the notary nor any other disinterested witness to prove that the entirety of the Stock Purchase Agreement had been presented to Broussard when she signed the signature page at the bank. As to Appellees' claims for fraud, Appellant argues that the financial records presented by Don Harman and DFW included "a disclaimer not to rely on the records but to perform their own due diligence." Appellant further argues that Appellees "had superior business knowledge, assistance of counsel throughout the negotiations, and were the makers of the contract through Appellees' counsel." In addition, Appellant argues that Appellees "failed to prove the authenticity of the legally insufficient, hearsay, records of corporate broker, 'DFW[.]'"

Standard of Review

A trial court's findings of fact issued after a bench trial have the same weight, and are judged by the same appellate standards, as a jury verdict. *Tex. Outfitters,*

Ltd., LLC v. Nicholson, 572 S.W.3d 647, 653 (Tex. 2019); *see also Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 333 (Tex. 2020) (citing *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994)). When a trial court makes findings of fact and conclusions of law, we review the findings under the sufficiency of evidence standard, and we review the trial court's conclusions of law under a de novo standard. *See Macpherson v. Aglony*, No. 09-21-00004-CV, 2022 Tex. App. LEXIS 7105, at *36 (Tex. App.—Beaumont Sept. 22, 2022, no pet.) (mem. op.). We accept the trial court's findings unless the appellant conclusively proved otherwise. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

A legal sufficiency challenge fails if more than a scintilla of evidence supports the finding. *See Tex. Outfitters, Ltd., LLC*, 572 S.W.3d at 653 (citing *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998)). The test for legal sufficiency is "'whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.'" *See Teal Trading & Dev., LP*, 593 S.W.3d at 333 (quoting *City of Keller*, 168 S.W.3d at 827). We credit evidence favoring the finding if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* (citing *City of Keller*, 168 S.W.3d at 827). If more than a scintilla of evidence exists, the evidence is legally sufficient. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex.

2001) (citations omitted). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Id.* at 782-83.

When the party that had the burden of proof at trial complains on appeal of the legal insufficiency of an adverse finding—as Appellant does here when she challenges the sufficiency of the evidence on her counterclaim—that party must demonstrate that the evidence establishes conclusively, as a matter of law, all vital facts in support of the finding she sought. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). A matter is conclusively established only if reasonable people could not differ as to the conclusions to be drawn from the evidence. *See City of Keller*, 168 S.W.3d at 816.

When challenging the factual sufficiency of the evidence supporting an adverse finding on which the appellant did not have the burden of proof at trial, the appellant must demonstrate that there is no or insufficient evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *In re Estate of Montemayor*, No. 09-21-00054-CV, 2023 Tex. App. LEXIS 1174, at **47-48 (Tex. App.—Beaumont Feb. 23, 2023, pet. denied) (mem. op.). When reviewing a factual sufficiency challenge, we consider and weigh all the evidence in support of and contrary to the jury's (or trial court's) finding. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998); *In re Estate of Montemayor*, 2023 Tex. App.

LEXIS 1174, at *48. We only set aside a finding for factual insufficiency if it "is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985). However, when a party attacks the factual sufficiency of an adverse finding on which she carried the burden of proof at trial, "she must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co.*, 46 S.W.3d at 242.

In a trial, the factfinder is the sole judge of the credibility of the witnesses and the weight to give their testimony, and the factfinder's role includes resolving any conflicts in the evidence. *See Horton v. Kan. City S. Ry.*, No. 21-0769, 2023 Tex. LEXIS 635, at *34 (Tex. June 30, 2023) (citing *City of Keller*, 168 S.W.3d at 819-20); *see also In re B.R.M.*, No. 09-21-00397-CV, 2023 Tex. App. LEXIS 1699, at **6-7 (Tex. App.—Beaumont Mar. 16, 2023, no pet.) (mem. op.). We credit favorable evidence if a reasonable factfinder could, and disregard contrary evidence unless the factfinder could not. *See Horton*, 2023 Tex. LEXIS 635, at *34. We consider the evidence in the light most favorable to the verdict, and we indulge every reasonable inference that could support it. *See id.*

Breach of Contract Claim

We address Appellant's third issue first because it pertains to the breach of contract claim asserted by the Plaintiffs against Broussard. Broussard argues that

there was insufficient evidence to support the trial court's finding in favor of Appellees on the breach of contract claim.

A breach of contract action requires proof of four elements: (1) formation of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) the plaintiff sustained damages as a result of the breach. *See S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018); *Ace Real Prop. Invs., LP v. Cedar Knob Invs., LLC*, No. 09-19-00375-CV, 2022 Tex. App. LEXIS 244, at *24 (Tex. App.—Beaumont Jan. 13, 2022, pet. denied) (mem. op.).

An appellate brief must present a clear and concise argument, supported by appropriate citations to the record and to authority, and it must "apply the facts to the cited law to show how the trial court committed error." *See* Tex. R. App. P. 38.1(h), (i); *Golden v. Milstead Towing & Storage*, Nos. 09-21-00043-CV, 09-21-00044-CV, 09-21-00045-CV, 2022 Tex. App. LEXIS 2988, at *9 (Tex. App.—Beaumont May 5, 2022, no pet.) (mem. op.) (citations omitted). Failure to do so waives error for appeal. *See Golden*, 2022 Tex. App. LEXIS 2988, at *9. Appellant does not challenge any specific element of the breach of contract claim nor does she attack any specific finding from the trial court's eighteen breach of contract findings.

Generally, an appellant must direct an attack on the sufficiency of the evidence at specific findings of fact and conclusions of law rather than at the judgment as a whole. *Shaw v. Cty. of Dallas*, 251 S.W.3d 165, 169 (Tex. App.—

Dallas 2008, pet. denied). Unchallenged findings are binding on an appellate court, but we may review specific findings being challenged if we are able to fairly identify from the argument the specific finding being challenged. *Id*. at 169 (citing *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 863 (Tex. 2005)). Broussard does not challenge any specific finding of fact. Rather, in her appellate brief she makes several legal arguments such as the court should have construed the contract against the maker, but she does not explain how or in what manner the contract was ambiguous or how a more "favorable construction" would support her contention that there was either insufficient or no evidence to support the trial court's breach of contract findings. She contends there was no evidence she was presented with the whole agreement or that she only saw the signature page when she signed the document, that the buyers inserted fraudulent representations into the contract, that the buyers are the source of any fraud and misrepresentation, that the buyers had unclean hands, that the buyers failed to exercise due diligence, and that the buyers had superior bargaining power.

The record contains testimony from Mitchell that Broussard was given a complete copy of the draft agreement about a month before closing on the sale, and that she was given a complete copy of the agreement to execute at closing, she executed the final version of the agreement, and an executed copy of the entire agreement was introduced and admitted as an exhibit into the record without

objection from Broussard. The trial court as the finder of fact could have disbelieved Broussard and believed the testimony of Mitchell. *See City of Keller*, 168 S.W.3d at 819. The trial court found that:

> 1. Karen Vicknair and Kristina Dubois, as Buyers, entered into a Stock Purchase Agreement on May 15, 2019 (the "Agreement") with Denise Broussard, as Seller, to purchase all of the interests in Omnibus Home Health Care, Inc. ("Omnibus").
> 2. The purchase price for the sale of Omnibus was $950,000.00 based on detailed financial data of Omnibus provided by Broussard to Karen and Kristina and represented as true and correct.
> 3. The $950,000 purchase price was to be paid in two components: a $500,000.00 cash portion paid by Buyers to Seller at closing, and $450,000.00 of promissory notes executed by Buyers for the benefit of Seller at closing (the "Promissory Notes").
> 4. Broussard agreed to adjust the purchase price to the extent the financial data was not correct.
> 5. Broussard agreed to indemnify Karen and Kristina to the extent the financial data was not correct.
> 6. Section 1.2 of the Agreement required that Broussard pay Karen and Kristina for all preclosing liabilities of Omnibus in excess of the amount disclosed in the Agreement.
> 7. In the Agreement, Broussard represented that there were $58,931.63 in pre-closing liabilities.
> 8. After closing, Karen and Kristina found there were actually $130,258.11 in pre-closing liabilities.
> 9. Broussard failed to reimburse or pay Karen and Kristina the amount of $71,326.48 as required by the Agreement.
> 10. Section 2.2 of the Agreement required that Broussard leave a minimum of $225,000.00 in Required Net Working Capital for Karen and Kristina.
> 11. Broussard failed to leave a minimum of $225,000.00 in Required Net Working Capital for Karen and Kristina as required by the Agreement.
> 12. After conducting the Post-Closing Adjustment under Section 2.2 of the Agreement, Karen and Kristina found a shortfall of $312,044.00.
> 13. Broussard failed to pay Karen and Kristina the amount of $312,044.00 as required by Section 2.2 of the Agreement.

> 14. Section 2.2 of the Agreement provides that Karen and Kristina may deduct from the purchase price, including from the balances of the Promissory Notes, an amount equal to the Post-Closing Adjustment.
> 15. Section 7.1 of the Agreement provided that Broussard shall indemnify Karen and Kristina for any false representations or breach of warranties contained in the Agreement.
> 16. At closing, Broussard represented that the accounts receivable of Omnibus were $659,262.20.
> 17. The actual accounts receivable of Omnibus were $40,535.37, a shortfall of $618,726.83.
> 18. Broussard failed to pay Karen and Kristina the amount of $618,726.83 as required by Section 7.1 of the Agreement.

Mitchell testified that the summary of Omnibus's liabilities in Exhibit 58 showed $130,258.11 in pre-closing liabilities actually paid versus $58,931.63 disclosed—a difference of $71,326.48. He also testified that the agreement provided that the buyers would receive closing net working capital of about $225,000, but the actual networking capital received was about negative $90,000 although the financial statements Broussard provided suggested the number should have been more than $600,000. And Mitchell also testified that the buyers were able to collect about $40,000 on receivables, which was about $620,000 less than Broussard represented. When Broussard was questioned about the differences between the financial statements provided to the buyers versus the actual amounts the buyers discovered after closing, she did not contest there was a difference and she testified that she "didn't review the marketing materials[]" and she "didn't do the finances." And the defense offered no other witnesses to contradict Mitchell's testimony.

We conclude that there was sufficient evidence that the parties entered into an agreement, the buyers performed under the agreement, the seller breached the agreement, and the buyers were damaged as a result of the breach—supporting Appellees' breach of contract claim. *See Lee Lewis Constr., Inc.*, 70 S.W.3d at 782. We also conclude that the judgment is not "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Dyson*, 692 S.W.2d at 457.

Appellant's appellate argument on the breach of contract claim includes a citation to article 2.42(c) of the Texas Business Corporations Act and states that "officers and directors are entitled to rely in good faith on the reports of public accountants." We note the Texas Business Corporations Act expired and was recodified in the Texas Business Organizations Code. *See Ritchie v. Rupe*, 443 S.W.3d 856, 863 n.6 (Tex. 2014) (citing Act of May 13, 2003, 82nd Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267). Appellant's brief does not explain the relevance of this statute, whether in its expired or recodified form, to Appellees' breach of contract claim. Appellant fails to explain why this provision applies to the facts of this case or how she relied upon a public accountant. Therefore, we do not find this argument persuasive. *See* Tex. R. App. P. 38.1(i) (an appellate brief must include "appropriate citations to authorities and to the record[]").

Appellant's brief argues that the contract should be construed against the drafter—here, the Appellees. An ambiguous contract is construed against the drafter

because the drafter is responsible for the language used. *Gonzalez v Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). That said, Appellant's brief fails to identify any section of the contract that is ambiguous, nor how any of Appellees' claims depend on resolving an ambiguity in the parties' contract. *See* Tex. R. App. P. 38.1(h) (an appellate brief "must contain a succinct, clear, and accurate statement of the arguments"). Therefore, we find this argument unavailing.

Additionally, Appellant argues that, at the time the Stock Purchase Agreement was executed, the Appellees only presented Broussard with a signature page and not the entire agreement, and that neither the notary nor any other "disinterested witness" testified that the entire Stock Purchase agreement was presented to Broussard. To the contrary, Mitchell testified that when the parties convened to execute the Stock Purchase Agreement all pages were present for everyone to read and sign. The record also includes an email from Mitchell to Broussard dated April 9, 2019—about a month before closing on the sale of Omnibus—transmitting "all the final documents[]" to Broussard, the bookkeeper Ginger Jones, and business broker Don Harman for their review and input. The trial court, as factfinder, was responsible for resolving conflicts in the evidence. *See City of Keller*, 168 S.W.3d at 821. And the trial court could have believed Mitchell and disbelieved Broussard. *See id.* at 819.

We read Appellant's brief to also argue that Appellees had "unclean hands" and should not be awarded equitable relief. The record does not reflect that Appellant made this argument in the trial court, she did not plead this defense in her answer, and she failed to preserve error thereon. *See* Tex. R. App. P. 33.1 (to preserve error for appeal, a party must object in the trial court and obtain a ruling thereon).[5]

Although Appellant does not specifically challenge the sufficiency of the evidence on damages, she also argues that "[i]f any award was made by the trial court based on the breach of contract claim, the award should have been for $90,000 for the negative capital paid by Appellees and $71,326.48 for the pre-closing liabilities paid by Appellees, for a total of 161,326.48."

The Final Judgment awarded Appellees economic damages of $649,000, without a breakdown of damages. In the trial court's Findings of Fact and Conclusions of Law the court stated that "Karen and Kristina are entitled to actual damages in the amount of $649,000.00 calculated as shown," with no breakdown of how the trial court arrived at the amount of damages. Broussard did not request that the trial court make a specific finding or additional or amended findings of damages. *See* Tex. R. Civ. P. 298 (allowing parties to make "a request for specified additional

[5] The trial court's Findings of Fact and Conclusions of Law concludes that the Plaintiffs/Appellees prevailed on their equitable claim for money had and received, but it awarded only money damages. We address Appellant's sixth issue on the claim for money had and received separately below.

or amended findings or conclusions[]”). Having failed to request a specific finding of fact after the trial court had made its findings, Appellant waived her right to complain of any failure to make any such additional finding of fact. *See Robles v. Robles*, 965 S.W.2d 605, 611 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (“The failure to request additional findings of fact and conclusions of law constitutes a waiver on appeal of the trial court’s lack of such findings and conclusions.”); *In re A.E.D.*, No. 09-13-00555-CV, 2014 Tex. App. LEXIS 10587, at **4-5 (Tex. App.—Beaumont Sept. 4, 2014, pet. denied) (mem. op.) (failure to request specific findings of fact waived error on the specific issue); *Vapor Corp. v. Welker*, 582 S.W.2d 858, 862 (Tex. App.—Beaumont 1979, no writ) (“In the absence of a request by appellant to make such a specific finding of fact after the trial court had entered its findings, appellant waived its right to complain of any failure to make any such additional finding of fact.”). Additionally, Appellant’s brief fails to cite to the record or relevant legal authority in support of her challenge to the damages awarded, and she fails to meet the briefing requirements. *See* Tex. R. App. P. 38.1(h), (i). Therefore, this argument presents nothing for our review. *See Golden*, 2022 Tex. App. LEXIS 2988, at *9 (citations omitted).

We conclude the evidence is legally and factually sufficient to support the trial court’s judgment on Appellees’ breach of contract claim, and we overrule

Appellant's third issue. *See Lee Lewis Constr., Inc.*, 70 S.W.3d at 782; *Dyson*, 692 S.W.2d at 457.

Fraud Claims

In Appellant's fourth issue, she argues that there was insufficient evidence to support the trial court's finding in favor of Appellees on the claims for fraud, fraudulent inducement, and fraud by non-disclosure. Appellant fails to identify in her brief which elements of these claims are not supported by sufficient evidence. As we have explained, an appellant waives error by a failure to present a clear and concise argument, supported by appropriate citations to the record and to authority, and to "apply the facts to the cited law to show how the trial court committed error." *See* Tex. R. App. P. 38.1(h), (i); *Golden*, 2022 Tex. App. LEXIS 2988, at *9.

Appellant argues the materials DFW provided to Appellees included "a disclaimer warning not to rely on the data 'DFW' provided." Appellees respond that "despite Broussard's assertion of disclaimers, there is no citation to any portion of the record referring the Court to such disclaimers." We find no disclaimer or warnings in Exhibit 3, which Appellant characterizes as "the broker[']s brochure." We also do not find a reference to any part of the record where a disclaimer was discussed or introduced in the testimony or exhibits at trial. Appellant's brief does not provide a record citation to the alleged disclaimer. *See* Tex. R. App. P. 38.1(i) (an appellate brief must provide appropriate citations to the record and to authority).

Therefore, we find this argument was not preserved for appellate review. *See Golden*, 2022 Tex. App. LEXIS 2988, at *9.

Appellant also argues that the representations upon which the Appellees relied were provided by DFW, not by Broussard. According to Appellant, "Plaintiffs failed to prove the authenticity of the legally insufficient, hearsay, records of corporate broker, 'DFW[.]'" The record does not reflect that Appellant ever objected to the evidence of the records that DFW provided to the buyers. The exhibits were admitted without objection from Broussard. Broussard also argues that DFW is "a totally separate corporate entity" from Omnibus, that it was DFW and not Omnibus nor Broussard who produced financial statements to the buyers, and that DFW was not called as a witness at trial.

To the extent Broussard made such arguments at trial, the trial court could have rejected such arguments and could have found that DFW and Don Harman, the broker, were Broussard's agents. "[A]n agent is one who consents to the control of a principal, and the principal manifests consent for the agent to act on behalf of the principal." *Greater Hous. Radiation Oncology, P.A. v. Sadler Clinic Ass'n, P.A.*, 384 S.W.3d 875, 898-99 (Tex. App.—Beaumont 2012, pet. denied) (citation omitted). "Generally in Texas, the doctrine of vicarious liability, or respondeat superior, makes a principal liable for the conduct of his employee or agent." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007) (citing *Baptist Mem.*

Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998)); *see also generally* Restatement (Third) of Agency § 7.03(1) (a principal is generally liable to a third party for an agent's conduct when the agent acts with actual authority). In her testimony, Broussard agreed that DFW was working on her behalf and Don Harman was her agent:

> [Plaintiffs' counsel]: . . . And so was DFW Business Exchange working on your behalf?
>
> [Broussard]: Yes.
>
> [Plaintiff's counsel]: Was Don Harman your agent?
>
> [Broussard]: Yes. He was the broker that I used, yes.
>
> . . .
>
> [Plaintiff's counsel]: But DFW was your agent. We already talked about that. You already agreed with me; right?
>
> [Broussard]: Yes.

Furthermore, the trial court could have concluded from the evidence in the record that Broussard as the owner of all the shares in Omnibus and as the Seller of such shares, had the obligation to provide accurate information to the Buyers. Broussard testified that she talked with her bookkeeper to make sure the financial information presented was accurate, but Broussard asked no questions, nor did she review the information before it was attached to the Stock Purchase Agreement. When asked whether a statement of liabilities attached to the Stock Purchase Agreement initialed

by Broussard was accurate, Broussard identified her initials on the document, but she testified that she could not say whether it was accurate because she did not have "anything in front of [her] to verify or clarify" that particular page. Ginger Jones, Broussard's bookkeeper, testified that she (Jones) provided financial information to Don Harmon in connection with the sale of Omnibus and that all the information she prepared she got from Broussard. A draft of the Stock Purchase Agreement along with exhibits outlining liabilities and receivables was sent to Broussard prior to closing, and there is no evidence that Broussard objected to the financial information therein.

Based on the evidence, the trial court could have reasonably believed that Broussard was either the source of the representations in the financial statements that DFW provided to the buyers, or that her agents provided the information with her authority, or that she ratified those representations, and she cannot avoid liability now by claiming that the representations at issue were made by someone else or a "a totally separate corporate entity[.]" *See Baptist Mem. Hosp. Sys.*, 969 S.W.2d at 948; *see also Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006) (an agent's actions bind the principal if the principal later ratifies the agent's conduct by retaining the benefits of the agent's conduct).

Appellant also argues that she expressly rejected certain provisions of the Stock Purchase Agreement when the earlier drafts of the agreement were sent to her

and that she "specifically rejected pre-closing debts and liabilities." The documents Appellant references in her brief are pages in a draft of the agreement that Broussard redlined and that pertain to (1) the seller's obligation to pay a Post-Closing Adjustment to account for differences between the pre-closing estimate of accounts receivable and the post-closing actual accounts receivable and (2) the seller's agreement to indemnify the buyers for deficiencies. However, after that another draft without her requested changes was then presented to her a month before closing, Broussard returned no further edits, and the final executed agreement contains Seller's post-closing obligation and indemnity provisions.

The trial court could have rejected Broussard's testimony and believed Mitchell, Karen, and Kristina. *See City of Keller*, 168 S.W.3d at 819. Deferring to the trial court in its role as factfinder, we conclude that the trial court could have concluded that Broussard provided material false information or failed to disclose accurate information or recklessly failed to verify the accuracy of her representations to Karen and Kristina, with the intent that Karen and Kristina would rely on those representations or omissions, Karen and Kristina actually did rely on Broussard's representations, and Karen and Kristina were injured by their reliance upon Broussard. *See Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019) (elements of fraudulent inducement); *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219 (Tex. 2019) (elements of fraud

by non-disclosure); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (elements of common law fraud).

We conclude the evidence is legally and factually sufficient to support the trial court's judgment on Appellees' fraud claims, and we overrule Appellant's fourth issue. *See Lee Lewis Constr., Inc.*, 70 S.W.3d at 782; *Dyson*, 692 S.W.2d at 457.

Negligent Misrepresentation Claim

In Appellant's fifth issue, she argues that there was insufficient evidence to support the trial court's finding against Broussard on Plaintiffs' claim for negligent misrepresentation. According to Appellant, the financial information on which Plaintiffs relied came, not from Broussard, but from DFW, the business broker. Appellant argues that (1) DFW was not a witness at trial; (2) the documentation provided by DFW was hearsay evidence; and (3) Plaintiffs/Appellees failed to do their due diligence.

We have already explained that Appellant failed to preserve error on her argument about the alleged hearsay evidence. *See* Tex. R. App. P. 33.1. Broussard testified that Don Harman and DFW acted as her agent. Whether Karen and Kristina did their due diligence was a fact issue for the trial court to determine in its role as factfinder. *See Horton*, 2023 Tex. LEXIS 635, at *34; *In re B.R.M.*, 2023 Tex. App. LEXIS 1699, at **6-7.

The trial court could have believed Mitchell, Karen, and Kristina and disbelieved Broussard. *See City of Keller*, 168 S.W.3d at 819. Deferring to the trial court in its role as factfinder, we conclude that the trial court could have concluded that Broussard negligently provided material false information to Karen and Kristina in a transaction in which Broussard had a pecuniary interest, and Karen and Kristina were injured by their reliance upon Broussard. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653-54 (Tex. 2018) (elements of negligent misrepresentation).

We conclude the evidence is legally and factually sufficient to support the trial court's judgment on Appellees' claim for negligent misrepresentation, and we overrule Appellant's fourth issue. *See Lee Lewis Constr., Inc.*, 70 S.W.3d at 782; *Dyson*, 692 S.W.2d at 457.

Claim for Money Had and Received

In Appellant's sixth issue, she argues that the evidence was insufficient to support the trial court's finding against Broussard on Appellees' claim for money had and received. According to Appellant, the evidence was "contradictory" because Appellees claimed Omnibus was worth only $350,000 while also testifying that Omnibus did nearly $2 million in sales annually. Appellant also argues that Broussard and "[t]he accountant testified that the business was worth at least

$800,000." That said, we find no citation to the record in the Appellant's brief for this amount or for the alleged testimony.

"Money had and received" is an equitable claim. *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 203 n.1 (Tex. 2007). A cause of action for money had and received is not premised on wrongdoing, but it looks only to the justice of the case and inquires whether the defendant has received money that rightfully belongs to another. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015) (citations omitted). To prove a claim for money had and received, a plaintiff must show that the defendant holds money that in equity and good conscience belongs to the plaintiff. *See id.*

In its Findings of Fact and Conclusions of Law, the trial court stated, "Broussard holds money that belongs to Karen and Kristina in equity and good conscience." To the extent that Appellant's argument on this issue relies on what Appellant argues would be contradictions in the evidence, we defer to the trial court as factfinder to resolve any such conflicts or contradictions. *See Horton*, 2023 Tex. LEXIS 635, at *34; *In re B.R.M.*, 2023 Tex. App. LEXIS 1699, at **6-7.

It is undisputed that the purchase price for Omnibus was $950,000. Mitchell testified that he believed Karen and Kristina overpaid for Omnibus, and instead of paying $950,000 they should have paid only $350,000. Accountant Jacob Tomkins

testified that the value of Omnibus based on the correct financial figures was "no more than $350,000."

Deferring to the trial court's role as factfinder to evaluate the evidence and to resolve conflicts, we conclude that the trial court could have determined that Broussard held money that belongs to Karen and Kristina in equity and good conscience. *See Stonebridge Life Ins. Co.*, 236 S.W.2d at 203 n.1; *Plains Expl. & Prod. Co.*, 473 S.W.3d at 302 n.4. We overrule Appellant's sixth issue.

Appellant's Counterclaim

In Appellant's seventh issue, she argues that the trial court erred in dismissing her counterclaims when there was "sufficient evidence to support [them]." After the trial court ruled on the Plaintiffs' motion for summary judgment, Appellant's only remaining counterclaim against Appellees was the claim for a breach of contract. That claim was based on Appellant's allegation that Appellees had failed to make payments on the promissory notes they executed at the same time they executed the Stock Purchase Agreement.

We do not read Appellant's arguments in her brief to address the specifics of her counterclaim nor to identify any evidence or testimony concerning the counterclaim for breach of contract. Neither does Appellant's argument on this issue include any citations to legal authority other than a citation to article 2.42(c) of the Texas Business Corporations Act, stating that "officers and directors are entitled to

rely in good faith on the reports of public accountants." As we have already noted herein, the Texas Business Corporations Act has expired and was recodified in the Texas Business Organizations Code. *See Ritchie*, 443 S.W.3d at 863 n.6 (citing Act of May 13, 2003, 82nd Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267). Appellant's brief does not explain how this statute—whether in its expired or current form—bears on her stated issue, nor does she cite evidence from trial regarding Appellees' alleged failure to pay on the promissory notes or her alleged reliance on public accountants. *See* Tex. R. App. P. 38.1(h), (i) (an appellate brief must include a succinct, clear, and accurate statement of the arguments, including citations to the record and to relevant authorities). Due to the inadequacy of Appellant's briefing on this issue, we conclude that she has waived this issue for appeal. *See Golden*, 2022 Tex. App. LEXIS 2988, at *9 (citations omitted). We overrule Appellant's seventh issue.

Legal and Factual Sufficiency of the Evidence

In Appellant's second issue, she argues that the trial court "ignored the legal and factual sufficiency of the evidence[.]" Appellant argues that the financial information presented to the buyers by DFW was unauthenticated hearsay, that Plaintiffs failed to call DFW to testify at trial, that there was no evidence that Broussard intentionally withheld or misrepresented financial information, that Plaintiffs chose not to hire an expert to review the financial information before

purchasing Omnibus, that the marketing materials that DFW provided included a disclaimer, that the trial court "accepted guess work testimony[,]" and that Broussard was never given an opportunity to review the DFW marketing materials for accuracy.

As we explained above, in an appeal from a bench trial, we defer to the trial court as factfinder because it is the sole judge of the credibility of the witnesses and the weight to give their testimony, and the factfinder's role includes resolving any conflicts in the evidence. *See Horton*, 2023 Tex. LEXIS 635, at *34. To the extent Appellant complains about contradictory evidence or the interpretation of the evidence presented, we defer to the trial court to resolve such conflicts. *See id.*

Also, "[t]o comply with Rule 38.1, an appellant must cite existing and relevant legal authority and apply the facts to the cited law to show how the trial court committed error." *See Golden*, 2022 Tex. App. LEXIS 2988, at *9. Appellant's brief provides no citation to authority supporting her assertions nor any analysis applying the evidence to relevant law, nor does she challenge any specific findings. *See id.*; *see also* Tex. R. App. P. 38.1(h), (i). We have already addressed the legal and factual sufficiency of the evidence supporting the judgment against Broussard. We conclude this issue presents nothing further for our review, and we overrule Appellant's second issue. *See* Tex. R. App. P. 38.1(h), (i), 47.1; *Golden*, 2022 Tex. App. LEXIS 2988 at *9.

Motion for New Trial

Finally, in Appellant's first issue, she argues that the trial court abused its discretion by not setting her motion for new trial for an oral hearing and by not granting the motion. In her argument on this issue she also contends the trial court's Final Judgment was not supported by sufficient evidence and the trial court awarded excessive damages.

We review a trial court's decision on a motion for new trial for abuse of discretion. *B. Gregg Price, P.C. v. Series 1-Virage Master LP*, 661 S.W.3d 419, 423 (Tex. 2023) (citation omitted); *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (citation omitted); *Vargas v. Applied Mach. Corp.*, No. 09-15-00049-CV, 2016 Tex. App. LEXIS 1151, at *10 (Tex. App.—Beaumont Feb. 4, 2016, no pet.) (mem. op.). "A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles." *Vargas*, 2016 Tex. App. LEXIS 1151, at *10 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)).

As to Appellant's complaint that the trial court failed to conduct a hearing on the motion for new trial, Appellant does not provide a citation to the record reflecting that she requested a hearing, and the appellate record includes her Notice of Submission that the motion "shall be heard by submission[.]" Appellant does not cite to any legal authority requiring a hearing on the motion, as compared to having

it placed on a submission docket. *See* Tex. R. App. P. 38.1(i) (requiring an appellate brief to include appropriate citations to the record and to authority). We conclude that Appellant failed to preserve error on this complaint. *See* Tex. R. App. P. 33.1.

As to Appellant's complaint that the Final Judgment, including the award of damages, was not supported by the evidence, Appellant's briefing on this argument includes no analysis of the evidence nor any citation to legal authority for her assertion that the trial court erred. Appellant merely states that the brief "describes the abuse of discretion by the [trial] court in the [other] six points of error." An appellate brief must cite existing and relevant legal authority and apply the facts to the cited law to explain how the trial court committed error. *See* Tex. R. App. P. 38.1(i); *Golden*, 2022 Tex. App. LEXIS 2988, at *9. Because Appellant provides no such analysis in this issue, we conclude that this issue presents nothing further for our review, and we overrule Appellant's first issue. *See Golden*, 2022 Tex. App. LEXIS 2988 at *9; *see also* Tex. R. App. P. 47.1.

Having overruled all of Appellant's issues, we affirm the trial court's Final Judgment.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on September 18, 2023
Opinion Delivered December 14, 2023

Before Golemon, C.J., Johnson and Wright, JJ.