COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00283-CV

JERRY V. DURANT; JERRY DURANT, INC. D/B/A DURANT TOYOTA AND D/B/A JERRY DURANT TOYOTA; JERRY DURANT HYUNDAI, LLC; DOYLE MAYNARD; ROBERT G. COTE, SR.; GARY MICHAEL DEERE; JERRY RASH; AND ELLIOT "SCOOTER" MICHELSON	APPELLANTS
V.	
ANDREW ANDERSON	APPELLEE

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-257626-12

DISSENTING OPINION FROM ORDER DENYING APPELLEE'S MOTION FOR REHEARING AND FOR EN BANC RECONSIDERATION

I must respectfully register my dissent from the denial of Appellee Andrew Anderson's Motion for Rehearing and for En Banc Reconsideration. Although I

joined in the panel's Memorandum Opinion, I am now convinced that we erred. We erred by reversing the judgment on the verdict based on the supposed failure of Anderson to secure a finding of an "enforceable contract" as an essential element of his cause of action for fraudulent inducement and in holding that we could not "infer" such a finding in favor of the judgment. *Durant v. Anderson*, No. 02-14-00283-CV, 2016 WL 552034, at *3 (Tex. App.—Fort Worth Feb. 11, 2016, no pet. h.) (mem. op.).

BACKGROUND

Anderson had worked in auto sales for approximately thirty years and had been employed in several managerial sales positions for eleven years by Jerry Durant, an auto dealer in Weatherford, as Durant's business grew and his dealerships multiplied. In 2005, Durant promoted Anderson to Manager over new cars for his Chevrolet dealership. Durant also appointed Anderson to the Jerry Durant Auto Group board of directors and, in addition, put him in charge of all advertising for the dealerships. Anderson became the face and voice of the Jerry Durant Auto Group on radio and television commercials.

In 2006, Durant promoted Anderson to General Manager over Durant's whole "complex" of several dealerships (except for the Toyota dealership) in Weatherford.[1] Anderson organized the managers and sales people of the

[1]Anderson was also active in industry associations, including serving as Treasurer for the North Texas Chevy Dealers Association and on the Truck Advisory Board for South Central Chevy Dealers. Anderson was also a member of the prestigious Parker County Sheriff's Posse.

individual dealerships in Weatherford and was able to take sales from around 7,000 cars in 2005 to almost 10,000 in 2008.

Durant built Jerry Durant Toyota in Granbury in 2008 off Highway 377; Durant opened a Hyundai franchise located about a half mile away in Granbury in 2009. Anderson was not initially involved in those dealerships, and prior to 2011, those dealerships struggled. There were two pre-existing major domestic dealerships in that market: "Mike Brown Ford, Jeep, Dodge" and a big Chevrolet GMC dealership. It was a tough market for Durant to move into with his two import dealerships.

Anderson's version of the agreement

Anderson testified at length. He testified that in early February 2011, Durant called him into his office and made a verbal offer to him to become General Manager of the two Granbury dealerships. Anderson testified that Durant said,

> I think with your consistency and your consistent background, how you've led the troops from 2005 to 2011, I'm offering you an opportunity to go down and be the dealer owner/operator of Jerry Durant Hyundai and Jerry Durant Toyota. And I'm offering you 10 percent to do it of the land and the dealerships they sit on.

The offer of the ownership was "immediate," Anderson said, and he accepted it. He testified there were no conditions other than that he would be leaving a secure position as the General Manager of the Jerry Durant dealerships in Weatherford to manage two risky dealerships in Granbury, but he was to have an ownership interest.

Durant had previously sent two or three other employees to try to manage the Granbury dealerships, but they had not succeeded. Anderson acknowledged he knew he was taking a "risk" going to Granbury. He had been the General Manager over the dealerships in Weatherford for several years and was a respected employee. The risk was "maybe failing," and there was no guarantee he would get his job back in Weatherford. But Anderson explained he was trading in stability for an ownership interest. He said he relied on the offer of the 10% ownership interest; it was material to his decision to accept the offer. He was very excited and felt up to the challenge; he went back to his office and packed and headed to Granbury that day.

Anderson testified he understood from Durant that it was his tenure, his ten years with the company, and his "sweat equity" that had earned him the 10% ownership interest or "buy-in" agreement as the term was used in the car business. David Thompson, a media consultant who handled media for advertising for the Durant dealerships, had worked together with Anderson on the company's advertising, and the two were also friends. On February 9, 2011, when the offer was made, Anderson texted Thompson stating: "Jerry just offered me buy-in to Toyota Granbury and Hyundai. You are the first to know so keep it to yourself and say a prayer."

Anderson testified Durant had been like a "mentor" to him; they had a good working relationship and were friends. Anderson's daughter and Durant's granddaughter were friends. Durant and Anderson had come a long way

together and had experienced incredible growth; he trusted Durant, and Anderson knew Durant was "extremely pleased" with him.

Anderson described his title after taking over the General Manager position of the Granbury Hyundai and Toyota dealerships as "dealer partner/principal of Jerry Durant Hyundai and Jerry Durant Toyota" in Granbury, and no one disputed that fact. A congratulatory press release was published in April 2011 in the Hood County News, welcoming Anderson's addition to the Durant dealerships in Granbury, quoting Don Allen, as President and CEO of the Jerry Durant Auto Group, as stating, "We've watched [Anderson's] professional growth for years," and announcing Anderson had been named "General Manager and Partner/Principle [sic] of the Jerry Durant Auto Group-Granbury division." The press release also quoted Durant, "Chairman of the Jerry Durant Auto Group," as stating: "We're thrilled to name [Anderson] as General Manager and Partner in The Jerry Durant Auto Group GRANBURY division. Granbury is home . . . our roots are here; it's where we got started. It's important to me to continue doing well here!"

Anderson also identified an insert from the Fort Worth Business Press in the form of a marketing brochure with photographs of Allen, Durant, and Anderson taken in front of the Toyota dealership in Granbury. According to the brochure, "Anderson was recently named General Manager and Partner/principle [sic] of the Jerry Durant Auto Group – Granbury Division." Anderson recalled that the photographs and brochure were Allen's idea and that Allen had called

Anderson and told him that the Toyota lot needed to be cleaned up because they were coming down to take pictures for the brochure. Anderson testified that Allen had a standing relationship with the Fort Worth Business Press.

Another photo in the brochure was identified by Anderson as portraying Toby Hynes, an executive with Toyota. Anderson recalled Durant had introduced him to Hynes and had asked Hynes to begin working to separate the Granbury Toyota location into a separate franchise from the Weatherford location so that Anderson could acquire an ownership interest in that franchise.

At trial, both Durant and Allen disclaimed input into the publicity and were not certain who prepared the press release or the marketing brochure, but they acknowledged that they had been aware of the brochure and the press release at the time they were published and had said nothing to Anderson to correct any misunderstanding. To the contrary, both admitted it was their goal at that time for Anderson to become a principal and a partner. Anderson testified that the brochure and other announcements accurately reflected his "deal" with Durant as partner and principal in both the Hyundai and Toyota dealerships. There was no signed, written agreement.

Durant's version of the agreement

Durant's version of the agreement differed dramatically from Anderson's. He testified that he and Allen, his co-owner of many years in all of the Durant dealerships, met with Anderson in February 2011 about moving to Granbury to work in return for a "buy-in" opportunity. Durant testified he told Anderson he

could go to Granbury and "here's your chance for a buy-in." He acknowledged he offered Anderson a "buy-in" of a 10% interest in the Granbury Hyundai dealership, but he said it was based on "certain conditions." The deal, according to Durant, was that the Hyundai dealership had to net a profit of at least $400,000 by the end of the year. According to Durant, if Anderson met that condition, Anderson would receive a 10% bonus of the net profit to buy in. Durant was aware that the Hyundai dealership had never made a profit and had a loss the year before of around $250,000, but he thought $400,000 in net profit was "achievable."

Durant acknowledged he had to offer to make Anderson the General Manager of both Granbury dealerships in order to make the deal work. He knew Anderson would have to leave Weatherford and relocate but somehow continue to keep his relationship as officer and board member of the North Texas Chevy Dealers Association and continue as General Manager to handle the weekly meetings for Durant's sales managers at the Weatherford location. But he said Anderson "took" the deal.

As to a promise of an ownership interest in the Toyota dealership and the real estate on which the dealerships sat, Durant testified that it was "false" that he offered Anderson a 10% buy-in interest in both stores and the real estate on which they sat. He denied that an interest in the Granbury Toyota dealership was "on the table" at that time. But he admitted that they discussed it during the meeting. The Granbury Toyota location was an "ROM" (rural opportunity market)

dealership and was merely a part of the Weatherford Toyota franchise. He acknowledged that he told Anderson that if Toyota would agree to split up the dealership to make the Granbury location a separate franchise, he would give Anderson a similar opportunity for a buy-in with the Toyota dealership as he had with the Hyundai dealership based on the profits it made and on the condition that it met a similar "profit threshold."

Durant acknowledged he did make a "promise" to Anderson for 10% of the Hyundai dealership conditioned on its meeting the profit threshold. He gave similar deals to two other general managers, Gary Burdick and Kevin Reeves, for buy-ins at other dealerships during the same timeframe, and they had signed agreements.

Durant said he understood that Anderson was claiming he also got an interest in the Toyota dealership and in the real estate on which the dealerships were located in Granbury. Durant testified that the real estate where the Granbury Hyundai dealership was located was owned by Silverado Life Reinsurance Company (a company owned by a family trust and named as a defendant in the trial court). Durant flatly testified: "[T]he real estate wasn't a part of the deal." Durant's position was "no land." He testified he wanted the jury to understand that Anderson was trying to bring the land in and that the land was not a part of it. Still testifying several days later, Durant reiterated that "[r]eal estate was never a part of mine and Mr. Anderson's deal, and he knew it."

Anderson learned within a few months that Durant was negotiating a deal to sell all his dealerships. When, at a meeting on December 8, 2011, Durant announced to his managers the proposed sale for $44 million of all of the dealerships, he told them he would "take care of" those with buy-ins. A week later, on December 15 at the Christmas party for the employees' children, Durant gave the three managers to whom he had given buy-ins, including Anderson, checks for $75,000 each and testified he told them the payments were "in lieu of" their buy-ins. He testified that the money "was to buy them out of their agreements that we had." He testified that neither Anderson nor one other manager had met their profit thresholds, but Durant was happy with the deal he was getting in selling his dealerships and also wanted them "to be happy." He acknowledged he got no written agreement or release from the managers in return for their checks. And he denied the payments were merely "bonuses," pointing out that Anderson's "bonus" for the year was $300. Although a company document entitled, "Bonus Program for 2011," listed Anderson as having received $75,000, and Durant acknowledged that the additional monies the company was paying out were listed as "bonuses" in the ledger for the year, his explanation was that he considered the payments were in lieu of the buy-ins.

Durant alternately denied he ever "promised" Anderson anything while admitting he gave him a buy-in agreement. He said he also met separately with Anderson and told him he was welcome to come back to Weatherford and run the Chevrolet new car dealership that Durant had decided not to sell, but

Anderson said "no." Durant also denied he ever had a "deal" in place to sell all the dealerships. There was nothing in writing, he said, and that sale did not take place. An acquaintance from outside the dealerships called him sometime around Christmas and suggested that he should check his inventory in Granbury. Events rapidly went downhill from there as described in the panel's opinion, with accusations culminating in Durant's telling Anderson he could "hit the dirt." *Id.* at *1.

Anderson files suit

On January 26, 2012, Anderson sued Durant and the Durant Entities for breach of contract, quantum meruit, fraud, fraudulent inducement, promissory estoppel, and attorney's fees (as well as defamation, which is beyond the scope of, and will not be addressed by, this dissent). After an eight-week trial, a fifty-page charge was submitted to the jury. As relevant to his claims against Durant and the Durant Entities regarding the alleged agreement for his buy-in for an interest in the Granbury dealerships, Anderson's breach of contract and fraud theories were submitted to the jury.

Jury Question No. 1, the first of a series of questions regarding Anderson's breach of contract cause of action, asked whether, in February 2011, Durant agreed to certain specific terms testified to by Anderson: that Durant would immediately provide to Anderson a 10% ownership interest in both the Hyundai and Toyota dealerships in Granbury and immediately provide him a 10% interest in the land associated with each dealership in exchange for Anderson's

becoming the General Manager for those dealerships in Granbury, to which the jury answered "no."[2]

However, the jury found in Anderson's favor on his fraudulent inducement claim in answer to Question No. 9: that Durant committed fraud on Anderson, defined as including the making of a "false statement of fact" or "a promise of future performance made with an intent, at the time the promise was made, not to perform as promised." In answer to Question No. 10, the jury found damages to Anderson "resulted from the fraud" in the amount of $323,150 for the value of a 10% interest in the Toyota dealership and $60,000 for the value of a 10% interest in the Hyundai dealership, but "excluding the value of the associated real estate" of each dealership, and the jury further found damages in the amount of "- 0 -" for the value of a 10% interest in the real estate associated with each dealership. Judgment was rendered on the jury's verdict for Anderson for the amount of the fraud damages, as well as the damages found against the other defendants for defamation as noted in the panel's opinion. *Id.* at *2.

[2]Questions No. 2 (did Durant fail to comply); No. 3 (did Anderson fully perform); No. 4 (did Anderson perform his obligations such that a failure to enforce the agreement would constitute a fraud on Anderson); No. 5 (was there a failure of consideration); No. 6 (was failure to comply by either party excused); No. 7 (what sum of money would fairly and reasonably compensate Anderson); and No. 8 (reasonable attorney's fees) were conditioned on a "yes" answer to Question No. 1. Having answered "no" to that first question, the jury was not called upon to answer Questions No. 2–8.

DISCUSSION

That this is a fraudulent inducement case is a critical matter never even mentioned in the discussion of the merits by the panel's opinion. *Id.* at *2–8. Durant and the Durant Entities (referred to herein as "Durant"), consistently argued in their second issue that Anderson was precluded from recovering the damages found by the jury to have resulted from the fraud because Anderson sought to prove fraudulent inducement, which theory required an "enforceable contract," and that because the jury "refused" to find that a contract existed in answer to Question No. 1, no claim for fraudulent inducement was available to Anderson as a matter of law. Durant further contended that because Anderson sought only benefit-of-the-bargain damages, recovery of damages was precluded because an oral contract involving real estate is unenforceable as barred under the statute of frauds. The panel's decision sustained Durant's second issue expressly holding that Anderson's failure to secure a jury finding of an "enforceable contract," as an essential element of his claim, defeated his recovery of the damages found by the jury. *Id.* at *3. None of this is even comprehensible without first reviewing the basic framework for a cause of action for fraudulent inducement to understand the nature of that claim.

Requirement of an enforceable contract

A common-law fraud claim requires "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was

relied upon, and which caused injury." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (op. on reh'g) (quoting *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994)). Fraudulent inducement is a "distinct category" of common-law fraud that shares the same elements but involves a promise of future performance made with no intention of performing at the time the promise is made. *Formosa Plastics*, 960 S.W.2d at 48. "Texas recognizes two measures of direct damages for common-law fraud: the out-of-pocket measure and the benefit-of-the-bargain measure." *Id*. at 49. Out-of-pocket damages are measured by the difference between the value expended versus value received; whereas benefit-of-the-bargain damages are measured by the difference between the value as represented and the value received, allowing the injured party to recover profits that would have been made had the bargain been performed as promised. *Id.* at 49–50.

While both measures of damages are available for fraudulent inducement, the benefit-of-the-bargain measure is not available for fraud that induces a nonbinding contract. *Haase v. Glazner*, 62 S.W.3d 795, 799–80 (Tex. 2001) (reasoning that fraudulent inducement, by its nature, presupposes that a party has been induced to enter into a contract; as a result, there can be no fraudulent inducement claim when there is no contract). In *Haase*, because the parties' contract was oral and, therefore, was unenforceable under the statute of frauds,

the supreme court held that the injured party could not recover the benefit of an unenforceable bargain via a fraud claim. *Id.*

Zorrilla v. Aypco Construction II, LLC

While this case was pending at the briefing stage of this appeal, the supreme court handed down its decision in *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153–54 (Tex. 2015), in which it held that a fraud submission, virtually identical to the one in this case, incorporated the essential elements of a contract and entitled the plaintiff to recovery of benefit-of-the-bargain damages. In that case, Mirta Zorrilla, an owner of multiple residential properties, hired Aypco, a construction company, to complete construction on one of her properties in 2006. *Id.* at 146–47. The parties entered into a written agreement for that work, which was completed and paid for, but the work then continued and expanded to include a guest house that Zorrilla requested to be built and work on another house she owned. *Id.* at 148. At her request, Aypco continued performing a substantial amount of additional work above and beyond that contemplated by the contract, and Zorrilla continued to pay. *Id.* She ultimately insisted that Aypco quit working and refused to pay Aypco for any additional construction work done after April 2007. *Id.* at 149.

Aypco sued Zorrilla for the additional work performed in May 2007, based on breach of contract and fraud. *Id.* Both theories of recovery were submitted to the jury. *Id.* at 149–50. The jury found that that Zorrilla breached an agreement to pay Aypco $56,654.15 for construction services at her two homes and

awarded her $56,654.15 in actual damages and $150,000 in attorney's fees. *Id.* at 150. The jury also found that she defrauded Aypco and awarded the same amount, $56,654.15, in economic damages and $250,000 in exemplary damages. *Id.* Aypco elected to recover under its fraud theory. *Id.*

The fraud question submitted to the jury included fraudulent inducement and was virtually identical to Question No. 9 submitted here. The jury found Zorrilla made a promise of future performance when she had no intent to perform and upon which the contractor detrimentally relied. *See id*. at 150, 154. In answer to the fraud damages question, the jury found Zorrilla failed to pay Aypco the $56,654.15 owed for the construction services performed in May 2007, i.e., the same benefit-of-the-bargain damages as the jury found for the contract damages. *Id*.

Affirming the judgment in favor of Aypco on its fraudulent inducement theory, the supreme court noted that the fraud liability question submitted to the jury all of the elements of a common-law fraud claim and, as in this case, defined "misrepresentation" to mean "a false statement of fact" or "a promise of future performance made with an intent, at the time the promise was made, not to perform as promised." *Id.* at 153 (quoting State Bar of Tex., Tex. Pattern Jury Charges—Business 105.1–105.3B (2010)). The supreme court also noted that the fraud damages question submitted only a benefit-of-the-bargain measure of damages, not an out-of-pocket measure. *Id.* at 153–54. Thus, if the "promise underlying the jury's fraud finding" was unenforceable, Aypco would not be able

to enforce the bargain in question and the fraud claim would fail for want of an appropriate damages finding. *Id*. at 154. Significantly, the supreme court pointed out that "[t]he fraud questions submitted to the jury [had] incorporate[d] the requisite elements of a contract—promise, reliance, and an agreement." *Id.*

The supreme court never said that recovery for fraudulent inducement required a separate jury finding of the contract that Aypco was induced to enter

Durant and the panel have stood the supreme court's decision in *Zorrilla* on its head in an effort to make it fit this case. In *Zorrilla*, the supreme court only said that, in the absence of a finding that the parties agreed that any additional work or modifications *must be in writing*, Zorrilla's attempt to impose that requirement as her *defense* of no written contract failed. *Id.* But the supreme court had already held that a contract existed by virtue of the jury's answer to the fraudulent inducement jury question. *Id.* at 153–54. Absent the finding that the contract was required to be in writing, the supreme court held that the contract was *enforceable* and *upheld* the award of damages *against* Zorrilla for Aypco's work in May 2007. *Id.* at 154. The case against Zorrilla, who was resisting the fraud findings by arguing that the contract encompassed within them was unenforceable, is the reverse of this case.

Thus, while at first *Zorrilla* seems similar, it is not. Zorrilla was a defendant seeking to avoid liability for damages under any contract encompassed in the jury's finding of fraudulent inducement, i.e., that she induced Aypco to perform the additional work in May 2007 in reliance on her requests and promises to pay

Aypco for those services when she had no intent to perform. The jury found that Zorrilla defrauded Aypco. She lost. Because she obtained no finding that the contract had to be in writing, it was enforceable against her without a written authorization. The supreme court upheld the judgment against her for the fraud damages.

Unlike Zorrilla, Anderson won in the trial court. The jury verdict was in his favor, and the trial court rendered judgment on the verdict. Neither of the parties has cited, nor does the panel's opinion cite, any authority requiring that a finding of fraudulent inducement must be accompanied by a separate jury finding of the existence of a contract as an essential element of that cause of action. Nor does the Pattern Jury Charge, as pointed out by Anderson in his Motion for Rehearing, recommend or even mention that a separate jury question as to whether there is a contract must be submitted in connection with fraudulent inducement.

No separate jury question to establish a contract induced by fraud is needed because, as pointed out in *Zorrilla,* the elements of a contract induced by fraud are incorporated within and subsumed by the submission of the jury question of whether a defendant committed fraudulent inducement. *Id.* Durant and the panel are wrong in interpreting the supreme court's language in *Zorrilla* in such a way as to suggest that a separate finding of an enforceable contract was required to support liability in favor of Aypco against Zorrilla for fraudulent inducement with recovery of the benefit-of-the-bargain damages. The supreme court held, loud and clear, that Aypco had the independent enforceable contract

finding it needed because, to belabor an important point, the fraud questions submitted to the jury already incorporated the requisite elements of a contract, as quoted above—"promise, reliance, and agreement." *Id.* The supreme court had previously made clear that a fraud claim could be based on a promise made with no intention of performing that was later subsumed within a contract. *See Haase*, 62 S.W.3d at 798 (explaining fraudulent inducement presupposes that a party has been induced to enter into a contract); *Formosa Plastics*, 960 S.W.2d at 46 (recognizing "a fraud claim can be based on a promise made with no intention of performing, irrespective of whether the promise is later subsumed within a contract"); *see also Elliott v. Whitten*, No. 01-02-00065-CV, 2004 WL 2115420, *6–8 (Tex. App.—Houston [1st Dist.] Sept. 23, 2004, pet. denied) (mem. op.) (discussing jury's implicit determination by its affirmative fraud answer that the parties had an agreement).

Having dealt with Zorrilla's attempted but failed effort to avoid liability to Aypco by her theory that any contract that was implicit in, incorporated in, and subsumed by the broad-form fraud finding of the jury was not in writing, the supreme court in that case proceeded to affirm the judgment on the verdict for the benefit-of-the-bargain damages *against* Zorrilla and in favor of Aypco.[3] *Zorrilla*, 469 S.W.3d at 153–54.

[3]Significantly, the supreme court in *Zorrilla* noted that neither party made any objections to the charge. The court cited *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 221 (Tex. 2005), as authority for its holding that Zorrilla's contract enforcement issue failed, with a parenthetical accompanying that

Unlike Zorrilla, who was sued by Aypco and lost, Anderson was the plaintiff in this case who sued Durant and won. Anderson prevailed on his fraud claim on which he obtained a jury finding against Durant in response to his proper broad-form issue that included not only the essential elements of fraud but also those of a contract by virtue of a promise of future performance that Durant had no intent to perform at the time he made the promise and that Anderson relied upon to his detriment.

No necessity for a separate finding of an enforceable contract

The panel opinion's statement that it cannot "infer" a finding of a contract which it says is "nowhere described in the jury charge" is incorrect for several reasons. *Durant*, 2016 WL 552034, at *3. That contract is fully described in Questions No. 9 and 10 of the jury charge. It is not the same contract inquired about in Question No. 1 (which the jury failed to find existed). Not only did the jury find that Durant made a "promise" that was false and that he had no intent to perform, but it also found damages resulting from his fraudulent inducement of

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citation, stating: "The sufficiency of the evidence must be measured by the jury charge when . . . there has been no objection to it." *Zorrilla*, 469 S.W.3d at 154; *see also Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (stating that an assessment of the evidence "must be made in light of the jury charge that the district court gave without objection"); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) ("Since neither party objected to this instruction [regarding malice], we are bound to review the evidence in light of this definition."); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex.) (op. on reh'g) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge."), *cert. denied*, 530 U.S. 1244 (2000); *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985).

Anderson into that contract (that Durant repudiated) that consisted of the value of a 10% interest in both the Hyundai and Toyota dealerships in Granbury, excluding the real estate. Those latter terms are also specifically set forth in the fraud damages issue, Jury Question No. 10, and provide the remaining terms of the underlying contract between the parties that was, consequently, enforceable because the damages constituting the benefit of the bargain, as found by the jury, did not include an interest in real estate and were not barred by the statute of frauds.

The jury's failure to find in favor of Anderson on his contract claim in answer to Question No. 1 did not preclude the jury from affirmatively finding fraudulent inducement by Durant's offer of a contract with different terms

In the part of Durant's second issue that the panel sustained in its opinion as determinative of the appeal, Durant consistently insisted on arguing that Anderson could not recover his benefit-of-the-bargain damages found by the jury in answer to Question No. 10 because the jury "refused" to find the existence of the contract that Anderson pleaded in answer to Jury Question No. 1. According to Durant, the jury's finding of "no" is the equivalent of an affirmative finding that there was no contract. With no enforceable contract as an essential element of fraudulent inducement, Durant argued, and continues to argue, that Anderson was precluded from recovering his benefit-of-the-bargain damages for Durant's fraudulent inducement. This is contrary to the most elementary principles of

appellate review of jury findings. The panel's opinion is totally silent as to the answer. But the answer is simple.

Under long-standing and well-settled Texas law, the "no" answer to Question No. 1 was not an affirmative finding of anything.[4] Sometimes referred to as a "non-finding" or negative finding, the "no" answer to Question No. 1 amounted to nothing more than the jury's conclusion that Anderson, the party with the burden of proof, ***failed to carry that burden to the satisfaction of the jury.*** *See, e.g.*, *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988); *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988) (noting that reviewing court must be mindful that a failure to find means the jury was not convinced by a preponderance of the evidence to make an affirmative finding); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986); *Traylor v. Goulding*, 497 S.W.2d 944, 945 (Tex. 1973).

Moreover, as in any civil jury case (absent a requirement of a heightened burden of proof under certain circumstances not present here), the general instructions that are mandatory under the Texas procedural rules were given to the jury in this case. *See* Tex. R. Civ. P. 226a. Among others, the jury was instructed in the charge that a "yes" answer to Jury Question No. 1 "must be

[4]The remaining Questions No. 2–8, by which the jury would have been asked whether Durant breached that contract and, if so, what amount of damages it found as a result of the breach (which would have been the value of the 10% of each dealership and 10% of the associated real estate) and attorney's fees, were conditioned on a "yes" answer to Question No. 1, and were left unanswered.

based on a preponderance of the evidence unless you are told otherwise." "Preponderance of the evidence" was defined as meaning "the greater weight of credible evidence presented in this case," and the jury was further instructed, "[i]f you do not find the preponderance of the evidence supports a 'yes' answer, then answer 'no.'" *See id.* (listing these instructions for answers "yes" and "no" and the definition of "preponderance of the evidence" among the general instructions required to be given to every jury as part of the charge in civil cases unless the nature of the case requires otherwise). Assuming, as we must, that the jury followed the trial court's instructions, the jury's "no" answer as to whether the parties agreed to the terms listed in Question No. 1 in no way represents an affirmative finding that there was no agreement between the parties. Nor did it preclude Anderson from obtaining an affirmative finding in answer to Question No. 9, that Durant fraudulently induced Anderson into a different contract with different terms, specifically, an agreement that did *not* include the associated real estate.

The essential contract finding by the jury exists as incorporated in and "subsumed by" the jury's finding of fraudulent inducement and fraud damages

Question No. 9 submitted to the jury the essential elements of fraud, again in terms virtually identical to the submission approved by the supreme court in *Zorrilla,* in which that court said:

> In the present case, the fraud liability question submitted to the jury included all the elements of a common-law fraud claim and defined "misrepresentation" to mean "a false statement of fact" or "a

> promise of future performance made with an intent, at the time the promise was made, not to perform as promised."

Zorrilla, 469 S.W.3d at 154 (quoting State Bar of Tex., Tex. Pattern Jury Charges—Business, PJC 105.1–105.3B (2010)).

As already said (but bears repeating), the supreme court in *Zorrilla* held that the fraud questions "incorporate[d] the requisite elements of a contract—promise, reliance, and an agreement." *Id.* By its "yes" answer to Questions No. 9 and 10 that Durant fraudulently induced Anderson into a contract that did not include the real estate, the jury found that a contract existed. The essential contract finding was subsumed within the jury's fraud verdict. Thus, Anderson did not need to and did not fail to "secure" yet another separate "finding that there was an enforceable contract between him, Durant, and the Durant entities," contrary to the panel opinion's holding. *Durant*, 2016 WL 552034, at *3. No finding of a contract needed to be inferred. Stated another way, in *Zorrilla*, the supreme court agreed with the court of appeals that "*the essential contract finding was subsumed in the jury's fraud verdict."* 469 S.W.3d at 158 (emphasis added).[5]

[5]In fact, because the fraud findings in *Zorrilla* were supported by the evidence, the supreme court agreed with the court of appeals that Zorrilla was obligated to pay an increased rate of interest to Aypco of 1.5% per month under the Prompt Payment to Contractors Act, *see* Tex. Prop. Code Ann. §§ 28.002(a), .004 (West 2014), and that her evidence-sufficiency challenges to the separate breach-of-contract findings against her were not material to the prejudgment interest inquiry and did not need to be addressed. *Zorrilla*, 469 S.W.3d at 158 (citing Tex. R. App. P. 47.1). Still further, the supreme court also rejected Zorrilla's contest of foreclosure of the statutory and constitutional mechanic's and

These holdings in *Zorrilla* serve to highlight that the supreme court surely meant what it said that the finding of fraud in that case necessarily incorporated the finding of a contract whereby Zorrilla promised, with no intent to perform, to compensate Aypco for its construction services in May 2007 on which promise Aypco relied. Likewise, the virtually identical fraud finding here necessarily incorporated a contract created by Durant's promise to Anderson of the percentage of ownership of the Granbury dealerships, absent the real estate, with no intent to perform and upon which promise Anderson relied in moving his management duties to Granbury and assuming his agreed role as General Manager of both dealerships. Absent an agreement that Anderson was also to receive a percentage ownership of the real estate on which the dealerships sat, his contract was "enforceable" because it involved no real estate and was not subject to the statute of frauds.

That the terms of the contract are "enforceable" is encompassed within the jury's "yes" answers to Question No. 10

The jury's answer of "no" to Question No. 1, simply failing to find that the parties agreed to a contract with terms including an interest in real estate, did not

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materialman's liens on the ground that consideration of her evidence-sufficiency challenges to the jury's breach-of-contract findings was essential to determine the validity of the liens since neither lien was valid absent proof of the contractor's performance and the existence of the debt. *Id*. at 158–59. Again, the supreme court agreed with the court of appeals's analysis of the issue that performance and existence of a contractual debt were "encompassed in the jury's fraud findings" and that the evidence was sufficient to sustain the fraud verdict. *Id.* at 159.

preclude the finding that there was a different agreement between the parties that did not include real estate. The contract induced by and implicit in the fraudulent inducement claim, according to Anderson's testimony, was that Durant made a promise of future performance to Anderson, albeit a fraudulent one, that he would give Anderson a "buy-in" for a 10% ownership interest in Durant's Hyundai and Toyota dealerships in Granbury, in exchange for Anderson's immediately assuming the duties of General Manager over both dealerships in Granbury and giving up his position as General Manager of the Durant Auto Group. Although Anderson testified the contract included an equal interest in the underlying real estate, the jury chose, as was its prerogative, not to credit that portion of his testimony. In answer to Question No. 10, the jury found the following fraud damages would reasonably compensate Anderson for his damages "that resulted from such fraud":

> 1. The value of a 10% ownership interest in the Durant Toyota dealership in Granbury, Texas, excluding the value of the associated real estate.
>
> Answer: $323,150
>
> 2. The value of a 10% ownership interest in the real estate associated with the Durant Toyota dealership in Granbury, Texas.
>
> Answer: - 0 -
>
> 3. The value of a 10% ownership interest in the Durant Hyundai dealership in Granbury, Texas, excluding the value of the associated real estate.
>
> Answer: $60,000

4. The value of a 10% ownership interest in the real estate associated with the Durant Hyundai dealership in Granbury, Texas.

Answer: - 0 –

The panel's opinion states that Anderson wanted this court to "infer" a finding of an agreement excluding any interest in the real estate based only on the "zero" damage findings of the jury for the value of the real estate associated with the dealerships in Question No. 10. *Durant*, 2016 WL 552034, at *3.[6] The panel responded that it could not infer that the jury "found an agreement described nowhere in the jury charge." *Id.* I have found no such request by Anderson (or his lawyers), nor did Durant make any such argument for this court to make any inferred finding based on zero answers for the value of the real estate anywhere within the many briefs filed or the oral argument in this case. More importantly, the zero answers for the value of the real estate are *not* the only findings in answer to the damages issue. The jury found that Anderson's damages included the value of the promised 10% ownership interest in both the

[6]The opinion attempts to analogize the zero findings to an answer of "no" and suggests the jury could have believed Anderson either failed to affirmatively establish the value of the interest in the real estate he was to receive or that he was entitled to no compensation for being deprived of the interest he would have received had Durant lived up to his promise. *Durant*, 2016 WL 552034, at *3. The opinion cites *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 625 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985). *Durant*, 2016 WL 552034, at *3. But that case, once again, held that the jury's answer of "no" to the question asking whether a note was substantially true was a "failure to find" the note true, not a finding that the note was not true. *Frank B. Hall & Co.*, 678 S.W.2d at 625. The dollar amount, at least as found by the jury here, was not simply a "failure to find" an amount but was an affirmative finding of an amount equaling zero.

Hyundai and the Toyota Granbury dealerships but "*excluding the value of the associated real estate.*" [Emphasis added.] In determining the amounts of damages to compensate Anderson for the ownership percentages he was promised and never received, the questions expressly instructed the jury to exclude the value of the real estate. We must presume the jury followed the instruction. Regardless of whether the findings of "zero" damages for the real estate are affirmative findings or negative findings, we know the jury's findings of the value of 10% of each dealership are affirmative findings of amounts that *do not include the value of any interest in real estate* associated with either dealership, which renders the statute of frauds inapplicable, and the contract fraudulently induced by Durant is thus "enforceable."

Anderson needed no separate or additional finding of the existence of a contract induced by the fraud. The broad-form submission of fraud and damages not only incorporated and thereby "subsumed" the essential elements of the enforceable contract but also its specific terms. Thus, our opinion is in error in holding that Anderson was required to secure, as an essential element of his fraud claim, an additional separate jury finding of the existence of an enforceable contract.

Basic procedural defaults under civil trial and appellate rules by Durant present valid independent and alternative reasons why our opinion and judgment on the fraud claim must be reversed

A closer look behind Durant's Appellants' Brief (as well as Durant's Reply Brief) reveals Durant never complained in the trial court that Anderson failed to

request or secure a finding of an enforceable contract as an essential element of his claim of fraudulent inducement. Nor did Durant assign any such failure as error in the Appellants' Brief in this appeal. For this reason, alone, the opinion is in error in reversing on an issue never raised or briefed on appeal. *See, e.g.*, *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) (holding a court of appeals commits reversible error when it reverses sua sponte on a ground not raised or briefed on appeal); *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error."); *Vawter v. Garvey*, 786 S.W.2d 263, 264 (Tex. 1990); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 210 (Tex. 1990).

Relatedly, the obvious reason why Durant made no such complaint on appeal is that he made no objection to the charge, specifically to Jury Question No. 9, which submitted Anderson's fraud claim, complaining of the omission of a predicate question requesting a finding as to whether there was an enforceable contract as required to recover benefit-of-the-bargain damages for fraudulent inducement, which the panel's opinion holds Anderson "failed to secure." *See Durant*, 2016 WL 552034, at *3. To the extent that a specific finding of an enforceable contract was an omitted essential element of Anderson's fraud claim as the panel in this case has held, absent any request or objection to its omission, that element must be "deemed found" in such manner *as to support*

the judgment. Tex. R. Civ. P. 279.[7] The holding by the panel that we cannot "infer" such an omitted finding in favor of the judgment is, incredibly and improperly, tantamount to a deemed finding *against* the judgment and thus directly contrary to that rule. All other elements necessarily referable to Anderson's claim of fraudulent inducement—a promise with no intent to perform at the time the promise was made and justifiable reliance—were submitted and found in favor of Anderson (Question No. 9), as was the agreement for the 10% interest in the dealerships, "excluding the value of the associated real estate" (Question No. 10).

The "omission" of a separate finding of an essential element of recovery fits squarely within the dictates of rule 279:

> When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto are submitted to and found by the jury, *and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, . . . such omitted element or elements shall be deemed found by the court in such manner as to support the judgment*.

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[7]When an incomplete theory is submitted without complaint, the parties are deemed to have waived a jury trial on the omitted issue and to have agreed to submit the issue to the trial court, but if the trial court does not make findings on the omitted issue, such omitted element or elements shall be deemed found in favor of the judgment. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 565 (Tex. 2002) (citing Tex. R. Civ. P. 279); *see also Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 991 (Tex. 1949) (holding that petitioner who did not object to improperly conditioned submission waived right to a jury answer on the unanswered issue, and the issue must be deemed as having been answered by the court in such manner as to support the judgment), *modified on other grounds by Bradford v. Arhelger*, 340 S.W.2d 772, 773–74 (Tex. 1960).

Tex. R. Civ. P. 279 (emphasis added). Under rule 279, if there is factually sufficient evidence to support a finding of a promise by Durant to give Anderson a 10% interest in each dealership but without the real estate, in return for which Anderson undertook to take over as General Manager for those dealerships in Granbury, then we must reinstate the verdict and judgment in favor of Anderson for fraudulent inducement. *See id.* And there clearly was ample such evidence as detailed above.

There was legally and factually sufficient evidence that the agreement (as represented to Anderson by Durant) did not include the associated real estate

The remaining prerequisite to deeming the omitted finding of an enforceable contract in support of the judgment under rule 279 is that it be supported by legally and factually sufficient evidence. The panel relies only on Durant's testimony and largely ignores Anderson's. But the jury heard the testimony of both Durant and Anderson, both of which were fraught with conflict. Anderson testified that the agreement was that he would get a 10% interest in the dealerships plus an interest in the real estate; Durant testified just as unequivocally that the "deal" did not include the real estate or, initially at least, a 10% interest in the Toyota dealership. Durant testified he believed that he and Anderson had an agreement when they left their meeting in February at which the deal was made. Anderson believed they had an agreement, too, and he acted on it immediately in relocating to Granbury and assuming management of the two Granbury dealerships. His actions, as well as the publishing of press

releases and marketing brochures representing Anderson as a partner/principal in Durant Auto Group—releases and brochures that were never disputed by Durant—buttressed Anderson's version of the agreement. Durant gave similar deals to two other managers for buy-ins at other dealerships during the same time frame. Durant again confirmed that he and Anderson entered into an agreement when he testified he gave all three gentlemen, including Anderson, checks for $75,000 "in lieu of" their "buy-in agreements."

Indeed, one fact both men agreed upon was that they had an agreement. Anderson thought it was a done deal from the outset; Durant thought he somehow bought the buy-in back in December. The panel in this case turned the standards of review of a jury verdict upside down, crediting only the testimony of Durant against the verdict and giving no credence to that of Anderson. When reviewing the legal sufficiency of the evidence, we must consider all of the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support the finding, not look only at evidence to defeat the judgment as the panel has done here. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder would and disregard contrary evidence unless a reasonable factfinder could not. *Id.* at 827. The ultimate test for legal sufficiency is whether the evidence would enable reasonable and fair-minded people to make the finding under review. *Id*. In reviewing a no-evidence issue, the court indulges every reasonable inference in support of that finding. *Id.* at 822. As

urged by Anderson in his motion for rehearing, *his testimony alone, which the panel largely ignored*, was both legally and factually sufficient to support the jury's finding of the existence of Anderson's dealership agreement for the management and ownership interest in both the Hyundai and Toyota dealerships in Granbury, while the jury was free to discredit his testimony that the deal included an interest in the real estate. Thus, Durant's testimony further suffices to affirmatively support the jury's finding that there was an agreement that did not include the real estate. *See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997); *see also City of Keller*, 168 S.W.3d at 822. The panel and this court were intimately familiar with the standards of review, so how the panel got the standards backwards is inexplicable.

"Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. They may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary." *City of Keller*, 168 S.W.3d at 819. "Most credibility questions are implicit rather than explicit in a jury's verdict." *Id.* Therefore, reviewing courts must assume that the jurors decided all credibility questions in favor of the verdict if reasonable persons could do so. *Id.* "Courts reviewing all the evidence in a light favorable to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it." *Id.*

In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant did not have the burden of proof, as is the case here, we

consider and weigh all of the evidence and set aside the verdict only if the evidence that supports the jury finding is so weak as to make the verdict clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Ins. Network of Tex. v. Kloesel*, 266 S.W.3d 456, 470 (Tex. App.—Corpus Christi 2008, pet. denied). In our factual-sufficiency review, we consider and weigh all the evidence, but as in our legal-sufficiency review, we still must defer to the jury as the sole judge of the witnesses' credibility. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *see Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The jury may choose to believe one witness over another, and a reviewing court may not impose its own opinion to the contrary. *City of Keller*, 168 S.W.3d at 819. And finally, if parties to a contract testify to conflicting terms, the reviewing court "must presume the terms were those asserted by the winner." *Id.*

CONCLUSION

There was ample evidence that Anderson was fraudulently induced to enter into a contract with Durant with damages that resulted from the fraud as found by the jury. There was no omission of any essential element of the cause of action for fraudulent inducement because of the omission of any separate finding of an enforceable contract. The panel should have affirmed the judgment in favor of Anderson for his fraud damages based on the jury's verdict. The court sitting en banc should have vacated the decision and judgment of the panel reversing the trial court's judgment and rendered judgment in favor of Anderson

on the verdict for fraudulent inducement. Because neither the panel nor the court sitting en banc so held, I dissent.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

DELIVERED: December 8, 2016