In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00280-CV

ARGONAUT GREAT CENTRAL INSURANCE COMPANY,
Appellant and Appellee

V.

MLLCA, INC., Appellee and Appellant

On Appeal from the 271st District Court
Wise County, Texas
Trial Court No. CV17-01-057

Before Sudderth, C.J.; Kerr and Birdwell, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

MLLCA, Inc. hired a contractor named Frank Walley to repair its gas station after a hail storm. Walley purloined several thousand dollars of the insurance proceeds meant for repairs, and MLLCA's insurer, Argonaut Great Central Insurance Company, refused to issue any further payments under the policy. MLLCA went on to obtain a money judgment against Argonaut for its supposed role in enabling the theft and for wrongfully denying policy benefits.

On appeal, Argonaut brings a series of no-evidence challenges against MLLCA's five alternate theories of recovery. We agree with each of these challenges; Argonaut's role in facilitating the theft was negligible, and MLLCA was not entitled to any amounts under the policy beyond what it had already received (and what Walley had regrettably stolen). We hold that none of MLLCA's theories offer a viable avenue for recovery.

MLLCA cross-appeals, but its arguments are either moot or unavailing. We therefore reverse and render judgment that MLLCA take nothing.

I. BACKGROUND

In November 2015, a hailstorm struck Decatur, Texas. The storm hit a gas station owned by MLLCA, damaging the roof of the station and the canopies over the gas pumps. MLLCA made a claim to its insurer Argonaut. Argonaut in turn assigned the claim to an independent adjuster, Vericlaim, Inc.

MLLCA arranged for a roofing company, RS Roofing, to submit an estimate for repairs to Vericlaim in January 2016. In its estimate, RS Roofing proposed to repair

both the roof and the canopies for a flat rate of $193,000. Vericlaim asked for an itemized bid that did not include certain repairs which Vericlaim deemed unnecessary, but RS Roofing would not provide one. Vericlaim's adjuster forwarded the bid to Argonaut, though, saying that most of the costs in RS Roofing's estimate were appropriate and reasonable, "but we are working through a few items that seem unnecessary." Negotiations between Vericlaim and RS Roofing eventually broke down over itemization and the scope of repairs, and RS Roofing became unresponsive.

Meanwhile, Argonaut requested a comparative bid, so Vericlaim asked an independent contractor named Frank Walley to evaluate the damage on March 31, 2016. MLLCA's witnesses testified that Argonaut described RS Roofing's bid as "sketchy" and that Vericlaim described Walley as an "adjuster" who would be evaluating the damage instead. According to MLLCA's store manager David Figueiredo, Walley came to the station and offered to repair the damage, telling Figueiredo that he could make the store look brand new. After Walley left, Figueiredo researched Walley and found a number of positive references online. MLLCA quickly decided to hire Walley as its contractor.

Walley returned an itemized bid for $372,000 on April 6, 2016. After vigorous back and forth (and the hiring of a roofing consultant to negotiate on Argonaut's behalf), Argonaut and Walley bargained the total cost of repairs down to $235,000. They further agreed that the actual cash value of the damaged buildings, less depreciation, was $140,000. Pursuant to the policy, that $140,000 would be disbursed

first, followed by additional payments to bring the total up to $235,000 as the completion of repairs demanded.

MLLCA agreed to the plan, but at Walley's urging, it asked to have the check for $140,000 made jointly payable to MLLCA and Walley. When the check was received, MLLCA indorsed it over to Walley.

Walley gave some of the proceeds back to MLLCA, did a few thousand dollars of repair work, and paid a company named Hunter Graphics $36,000 to start repairs to the canopies. However, Walley ultimately stole the remaining $95,000 and left the gas station in disrepair.

MLLCA then looked for options on how to complete the repairs. Vericlaim led MLLCA to believe that if it fully repaired the canopies, Argonaut would probably release the remaining funds that made up the $235,000 replacement cost. So, MLLCA's owners used their own money and took out a loan to pay Hunter Graphics roughly $45,000 to complete repairs to the canopies. Vericlaim's agent then inspected the progress on the repairs and advised Argonaut that since around 80 to 85 percent of the canopy repairs were complete, it "wouldn't be unreasonable to release" the remaining funds, though Vericlaim acknowledged that whether to release the funds "will be Argo's decision." However, Argonaut declined to release the remaining $95,000, believing that its obligation to pay the full $235,000 repair cost would be triggered under the policy only if MLLCA documented more than $140,000 in expenses on completed repairs. Since MLLCA had documented just over $80,000 in expenses—consisting of the

$36,000 and the roughly $45,000 that Walley and MLLCA had paid to Hunter Graphics—Argonaut concluded that it was not contractually obligated to pay anything more than the $140,000 it had already disbursed.

Since MLLCA could not afford to repair the roof, it decided to sell the gas station. It then sued Argonaut, Vericlaim, and Walley, among others.

The case went to trial in January 2019. MLLCA argued that Argonaut breached the policy by refusing to pay the remaining $95,000 in repair costs. MLLCA also argued that Argonaut knew of, but ignored, several red flags that Walley was illegally acting as both a contractor and an "unlicensed public adjuster" on MLLCA's claim, in that Walley was attempting both to handle the repairs, as a contractor would, and to negotiate the claim with Argonaut, as an adjuster would. According to MLLCA's expert, those who attempt to act as both contractor and unlicensed adjuster on the same claim are known to be unethical and often prey on unknowing consumers, just as Walley did to MLLCA. MLLCA contended that Argonaut committed various tortious acts when it (1) called RS Roofing's bid "sketchy" and (2) failed to disclose Walley's dual role as a contractor and unlicensed adjuster, both of which spurred MLLCA to use and keep Walley as its contractor. By MLLCA's account, Argonaut's tortious conduct and breach of the policy were thus the cause of Walley's theft and other consequential damages such as the lost profits that the gas station suffered while it was in disrepair.

As relevant to this appeal, the jury found against Argonaut on MLLCA's claims for fraud and fraud by nondisclosure, breach of contract, insurance code violations,

violations of the duty of good faith and fair dealing, and deceptive trade practices. MLLCA elected to recover on its fraud claims, for which the jury awarded $95,000 for unpaid benefits under the policy, $60,000 for lost profits, $50,000 to account for MLLCA's loss in selling the gas station below market price, $56,318.06 in out-of-pocket expenses, and $500,000 in punitive damages against Argonaut. The trial court rendered judgment accordingly, with four alternative recoveries in the event this court reversed the judgment on the fraud claims. Argonaut appealed, and MLLCA cross-appealed.

II. STANDARD OF REVIEW

We may sustain a legal-sufficiency challenge only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Shields v. Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *see also Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998) (op. on reh'g). In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We indulge "every reasonable inference deducible from the evidence" in support of the challenged finding. *Gunn v.*

McCoy, 554 S.W.3d 645, 658 (Tex. 2018). When the evidence offered to prove a vital fact is so weak that it creates no more than a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). We also apply this standard to determine whether a directed verdict was appropriate. *City of Keller*, 168 S.W.3d at 823.

The interpretation of an unambiguous contract is a question of law we review de novo using well-settled contract-construction principles. *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763 (Tex. 2018). "When a contract's meaning is disputed, our primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument." *Id.* "We therefore presume parties intend what the words of their contract say and interpret contract language according to its plain, ordinary, and generally accepted meaning unless the instrument directs otherwise." *Id.* at 764 (cleaned up).

III. FRAUD

In its first, second, and seventh issues, Argonaut brings what we construe as a challenge to the legal sufficiency of the evidence to support the causation, intent, and duty elements of MLLCA's claims for fraud and fraud by nondisclosure.[1]

[1] Argonaut also contests the factual sufficiency of the evidence across the board. Because of our disposition of Argonaut's legal sufficiency challenges, we need not address factual sufficiency.

To prove fraud, a plaintiff must show that: (1) the defendant made a false, material representation; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff justifiably relied on the representation, which caused the plaintiff's injury. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019). "To establish the fourth element, the plaintiff must show that it actually relied on the defendant's representation and, also, that such reliance was justifiable." *Id.* at 496–97 (cleaned up).

"Fraud by non-disclosure, a subcategory of fraud, occurs when a party has a duty to disclose certain information and fails to disclose it." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219 (Tex. 2019). To demonstrate fraud by non-disclosure, the plaintiff must show: (1) the defendant deliberately failed to disclose material facts; (2) the defendant had a duty to disclose such facts to the plaintiff; (3) the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) the defendant intended the plaintiff to act or refrain from acting based on the nondisclosure; and (5) the plaintiff relied on the nondisclosure, which resulted in injury. *Id.* at 219–20.

MLLCA's theory of fraud was that Argonaut falsely described RS Roofing and its estimate for repairs as "sketchy," even though Argonaut knew that RS Roofing's estimate was mostly reasonable. According to MLLCA, Argonaut knew this representation was false, but Argonaut wanted to save money, so it disparaged RS

Roofing to deter MLLCA from using the company. MLLCA contends that it justifiably relied on this false statement when it hired Walley, and thus Walley's subsequent theft of the insurance proceeds can be causally attributed to Argonaut's misrepresentation.

We conclude that the evidence of causation is lacking. To begin, it is important to note that Argonaut had nothing to do with selecting Walley for work on MLLCA's claim for repairs. Rather, it was the independent adjuster Vericlaim that brought Walley into the mix, and it was MLLCA that kept him there when MLLCA retained Walley to perform the repairs. Argonaut did not directly refer Walley to MLLCA, did not force Vericlaim's hand in sending Walley to the gas station, did not compel MLLCA to hire him, and did not so much as endorse Walley for work on the claim either expressly or impliedly. Our standard of review requires us to accept as fact the testimony that Argonaut referred to RS Roofing as "sketchy," but even after Argonaut's remark, it remained MLLCA's responsibility to vet and hire its own contractor. *See Barrow-Shaver*, 590 S.W.3d at 497 (discussing a fraud claimant's duty to use reasonable diligence and ordinary care in protecting its own affairs). MLLCA's own store manager testified that he discharged that responsibility not by consulting Argonaut, but by researching online, and he was satisfied enough with the results of the research that MLLCA made the independent decision to hire Walley.

And all of that speaks to just the causative distance between Argonaut's remark and MLLCA's hiring decision. There is a further remove between that hiring decision and Walley's criminal conduct. "Cause in fact is not shown if the defendant's [wrongful

act] did no more than furnish a condition which made the injury possible." *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). "[E]ven if the injury would not have happened but for the defendant's conduct, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause." *Id.* Thus, in *Doe*, a boys club's failure to screen a volunteer was too attenuated to be the legal cause of the criminal assault against children belonging to the club where that screening would have revealed only DWI convictions, and where there was no evidence that the club would have excluded the volunteer simply for having DWI convictions. *Id.* at 477–78. Similarly, we conclude that Argonaut's one-word remark about RS Roofing is simply too far detached from Walley's later criminal conduct to constitute the legal cause of that conduct. *See Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Nothing about this one remark so fomented, facilitated, or connected with Walley's theft of $95,000 that the remark could fairly be attributed as the tortious cause of the theft. We therefore hold the evidence legally insufficient to support MLLCA's fraud claim.

The evidence to support MLLCA's theory of fraud by nondisclosure is equally lacking. At trial, MLLCA advanced the narrative that, at some point after MLLCA hired Walley, Argonaut learned that Walley was not just acting as a contractor but was also acting illegally as an unlicensed public adjuster, and Argonaut knew that those who act in the dual roles of contractor and public adjuster are inherently unscrupulous and

liable to steal money from the insured, as Walley later did from MLLCA. MLLCA maintains that Argonaut withheld information about Walley's dual role because Argonaut wanted to induce MLLCA to keep Walley as its contractor and to seal the deal on MLLCA's claim. According to MLLCA, Argonaut figured that alerting MLLCA about the dangers that Walley presented would have posed the risks of further delaying the claims handling process while MLLCA found another contractor and of creating further friction between Argonaut and its insured during that delay. Argonaut wanted to avoid that delay and friction, MLLCA says, so Argonaut kept quiet about the danger that it knew Walley posed. MLLCA maintains that it justifiably relied on Argonaut's silence when it kept Walley as its contractor.

But the notion that Argonaut intended to induce anything having to do with Walley is supposition projected onto a silent record. There is no direct evidence of intent to induce, and we find no circumstantial evidence suggesting that Argonaut wanted to avoid delay and discord with MLLCA. If anything, Argonaut's course of action suggests that its foremost goal was minimizing costs on hailstorm claims, even if it meant some time lost and conflict with its policyholders. Besides, if Argonaut's goal was to avoid friction and obtain MLLCA's gratitude, one sure way to do that would be to alert MLLCA about the danger it faced from Walley, not to conceal that danger. Moreover, Argonaut would have had no reason to induce MLLCA to keep a contractor who had initially returned an inflated bid (for $372,000) that could have put Argonaut on the hook for thousands more in repair costs than a previously obtained estimate

from another contractor (for $193,000). If getting MLLCA to keep its own contractor would have benefited Argonaut at all, then, there is nothing in the record to show Argonaut was so keen to obtain that benefit that it would have committed a fraud.

MLLCA's claim for fraud by nondisclosure also falters on the duty element because MLLCA neglects to mention any facts that would saddle Argonaut with a duty to disclose Walley's dual role in the first place. "In general, there is no duty to disclose without evidence of a confidential or fiduciary relationship." *Bombardier*, 572 S.W.3d at 220. "A fiduciary duty arises as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships." *Id.* (cleaned up). "A confidential relationship is one in which the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest." *Id.* (cleaned up).

"[N]ot every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (per curiam). Due to their extraordinary nature, the law does not recognize confidential or fiduciary relationships lightly. *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 678 (Tex. App.—Fort Worth 2010, no pet.). An insurer does not generally have a fiduciary or confidential relationship with its insured. *Id.* A confidential relationship may arise from circumstances of the particular case, but when this fact-dependent sort of bond is alleged, "it must exist prior to, and apart from, the agreement made the basis of the suit." *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995). Thus, in *Rice*, where

the insured offered no evidence to demonstrate that it had an intimate and trusting relationship with its insurer that extended beyond the simple issuance of a policy, we held that there was nothing to sustain the existence of a confidential relationship. 324 S.W.3d at 679.

Similarly, here, the insurer Argonaut did not generally have a fiduciary or confidential relationship with the insured MLLCA, and MLLCA has not pointed to any evidence of the sort of prolonged, close dealings prior to the issuance of the policy that would support a confidential relationship. In the absence of any fiduciary or confidential relationship, Argonaut had no duty to disclose Walley's alleged dual role.

In short, there is no evidence, direct or circumstantial, to support the causation aspect of MLLCA's fraud claim and the intent and duty elements of its claim for fraud by nondisclosure. The evidence is therefore legally insufficient to support MLLCA's recovery under either theory. *See Shields*, 526 S.W.3d at 480. We sustain Argonaut's first, second, and seventh issues as to MLLCA's fraud claim.

The question becomes whether the evidence is sufficient to support recovery under any of MLLCA's alternate theories. *See Transp. Ins.*, 898 S.W.2d at 274; *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988).

IV. BREACH OF CONTRACT

In Argonaut's third issue, it contends that the evidence is legally insufficient to support the jury's finding that Argonaut breached the insurance contract.

The parties appear to see eye to eye on most of the factual and legal foundations of this issue. The parties agree that as the policy was structured, Argonaut's baseline obligation was to pay MLLCA $140,000, which represented the actual cash value of the damage. They also agree that Argonaut paid MLLCA $140,000 and no more than that. They further concur that there was a clause in the policy that, if satisfied, would obligate Argonaut to pay an additional $95,000, which represents the difference between the actual cash value and the $235,000 cost to repair the damage at the gas station, i.e., the "replacement cost value." But the parties differ on whether MLLCA satisfied the clause dealing with replacement cost value.

To address the parties' arguments, we review the evidence in light of the policy's unambiguous language.[2] *See URI*, 543 S.W.3d at 763. "The essential elements of a

[2]Absent an objection to the jury charge, the sufficiency of the evidence is reviewed in light of the charge submitted. *Strickland Grp., Inc. v. Pathfinder Expl., LLC*, No. 02-12-00187-CV, 2013 WL 4773363, at *8 (Tex. App.—Fort Worth Sept. 5, 2013, no pet.) (mem. op.) (citing *W.L. Lindemann Operating Co. v. Strange*, 256 S.W.3d 766, 775 (Tex. App.—Fort Worth 2008, pet. denied)). In *Strickland*, for example, a question in the jury charge summarized the effect of a contractual provision, the jury found in favor of the appellees on the question, and the parties did not challenge that question's summary at trial or on appeal. *Id.* at *8, *10. In our opinion, we judged the merits of the appellant's complaint against the contractual provision as it was summarized in the jury charge rather than based on the provision's language. *See id.* at *10.

MLLCA contends that the same sort of thinking should apply here. As MLLCA points out, the jury charge's question on contractual breach quoted only a few of the terms in the insurance policy:

Did Argonaut fail to comply with the policy by refusing to pay the full replacement cost?

The policy provides:

> d. Except as provided in Paragraphs (2) through (7) below, we will determine the value of Covered Property as follows:
>
> (1) At replacement cost without deduction for depreciation, subject to the following:
>
> * * *
>
> (d) We will not pay on a replacement cost basis for any loss or damage:
>
> (i) Until the lost or damaged property is actually repaired or replaced[.]

MLLCA argues that we should judge the breach issue based only on the policy language that was quoted in the charge; MLLCA urges us to ignore other terms in the policy that limited Argonaut's obligation to pay the replacement cost because those limitations were not expressly quoted in the jury charge.

But unlike *Strickland*, the jury charge does not summarize the effect of a provision, such that the charge might arguably override the language of any given provision. Rather, the charge faithfully quotes a few selected provisions from the policy, and it does not purport to negate any other terms that are not quoted; the charge does not say that the jury was only to consider the quoted passage from the policy, the full text of which was in evidence for the jury to consider. We therefore do not believe that the charge obligates us to judge the merits of this issue against only the quoted passages and to ignore the effect of any provision not expressly quoted.

Moreover, even if we were to oblige MLLCA's request, MLLCA would not prevail. If the universe of the policy were limited to only the provisions that were expressly quoted in the charge, Argonaut would have had no obligation to pay anything whatsoever. The quoted passages state that Argonaut will *determine* the replacement cost subject to a limitation. The quoted passage says nothing of actually obligating Argonaut to *pay* the replacement cost. If we were to indulge MLLCA's argument and treat the policy as though it consisted of only the quoted passage, Argonaut could not have breached the policy by declining to pay the replacement cost when the quoted provision

breach of contract claim are the existence of a valid contract, performance or tendered performance by the plaintiff, breach of the contract by the defendant, and damages sustained as a result of the breach." *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex. App.—Fort Worth 2008, pet. dism'd).

The policy provides that when Argonaut pays for loss or damage on a replacement cost basis, Argonaut will not pay more than the least of the following: (1) the applicable limit of insurance (which in this case was $470,000), (2) the replacement cost of the lost or damaged property (which the parties agreed was $235,000), or, pursuant to the provision on which this issue hinges, (3) "[t]he amount you actually spend that is necessary to repair or replace the lost or damaged property."

The parties both focus on the "actually spend" part of this last provision. Argonaut maintains, and we agree, that in order to trigger the replacement cost value clause under the policy's plain terms, MLLCA was required to show that it actually spent more on repairs than the $140,000 that Argonaut disbursed. Argonaut argues that MLLCA did not satisfy the clause because MLLCA never submitted documentation showing more than $140,000 in expenses on repairs. As Argonaut paints the scene, there were only two sets of actual repair expenses, which together do not exceed $140,000: (1) of the initial $140,000 that MLLCA gave to Walley, only $36,000 was actually devoted to repairs; and (2) MLLCA also later spent roughly an

---

did not obligate Argonaut to pay anything of the sort. We therefore decline MLLCA's invitation to skew the manner in which we evaluate this issue.

additional $45,000 to complete repairs to the canopies over the fuel pumps. Thus, Argonaut reasons that because MLLCA's actual repair expenses never exceeded $140,000, Argonaut was not obligated to pay replacement cost value, and there is no evidence to support the jury's finding that Argonaut breached the contract by failing to pay the additional $95,000.

MLLCA insists that it actually spent the funds on the repairs simply by signing the $140,000 check over to a contractor who had promised to perform the repairs. Thus, MLLCA reasons that together with the additional $45,000 it used to complete repairs to the canopies, MLLCA actually spent well in excess of $140,000 on repairs, which obligated Argonaut to pay the additional $95,000.

Some authorities support the stance that MLLCA actually spent the $140,000 when it signed that amount over to Walley. For instance, when a Wisconsin appeals court dealt with an identical contractual provision, the court concluded that if the insured had "endorsed" checks over to the contractors who performed certain repairs, it would have thereby actually spent "the total of the endorsed checks" on repairs. *Chiconas v. LaPorte*, 573 N.W.2d 899, 1997 WL 784123, at *5 (Wis. Ct. App. 1997) (per curiam).

And some dictionaries arguably lend support to MLLCA's position as well. One dictionary's primary definition of "spend" is "to use up or pay out." Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/spend (last visited May 10, 2021); *Driveline Retail Merch., Inc. v. PepsiCo, Inc.*, No. 4:17-CV-00423, 2018 WL

2298386, at *7 (E.D. Tex. May 21, 2018) (mem. op. & order). If all that is required to actually spend the funds on repairs is to "pay out" the funds to a contractor, then MLLCA's position might have merit.

"Words are ridden with nuance," though. *RPC, Inc. v. CTMI, LLC*, 606 S.W.3d 469, 489 (Tex. App.—Fort Worth 2020, pet. filed) (mem. op.). We are not convinced that MLLCA "actually spent" $140,000 on repairs if only $36,000 of that amount was actually devoted, through Walley, to mending the store's damage.

Regardless, we will assume arguendo that simply signing over the check qualifies as actually spending it. Even so, that is not all that the policy requires. Both parties neglect the effect of the word "necessary" within the provision, "The amount that you actually spend that is *necessary* to repair or replace the lost or damaged property." [Emphasis added.] Even if MLLCA did "actually spend" the $140,000 when it endorsed the check to Walley, was all of that expense "necessary"? We think it was not.

To illustrate, suppose that the facts were a bit different: after MLLCA signs over the $140,000, Walley applies $120,000 and completes the repairs in their entirety, and MLLCA allows him to keep the remaining $20,000 as a gratuity. Would the entire $140,000 expense have been made "necessary" by repairs? No. The repairs only necessitate the expense of $120,000; the remaining $20,000 would be unnecessary. In this scenario, MLLCA's actual and necessary expenses did not exceed the $140,000 that Argonaut already provided. Therefore, under the policy, Argonaut would not be required to provide additional funds corresponding with a greater replacement cost.

Now suppose the scenario better resembled the present one. MLLCA signs over the $140,000, and under the assumptions we have made, MLLCA thereby spends it. Subsequently, Walley incurs $36,000 of expenses in repairing the canopies, making $36,000 of the $140,000 expense necessary. He then leaves the job unfinished and absconds with $95,000 of the remaining funds. Was that $95,000 of expense made necessary? We hold it was not. Thus, even if MLLCA did "actually spend" all $140,000 by giving it to Walley, doing so was not necessary for repairs or replacement under the plain meaning of the policy.

Rather, the evidence reflects that MLLCA had only two sets of actual and necessary expenses on repair or replacement. First, there was the $36,000 that Walley gave to Hunter Graphics to begin repair work on the canopies. Then there was the roughly $45,000 that MLLCA gave Hunter Graphics to complete repairs on the canopies.

Even viewing this evidence in the light most favorable to MLLCA, there is no evidence that MLLCA necessarily spent more than $140,000 on repairs. Under those circumstances, nothing in the policy obligated Argonaut to pay more than it already had. We therefore hold that the evidence is legally insufficient to show that Argonaut breached the policy by refusing to pay additional sums. *See Shields*, 526 S.W.3d at 480. We sustain Argonaut's third issue.

V. INSURANCE CODE AND DUTY OF GOOD FAITH AND FAIR DEALING

In its ninth issue, Argonaut contends that because there was no evidence to show a breach of the policy, MLLCA therefore cannot recover damages for claims regarding violation of the insurance code and the duty of good faith and fair dealing.

There are only two paths an insured may take to establish the damages caused by an insurer's violation of the insurance code or the duty of good faith and fair dealing: either the insured establishes (1) "a right to receive benefits under the policy" or (2) "an injury independent of a right to benefits." *In re State Farm Mut. Auto. Ins. Co.*, Nos. 19-0791, 19-0792, 2021 WL 1045651, at *3 (Tex. Mar. 19, 2021) (orig. proceeding) (quoting *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 500 (Tex. 2018) (op. on reh'g)); *see Old Am. Ins. Co. v. Lincoln Factoring, LLC*, 571 S.W.3d 271, 277–78 (Tex. App.—Fort Worth 2018, no pet.). Under the first path, if an insured establishes a right to receive benefits under the insurance policy, it can recover those benefits as actual damages under the insurance code if the insurer's statutory violation causes the loss of benefits. *State Farm*, 2021 WL 1045651, at *3. "And under the second path, 'if an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits.'" *Id.* (quoting *Menchaca*, 545 S.W.3d at 499). "As *Menchaca* made clear, there is no alternative to these two pathways." *Id.* "An insured cannot recover *any* damages based on an insurer's statutory violation if the insured had

no right to receive benefits under the policy and sustained no injury independent of a right to benefits." *Id.* (quoting *Menchaca*, 545 S.W.3d at 489).

As a corollary to these rules, "the plaintiff must claim 'actual damages' that have not already been paid." *Park Bd. Ltd. v. State Auto. Mut. Ins. Co.*, No. 4:18-CV-382, 2019 WL 3776450, at *4 (E.D. Tex. Aug. 12, 2019) (mem. op. & order). Thus, if the insurer pays all policy benefits to which the insured is entitled, this will moot bad faith claims to the extent that the insured seeks damages for wrongfully withheld policy benefits. *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 134 (Tex. 2019). In such circumstances, the insured must allege and prove some injury "independent from the loss of the benefits" in order to prevail. *Id.* (quoting *Menchaca*, 545 S.W.3d at 500).

We have already determined that Argonaut paid all the benefits to which MLLCA was entitled under the policy; under the facts here, MLLCA had no right to receive any additional benefits beyond what Argonaut paid in the initial installment of $140,000. Therefore, no recovery of additional policy benefits could be had in the name of the insurance code or the duty of good faith. *See id.*; *cf. Lambert v. State Farm Lloyds*, No. 02-17-00374-CV, 2019 WL 5792812, at *2 (Tex. App.—Fort Worth Nov. 7, 2019, pet. filed) (mem. op.). To prevail, it was incumbent upon MLLCA to show some injury independent from the loss of policy benefits. *See Ortiz*, 589 S.W.3d at 134.

But a successful independent-injury claim is rare—so rare that the *Menchaca* court remarked, "we in fact have yet to encounter one." 545 S.W.3d at 500. This aspect of the independent-injury rule applies only if the damages are truly independent of the

insured's right to receive policy benefits. *Id.* at 499–500. "It does not apply if the insured's statutory or extra-contractual claims are predicated on the loss being covered under the insurance policy, or if the damages 'flow' or 'stem' from the denial of the claim for policy benefits." *Id.* at 500 (cleaned up). One potential example of an independent injury is mental anguish damages in cases of truly extreme conduct on the part of the insurer. *See id.* at 499; *State Farm Lloyds v. Fuentes*, 597 S.W.3d 925, 941 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

Here, the jury awarded MLLCA three types of damages for harms that extended beyond the loss of policy benefits, including damages of $15,000 for lost profits, $14,079.52 for out-of-pocket expenses, and $12,500 for the reduced sales price of MLLCA's gas station. According to MLLCA, these damages are independent injuries, unrelated to the right to policy benefits. MLLCA maintains that none of these damages arose because of—or stemmed from—the denial of policy benefits.

We disagree. Each of these forms of damages was a natural extension from Argonaut's failure to pay the additional $95,000 in policy benefits. According to MLLCA's own damage modeling at trial, it suffered lost profits, incidental expenses, and a reduced sales price because MLLCA could not complete repairs to the gas station—and it could not complete those repairs because Argonaut breached the policy by refusing to turn over the necessary funds. Each of these damages flowed from the alleged breach of the insurance policy, *see, e.g.*, *Byrd v. Liberty Ins. Corp.*, No. 5:17-CV-209, 2018 WL 7021591, at *5 (S.D. Tex. Nov. 29, 2018) (deeming the resulting

"additional costs, economic hardship, [and] losses" to flow from a claim for policy benefits), *report and recommendation adopted*, No. 5.17-CV-209, 2019 WL 184096 (S.D. Tex. Jan. 14, 2019), much like consequential damages would "flow" "naturally, but not necessarily," from the breach of any other sort of contract, *see El Paso Mktg., L.P. v. Wolf Hollow I, L.P.*, 383 S.W.3d 138, 144 (Tex. 2012); *see also Dall./Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 373 (Tex. 2019) (recognizing that incidental expenses may constitute consequential damages); *DaimlerChrysler Motors Co., LLC v. Manuel*, 362 S.W.3d 160, 181 (Tex. App.—Fort Worth 2012, no pet.) (same as to lost profits). None were independent injuries in their own right, such that they might qualify for this narrow exception. In short, MLLCA produced no evidence of an independent injury.

Ergo, MLLCA could not recover for an injury independent from the policy benefits. And we have already determined that MLLCA could not recover the policy benefits themselves. The evidence is therefore legally insufficient to support any recovery under MLLCA's claims for breach of the insurance code or the duty of good faith and fair dealing. *Cf. Valentine v. Fed. Ins. Co.*, No. 14-18-00438-CV, 2020 WL 1467352, at *8 (Tex. App.—Houston [14th Dist.] Mar. 26, 2020, pet. denied) (mem. op.) (deeming summary judgment on insurance code claims appropriate because there was no entitlement to policy benefits and there was no evidence of independent injury beyond those benefits). We sustain Argonaut's ninth issue.

VI. DTPA

Within its fourth issue, Argonaut challenges the jury's finding that Argonaut violated the Texas Deceptive Trade Practices Act (DTPA). According to Argonaut, the evidence is legally insufficient to support this finding.

"The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *see* Tex. Bus. & Com. Code Ann. § 17.50(a). Under the circumstances present here, that cause of action required MLLCA to prove (1) it was a consumer; (2) Argonaut committed one of the false, misleading, or deceptive acts or practices enumerated in Section 17.46(b) of the Texas Business and Commerce Code; and (3) such action was a producing cause of MLLCA's injuries. *See Payne v. Highland Homes, Ltd.*, No. 02-14-00067-CV, 2016 WL 3569533, at *8 (Tex. App.—Fort Worth June 30, 2016, no pet.) (mem. op.).

The charge gave the jury eight potential definitions of false, misleading, or deceptive acts drawn from the "laundry list" provided by Section 17.46(b).[3] *Hulcher*

[3]Specifically, the charge informed the jury,

> "False, misleading, or deceptive act or practice" means any of the following.
>
> 1. Representing that services are or will be of a particular quality if they were of another; or
>
> 2. Failing to disclose information about services that was known at the time of the transaction with the intention to

Servs., Inc. v. Emmert Indus. Corp., No. 02-14-00110-CV, 2016 WL 368180, at *7 (Tex. App.—Fort Worth Jan. 28, 2016, pet. denied) (mem. op.). However, only two of those definitions can be credibly argued to fit this case; the evidence is patently insufficient to support the other six definitions because they bear no resemblance to our facts. We therefore focus on those two salient definitions in determining whether the evidence is sufficient to show a DTPA violation.

---

induce MLLCA into a transaction it would not have otherwise entered into if the information had been disclosed; or

3. Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by, another; or

4. Representing that services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not; or

5. Representing that services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; or

6. Disparaging the services or business of another by false or misleading representation of facts; or

7. Advertising services with intent not to sell them as advertised; or

8. Misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction.

First, Section 17.46(b)(24) provides that "failing to disclose information concerning goods or services which was known at the time of the transaction" may be a false, misleading, or deceptive act "if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." Tex. Bus. & Com. Code Ann. § 17.46(b)(24); *Satterfield v. Vess*, No. 2-04-287-CV, 2005 WL 1838978, at *4 (Tex. App.—Fort Worth Aug. 4, 2005, no pet.) (mem. op.). To prevail on a claim for failure to disclose, MLLCA was required to prove four elements: (1) a failure to disclose information concerning goods or services, (2) which was known at the time of the transaction, (3) if such failure was intended to induce the consumer into a transaction, (4) which the consumer would not have entered had the information been disclosed. *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 744 (Tex. App.—Fort Worth 2005, no pet.).

MLLCA maintains that Argonaut violated this DTPA provision when it held silent about Walley's dual role in order to induce MLLCA to keep Walley as its contractor. But in the same way that the evidence was insufficient to support the intent element of MLLCA's fraud by nondisclosure claim, the evidence is insufficient to support the intent element of the DTPA claim for failure to disclose. We find no direct or circumstantial evidence that Argonaut intended to keep mum about Walley as a means to persuade MLLCA to keep Walley as its contractor. *See, e.g.*, *Martin v. Citizens*,

No. 12-17-00033-CV, 2017 WL 5167400, at *6 (Tex. App.—Tyler Nov. 8, 2017, no pet.) (mem. op.).

The second definition of deceptive practice that has any potential applicability here is "disparaging the goods, services, or business of another by false or misleading representation of facts." Tex. Bus. & Com. Code Ann. § 17.46(b)(8). For DTPA violations, producing cause must be shown. *Transcont'l Ins. Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010). Producing cause requires actual causation in fact—proof that an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred. *Id.*

As with its fraud claim, MLLCA theorizes that Argonaut's disparaging comment about RS Roofing was the cause in fact of Walley's theft; when Argonaut called RS Roofing "sketchy," this led MLLCA to opt for another contractor—Walley—who then stole MLLCA's insurance funds. But again, in dealing with MLLCA's fraud claim, we have already resolved a similar argument against MLLCA. As before, there is no evidence that Argonaut's disparagement caused MLLCA's harm.

There is a failing in proof as to each of the two DTPA laundry list items with potential applicability to the facts of this case. We therefore hold that the evidence is legally insufficient to sustain MLLCA's DTPA claim, which is the last of the alternate

theories upon which MLLCA recovered.[4] *See Shields*, 526 S.W.3d at 480. We sustain Argonaut's fourth issue.

VII. MLLCA's Cross-Appeal

In its first three issues on cross-appeal, MLLCA contends that the trial court erred in calculating damages on MLLCA's fraud, insurance code, and DTPA claims. However, we have already determined that MLLCA is not entitled to anything on those claims. MLLCA's challenges to the manner of calculating damages are therefore moot. *See Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 702 (Tex. 2019).

In its fourth issue, MLLCA asserts that the trial court erred by granting a directed verdict disposing of MLLCA's claim that Argonaut knowingly participated in Walley's breach of fiduciary duty. According to MLLCA, there is more than a scintilla of evidence that Walley had and breached a fiduciary duty because he was acting as a public insurance adjuster when he stole the insurance proceeds, and that Argonaut knowingly participated in Walley's breaches by not alerting MLLCA to the warning signs that Walley showed.

---

[4]This renders it unnecessary to consider Argonaut's fifth, sixth, eighth, and eleventh issues.

In its tenth issue, Argonaut contends that because both of the claims that warranted attorney's fees have been deemed insupportable, the award of attorney's fees must be set aside. We agree. *See JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 491 (Tex. 2019) ("The DTPA, for instance, says fees are available to consumers who *prevail*." (cleaned up)); *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) ("To recover attorney's fees under section 38.001, a party must prevail on the underlying claim and recover damages."). We sustain Argonaut's tenth issue.

But MLLCA attempts to rely on a statute that imposes a fiduciary duty on "*a license holder* acting as a public insurance adjuster" who receives and holds claim proceeds. *See* Tex. Ins. Code Ann. § 4102.111(a) (emphasis added); *Lon Smith & Assocs., Inc. v. Key*, 527 S.W.3d 604, 618 (Tex. App.—Fort Worth 2017, pet. denied). It says nothing about imposing such a duty on a contractor who was performing functions that were similar to what a public insurance adjuster might do, even though he did not hold a license as a public insurance adjuster. And to the extent that Walley was simply acting as an independent contractor, MLLCA offers no evidence that would give rise to fiduciary duties. *See Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 703 (Tex. 2007); *cf. Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 507–09 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Even assuming the existence of a fiduciary duty, there is no evidence that Argonaut participated in any breach of that duty with the requisite mental state. Indeed, on the stand, MLLCA's owners agreed that Argonaut did not knowingly or intentionally pave the way for Walley's crimes.

Because there was no evidence to support this claim, the trial court did not err by disposing of it through directed verdict. *See City of Keller*, 168 S.W.3d at 823. We overrule MLLCA's fourth and final issue on cross-appeal.

VIII. CONCLUSION

We have determined that the evidence is legally insufficient to support recovery on any of the theories that MLLCA brought before the jury, and MLLCA's cross-appeal

is unavailing. We therefore reverse the trial court's judgment and render judgment that MLLCA take nothing.

/s/ Wade Birdwell

Wade Birdwell
Justice

Delivered: May 13, 2021