TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00407-CV

Kathy Jones-Hospod, Appellant

v.

Nikki G. Maples, individually; and the Law Office of Nikki G. Maples, PLLC, Appellees

FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-007723, THE HONORABLE TIM SULAK, JUDGE PRESIDING

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

After the Williamson County District Court denied Kathy Jones-Hospod's motion to disqualify her husband's attorney Nikki G. Maples in their divorce suit, Jones-Hospod sued Maples and Maples's firm in Travis County for violations of the Deceptive Trade Practices-Consumer Protection Act (DTPA), fraud, fraud in the inducement, and breach of fiduciary duty.[1] Maples filed a motion to dismiss the suit under the Texas Citizens Participation Act (TCPA), *see* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011, which the trial court granted in part, dismissing only Jones-Hospod's claim for breach of fiduciary duty. Maples then filed a traditional summary-

[1] Maples practices through a professional limited liability company, appellee Law Office of Nikki G. Maples, PLLC. We will refer to the two defendants collectively as "Maples."

judgment motion on Jones-Hospod's other claims, which the trial court granted.[2] For the reasons explained below, we affirm the trial court's judgment.

BACKGROUND

Jones-Hospod's husband, Stanley Hospod, retained Maples, an attorney who primarily practices family law, to represent him in his divorce from his prior wife in 2012. That divorce was granted in April 2013.

When Jones-Hospod and Hospod married in April 2018, Jones-Hospod was involved in a guardianship proceeding for her mother, Cause No. PR-2014-00591, in the Denton County Probate Court. In May 2018, Jones-Hospod contacted Maples about the guardianship case. The parties dispute the content of their communications about the guardianship case and whether an attorney-client relationship was formed. Maples attested that during that first call she explicitly disclosed to Jones-Hospod that she could not represent Jones-Hospod in the guardianship case and that she referred Jones-Hospod to two other attorneys (named specifically in the affidavit) for potential representation. Maples attested that Jones-Hospod next called her on June 28, 2018, seeking a referral to an appellate lawyer for issues related to the guardianship case, and Maples gave her six names. Jones-Hospod asserted that she was not seeking a referral when she called Maples that day, but that Maples told her that "it would be wise for me to also hire an attorney who was an expert in guardianship law and she would tell me: 'Now if this one does not work out, call me back.'" Jones-Hospod contacted Maples again in early July, and Maples agreed to meet with her to discuss the guardianship case.

[2] Jones-Hospod amended her petition to add a claim for negligent misrepresentation after Maples filed her summary-judgment motion. Although Maples did not amend her summary-judgment motion, the trial court granted a take-nothing judgment against Jones-Hospod.

Maples and Jones-Hospod had a two-hour in-person meeting on July 12, 2018, although they dispute the meeting's purpose and what they discussed. Maples charged Jones-Hospod $600 for the two-hour meeting. Maples asserts that she and Jones-Hospod exchanged voicemails on July 17 and that she "reiterated that [she] would not be able to provide the services that [Jones-Hospod] needed," that she exclusively practiced family law, and that Jones-Hospod needed a lawyer experienced in guardianship proceedings and might want to consult with a constitutional lawyer. Jones-Hospod disputes that Maples left this voicemail. Jones-Hospod subsequently emailed documents to Maples on July 20. In her July 23 email response, Maples advised Jones-Hospod, "Per my voicemail to you, I do not believe that I will be able to accomplish the goals that you [are] wanting to achieve with your litigation since I do not practice probate or constitutional law." Maples also referred her to a Dallas law firm. On appeal, Jones-Hospod asserts that this was the first time that Maples advised her that Maples would not accept the case and gave her names of other lawyers to contact, although in her affidavit she admits to contacting other attorneys in June, soon after Maples referred her to them. Jones-Hospod thanked Maples by email for the referral to the Dallas firm. Maples emailed her another local attorney's contact information the next day. The parties agree that they had no further contact after late July 2018.

On August 7, 2019, Jones-Hospod filed suit for divorce from Hospod and sought a protective order in two separate suits in Williamson County District Court. On August 12, Hospod retained Maples to represent him in the two suits, and Meagan Jones of Maples's firm was assigned as lead counsel. When Jones offered to accept service on behalf of Hospod, one of Jones-Hospod's attorneys, Holly Crampton, refused to agree, asserting that Maples and the firm had a conflict of interest and should not be representing Hospod. Maples filed an answer for Hospod in the divorce case on August 19.

Jones-Hospod filed a motion to disqualify Maples, supported by her affidavit asserting that an attorney-client relationship had been formed when Jones-Hospod contacted Maples about the Denton County guardianship case and that Jones-Hospod had imparted personal, confidential information concerning herself and her marriage. Maples filed a response, which was supported by her affidavit detailing her contacts with Jones-Hospod related to the guardianship case and asserting that Jones-Hospod never had revealed any information to Maples related to her marriage to Hospod. After an evidentiary hearing on the motion to disqualify, the Williamson County court denied the motion. Although Jones-Hospod announced in response to the court's ruling that she would seek mandamus relief from the denial of the motion, she never did.

While the divorce suit remained pending, on November 4, 2019, Jones-Hospod filed the suit underlying this appeal in Travis County, alleging that by representing Hospod in the divorce case, Maples was engaging in a conflict of interest and an unconscionable course of conduct, resulting in DTPA violations (including breach of warranty), fraud in the inducement, common-law fraud, and breach of fiduciary duty. Jones-Hospod sought damages, treble damages, exemplary damages, attorneys' fees, and an injunction. The trial court granted Maples's TCPA motion to dismiss on Jones-Hospod's breach-of-fiduciary-duty claim and later granted Maples's summary-judgment motion on Jones-Hospod's remaining claims. This appeal followed.

ANALYSIS

On appeal, Jones-Hospod challenges the trial court's judgment in three issues. In her first two issues, she challenges whether the TCPA's commercial-speech exemption applies to preclude dismissal of her breach-of-fiduciary-duty claim and whether the trial court erred by awarding attorneys' fees to Maples after the partial grant of the TCPA motion. In her third issue,

Jones-Hospod challenges the trial court's grant of summary judgment on the remaining claims in eleven subsidiary points of error. Points of error one, two, three, four, and ten concern Jones-Hospod's fraud and negligent-misrepresentation claims; point of error seven concerns her DTPA claims and whether the DTPA's professional-services exemption applies to them; points of error five, nine, and eleven apply to all the claims; and points of error six and eight concern Maples's affirmative defenses of attorney immunity and collateral estoppel. We first address Jones-Hospod's TCPA issues, followed by her summary-judgment issue and its subsidiary points of error.

I. TCPA motion to dismiss

The TCPA "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding); *see also* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011. The TCPA provides this protection by means of an expedited motion to dismiss a suit that appears to stifle the defendant's exercise of certain protected rights, including the right to petition. *In re Lipsky*, 460 S.W.3d at 584 (citing Tex. Civ. Prac. & Rem. Code § 27.003). Review of an order on a TCPA motion to dismiss requires a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). Under the first step, the party moving for dismissal must demonstrate that the TCPA applies to the legal action that is the subject of the motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code §§ 27.003(a), .005(b). If the movant satisfies that burden, under the second step, the burden shifts to the nonmovant to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). Alternatively, the nonmovant can avoid its burden of demonstrating a prima facie case by showing that one of the TCPA's several

exemptions applies. *See id.* § 27.010(a)(2) (establishing exemption commonly referred to as "commercial-speech" exemption); *Morrison v. Profanchik*, 578 S.W.3d 676, 680 (Tex. App.—Austin 2019, no pet.) (explaining that "[i]f an action falls under a TCPA exemption, the TCPA does not apply and may not be used to dismiss the action"). Finally, if the TCPA applies and the nonmovant satisfies its burden of presenting a prima facie case, the burden shifts back to the movant to establish each essential element of a valid defense to the nonmovant's claim. Tex. Civ. Prac. & Rem. Code § 27.005(d).

When determining whether a legal action should be dismissed under the TCPA, we must consider "the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a). We review de novo a trial court's ruling on a motion to dismiss, including whether each party has carried its respective burden and the construction of the TCPA's exemptions. *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, pet. denied).

In response to Maples's motion to dismiss, Jones-Hospod asserted that the TCPA's commercial-speech exemption should apply to prevent the dismissal of her breach-of-fiduciary-duty claim. On appeal, Jones-Hospod acknowledges that she elected to stand on her position that the commercial-speech exemption applies to preclude her claims from being subject to dismissal under the TCPA. She does not argue that the TCPA does not apply to this legal action, nor does she attempt to show that she established a prima facie case on each element of her claims. Accordingly, the only issues before us are whether the commercial-speech exemption applies to Jones-Hospod's breach-of-fiduciary-duty claim and whether the trial court abused its discretion by awarding $5,000 in attorneys' fees.

A. Commercial-speech exemption

The commercial-speech exemption expressly provides that the TCPA does not apply to "a legal action brought against a person primarily engaged in the business of selling or leasing goods or services if the statement or conduct arises out of the sale or lease of goods, services, . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Tex. Civ. Prac. & Rem. Code § 27.010(a)(2). The Texas Supreme Court has construed the exemption to apply when:

> (1) the defendant was primarily engaged in the business of selling or leasing goods [or services],
>
> (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services,
>
> (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and
>
> (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.

Castleman v. Internet Money Ltd., 546 S.W.3d 684, 688 (Tex. 2018). "The burden to establish the commercial-speech exemption is on the party relying on it." *Grant*, 556 S.W.3d at 887. We consider the pleadings and record evidence to determine whether a party has met its burden on the exemption's elements. *See Rose v. Scientific Mach. & Welding, Inc.*, No. 03-18-00721-CV, 2019 WL 2588512, at *4 (Tex. App.—Austin June 25, 2019, no pet.) (mem. op.). Factual allegations in a plaintiff's petition alone may be sufficient to meet the exemption's elements. *See id.*; *see also Dickens v. Jason C. Webster, P.C.*, No. 05-17-00423-CV, 2018 WL 6839568, at *6 (Tex. App.—Dallas Dec. 31, 2018, no pet.) (mem. op.) (analyzing plaintiff's allegations in petition

to determine what statements or conduct were at issue and concluding that plaintiff failed to show that defendant's alleged statements or conduct satisfied elements of commercial-speech exemption).

Jones-Hospod argues that the commercial-speech exemption applies because (1) Maples is primarily engaged in the business of selling legal services, (2) Maples made statements to Jones-Hospod and engaged in the conduct that Jones-Hospod alleges was a breach of Maples's fiduciary duty in Maples's capacity as a seller of legal services, (3) Maples's statements and conduct at issue arose out of the commercial transaction involving legal services that she provided to Jones-Hospod, and (4) Maples's intended audience for her statements and conduct was Jones-Hospod, who was Maples's actual customer for legal services. Jones-Hospod argues that this lawsuit arises out of the parties' series of communications for which Maples charged her $600 and which she alleges created an attorney-client relationship, i.e., a fiduciary relationship. She further asserts that Maples's "statements and conduct which constitute commercial speech are a completed set of acts which ended at the last communication between Jones-Hospod and Maples in July 2018." However, Jones-Hospod specifically pleaded her breach-of-fiduciary-duty claim in Paragraphs 32 and 33 of her original petition as follows:

> 32. As set out above, Defendant Maples breached her fiduciary relationship with plaintiff, in multiple different instances, including but not limited to disclosing information which Defendant Maples promised was attorney-client-privileged with her and Defendant Law Office, and would not be shared with any other person or entity.
>
> 33. By accepting representation directly adverse to Plaintiff and then in the course of that litigation disclosing Plaintiff's attorney-client-privileged

> information, Defendant further knowingly and intentionally breached her fiduciary duty.[3]

In other words, while Jones-Hospod argues that this Court should only examine Maples's statements and conduct during the parties' series of telephone conversations and emails from May through July 2018 and during their July 2018 meeting, her pleading identifies Maples's representation of Hospod in the divorce suit and Maples's alleged disclosure of attorney-client privileged information in that suit as the alleged breaches of Maples's fiduciary duty. Consequently, Maples argues, Jones-Hospod sued her in response to her appearance in the divorce suit on Hospod's behalf, when she filed Hospod's answer in that suit, making that the conduct that prompted this suit.

Therefore, to determine whether the commercial-speech exemption applies, we must determine what "statement[s] or conduct are at issue." *Castleman*, 546 S.W.3d at 688. We discern the nature of the legal action from the factual allegations in the plaintiff's petition. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (observing that supreme court has often said that plaintiff's petition is "the best and all-sufficient evidence of the nature of the action" to show whether TCPA applies to plaintiff's claims). Jones-Hospod's pleading unambiguously states that the basis for her breach-of-fiduciary-duty claim is Maples's representation of Hospod and the alleged disclosure of attorney-client privileged information in the divorce suit. The TCPA directs us to consider the pleadings, as well as affidavits and other evidence, when determining whether a legal action should be dismissed. Tex. Civ. Prac. & Rem. Code § 27.006(a). In this case, although

[3] Jones-Hospod retained these same allegations in Paragraphs 42 and 43 of the live amended petition that she filed after the trial court granted the TCPA motion to dismiss and Maples filed a summary-judgment motion on the remaining claims.

Jones-Hospod argues that we should consider the parties' series of communications that she asserts gave rise to a fiduciary duty on the part of Maples to be the only statements and conduct at issue, based on her pleading, we conclude the actionable breach of duty alleged by Jones-Hospod stems from Maples's representation of Hospod and alleged disclosure of privileged information in the divorce suit, not from the parties' initial communications. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 897 (Tex. 2018) (explaining, in context of determining whether legal action was based on exercise of right of free speech, that "the unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings"); *Hersh*, 526 S.W.3d at 467 ("The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations."); *cf., e.g.*, *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 480 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd) (en banc) (reasoning that "the factual allegations contained in the pleadings may alone be sufficient to demonstrate that the nature of the claims is such that the claims are statutorily exempt without need of additional proof" and collecting cases determining applicability of commercial-speech exemption based on plaintiff's allegations in petition).

Maples does not dispute the first two elements of the exemption—that she is engaged in the business of selling services and that her representation of Hospod was undertaken in her capacity as a seller of legal services. However, she contends that Jones-Hospod has failed to establish the third and fourth elements of the commercial-speech exemption because filing an answer in a lawsuit is not a commercial transaction and because the intended audience of the conduct was not an actual or potential customer for legal services, but the Williamson County District Court. We need not determine whether Maples's filing of Hospod's answer or representing him in the divorce suit are commercial transactions involving legal services because

Jones-Hospod's failure to establish the fourth element of the commercial-speech exemption is dispositive. *See* Tex. R. App. P. 47.1. The "intended audience" of Maples's representation of Hospod in the divorce suit and of any alleged disclosure of privileged information was the Williamson County District Court, which is not an "actual or potential" customer for Maples's legal services.[4] *See* Tex. Civ. Prac. & Rem. Code § 27.010(a)(2); *see also Castleman*, 546 S.W.3d at 689-90 (holding that exemption applies only to "commercial speech which does 'no more than propose a commercial transaction'" (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986)). Therefore, we conclude that Jones-Hospod failed to establish the applicability of the commercial-speech exemption to her breach-of-fiduciary-duty claim, and thus the trial court properly granted the TCPA motion to dismiss the claim. *See Schimmel v. McGregor*, 438 S.W.3d 847, 858 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (holding that nonmovant failed to establish exemption's applicability because movant's intended audience for statements was not actual or potential buyer or customer for movant's legal services); *Pena v. Perel*, 417 S.W.3d 552, 555 (Tex. App.—El Paso 2013, no pet.) (same). We overrule Jones-Hospod's first issue.

[4] To the extent that the opposing party in a lawsuit could also be considered the intended audience for court filings, such a party would not be either an actual (i.e., current) or potential (i.e., future) customer of their opponent's counsel. *See Schimmel v. McGregor*, 438 S.W.3d 847, 858 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Schimmel was an attorney, who represented a homeowners' association and one set of the subdivision's homeowners that did not wish to sell their properties to the City of Galveston in a post-hurricane buy-out program, in a dispute with another set of the subdivision's homeowners that wanted to sell their properties to the City. *Id.* at 849-50. After the City did not close on the purchases of the properties of the selling homeowners, those homeowners sued Schimmel for tortious interference with prospective business relations. *Id.* at 850. The court of appeals concluded that Schimmel's statements at issue did not fall within the TCPA's commercial-speech exemption because the City was "[t]he ultimate intended audience" for his statements. *Id.* at 858. Schimmel did not represent the City, so it was neither his actual customer, nor was it "a potential buyer or customer" of his legal services. *Id.*

B. Attorneys' fees

In its order granting in part the TCPA motion, the trial court awarded Maples $5,000 in attorneys' fees "for defending against the fiduciary duty claim." In her second issue, Jones-Hospod argues that this award was an abuse of the trial court's discretion because (1) Maples's attorneys did not segregate their time spent among the various claims that Jones-Hospod had asserted and (2) without proof of fees attributable to the fiduciary-duty claim, the evidence submitted in support of the attorneys' fees is insufficient to support that the fee award was reasonable. In response, Maples contends that she submitted sufficient proof of her attorneys' fees to support the trial court's award.

The TCPA mandates that "if the court orders dismissal of a legal action under this chapter," it "shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action." Tex. Civ. Prac. & Rem. Code § 27.009(a). "A 'reasonable' attorney's fee 'is one that is not excessive or extreme, but rather moderate or fair.'" *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (quoting *Garcia v. Gomez,* 319 S.W.3d 638, 642 (Tex. 2010)). A determination of "reasonable attorney's fees" rests within the trial court's sound discretion, *see id.*, and the reasonableness of attorneys' fees authorized by statute is a fact question, *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019); *see also Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Thus, when reviewing an award of reasonable attorneys' fees, we must determine whether there was insufficient evidence to support the award. *See Bocquet*, 972 S.W.2d at 21 (holding that trial court abuses discretion when it rules without supporting evidence); *see also Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied) (concluding that under abuse-of-discretion standard, legal and factual sufficiency are not independent grounds of error but are relevant factors in determining whether trial court abused

its discretion, and that courts apply hybrid analysis in which traditional sufficiency standards overlap abuse-of-discretion standard).

To determine whether the evidence is sufficient to support the court's exercise of discretion, we engage in a two-pronged inquiry: (1) whether the trial court had sufficient information upon which to exercise its discretion and (2) whether the trial court erred in its application of that discretion. *Zeifman*, 212 S.W.3d at 587. The focus of the first inquiry is the sufficiency of the evidence, and we apply the applicable sufficiency standards of review.[5] *Id.* at 588. Under the second inquiry, we must decide whether, based on the evidence before it, the trial court made a reasonable decision. *Id.* Because the trial court did not issue findings of fact or conclusions of law, we imply all facts supported by the evidence that are necessary to support the trial court's ruling. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

At the March 11, 2020 hearing on the TCPA motion to dismiss, the trial court admitted into evidence an affidavit from Scott R. Kidd, Maples's lead attorney, who averred as to the reasonable hourly rates for attorneys in Travis County with his experience and the experience of his partner, who had also worked on the case. Kidd attached his firm's billing records showing

[5] When reviewing legal sufficiency of the evidence supporting a finding, we review the evidence in the light most favorable to the judgment, crediting favorable evidence if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We will sustain a legal-sufficiency challenge to the evidence if the record reveals (1) a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810. When reviewing factual sufficiency of the evidence supporting a finding, we must consider and weigh all of the evidence in the record pertinent to that finding, and we may set aside the finding only if we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered on that issue. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016).

the time and services performed by the firm from December 2019 through February 2020 and attested to his time incurred up to March 10, 2020, and the time he anticipated would be incurred on the day of the hearing. Based on those records and his anticipated incurred time, he attested to his opinion that a reasonable fee for his firm's representation of Maples through the TCPA motion hearing was $50,530. At the initial hearing on the motion, the trial court decided to recess the hearing to provide Jones-Hospod with time to respond to a supplemental affidavit that the court had allowed Maples to file, as well as to the attorneys' fees affidavit. Although Jones-Hospod filed a response to the supplemental affidavit, she did not file a response or objections to the attorneys' fees affidavit, nor did she respond or object to the fee affidavit when the hearing continued a month after the initial hearing.

On appeal, Jones-Hospod contends that the trial court abused its discretion by awarding $5,000 in attorneys' fees because neither the affidavit nor the billing records segregated the fees incurred for work on the recoverable breach-of-fiduciary-duty claim from the unrecoverable DTPA and fraud claims or even mentioned any of the three claims by name. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006) (holding that prevailing party must "segregate fees between claims for which they are recoverable and claims for which they are not"). While "[a] failure to segregate attorney's fees in a case containing multiple causes of action, only some of which entitle the recovery of attorney's fees," can result in the recovery of no attorney's fees, "if no one objects to the fact that the attorney's fees are not segregated as to specific claims, then the objection is waived." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). Thus, to the extent that Jones-Hospod argues that the award of attorneys' fees was improper based solely on the failure to segregate the fees by claim, we conclude that she has

waived any error based on this untimely objection. *See Horvath v. Hagey*, No. 03-09-00056-CV, 2011 WL 1744969, at *6 (Tex. App.—Austin May 6, 2011, no pet.) (mem. op.).

Jones-Hospod also argues that the affidavit is insufficient to support the fee award because it did not adequately specify the services provided in connection with the breach-of-fiduciary-duty claim, and thus it amounted to the "simple generalities" that the Texas Supreme Court held to be insufficient in *Rohrmoos*.[6] *See* 578 S.W.3d at 496. We disagree that the evidence submitted by Maples is the type that the court disapproved of in *Rohrmoos*. In that case, the court examined Texas jurisprudence on fee-shifting and clarified that the lodestar method for determining a fee award applies in any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. *Id.* at 493-94, 498 (explaining development of factor-based method for assessing reasonable and necessary fees that may be shifted from prevailing party to non-prevailing party and listing factors identified in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). The lodestar method developed as a short-hand version of the *Arthur Andersen* factors, *id.* at 496, and most of those factors are subsumed in the first step of the lodestar method, *id.* at 500. Under the first step of the lodestar method, the factfinder determines the reasonable hours that counsel worked on the case and the reasonable hourly rate for such work, and it is the fee claimant's burden to provide sufficient evidence on both counts. *Id.* at 498. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such

[6] When a case is tried to the bench, complaints that evidence was legally and factually insufficient may be raised for the first time on appeal. *See* Tex. R. App. P. 33.1(d).

services. *Id.* While contemporaneous billing records are not required to prove that the requested fees are reasonable and necessary, they "are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.* at 502.

The factfinder multiplies the number of reasonable hours worked by the applicable rate, the product of which is the base fee or lodestar. *Id.* at 498. There is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorneys' fees that can be awarded to the prevailing party. *Id.* at 499. The trial court engages in the second step of the lodestar method—adjusting the base calculation up or down based on relevant considerations—only if a fee claimant seeks an enhancement and produces specific evidence to support it or if a fee opponent seeks a reduction and produces specific evidence to support it. *Id.* at 500-01.

In this case, Kidd's affidavit applies the lodestar method for calculating fees. Kidd attested to the reasonable hourly rates for him and his partner and provided billing records that identified the particular services performed, who performed those services, approximately when the services were performed, and the reasonable amount of time required to perform the services. The affidavit supported the request for fees in an amount of $50,530, which reflected the lodestar calculation of hours worked times the applicable rates. Jones-Hospod did not present evidence to controvert the reasonableness of either the hours worked or the applicable rates. The trial court's order specified that Maples would recover attorneys' fees from Jones-Hospod in the amount of $5,000 "for defending against the fiduciary-duty claim," but it did not include fact findings or legal conclusions or otherwise explain the basis for the $5,000 award.

Jones-Hospod asserts that because Kidd's affidavit alleges his aggregated time of over 96 hours at his $450 hourly rate and his partner's 20.5 hours at his $350 rate instead of proving

their time specifically spent on the fiduciary-duty claim, Kidd's affidavit offered only generalities and the trial court had insufficient information to meaningfully review the fee request. *See id.* at 496. We disagree. The type of affidavits and testimony disapproved of in *Rohrmoos* and its predecessor cases were deemed too general because the attorneys provided the amount of time spent on the case in the aggregate but did not indicate how the aggregated time was "devoted to any particular task or category of tasks." *Id.* at 495 (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)); *see also, e.g.*, *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam) (reiterating basic proof required for lodestar calculation). In *El Apple*, for example, the attorneys did not present time records or other documentary evidence or testify based on their recollection of those records, instead basing their time estimates "on generalities such as the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial." 370 S.W.3d at 763. The supreme court determined that because the trial court lacked evidence of how many hours each task required, it could not determine whether that time was reasonable, concluding that "[w]ithout at least some indication of the time spent on various parts of the case, a court has little basis upon which to conduct a meaningful review of the fee award." *Id.*

In contrast, the trial court here had evidence before it in the form of billing records identifying the specific time spent by Kidd and his partner on various tasks, including some tasks involving services that would be "necessary whether a claim is filed alone or with others" and that "are not disallowed simply because they do double service," such as review and development of background facts, preparing Maples's answer, and conferencing and corresponding with opposing counsel to set the hearing on the motion to dismiss. *See Tony Gullo Motors*, 212 S.W.3d at 313. Moreover, and more importantly, Kidd attested that he had incurred 17.4 hours through March 10,

2020, and he identified the specific tasks he performed, including receiving and reviewing Jones-Hospod's TCPA response, which dealt exclusively with the commercial-speech exemption; researching the commercial-speech exemption; drafting Maples's TCPA reply, which also dealt exclusively with commercial speech; and preparing for the hearing. As explained above, Jones-Hospod relied solely on the commercial-speech exemption to defend against the TCPA motion, and thus Kidd's work on that issue resulted in the dismissal of the breach-of-fiduciary-duty claim. *Cf. Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam) (concluding that prevailing parties' fees for defending against counterclaim were recoverable and did not require segregation from fees incurred to recover on note because "to collect the full amount, the [prevailing parties] had to overcome this defense"); *see also Bruce v. Bruce*, No. 03-17-00672-CV, 2018 WL 2653550, at *4 (Tex. App.—Austin June 5, 2018, no pet.) (mem. op.) (concluding that defendant was necessarily required to defeat plaintiff's claim for overpayment of child support to prevail on defendant's counterclaim for unpaid child support and thus defendant was not required to segregate fees). Jones-Hospod has not asserted that the time spent on those tasks was unreasonable or that the hourly rates were unreasonable. Consequently, based on the record before us, we conclude that the evidence of recoverable segregated time and recoverable unsegregated time is factually and legally sufficient to support the trial court's implied finding that the $5,000 fee award (which equates to 11 hours of Kidd's time) was reasonable. We overrule Jones-Hospod's second issue.

II. Summary-judgment motion

After the trial court granted Maples's TCPA motion in part and dismissed Jones-Hospod's breach-of-fiduciary-duty claim, Maples sought traditional summary judgment on Jones-Hospod's claims for fraud in the inducement, common-law fraud, and violations of the DTPA.

Jones-Hospod filed an amended petition a week before the hearing on the summary-judgment motion, adding a negligent-misrepresentation claim. Maples proceeded with the scheduled hearing on the pending motion without amending the motion. After the hearing, the trial court granted the summary-judgment motion, ordering that Jones-Hospod take nothing from Maples and stating that the final and appealable order disposed "of all issues and all parties." In her third issue, supported by eleven points of error, Jones-Hospod contends that the trial court erred by granting the summary-judgment motion. We will consider whether summary judgment was proper on the four claims and will address Jones-Hospod's points of error as they relate to those claims.

A. Standard of review

We review the trial court's decision to grant summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a summary-judgment motion, the movant must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2019). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

A movant who seeks traditional summary judgment against another party's cause of action must conclusively negate at least one essential element of that cause of action. *Little v. Texas Dep't of Crim. Justice*, 148 S.W.3d 374, 381 (Tex. 2004). If the movant meets this burden, the burden shifts to the nonmovant to produce evidence that raises a genuine issue of material fact precluding summary judgment. Tex. R. Civ. P. 166a(c); *Walker v. Harris*,

924 S.W.2d 375, 377 (Tex. 1996). When the trial court does not specify the grounds for granting the motion, we must uphold the judgment if any ground asserted in the motion and preserved for appellate review is meritorious. *Provident Life*, 128 S.W.3d at 216.

B. Fraud, fraudulent-inducement, and negligent-misrepresentation claims

We turn first to Jones-Hospod's negligent-misrepresentation and fraud claims. To prevail on her fraud claim, Jones-Hospod must prove the following elements: (1) Maples "made a material representation that was false"; (2) Maples "knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth"; (3) Maples intended to induce Jones-Hospod to act upon the representation; and (4) Jones-Hospod actually and justifiably relied upon the representation and suffered injury as a result. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (quoting *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins.*, 51 S.W.3d 573, 577 (Tex. 2001)). Jones-Hospod also alleges a fraudulent-inducement claim. Fraudulent inducement is a "species of common-law fraud" that "arises only in the context of a contract." *International Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019) (quoting *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018)). The fraudulent-inducement claim requires proof of the same elements as a broader common-law fraud claim. *Id.* In a fraudulent-inducement claim, the actionable "misrepresentation" occurs when the defendant falsely promises to perform a future act while having no present intent to perform it. *Id.* The fraudulent inducement occurs if the plaintiff relies on the false promise, and the promise induces the plaintiff to agree to a contract the plaintiff would not have agreed to if the defendant had not made the false promise. *Id.*

Similarly, to prevail on her negligent-misrepresentation claim, Jones-Hospod must prove the following elements: (1) a representation made by Maples in the course of her business or in a transaction in which she has a pecuniary interest; (2) the representation conveyed "false information" for the guidance of others in their business; (3) Maples did not exercise reasonable care or competence in obtaining or communicating the information; and (4) Jones-Hospod suffered pecuniary loss by justifiably relying on the representation. *See Orca Assets*, 546 S.W.3d 648 at 654. In the context of a negligent-misrepresentation claim, the term "false information" means a misstatement of existing fact, not a promise of future conduct. *Lindsey Constr., Inc. v. AutoNation Fin. Services, LLC*, 541 S.W.3d 355, 366 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also, e.g.*, *Maddox v. Vantage Energy, LLC*, 361 S.W.3d 752, 760-61 (Tex. App.—Fort Worth 2012, pet. denied) ("A promise to do or to refrain from doing an act in the future is not actionable because it does not concern an existing fact.").

In this case, the representation upon which the fraud and negligent-misrepresentation claims turn is Maples's alleged representation that she would keep confidential the "personal, private, non-public information" that Jones-Hospod alleges she disclosed to Maples when they discussed the guardianship case.[7] While Jones-Hospod challenges all of the grounds

[7] Specifically, Jones-Hospod alleges the following misrepresentations by Maples: (1) that "Maples could be trusted with [Jones-Hospod's] most private and personal, non-public information, and self-revelations and that Maples would not seek to benefit from [Jones-Hospod's] personal, private, non-public information"; (2) that "all the information [Jones-Hospod] shared with [Maples and her firm] . . . would be protected; was and would remain confidential; and that [Jones-Hospod] enjoyed an attorney-client privilege with Defendant Maples which would be maintained both by Maples and by Law Office"; and (3) that Jones-Hospod's "personal, private, non-public information [shared] with Maples . . . was covered under attorney-client privilege, meaning that Defendants Maples and Law Office could not, and would not, share [Jones-Hospod's] personal, private, non-public information with any other person or entity, nor would Defendants ever use such information against [Jones-Hospod] or use it to [Jones-Hospod's] detriment, nor would Maples ever seek to benefit from the information and insights provided to

upon which Maples moved for summary judgment, Maples asserts that she negated two elements of the fraud and negligent-misrepresentation claims as a matter of law—that a material misrepresentation occurred and that Jones-Hospod suffered any damages as a result.

In support of her summary-judgment motion, Maples submitted an affidavit in which she averred as follows:

> In my meetings and communications with Kathy Jones-Hospod with regard to my attempts to refer her for proper representation in the Denton County guardianship proceeding, I never received any information from her related to her marriage to Stanley Hospod. The only information I received from Kathy Jones-Hospod related to the guardianship proceeding concerning her mother, and the information I received was limited to the guardianship of her mother. **Additionally, I have never disclosed to anyone outside of my law firm any confidential information Kathy Jones-Hospod gave to me related to the guardianship proceeding, nor has any confidential information been used in the divorce proceeding.** No information given to me related to the guardianship proceeding could have any impact on the pending divorce proceeding.

(Emphasis added.) With her response, Jones-Hospod submitted her own affidavit. Jones-Hospod disputed whether Maples considered representing her in the guardianship case rather than referring it out, and she averred that Maples told her that all information she shared with Maples would be protected by attorney-client confidentiality and attorney-client privilege. Jones-Hospod also attested that the topics she discussed with Maples included her relationship and marriage, the impact that the guardianship case had on her relationship with Hospod, the impact her family had on her and on her relationship with Hospod, false allegations that had been or might be made against her in the guardianship case, and other information that Jones-Hospod considered to be

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her." To the extent that Jones-Hospod alleges Maples made false promises of future conduct, these representations are not actionable conduct that would form the basis for a negligent-misrepresentation claim. *See, e.g.*, *Lindsey Constr., Inc. v. AutoNation Fin. Services, LLC*, 541 S.W.3d 355, 366 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

"confidential, private, non-public information" about the guardianship case. Although Jones-Hospod alleges in her petition that Maples accepted representation that was directly adverse to Jones-Hospod "and then in the course of that litigation disclos[ed] [Jones-Hospod's] attorney-client-privileged information," Jones-Hospod did not provide any testimony or other evidence, such as pleadings or discovery from the divorce case, showing when or how Maples disclosed any of her confidential information.

"Summary judgment based on the uncontroverted affidavit of an interested witness is proper if the evidence is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997); *see also* Tex. R. Civ. P. 166a(c). "Could have been readily controverted" does not mean simply that the summary-judgment evidence could have been easily and conveniently rebutted; it means that the "testimony at issue is of a nature which can be effectively countered by opposing evidence." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). In this case, Maples's affidavit is clear, positive, and direct that she had not disclosed to a third party or used in the divorce case any information that she obtained from her communications with Jones-Hospod about the guardianship case. It is credible and free from inconsistencies and contradictions. Jones-Hospod could have readily contradicted Maples's testimony by explaining when and how Maples has disclosed any allegedly confidential information, but she has not done so.

The parties dispute whether Maples represented to Jones-Hospod that she would keep confidential any information that Jones-Hospod disclosed to her and whether Jones-Hospod disclosed any information during their discussions about the guardianship proceeding that had any bearing on Maples's representation of Hospod in the divorce proceeding. Even taking as true, as

we must, Jones-Hospod's averments that Maples made such a representation and that Jones-Hospod disclosed confidential information in reliance on that representation, Jones-Hospod has failed to raise a fact issue on whether Maples's representation was false or whether Jones-Hospod suffered damages from the alleged misrepresentation because she has not presented any evidence that Maples disclosed any confidential information to any third party.[8] Thus, Maples has negated the elements of falsity and damages as a matter of law.

In addition, Jones-Hospod argues that the trial court improperly granted summary judgment on the negligent-misrepresentation claim because Maples did not file an amended summary-judgment motion after Jones-Hospod amended her petition to add that claim. A defendant who does not amend or supplement its motion for summary judgment to address claims asserted in a plaintiff's amended pleading is generally not entitled to a summary judgment on the plaintiff's entire case because a judgment on the entire case would grant more relief than requested. *Rotating Servs. Indus., Inc. v. Harris*, 245 S.W.3d 476, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) ("A motion [for summary judgment] must stand or fall on the grounds expressly presented in the motion.")). However, "[s]ummary judgment may also be proper when a ground asserted in a motion for summary judgment conclusively negates a common element of the newly and previously pleaded claims or

[8] We note that Jones-Hospod argues that the divorce case is irrelevant to this case because it is not final and is irrelevant to the claims that she has pled. She alleges that she suffered the economic loss of the $600 payment that she made to Maples for the July 2018 in-person consultation and that she would not have made that payment but for Maples's alleged misrepresentation that she would keep any information disclosed by Jones-Hospod confidential. Again, Jones-Hospod has not provided evidence that Maples has in fact disclosed any confidential information. Thus, Jones-Hospod has not demonstrated that she was harmed by making the $600 payment to Maples.

when the original motion is broad enough to encompass the newly asserted claims." *Rotating Servs. Indus.*, 245 S.W.3d at 487 (citations omitted). As explained above, we conclude that the grounds asserted by Maples conclusively negate the falsity and injury elements common to both negligent misrepresentation and fraud. Accordingly, we conclude that Maples's motion was sufficient to defeat Jones-Hospod's newly pleaded negligent-misrepresentation claim, as well as her fraud claims, and the trial court did not err by granting summary judgment on those claims.[9] Because we have concluded that Maples conclusively negated the elements of falsity and damages, which are common to the fraud, fraudulent-inducement, and negligent-misrepresentation claims, and that Maples was not required to amend her summary-judgment motion to address the negligent-misrepresentation claim, we overrule Jones-Hospod's points of error three, four, and ten.

C. DTPA claim

In her amended petition, Jones-Hospod also pled the following violations of the DTPA: (1) Maples violated DTPA Section 17.46(b)(24) by failing to disclose information concerning her services that was known at the time of the transaction and Maples's failure to disclose was intended to induce Jones-Hospod into a transaction she would not have entered had the information been disclosed (i.e., the July 2018 meeting for which she paid Maples $600), *see* Tex. Bus. & Com. Code § 17.50(a)(1); (2) Maples engaged in an unconscionable course of conduct by taking advantage of Jones-Hospod's lack of knowledge, ability, experience, or capacity to a grossly unfair degree, *see id.* § 17.50(a)(3); (3) Maples was actually aware of the falsity, deception,

[9] Because we take as true all evidence favorable to Jones-Hospod, we need not reach her points of error one and two in which she argues that none of her claims require proof of the existence of an attorney-client relationship and that she has raised a fact issue on whether she provided confidential information to Maples. *See* Tex. R. App. P. 47.1.

and unfairness of the challenged conduct and was actually aware of the acts constituting a breach of warranty, *see id.* § 17.50(a)(2); and (4) Maples's conduct was a producing cause of damages to Jones-Hospod, *see id.* § 17.50(a). To be actionable under the DTPA, the defendant's deceptive trade act or practice must be "committed *in connection with* the plaintiff's transaction in goods or services." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 650 (Tex. 1996). The only transaction in services that Jones-Hospod alleges here is the parties' July 2018 in-person meeting for which she paid Maples $600.

Jones-Hospod relies on the same conduct allegations for the DTPA violations as she did for her fraud claims—that Maples had misrepresented either negligently or intentionally that the information Jones-Hospod disclosed to her was protected by the attorney-client privilege and that Maples would keep the information confidential and would not seek to benefit from it and that she made these misrepresentations to Jones-Hospod "under circumstances where an independent duty by Maples to [Jones-Hospod] arose." Jones-Hospod also alleged in her petition that she sought legal advice from Maples concerning the guardianship case, that they formed a formal and informal attorney-client relationship, and that Maples accepted representation directly adverse to Jones-Hospod, and in the course of that litigation disclosed Jones-Hospod's attorney-client privileged information.

Maples moved for summary judgment on Jones-Hospod's claim of DTPA violations, arguing that Jones-Hospod's allegations fall within the DTPA's professional-services exemption. *See* Tex. Civ. Prac. & Rem. Code § 17.49(c). In addition, Maples argued that there is no implied warranty in the provision of professional services, *see Murphy v. Campbell*, 964 S.W.2d 365, 268-69 (Tex. 1997) (holding that Texas law does not recognize claim for breach of implied warranty of professional services), and that as a matter of law, there was no

unconscionable action or course of action or any violation of the DTPA "laundry list." On appeal, Jones-Hospod argues that the professional-services exemption does not apply to the allegations that she pled. She further argues that she raised fact issues on the fraudulent nature of Maples's misrepresentation and whether she was injured by it.

The professional-services exemption in the DTPA provides that "[n]othing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." *See* Tex. Bus. & Com. Code § 17.49(c). Maples argues that Jones-Hospod's claims were based on alleged misrepresentations arising from the advice that Jones-Hospod sought with regard to representation in the guardianship case, and thus this exemption should apply. Jones-Hospod counters that the exemption does not apply to "(2) a failure to disclose information in violation of Section 17.46(b)(24); [or] (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion," *see id.* § 17.49(c)(2)-(3), and that under the facts she pled, these exceptions apply.

Jones-Hospod's core allegation underlying her assertions of failure to disclose known information and of an unconscionable course of conduct is Maples's purported misrepresentation that any information Jones-Hospod disclosed to her in the course of seeking advice for the guardianship case would be protected by the attorney-client privilege and that she would keep confidential any such privileged information. Taking this allegation as true, this representation would constitute opinion or legal advice about what information Maples could protect as privileged. In addition, Maples's representation that she would keep confidential the privileged information would only be an actionable Section 17.46(b)(24) violation if she knew

when she made that representation that she intended to disclose Jones-Hospod's confidential information to third parties.

As with her fraud and negligent-misrepresentation claims, Jones-Hospod has failed to produce evidence creating a fact issue on any disclosure of Jones-Hospod's allegedly confidential information. In the absence of a disclosure by Maples, Jones-Hospod has not shown that Maples misrepresented anything, much less that she knew at the time she told Jones-Hospod that she would keep the information confidential that she did not intend to do so.[10]

In addition, Jones-Hospod has not shown an unconscionable course of conduct by Maples "that cannot be characterized as advice, judgment, or opinion." *Id.* § 17.49(c)(3). "To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and 'that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'" *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001) (quoting *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998)). Jones-Hospod does not articulate how Maples took advantage of her lack of knowledge or any conduct by Maples that does not constitute advice, judgment, or opinion. The only course of action that Jones-Hospod alleges is the $600 in-person meeting at which she purportedly sought advice from Maples on the guardianship case and disclosed confidential information in the course of seeking that advice. In the absence of evidence that Maples disclosed that confidential information to anyone, Jones-Hospod has not shown glaring unfairness resulting from the transaction. We conclude that the

[10] We note that Jones-Hospod and Hospod had only been married for a month when Jones-Hospod first contacted Maples, and Jones-Hospod has not alleged or produced evidence that she and Hospod were contemplating divorce at that time.

professional-services exemption applies to Jones-Hospod's DTPA claims, and we overrule Jones-Hospod's point of error seven.[11]

Having concluded that Maples conclusively negated essential elements of Jones-Hospod's claims for fraud, fraudulent inducement, negligent misrepresentation, and DTPA violations, and that the professional-services exemption applies to Jones-Hospod's DTPA claims, we hold that the trial court did not err by granting summary judgment on those claims. We overrule Jones-Hospod's third issue.

CONCLUSION

We have concluded that the trial court did not err by dismissing Jones-Hospod's breach-of-fiduciary-duty claim and awarding attorneys' fees under the TCPA motion to dismiss. We have also concluded that the trial court properly granted summary judgment on Jones-Hospod's remaining claims. Accordingly, we affirm the trial court's judgment that Jones-Hospod take nothing from Maples.

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[11] In Jones-Hospod's point of error five, she asserts that none of her claims (fraud, negligent misrepresentation, and DTPA) require her to prove that Maples used the confidential information against her. As we explain above, a lack of evidence that Maples disclosed any confidential information negates the elements of falsity of the representation of confidentiality and any harm to Jones-Hospod from the representation. Accordingly, we overrule point of error five. Similarly, to the extent that Jones-Hospod argues in point of error nine that Maples has failed to conclusively negate the elements of falsity and harm for any of the claims, we have disposed of this argument above and we overrule this point of error. We also overrule Jones-Hospod's point of error eleven in which she contends that the trial court erred by denying her objection that Maples's summary-judgment motion was unclear and vague when Maples contended that as a matter of law there were no fraud and no DTPA violations; Maples adequately articulated her arguments that Jones-Hospod could not establish falsity and harm. Finally, because we have concluded that Maples conclusively negated essential elements of Jones-Hospod's claims and showed that the professional-services exemption applies to the DTPA claim, we need not reach Jones-Hospod's points of error six and eight, which concern Maples's affirmative defenses of attorney immunity and collateral estoppel. *See* Tex. R. App. P. 47.1.

Gisela D. Triana, Justice

Before Justices Goodwin, Triana, and Kelly

Affirmed

Filed: August 31, 2021