NUMBER 13-18-00534-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

RANDALL P. CRANE, **Appellant,**

v.

ALETA HANNA, **Appellee.**

On appeal from the 103rd District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Tijerina

A jury found that appellant Randall P. Crane made a negligent misrepresentation on which appellee Aleta Hanna[1] justifiably relied. By two issues, Crane: (1) challenges the trial court's denial of his combined motion for traditional and no-evidence summary

[1] Hanna did not file a brief to assist us in the resolution of this matter.

judgment and (2) claims the evidence does not support the jury's finding that he made a negligent misrepresentation. We reverse and render.

I. BACKGROUND

Robert and Dorothy Huff owned two lots in Cameron County, Texas. In 2006, Hanna and her husband Tony rented a home on the property in exchange for Tony tending to the Huffs' cat sanctuary. On December 1, 2010, the Huffs conveyed the home Hanna rented and some property as a gift via warranty deed to Hanna. Crane is an attorney and prepared the deed. He also prepared a separate document memorializing the parties' agreement regarding the cat sanctuary and the continued care of the animals. After the transfer, Dorothy learned that she inadvertently transferred property, which straddled the property line dividing the two lots.

A. Hanna's Testimony

Hanna testified that she and Dorothy went to Crane's office at the request of Dorothy. When she arrived at Crane's office, Dorothy and Crane explained to her that her property needed to be conveyed to Dorothy to be re-subdivided. Hanna testified that Crane stated Dorothy would reconvey the property back to Hanna once "it was all said and done." Her testimony was as follows:

- I was given a paper to sign the deed back over to her until the house got subdivided, and then I would get it back.
- I was assured by Mr. Crane that I would get the house back.
- He said that I would get my house back after it was all said and done.
- And I told [Crane][,] "I understand that, but you were there when, you know, you and her both agreed—told me that I would get my house back."

- [H]e told me that I would get—once it was said and done, I would get the house back if I would just sign

According to Hanna, Dorothy changed after Robert's death—she was not friendly, and their relationship soured. Hanna told the jury that the only reason she signed the deed back to Dorothy was because she trusted Crane, and he assured her she would get her house back.

Dorothy did not convey the property back to Hanna, and after it was subdivided, Dorothy evicted Hanna. Hanna returned to Crane's office to get a copy of "what she signed." Hanna explained to Crane that Dorothy did not want to convey the property back to her, and Crane responded that he was not Hanna's lawyer; he was Dorothy's lawyer.

Hanna stated that she and Dorothy reached a settlement agreement the day before trial. As part of the settlement agreement, Hanna would receive $16,000 and the house itself, which she needed to relocate.[2]

B. Crane's Testimony

Crane testified that in March 2014, Hanna came to his office and asked why she was being asked to sign the property back to Dorothy. Contrary to Hanna's testimony, Crane testified that the only statement he made to Hanna was that according to Dorothy's surveyor, Jose Vasquez, the easiest way to get the property re-subdivided was if Hanna conveyed her property to Dorothy:

> It was my understanding that that was being done because the surveyor thought that would be the easiest way to resubdivide the land. [Dorothy] had come in before that and told me about the problem with the property being divided other than she and Ms. Hanna thought it was . . . I never—as she said, I never, ever told her that [Dorothy] is going to give her back that property. That's something I couldn't tell her . . . I don't know what

[2] The evidence produced at trial reflects that the land together with the house is assessed by the Cameron County Appraisal District at $24,857.00.

> someone's going to do in the future. I can't guarantee what anyone is going to do . . . It wasn't my property. I had no control over [Dorothy].
>
> . . . .
>
> Well, what I told her was that there needed to be, according to the surveyor, needed to be transferred back to [Dorothy] so she could resubdivide it. That's true. She did resubdivide it, and that is the only representation I made to her. I could not tell her that [Dorothy] was going to transfer it back to her or guarantee her that.

Furthermore, Crane stated that in 2015, Hanna went to his office and asked that Crane represent Hanna in the eviction proceeding. According to Crane, if Hanna felt that Crane had truly "tricked her," she would not have requested his representation one year later.

C. Vasquez's Testimony

Vasquez, on the other hand, contradicted Crane's testimony and denied making such a statement. He testified that Dorothy contacted him because she wanted to survey her property to make sure she conveyed the right portion to Hanna. He noticed that the description in the current deed split Dorothy's home in half and needed to be revised. Vasquez "explained to her that she needed to go back and consult her attorney and have that fixed." When asked what advice he gave Dorothy about how she needed to proceed to fix the problem, he stated that he told Dorothy "to seek legal advice. I'm not an attorney, and that was a legal problem that she had in the deed. According to what she told me, that's what she did not want to convey to Ms. Hanna." Vasquez stated that Dorothy intended to give Hanna "something different than what actually was given to her."

D. Verdict

Hanna sued Crane for common-law fraud, fraud by nondisclosure, statutory fraud, and negligent misrepresentation, among other things. At the charge conference, Crane moved for a directed verdict on all counts. The trial court granted the motion for a directed

verdict on the common-law fraud and the fraud by non-disclosure. However, it submitted the statutory fraud and negligent misrepresentation to the jury.[3] The jury answered no to whether Crane committed statutory fraud against Hanna. Question Number 1 asked, "Did Randall P. Crane make a negligent misrepresentation on which Aleta Hanna justifiably relied?" The jury answered "yes" and assessed $3,000.00 in damages and $5,000.00 in attorney's fees. This appeal followed.

II. NEGLIGENT MISREPRESENTATION

By his second issue, Crane asserts the evidence does not support the jury's finding that he made a negligent misrepresentation because his statement is not actionable as it did not concern an existing fact.[4]

A. Standard of Review

In evaluating the legal sufficiency of the evidence to support a finding, we determine whether the evidence at trial could enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We must consider the evidence "in the light most favorable to the verdict[] and indulge every reasonable inference that would support it." *Id*. at 822. "A challenge to the legal sufficiency of evidence will be sustained when, among other things, the evidence offered to establish a vital fact does not exceed a scintilla." *Kroger Tex. Ltd. P'ship v.*

[3] The trial court stated it was giving Hanna some leeway, and it was really "stretching the chord" in that regard.

[4] To preserve a legal sufficiency challenge for appeal after a jury trial, a party must move for an instructed verdict; object to the submission of the jury question; or move for a judgment notwithstanding the verdict, to disregard the jury finding, or for a new trial. *Defterios v. Dallas Bayou Bend*, *Ltd*., 350 S.W.3d 659, 664 (Tex. App.—Dallas 2011, pet. denied). To preserve a factual sufficiency challenge for appeal, a party must present the specific complaint to the trial court in a motion for new trial. *See id*.; TEX. R. CIV. P. 324(b)(2), (3). At the charge conference, Crane moved for a directed verdict. Therefore, we construe his argument as a challenge to the legal sufficiency of the evidence.

Suberu, 216 S.W.3d 788, 793 (Tex. 2006). Evidence that is so weak that it creates only a mere surmise or suspicion that a fact exists is regarded as no evidence. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill*, *Inc.*, 434 S.W.3d 142, 156 (Tex. 2014). It is not within our power to second guess the factfinder unless only one inference can be drawn from the evidence. *See Havner v. E–Z Mart Stores, Inc*., 825 S.W.2d 456, 461 (Tex. 1992). Jurors are the sole judges of the weight and credibility to give to witness testimony, and if the evidence at trial would allow reasonable, fair-minded jurors to differ in their conclusions, then jurors must be allowed to do so. *City of Keller*, 168 S.W.3d at 819, 822.

B. Applicable Law

To recover in an action for negligent misrepresentation, Hanna had to prove the following elements: (1) Crane made a representation to Hanna in the course of his business or in a transaction in which Crane had an interest; (2) Crane supplied false information for the guidance of others;[5] (3) Crane did not exercise reasonable care or competence in obtaining or communicating the information; (4) Hanna justifiably relied on the representation; and (5) Crane's negligent misrepresentation proximately caused Hanna's injury. *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999); *Miller v. LandAmerica Lawyers Title of El Paso*, 362 S.W.3d 842, 845 (Tex. App.—El Paso 2012, no pet.). Additionally, the "false information" contemplated in a negligent misrepresentation case must be a misstatement of an existing fact rather than a promise of future conduct.[6] *Miller v. Raytheon Aircraft Co*., 229

[5] Crane only challenges this element; therefore, we will not address the remaining elements.

[6] The jury charge explained:

S.W.3d 358, 379 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007, no pet.).

C. Discussion

In her pleading and at the trial court, Hanna based her negligent misrepresentation claim on only one statement allegedly made by Crane: that Dorothy would give Hanna her house back. Crane's statement that Dorothy would give Hanna her house back amounted to no more than a promise of a future performance by Dorothy. In fact, Hanna admitted that Crane had no way of knowing "that a year or so later [Dorothy] would have a change of heart and refuse to convey" the property back to Hanna, and she also acknowledged she had no evidence to that effect. Thus, Crane's statement, even when considered in a light that tends to support the jury's verdict, is "insufficient to establish negligent misrepresentation as a matter of law because [it] do[es] not constitute a representation of existing fact." *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Therefore, because Crane's statement is not a representation of existing fact, it cannot support a claim of negligent representation. *See BCY Water Supply Corp. v. Residential Inv., Inc.*, 170 S.W.3d 596, 602 (Tex. App.—Tyler 2005, pet. denied) (explaining that the "false information" contemplated in a negligent misrepresentation case must be a misstatement of existing fact, not a promise of future conduct); *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 439 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same); *Airborne Freight Corp. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 294 (Tex. App.—El Paso 1992, writ denied) (same).

> "False information" contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a promise of future conduct. A promise to act or not to act in the future cannot form the basis of a negligent misrepresentation claim. The plaintiff must prove that the defendant misrepresented an existing fact in the course of the defendant's business.

Absent any false information, we conclude that there was no evidence supporting Hanna's negligent misrepresentation claim.[7] *See Dall. Firefighters Ass'n v. Booth Research Group, Inc.,* 156 S.W.3d 188, 195 (Tex. App.—Dallas 2005, pet. denied) (holding that statements about movement of ranks consisted of expectation of future conduct, not existing fact, and were not actionable); *Swank v. Sverdlin*, 121 S.W.3d 785, 802–03 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding that oral promises not to fire plaintiff and not to exercise stock options were promises of future conduct, not existing fact); *Holt*, 987 S.W.2d at 141 (holding that representations defendant would provide all equipment necessary to start Louisiana plant and would pay plaintiff $55,000 annually were promises of future conduct and not misrepresentations of existing fact); *Miksch v. Exxon Corp*., 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding that an alleged oral promise not to terminate plaintiff was not a misrepresentation of existing fact but was a promise to refrain from taking future action); *see also Beckham Res., Inc. v. Mantle Res., L.L.C*., No. 13–09–00083–CV, 2010 WL 672880, at *15 (Tex. App.—Corpus Christi–Edinburg Feb. 25, 2010, pet. denied) (mem. op.). Therefore, we hold the evidence was legally insufficient to support the jury's verdict, and we sustain Crane's second issue. *See BCY Water Supply Corp*., 170 S.W.3d at 604. We sustain Crane's second issue.[8]

D. Attorney's Fees

[7] "[A] third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context" because "an attorney, hired by a client for the benefit and protection of the client's interests, must pursue those interests with undivided loyalty . . . without the imposition of a conflicting duty to a nonclient whose interests are adverse to the client." *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

[8] Because this issue is dispositive, we need not address Crane's first issue. *See* TEX. R. APP. P. 47.1.

Having determined that the jury finding in favor of Hanna was not based on legally sufficient evidence, we further conclude that the award of attorney's fees for negligent misrepresentation cannot survive. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006); *Rodgers v. RAB Invs., Ltd*., 816 S.W.2d 543, 551 (Tex. App.—Dallas 1991, no writ) (providing that to obtain an award of attorney's fees, a party must prevail on a cause of action for which attorney's fees are recoverable). Accordingly, we reverse the trial court's judgment in its entirety and render judgment that Hanna take nothing on her claims against Crane. *See Scherer*, 253 S.W.3d at 783.

IV. CONCLUSION

We reverse the trial court's judgment and render judgment that Hanna take nothing on her claim.

JAIME TIJERINA,
Justice

Delivered and filed the
25th day of June, 2020.