Affirmed and Opinion filed October 21, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00817-CV

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FALCON ENTERPRISES, INC. and LUXURY LIVING, INC., Appellants

V.

SUGAR CREEK SECTION 25, L.C. and HARRY W. REED, INDIVIDUALLY, Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 94-27977

O P I N I O N

Appellants, Falcon Enterprises, Inc. ("Falcon") and Luxury Living, Inc. ("Luxury Living"), appeal the judgment of the trial court entered in favor of appellees, Sugar Creek Section 25, L.C. ("Sugar Creek") and Harry W. Reed, Individually ("Reed"). In eight points of error, Falcon and Luxury Living challenge the judgment of the trial court. We affirm.

I. Background

Falcon, a company that builds custom homes, is owned by Louis Davidson ("Davidson"). Luxury Living, a company that also builds custom homes, is owned by Al Fairfield ("Fairfield") and his wife, Rae Fairfield. Reed is president of Sugar Creek, a limited liability corporation formed to develop a residential subdivision known as Lakebend in Fort Bend County.

In October 1991, Sugar Creek started contacting prospective builders, including Davidson, for Lakebend.[1] In January 1992, Davidson and four other custom home builders signed letters of intent to build in Lakebend. On January 23, 1992, Sugar Creek closed on the Lakebend property for $1,400,000. Reed signed as guarantor of the loan.

On May 4, 1992, Falcon signed a purchase and sale agreement with Sugar Creek for one lot and an option to purchase a second lot. Sugar Creek signed the agreement on July 2, 1992. On August 26, 1992, the project engineer certified the project as substantially complete. On September 4, 1992, Falcon was notified that the subdivision was substantially complete. Although notified of substantial completion in September 1992, Falcon did not close on its first lot until June 30, 1993. Falcon completed construction on its only home in December 1993.

At some point in time, the other builders who had signed letters of intent backed out of the project. In an effort to fill the void, Reed and Martin contacted other builders, including Fairfield.[2] On May 11, 1993, Luxury Living signed a purchase and sale agreement. On June 9, 1993, and July 7, 1993, Luxury Living closed on its first and second lots, respectively. It

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[1] Davidson, who was a real estate consultant to Southern National Bank where Sugar Creek was seeking financing to purchase the Lakebend property, was asked by the bank to look at the Lakebend loan proposal. Davidson contacted Reed expressing an interest in Lakebend.

[2] Martin drove Rae Fairfield through other subdivisions to demonstrate what he envisioned for Lakebend. She conducted a market study of these other subdivisions to determine how houses had sold and in what price range.

completed construction on its first home in October 1993, and on its second home in November 1993.

Luxury Living did not sell its homes until Spring 1994, and Falcon did not sell its home until December 1995.[3] In April 1994, Brighton Homes approached Sugar Creek about building in Lakebend and signed an agreement on May 12, 1994, initially purchasing five lots.

Falcon and Luxury Living's homes sold for substantially less than their original asking price. Appellants claim the losses they incurred on their homes were due to Sugar Creek's allegedly lacking the funds to successfully promote and develop Lakebend. Appellants assert that because Sugar Creek was allegedly financially strapped, appellees had to resort to misrepresentations to sell lots to make up for the budget shortfall that would have required the sale of most of the Lakebend lots. Such alleged misrepresentations include: (1) Reed had the authority to make representations on behalf of, and bind, Sugar Creek; (2) lots would be "builder ready" by July 1, 1992; (3) homes in Lakebend would not sell below $270,000; (4) only custom home builders would participate in Lakebend; (5) other builders were committed to Lakebend; (6) the price of lots in Lakebend would not be reduced; (7) Lakebend would be aggressively marketed and promoted; and (8) any additional builders coming into Lakebend would be subject to the approval of builders already in place. Appellants also claim appellees failed to disclose that Sugar Creek was merely a "shell" corporation with insufficient capital to develop Lakebend.

Accordingly, appellants brought suit against Sugar Creek and Reed in his individual capacity, asserting claims for breach of contract, common law fraud, fraud in a real estate transaction, negligent misrepresentation, violations of the Deceptive Trade Practices Act ("DTPA"), and estoppel. Appellees filed a counterclaim for breach of contract and DTPA violations.

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[3] The two homes built by Luxury Living and the one home built by Falcon were speculation, or "spec" homes, i.e., homes built without a contract with buyer.

The case was tried to the court. The trial court entered judgment that Falcon and Luxury Living take nothing from appellees and further entered findings of fact and conclusions of law in support of the judgment. In eight points of error, appellants complain of the trial court's failure to rule on their motion to take judicial notice of appellees' judicial admissions and challenge the sufficiency of the evidence supporting the trial court's findings.

II. Judicial Admissions

In their first point of error, appellants contend the trial court erred in refusing to rule on their motion to take judicial notice of appellees' alleged judicial admissions. A party's testimonial declaration, which is contrary to its position, is a quasi-admission. *See Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). A quasi-admission is merely some evidence and not conclusive upon the admitter. *See id.* The trial court, as the trier of fact, determines the amount of weight to be given to such admissions. *See id.* The quasi-admission is distinguishable from the true judicial admission, i.e., a formal waiver of proof usually found in pleadings or the parties' stipulations. *See id.* A judicial admission is conclusive on the party that made it, and relieves the opposing party of its burden of proving the admitted fact. *See id.* It prohibits the party against whom the admission is being asserted from disputing it. *See id.*

As a matter of public policy, a party's testimonial quasi-admission will be treated as a true judicial admission if it appears:

> (1) That the declaration relied upon was made during the course of a judicial proceeding.
>
> (2) That the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony.
>
> (3) That the statement is deliberate, clear, and unequivocal. The hypothesis of mere mistake or slip of the tongue must be eliminated.
>
> (4) That the giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based.

(5) That the statement is not also destructive of the opposing party's theory of recovery.

Id. (emphasis omitted) (quoting *United States Fidelity & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.–San Antonio 1951, writ ref'd)).

The party asserting the conclusive effect of an opponent's judicial admission of fact must protect the record by objecting to the introduction of controverting evidence. *See Parkway Hosp., Inc. v. Lee*, 946 S.W.2d 580, 587 (Tex. App.–Houston [14th Dist.] 1997, writ denied). A judicial admission is waived when evidence contrary to the admission is admitted. *See Industrial Disposal Supply Co. v. Perryman Bros. Trash Serv., Inc.*, 664 S.W.2d 756, 764 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.).

In their second amended answer, appellees denied Reed's personal liability, stating that "[a]t all times pertinent to the allegations made by the Plaintiffs, Harry W. Reed was acting in his capacity as a corporate representative of Sugar Creek." Appellants claim that, in his deposition, Reed maintained that he did not have any authority, while acting as president of Sugar Creek, to make certain representations regarding Lakebend to the builders. Appellants, asserting the conclusive effect of Reed's denial of authority in his deposition, claim appellees could not at trial deny Reed's personal liability for any false representations. Appellants, therefore, sought the exclusion of any evidence offered by appellees showing that Reed had authority, in his corporate capacity, to make representations to the builders regarding Lakebend. Appellants also requested the trial court to take judicial notice of statements made by Reed at his deposition relating to his knowledge of the source of Sugar Creek's income.

During a pretrial hearing, appellants brought its motion to the court's attention. The court declined to rule on the motion at that time and instead, instructed appellants that when such evidence was being offered to ask the court to take judicial notice. Appellants agreed to this.[4]

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[4] At the end of their rebuttal, appellants again brought its motion to the trial court's (continued...)

On appeal, appellants do not point to those portions of the record showing where appellees offered such evidence or where appellants objected to such evidence pursuant to the court's instructions. It was appellants' duty, as the parties asserting the conclusive effect of Reed's alleged judicial admissions, to object to the introduction of any evidence to the contrary. *See Parkway Hosp., Inc.*, 946 S.W.2d at 587. Absent any objections to the trial court, appellants have waived their assertion of Reed's alleged judicial admissions. *See Industrial Disposal Supply Co.*, 664 S.W.2d at 764; *see also Parkway Hosp., Inc.*, 946 S.W.2d at 587.

Moreover, appellants' attempt to rely on any admission by Reed assumes that there were, in fact, misrepresentations of Reed's authority and other matters regarding the development of Lakebend. As discussed below, we find no misrepresentations by Reed. Appellant's first point of error is overruled.

III. Misrepresentations

In their second through fifth points of error, appellants challenge the legal and factual sufficiency of the evidence supporting the trial court's findings that Reed made no misrepresentations.[5] We review the trial court's findings of fact for legal and factual sufficiency of the evidence by the same standards applied in reviewing the evidence supporting a jury's findings. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Skrepnek v. Shearson Lehman Bros., Inc.*, 889 S.W.2d 578, 579 (Tex. App.–Houston [14th Dist.] 1994, no

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[4] (...continued)
attention. The court stated it was overruling the motion. The court then allowed appellants to read in the record excerpts of Reed's deposition purportedly showing he did not have authority to make certain misrepresentations. The court then stated it would take up the motion "after trial." Appellees, in response, were allowed to present further testimony from Reed that he had legal authority as president of Sugar Creek to make representations regarding Lakebend, but that he had no authority to make false representaions.

[5] With regard to their claims for common law fraud, fraud in a real estate transaction, DTPA violations, and negligent misrepresentation, appellants appear to have abandoned these claims against Sugar Creek on appeal, but maintain such claims against Reed, individually.

writ). When attacking the legal sufficiency of an adverse finding on an issue on which the appellant had the burden of proof, the appellant must demonstrate the evidence conclusively established all vital facts in support of the issue. *See Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.–Houston [14th Dist.] 1997, no writ). When reviewing a "matter of law" point, we apply a two-prong test: (1) we examine the record for any evidence that supports the finding, ignoring all evidence to the contrary, and (2) if there is no evidence to support the finding, we then examine the record to determine if the contrary position is established as a matter of law. *See id.*

In reviewing the factual sufficiency of the evidence, we must consider all the evidence and will set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Dickerson v. DeBarbieris*, 964 S.W.2d 680, 683 (Tex. App.–Houston [14th Dist.] 1998, no pet.). Because the trier of fact is the sole judge of the credibility of the witnesses and the weight to given their testimony, we may not substitute our judgment for that of the trial court simply because we may disagree with its findings. *See Tigner v. City of Angleton*, 949 S.W.2d 887, 889 (Tex. App.–Houston [14th Dist.] 1997, no writ). Where there is conflicting evidence, the trial court's determination on such matters is generally regarded as conclusive. *See Brown v. State Bar of Texas*, 960 S.W.2d 671, 675 (Tex. App.–El Paso 1997, no writ); *In the Interest of B.R.*, 950 S.W.2d 113, 121 (Tex. App.–El Paso 1997, no writ). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *See Peter v. Ogden Ground Servs., Inc.*, 915 S.W.2d 648, 650 (Tex. App.–Houston [14th Dist.] 1996, no writ).

A. Common Law Fraud

In their fourth point of error, appellants assert the evidence supporting the trial court's finding that Reed did not commit fraud is legally and factually insufficient. Appellants claim Reed made several false representations, which induced them into entering into their respective contracts with Sugar Creek. The elements of fraud are: (1) a material misrepresentation, (2) that was false, (3) that was either known to be false when made or

without knowledge of the truth, (4) that was intended to be acted upon, (5) that was relied upon, and (6) that caused injury. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). A promise of future performance constitutes an actionable misrepresentation if it was made with the present intent not to perform. *See id.* Failure to perform is not evidence of the promisor's intent not to perform when the promise was made, but a circumstance to be considered with other facts to establish intent. *See Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 444 (Tex. App.–Houston [14th Dist.] 1998, pet. denied).[6]

A misrepresentation is material if it induced the complaining party to enter into the contract. *See Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 86 n.4 (Tex. App.–Houston [14th Dist.] 1997, pet. denied); *American Med. Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 338 (Tex. App.–Houston [14th Dist.] 1991, no writ). To prove reliance, the party claiming fraud must show he knew of, and was induced by, the defendant's representations. *See Marburger*, 957 S.W.2d at 86 n.5; *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 68 (Tex. App.–Corpus Christi 1993, writ denied).

Reed's Authority

Appellants first assert that Reed, in making representations and promises regarding the development and sale of Lakebend lots, falsely held himself out as having the authority to bind Sugar Creek. Evidence establishes that Reed was president of Sugar Creek. Furthermore, Reed's testimony establishes he had the authority to both negotiate and bind Sugar Creek in business transactions. The evidence is sufficient to support the trial court's finding that Reed, at all relevant times, acted in his capacity as president of Sugar Creek.

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[6] In addition to making certain affirmative false representations, appellants generally claim Reed failed to disclose new information which rendered earlier statements misleading. *See Ho v. University of Texas at Arlington*, 984 S.W.2d 672, 691 (Tex. App.–Amarillo 1998, pet. filed). Appellants, however, have not explained what new information Reed purportedly had or what statements were rendered misleading by such information. Therefore, this argument is waived on appeal. *See* TEX. R. APP. 38.1.

Substantial Completion Date

Next, appellants claim Reed falsely represented that the lots would be "builder ready" on July 1, 1992, but, in fact, were not ready until at least June or July 1993. In support of their contention that Reed misrepresented the substantial completion date, appellants cite a July 2, 1992 memo from Al Hermann, a Harry Reed & Co. employee, to Peyton Martin, the "point man" on the project, in which he states:

> . . . I'm concerned about the representation we have made as it relates to substantial completion. There are two contracts on 7/1/92 and one on 7/15/92. It is obviously impossible for us to comply with those dates. You might want to get a side letter from each one of these people clarifying that.

The July 1, 1992 completion date applies only to Falcon because Luxury Living did not execute a purchase and sale agreement until May 1993. Falcon's sale and purchase agreement defined substantially complete:

> The date of Substantial Completion (herein so called) of the above referenced improvements shall be the date that Kelly R. Kaluza & Associates, Inc. (or a successor appointed by Seller) issues a certificate stating that said improvements have been substantially completed, which shall be on or before July 1, 1992. Seller agrees to cause underground electrical, gas and telephone service to be in place and available with respect to the Lots within thirty (30) days following the Substantial Completion date. Further, Seller will, within forty-five (45) days after the Substantial Completion date, commence constructing a perimeter fence fronting on Central Drive and South Parkway Boulevard.

Reed testified that there were delays because of rain, the inspectors were not out there in a prompt and efficient manner, and Houston Lighting & Power did not install electrical lines timely. We do not find that Reed made a promise with respect to the completion date of the development with no intent to have the lots "builder ready" by that date.

Moreover, we do not find that Falcon relied on the July 1, 1992 completion date. Pursuant to Falcon's purchase and sale agreement, the project engineer certified the development as substantially complete on August 26, 1992. Although receiving notification

of substantial completion on September 4, 1992, Falcon did not close on its first lot until June 30, 1993. Falcon's contract provided that in the event of Sugar Creek's default, Falcon would be entitled to a refund of its earnest money and option fee not already applied to the purchase of the lot. Falcon, therefore, could not have relied on the July 1, 1992 completion date when it elected to close on its lot.

Minimum Selling Price

Appellants next assert that Reed promised that homes built in Lakebend would not be priced lower than $270,000. Appellants' complaint centers on the fact that in April 1994, Sugar Creek entered into an agreement to sell lots to Brighton Homes, which homes sold in the $190,000 range. Appellants contend that having lower priced homes in the same subdivision makes it more difficult to sell higher-priced custom homes.

Appellees acknowledge that Reed agreed to a price range for homes in Lakebend, but that this representation was true at the time it was made. In its purchase and sale agreement, Falcon agreed to purchase two lots. Falcon, however, did not close on its second lot. Although Luxury Living agreed, in its purchase and sale agreement, to purchase three lots, it did not purchase its third lot. Sugar Creek did not sell any lots to Brighton Homes until after appellants had failed to purchase the requisite number of lots as provided in their contracts. Under these circumstances, it cannot be said that any representation regarding a minimum price in Lakebend was false at the time made.

Custom Homes

Appellants claim Reed also falsely represented that Lakebend would be restricted to custom homes. Again, appellants' complaint is based on Sugar Creek having sold lots to Brighton Homes, which, according to appellants, builds tract houses.[7] Appellants maintain that

[7] According to appellants, tract houses generally sell for less than custom homes of the same size because there are fewer options available and the work is of lesser quality.

having tract homes in the same subdivision as custom homes drives down the prices of higher-priced custom homes.

Appellees admit that Reed made this representation, but contend that it was true at the time it was made. As mentioned before, Brighton Homes did not come into Lakebend until after appellants had failed to close on other lots as agreed to in their purchase and sale agreements. Moreover, a review of the records reflects Reed's efforts to bring in other custom home builders to replace the ones who had backed out of Lakebend. We find that at the time this promise was made, it was true.

Commitment of Builders

Appellants further claim Reed misrepresented the participation of other builders in Lakebend. Falcon asserts it did not know the other four builders, who had signed letters of intent, had backed out when it entered into its contract with Sugar Creek. Davidson, however, testified that it could have been by June or July 1992 that he knew three of the original builders had not signed an earnest money contract. Davidson explained that he did not think that three of the other original builders "were going to proceed any further. At least that was what I was thinking, 'cause I did not know positively that they were not. . . ." This indicates that Falcon knew by the time Sugar Creek signed the purchase agreement in July 1992, and at least a year prior to closing on its first lot in June 1993, that those other builders were no longer committed to Lakebend. Under these facts, there could not have been any reliance by Falcon on this representation.

Moreover, when Reed represented to Falcon that four other builders had signed letters of intent and were committed to building in Lakebend, such representation was true. Reed testified there was no penalty for not going forward with the letters of intent as long as the builders had not put up the earnest money. There is ample evidence in the record showing that appellees attempted to bring other builders into Lakebend. We find no evidence that when Reed made this representation, he had no intention of going forward with the development without other custom home builders committed to Lakebend.

Luxury Living claims Reed had told it that other builders, in addition to Falcon, would be participating in Lakebend. Fairfield, however, testified that it was his understanding that Lakebend "needed very badly to have some builder to jump-start the subdivision . . . It was dead in the water." Prior to Luxury Living entering into a purchase and sale agreement, Fairfield talked to Davidson, who told him that the development had problems and needed a builder to start off the subdivision. This is evidence that Luxury Living knew there were no other builders, with the exception of Falcon, committed to Lakebend. Luxury Living, therefore, could not have relied on any representation that several other builders were committed to the subdivision.

Sugar Creek's Financial Status

Appellants also contend that Sugar Creek had inadequate funds to develop Lakebend. They assert that Reed failed to disclose Sugar Creek's alleged financial "straights," including (1) that Sugar Creek was a "shell corporation," with no staff, only the minimal required capital of $1,000, and no other resources apart from Reed and high cost borrowed collateral; (2) that the funding for the completion of the development was dependent on lot sales; and (3) that Sugar Creek did not have the financial resources to complete the subdivision timely or to market and promote the subdivision.

Where there is a duty to disclose, the nondisclosure may be as misleading as a positive misrepresentation of facts. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997). For there to be actionable fraud by nondisclosure, there must be a duty to disclose. *See Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.–Houston [14th Dist.] 1997, pet. denied); *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 633-36 (Tex. App.–San Antonio 1993, writ denied). Whether a duty exits is a question of law. *See Hoggett*, 971 S.W.2d at 487.

A duty to disclose may arise when there is a fiduciary relationship. *See Ho*, 984 S.W.2d at 692. A fiduciary duty requires the fiduciary to place the interest of the other party above its own. *See Hoggett*, 971 S.W.2d at 487. Where a fiduciary relationship exists, the burden is

on the fiduciary to show it acted fairly and informed the other party of all material facts relating to the challenged transaction. *See id.*; *Brazosport Bank v. Oak Park Townhouses*, 889 S.W.2d 676, 684 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

There are two type of fiduciary relationships. The first is a formal fiduciary relationship, which arises as a matter of law, including partnership, attorney-client, and principal-agency relationships. *See Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980). The second is an informal fiduciary relationship which may arise "from a moral, social, domestic or purely personal relationship called a confidential relationship." *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998). Here, there is no assertion or evidence of a formal relationship between appellants and appellees. Therefore, any fiduciary duty must arise from a confidential relationship.

A confidential relationship exists where influence has been acquired and abused, and confidence has been reposed and betrayed. *See id.*; *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). Subjective trust does not convert a an arm's-length transaction into fiduciary relationship. *See Morris*, 981 S.W.2d at 674; *Schlumberger Tech. Corp.*, 959 S.W.2d at 177; *see also Crim Truck & Tractor Co.*, 823 S.W.2d at 594 (stating "[t]he fact that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship"). Instead, to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. *See Schlumberger Tech. Corp.*, 959 S.W.2d at 177; *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995).

Lakebend was an arm's-length transaction entered into for the mutual benefit of appellants and appellees. *See Associated Indem. Corp.*, 964 S.W.2d at 288. Moreover, because there is no prior relationship between appellants and appellees, we find no evidence of a confidential relationship under which appellees had a fiduciary duty to disclose Sugar

Creek's financial status to appellants. *See Morris,* 981 S.W.2d at 674; *Associated Indem. Corp.,* 964 S.W.2d at 288; *Schlumberger,* 959 S.W.2d at 177. We conclude the evidence is sufficient to support the trial court's finding that Reed did not commit common law fraud. Appellant's fourth point of error is overruled.

B. Section 27.01

In their second point of error, appellants challenge the legal and factual sufficiency of the evidence supporting the trial court's finding that Reed did not commit statutory fraud. Section 27.01 of the Business and Commerce Code provides a statutory cause of action for fraud in a real estate transaction. *See* TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987). The elements of statutory fraud are identical to common law fraud, except that proof of knowledge or recklessness is not a necessary prerequisite to recovery of actual damages. *See Brush v. Reata Oil & Gas Corp.,* 984 S.W.2d 720, 726 (Tex. App.–Waco 1998, pet. denied). Like common law fraud, reliance is a necessary element under section 27.01. *See Schlumberger Tech. Corp.,* 959 S.W.2d at 182.

Here, as in their challenge to the trial court's findings with regard to their claim for common law fraud, appellants claim Reed misrepresented (1) his authority as president of Sugar Creek, (2) the completion date for the development, (3) the minimum selling price of Lakebend homes, (4) that the subdivision would be restricted to custom homes only, and (5) other builders were committed to building in Lakebend; and Reed failed to disclose Sugar Creek's financial status. As determined above, Reed made no misrepresentations and/or appellants did not rely on these representations.

Lot Prices

Appellants further claim Reed falsely promised that the purchase price of the lots would not be reduced. Appellants complain that Sugar Creek sold the remaining Lakebend lots to Brighton Homes at discounted prices. Other than their own testimony, appellants presented no evidence that Reed made any promises regarding lot prices. Reed, on the other hand, testified that he never promised not to reduce lot prices. As the trier of fact, the trial court was

the sole judge of the credibility of the witnesses. *See Tigner*, 949 S.W.2d at 889. Moreover, where the evidence is conflicting, the trial court's determination is considered conclusive. *See Brown*, 960 S.W.2d at 675. We find the evidence sufficient to support a finding that Reed made no such representation.

Marketing and Promotion

Appellants next contend that Reed represented that Sugar Creek would market and promote the sale of lots and homes in Lakebend, but never carried through on that promise. They claim Reed promised there would be a major advertising campaign, including a grand opening, a realtor campaign, signs placed on major thoroughfares, and advertisements in the print media for at least one year.

In March 1992, Stewart Title hosted a Million-Dollar Broker's luncheon, at which time, a presentation on Lakebend was given and the five original builders were introduced. Reed testified that he thought the luncheon was the grand opening or announcement of Lakebend. Reed thought that was the appropriate time to announce Lakebend to area realtors. Reed testified that any other type of grand opening would have had to occur when there were number of houses constructed, but there was not a sufficient number of houses.

Reed also testified that he never promised a large scale advertising campaign for Lakebend. A review of the evidence, however, shows there was some advertising and marketing in the Spring of 1992, including advertisements in area publications, an articles in an area subdivision newsletter, and a bill board. Reed acknowledged that Sugar Creek did not engage in any additional advertising or marketing for Lakebend after Falcon and Luxury Living had entered into their contracts with Sugar Creek; however, Reed also believed that Lakebend was going to be ready sooner than it actually was.

The trial court was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The evidence is sufficient to support a finding that Reed did not promise appellants extensive advertising with regard to the development of Lakebend and that any promise for any advertising was true at the time it was made.

Approval of Additional Builders

Appellants claim Reed promised that new builders coming into Lakebend would be subject to the approval of the builders already participating in Lakebend. Appellants' complaints centers on the fact that Sugar Creek sold its remaining lots to Brighton Homes and relates to its other complaints that Brighton Homes builds "tract" houses, which drive down the prices of custom homes and make it more difficult to sell custom homes. Appellants presented no evidence other than their own testimony that Reed made such a promise. Reed, to the contrary, testified that he never promised Davidson and Fairfield that the builders would have veto power over new builders coming into Lakebend. Furthermore, Carl Mann ("Mann"), vice president of Sugar Creek, testified that he knew of no written or oral agreement giving the builders veto power over the developer's ability to bring in other builders. Accordingly, we find the evidence sufficient to support the trial court's finding that Reed did not commit statutory fraud and overrule appellants second point of error.

C. DTPA

In their third point or error, appellants contend the evidence is neither legally nor factually sufficient to support the trial court's finding that Reed did not violate the DTPA. The elements of a DTPA misrepresentation claim are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts, and (3) the acts were a producing cause of the plaintiff's injuries. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). The misrepresentation must be of a material fact. *See Church & Dwight Co, Inc. v. Huey*, 961 S.W.2d 560, 567 (Tex. App.–San Antonio 1997, pet. denied). There is no requirement that the defendant know of the falsity of the misrepresentation in order to be liable. *See Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). In establishing producing cause, reliance is not a separate element, but may be a factor to consider in determining whether the misrepresentation was a producing cause. *See Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 130 (Tex. App.–Texarkana 1994, writ denied) (citing *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 100-

01 (Tex. 1994) (Enoch, J., concurring) (concluding that producing cause is present only if misrepresentation is not patently absurd so that reliance is reasonable)); *see also Camden Mach. & Tool, Inc. v. Cascade Co.*, 870 S.W.2d 304, 311 (Tex. App.–Fort Worth 1993, no writ) (stating that the misrepresentation must induce the plaintiff into entering the contract in order for there to be recovery).

Appellants, again, allege the same misrepresentations as in the previous points of error. Having already rejected appellants assertions, we shall only address those allegations which are required to be resolved by different analysis.

Appellants claim Reed represented the substantial completion date for the development and that other builders had committed to building in Lakebend. We have previously determined that Falcon did not rely on this representation in closing on its lot and Luxury Living did not rely on this representation in entering into the sale and purchase agreement. Although reliance is not an independent element in establishing a DTPA claim, it is a factor in proving producing cause. Accordingly, we find that any representation regarding the substantial completion date or the participation of other builders in Lakebend is not a producing cause of appellants' damages.

Appellants also maintain that Reed's failure to disclose that Sugar Creek was a "shell" corporation with no staff, only the minimal required capital of $1,000, and no resources other than loans from the bank and Reed's daughter constitutes a false, misleading or deceptive act. The failure to disclose information about goods and services at the time the transaction is entered into is actionable as a false, misleading, or deceptive act under the DTPA, if such concealment was intended to induce the consumer to enter into the transaction, into which the consumer would not have entered had the information been disclosed. *See* TEX. BUS. & COM. CODE ANN. § 46(b)(23) (Vernon Supp. 1999).

The evidence shows that Sugar Creek had a $1,400,000 bank loan and a $750,000 loan from Robin Reed. Appellants assert Lakebend was to be developed entirely with funds from the loans and cash flow. We find this, in and of itself, is neither unusual nor extraordinary.

Mann testified that development costs for Lakebend exceeded his original cost projections. However, he and Reed both testified that Sugar Creek met all financial obligations and repaid all money borrowed from the bank. Reed further testified that Sugar Creek had the funds to develop Lakebend. We find no intent by appellees to induce appellants into participating in Lakebend by failing to disclose Sugar Creek's financial arrangements.

Appellants also contend Reed's representations were made knowingly, thereby entitling them to treble damages. *See* TEX. BUS. & COM CODE ANN. § 17.50(b)(1) (Vernon Supp. 1999). Because appellants have failed to establish the elements for any DTPA claim, we need not reach this contention. We find that evidence sufficient to support the trial court's finding that Reed did not engage in any false, misleading, or deceptive acts in violation of the DTPA. Appellants' third point of error is overruled.

D. Negligent Misrepresentation

In their fourth point of error, appellants challenge the legal and factual sufficiency of the evidence in support of the trial court's finding that Reed did not make any negligent misrepresentations. The elements of negligent misrepresentation are: (1) the representation is made by a defendant in the course of its business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *See Federal Lank Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Unlike common law fraud, negligent misrepresentation does not require knowledge of the falsity or reckless disregard of the truth or falsity of the representation at the time it was made. *See Milestone Properties, Inc. v. Federated Metals Corp.*, 867 S.W.2d 113, 119 (Tex. App.–Austin 1993, no writ). To prevail on a claim for negligent misrepresentation, however, the plaintiff must prove that the defendant misrepresented an existing fact in the course of the defendant's business. *See Miksch v. Exxon Corp.*, 979 S.W.2d 700, 707 (Tex. App.–Houston [14th Dist.] 1998, pet. filed); *Airborne Freight Corp.*

v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 294 (Tex. App.–El Paso 1992, writ denied) (stating that the sort of false information contemplated in a negligent misrepresentation case is a misstatement of existing fact).

Appellants claim Reed negligently asserted that any builder selling houses in Lakebend subdivision at substantially reduced prices would be "removed from the program." This is merely a variation of appellants' claim that Reed agreed no houses in Lakebend would sell below a minimum price. As previously discussed, such representation, at the time it was made, was true. Appellants must prove that the defendant misrepresented an existing fact in the course of the defendant's business. *See Miksch*, 979 S.W.2d at 707; *Airborne Freight Corp.*, 847 S.W.2d at294.

Appellants also assert Reed negligently made representations regarding extensive marketing and promotional activities to promote sales in Lakebend. Having already rejected this assertion, we find that Reed did not make this representation.

Appellants further contend Reed negligently made representations regarding the completion date for the settlement and other builders were committed to building in Lakebend. As addressed above, Falcon could not have relied on these representations in closing on its first lot, and Luxury Living could have relied on them in signing the purchase and sale agreement. We conclude the evidence is sufficient to support the finding by the trial court that Reed did not negligently misrepresent any facts regarding Lakebend. Appellants' fifth point of error is overruled.

III. Estoppel

In their sixth point of error, appellants claim Reed and Sugar Creek changed their positions on matters material to their operations at Lakebend to achieve benefits to appellants' detriment. The elements of estoppel are: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; and (5) who detrimentally relies on the representations. *See Johnson & Higgins*

of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 515-16 (Tex. 1998). It allows the enforcement of a promise to avoid an injustice. *See Highlands Management Co. v. First Interstate Bank of Texas, N.A.*, 956 S.W.2d 749, 756 (Tex. App.–Houston [14th Dist.] 1997, pet. denied).

Quasi-estoppel precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken. *See Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 111 (Tex. App.–Houston [14th Dist.] 1996, no writ). It is applied where it would be unconscionable to allow a party to maintain a position inconsistent with one in which it acquiesced, or of which it accepted a benefit. *See id.* Unlike estoppel, however, quasi-estoppel does not require a showing of a false representation or detrimental reliance. *See Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App.–Houston [14th Dist.] 1991, no writ).

Appellants assert they detrimentally relied on Reed's representations and failures to disclose, and in so doing, they (1) executed earnest money contracts; (2) purchased lots for $190,000; (3) incurred expenses for the preparation of the lots; (4) obtained financing for construction; and (5) constructed approximately $1,000,000 in improvements. We first note that appellants do not specify which representations are included in their claim for estoppel. We have, however, previously determined that appellees either made no false representations or that appellants did not rely on such representations in purchasing the lots.

With respect to their claim for quasi-estoppel, appellants claim that Reed benefitted from the purchase of the lots because such purchases, in effect, reduced the indebtedness guaranteed by Reed. Moreover, appellants claim they were responsible for "kicking off" the subdivision, which ultimately paid off the $1,400,000 loan. With regard to Reed's representation that Lakebend would be a custom home subdivision with homes selling for at least$270,000, appellants have failed to prove appellees have benefitted from the purchase of the three lots. Sugar Creek received only the purchase price for the three lots. Appellants have not presented any evidence from which it can be reasonably inferred that their $1,000,000 in

improvements was a source of funds for the $1,400,000. To the contrary, Reed testified that the loan was paid off from funds other than any lots sales in Lakebend. We find the evidence legally and factually sufficient to support the trial court's finding that there was no detrimental reliance by appellants to the benefit of appellees. Appellants' sixth point of error is overruled.

IV. Reliance

In their seventh point of error, appellants claim the evidence establishes that they relied on certain representations made by Reed. We first note that appellants fail to specify to which of their claims this point of error applies. Appellants first maintain that in entering Lakebend, they relied on Reed's promises that only custom homes would be built in Lakebend and that such homes would not sell for less than $270,000. While appellants may claim reliance on these misrepresentations, we have already determined, they were true at the time they were made, and were not made with the intention of not carrying them out. Each of appellants' claims, with the exception of quasi-estoppel, requires a misrepresentation. Therefore, appellants may not recover on the basis of reliance because there has been no misrepresentation. With respect to their claim for quasi-estoppel, as discussed above, appellants have failed to establish that appellees benefitted from the purchase of three lots.

Next, appellants assert Falcon would not have purchased any lot without the "Dorshaw" contract in place and without Reed's promise that there were other builders who were committed to building in Lakebend. The Dorshaws were a family who purchased a lot directly from Sugar Creek. Falcon received the Dorshaws' name from Sugar Creek and contacted them about building their house. Falcon started working with the Dorshaws in June 1992. The Dorshaws entered into an earnest money contract with Falcon in November or December 1992. The Dorshaws, however, eventually decided not to go through with the house and it was never built. Davidson testified that the Dorshaws would not allow Falcon to begin construction on their home until one or more homes were under construction by other builders.

Falcon prepared plans in preparation of construction on the Dorshaw home. The Dorshaws paid for the drawings and plans for the house. Falcon did not expend any funds for

the purchase of any construction material for the Dorshaw house. Davidson testified that it could have been in June or July 1992, that he knew at least three of the other builders who had signed letters of intent had not entered into any contracts with Sugar Creek. Falcon, therefore, was aware that Sugar Creek did not have the commitment of at least three other builders at the time it began working with the Dorshaws in June 1992, and when it entered into the Dorshaw contract in November or December 1992. Thus, Falcon could not have relied on any such representation. The evidence is sufficient to support the trial court's finding that appellants did not rely on any representations by Reed. Appellants' seventh point of error is overruled.

V. Specific Findings

In their eighth point of error, appellants challenge the legal and factual sufficiency of the evidence supporting 23 of the trial court's findings of fact. With respect to findings nos. 8,9,10, 11, 16 35, 39, 40, 43, 52, and 56, these findings generally regard appellants' allegations of misrepresentations made by Reed and claims they relied on such representations in support of their claims for common law fraud, fraud in a real estate transaction, DTPA violations, and negligent misrepresentation. These claims have already been addressed in appellants' second through seventh points of error, wherein we found sufficient evidence to support the trial court's findings that there were no false representations by Reed and no reliance by appellants.

With respect to finding nos. 12, 44, and 45, which state that appellants sustained no damages or injury, we need not address these because appellants have failed to establish the elements of either misrepresentation or reliance on any of their claims.

With respect to finding no. 4, which states that Reed, individually, never owned any interest in Sugar Creek or the Lakebend property, appellants complain this is false. Carl Mann, vice president of Sugar Creek, testified that Sugar Creek purchase the Lakebend property. Mann further stated Reed never had any ownership interest in Sugar Creek; instead, Reed's daughters and wife had ownership interest in the corporation. Appellants never presented any evidence to the contrary. The evidence is sufficient to support this finding.

With respect to finding no. 18, which states that as of February 5, 1993, Falcon had failed to purchase and close on the first lot, appellants do not challenge the sufficiency of the evidence supporting this finding, but rather, complain this finding is irrelevant because no claims for specific performance or refund of the earnest money have been brought. The evidence overwhelmingly supports this finding, and it is relevant to appellants' claim of reliance on the numerous alleged misrepresentations.

With respect to finding nos. 27 and 28, which state that Falcon and Luxury Living breached their purchase and sale agreements and forfeited any remaining escrow money, appellants contend these findings are false and irrelevant. With respect to finding no. 36, which states that Falcon and Luxury Living's purchase and sale agreements expired due to their failure to designate and close on any additional lots, appellants contend that the agreements cannot arbitrarily be found by appellees to have expired. Fairfield testified that Luxury Living did not close on a third lot pursuant to its contract. Davidson testified that Falcon did not close on a second lot pursuant to its contract. Their contracts provide for the forfeiture of their earnest money in the event of their default. The evidence is sufficient to support findings that Falcon and Luxury Living were in breach of their contracts with Sugar Creek. Moreover, these findings are relevant to appellants' claims that Reed falsely represented that homes in Lakebend would be only custom homes selling for at least $270,000.

With respect to finding nos. 47, 49, and 50, regarding any duty to use reasonable care in obtaining and communicating information to appellants, and breach of that duty, we have already found no misrepresentations or reliance with respect to appellants' negligent misrepresentation claim. The evidence is sufficient to support these findings.

With respect to finding no. 51, that Reed's conduct was not willful and malicious, appellants have failed to establish the misrepresentation and reliance or producing cause elements of their DTPA and statutory fraud claims entitling them to compensatory damages. Therefore, they are not entitled to exemplary damages on the basis of willful or malicious conduct. The evidence is sufficient to support this finding.

We find the evidence is sufficient to support each of the trial court's findings and overrule appellants' eighth point of error.

VI. Conclusion

Finding the evidence both legally and factually sufficient to support the trial court's findings and that appellants waived error on their claim for judicial admissions, the judgment of the trial court is affirmed. Furthermore, any pending motions taken with this case are rendered moot by this opinion.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 21, 1999.

Panel consists of Justices Hudson, Draughn, and Lee.[8]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[8] Senior Justices Draughn and Lee sitting by assignment.