Affirmed in Part and Reversed and Remanded in Part and Opinion Filed October 9, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00878-CV

D. KYLE FAGIN, INDIVIDUALLY AND AS TRUSTEE AND BENEFICIARY OF THE D. KYLE FAGIN QUALIFIED SUBCHAPTER S TRUST, Appellant
V.
INWOOD NATIONAL BANK AND INWOOD BANCSHARES, INC., AND CHRISTY FAGIN, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-01688

MEMORANDUM OPINION

Before Justices Pedersen, III, Goldstein, and Smith
Opinion by Justice Goldstein

This is an appeal from the trial court's grant of summary judgment in a suit over a trust agreement. In four issues, appellant D. Kyle Fagin[1] complains that the trial court erred in granting summary judgment in favor of appellees Inwood National Bank (INB) and Inwood Bancshares, Inc. (IBI) (together, Inwood Bank or

[1] Kyle's estranged wife, Christy Fagin, intervened in the lawsuit below. Although Christy is not a party to this appeal, we will be discussing her part in the proceedings below at length. Because they share the same last name, we will refer to Kyle and Christy by their first names.

the Bank) on all of Kyle's causes of action. We affirm in part and reverse and remand in part for further proceedings. Because all issues are settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a).

BACKGROUND

Kyle and Christy were married in 1991. The day before their marriage, Christy's father created a trust in Christy's name and placed 2,326,632.84 shares of IBI stock into the trust. The trust was to terminate on its own terms when Christy reached thirty-eight years of age. When that occurred, the shares became Christy's separate property.[2] In 2015, Kyle and Christy discussed creating new entities to hold the shares. Kyle emailed Dennis Lorch, an Executive Vice President of the Bank, stating that the couple's attorney had advised putting the shares "into an LLC as a disregarded entity for asset protection and estate purposes." Lorch responded that the use of LLCs to hold the shares would jeopardize the Bank's status as an S Corporation. Lorch advised that per the Bank's shareholder agreement, the Bank "require[d] notice and review of any anticipated change in ownership or transfer of stock, so that our tax accountants can review the proposed change / transfer and determine that the change / transfer will have no adverse consequences for the corporation's S-Corp status."

[2] Neither party alleges that the stock was community property.

To ensure compliance with the shareholder agreement, Kyle retained attorney Brett Flagg to facilitate the transfer. Flagg spoke with an attorney for the Bank, Roy True, and the two agreed that the best path would be to place the stock into trusts. Thus, Flagg advised Kyle that he and Christy should create two trusts, one of which, as relevant here, named Kyle the sole beneficiary (the Kyle Trust). To that end, Flagg drafted a trust agreement titled "D. Kyle Fagin Qualified Subchapter S Trust" (the KTA). Under the KTA, Christy, as settlor, would place 581,658.21 shares of her IBI stock (the Shares) into the Kyle Trust. On October 16, 2015, Kyle and Christy both signed the KTA, and Flagg forwarded it to True some time later.

On December 22, 2015, True emailed Flagg stating that there were further steps that needed to be completed to effectuate the transfer. Specifically, Christy and Kyle needed to sign, but not date, a "Shareholder Consent to Subchapter S Election" and a "Shareholder Subscription Agreement." Also, Christy needed to endorse her existing stock certificate to the Bank. True stated that once these steps were completed, the Bank would "(i) sign and date the documents requiring its signature, (ii) cancel the endorsed Certificate, and (iii) issue the new Certificates in the name of the respective Trusts." Kyle and Christy signed their copies of the Shareholder Consent and Shareholder Subscription Agreement and provided them to the Bank. However, Christy could not locate her IBI stock certificate. To resolve that issue, the Bank informed the couple that Christy would have to execute an "Affidavit of Facts Regarding Lost Share Certificates." Christy did so and Kyle dropped the affidavit

off at one of the Bank's branch locations on February 16, 2016. On February 18, Flagg emailed True stating that the affidavit had been dropped off and asked True to "please let me know what else needs to be done to accomplish the share transfer as soon as possible." True responded the same day, saying, "Brett: The bank notified me yesterday and I will complete the transfers next week."

The transfer was never completed. Christy testified that in March 2016, Gary Tipton, the Bank's president, called her to discuss the transfer. Christy recounted the details of the conversation in her deposition:

> Gary Tipton told me that Kyle was attempting to transfer half of the Inwood Bank stock to a trust in his name and his name alone. And Gary told me that it was his fiduciary duty to let me know the effect that that was going to have on me and that I was gifting or giving Kyle half of my Inwood Bank stock and I could never give it back.
>
> And he said that there are still two things that have to be signed before it's a done deal. One thing I have to sign, one thing Inwood had to sign. And before it happened he wanted to talk to me personally and be sure that I understood the economic consequences of this.
>
> I told Gary that I didn't think that Kyle understood that that's what was going on that he was -- he was trying to help our family and I had no idea that he was trying to take half of my Inwood Bank shares and transfer in to his name and his name alone.
>
> And that Kyle had told me that this was to protect us from taxes and like it should have been done ten years ago but it's okay if we still do it now and taxes and if we both die in a plane crash, an estate and asset and it just had to be done.
>
> And Gary said, no it doesn't and that it doesn't matter how many creditors and how many taxes it wouldn't be near -- it wouldn't cost me nearly as much as it would giving him my stock.

> And Gary told me he had spoken to my father before he called me and that my father said Gary, I want you to call Christy and tell her what's going on here and so he did.
>
> And I told Gary that I had no intention whatsoever to give Kyle half of my Inwood Bank stock and that I had no idea that's what Kyle was doing and that I trusted Kyle and I didn't think that's what he realized that's what he was doing.
>
> I later found out he did realize it but at the time, I trusted my husband so I assumed he was doing the right thing by us but he was doing the right by himself.
>
> So I told Gary don't sign your thing, I won't sign my thing and it's not going to be done deal and then I called my dad and my dad told me the same stuff and I promised my dad I would never transfer half or any of my Inwood Bank stock to Kyle.

Christy did not endorse her replacement certificate and the Bank did not countersign the Shareholder Consent and Shareholder Subscription Agreement.

On January 30, 2020, Kyle sued Inwood Bank for breach of contract, fraud, negligent misrepresentation, conversion,[3] and declaratory judgment that the Shares are property of the Kyle Trust. Christy intervened in the lawsuit, asserting her interest in the Shares and denying Kyle's claim that the Shares were rightfully the property of the Kyle Trust. Kyle then asserted various claims against Christy and, after her deposition, filed his second amended petition, adding a claim for tortious interference against the Bank. The Bank and Christy filed separate motions for summary judgment on each of Kyle's claims. The trial court granted both motions, ordered that Kyle take nothing on his claims, and entered final judgment on Inwood

[3] The conversion claim is unrelated to the Shares. It is based on Kyle's assertion that the Bank refused to let him cash checks against the couple's joint checking account.

Bank's counterclaims for declaratory relief and interpleader. After the judgment, Kyle settled his claims against Christy. Kyle appealed the judgment only as to his claims against Inwood Bank for fraud, negligent misrepresentation, tortious interference, and conversion.

DISCUSSION

Kyle raises four issues on appeal: (1) there was some evidence that the KTA was ambiguous, allowing the trial court to consider parol evidence in support of Kyle's claims for fraud and tortious interference; (2) the existence of the KTA renders "Article 8 of the Texas Business & Commerce Code" inapplicable; (3) there was some evidence that agents of Inwood Bank made false statements, precluding summary judgment on Kyle's tort claims; and (4) there was some evidence supporting Kyle's claim that Inwood Bank converted the funds in Kyle and Christy's joint checking account.

I. STANDARD OF REVIEW AND SUMMARY JUDGMENT STANDARD

We review summary judgments de novo. *De La Cruz v. Kailer*, 526 S.W.3d 588, 592 (Tex. App.—Dallas 2017, pet. denied). A defendant is entitled to traditional summary judgment if it conclusively disproves at least one essential element of the plaintiff's claim or conclusively establishes every element of an affirmative defense. *Ward v. Stanford*, 443 S.W.3d 334, 342 (Tex. App.—Dallas 2014, pet. denied). Under the traditional summary-judgment standard, the movant has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a

matter of law. *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 213–14 (Tex. App.—Dallas 2015, no pet.) (citing TEX. R. CIV. P. 166a). In deciding whether there is a disputed fact issue precluding summary judgment, we take evidence favorable to the non-movant as true. *Id.* at 214. We indulge every reasonable inference, and resolve any doubts, in the non-movant's favor. *Id.* at 214. Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *Id.* A genuine issue of material fact exists if the non-movant produces more than a scintilla of probative evidence regarding the challenged element. *Id.* When the trial court does not state the grounds upon which it granted the summary judgment, the nonmovant must show on appeal that each independent ground alleged in the motion is insufficient to support the judgment. *Boone R. Enters., Inc. v. Fox Television Stations, Inc.*, 189 S.W.3d 795, 796 (Tex. App.—Dallas 2005, no pet.).

II. ANALYSIS

A. Ambiguity

Kyle states his first issue as follows: "Did the conflicting terms of 'upon approval' in Schedule A [to the KTA] create any fact issues or at the very least ambiguity sufficient to allow parole [*sic*] evidence in support of [Kyle's] fraud and tortious interference claims?" Before we address the merits of Kyle's first issue, we first must determine whether the construction of the KTA is currently in dispute.

We conclude it is not. In the trial court, Kyle raised the issue of ambiguity in his consolidated response to Christy's and Inwood Bank's motions for summary judgment. In those motions, Christy and the Bank argued that there had been no effective stock transfer because a condition precedent to the transfer—namely, the Bank's approval—had not occurred before Christy's revocation. Kyle responded that the KTA was ambiguous and that Christy intent to transfer the Shares was supported by parol evidence. The trial court granted both Christy's and Inwood Bank's motions for summary judgment, in effect ruling that the Shares remained Christy's property.[4] On appeal, Kyle does not challenge the trial court's grant of summary judgment in Christy's favor. Instead, Kyle challenges only the trial court's grant of summary judgment on his claims against Inwood Bank relative to the Shares. As we explain below, Inwood Bank moved for summary judgment on these tort claims on the ground that it made no false statements, and the trial court was not required to determine the enforceability of the KTA in order to dispose of Kyle's

[4] Christy successfully argued to defeat Kyle's request for a declaratory-judgment finding that "the stock is owned by [Kyle] and has been owned by [Kyle] since February 1, 2016" on the grounds that there (1) was no breach of contract with respect to the Shares; (2) was no completed gift of the Shares as Christy had no present intent to give Kyle the Shares and did not relinquish dominion and control over the Shares; and (3) had been no constructive transfer. Christy also sought summary judgment on Kyle's fraud, breach of fiduciary duty, negligent misrepresentation, conversion and conspiracy claims. Kyle's failure to challenge summary judgment as to Christy's claims waives any challenges associated with her ownership of the Shares.

tort claims against Inwood Bank. Therefore, it is immaterial whether the evidence supporting Kyle's tort claims against the Bank was parol with respect to the KTA.[5]

We overrule Kyle's first issue as moot.

B. Indorsement and Delivery

In his second issue, Kyle contends that "the existence of the [KTA] ma[de] Article 8 of the Business & Commerce Code inapplicable." This issue suffers the same fate as Kyle's first issue.

In the trial court, Inwood Bank moved for summary judgment on Kyle's declaratory-judgment claim that Christy transferred the Shares to the Kyle Trust. Inwood Bank argued that, under the UCC, Kyle was neither a "purchaser" nor a person who "acquire[d] a security entitlement" because the elements of indorsement and delivery were not met. *See* TEX. BUS. & COM. CODE ANN. §§ 8.104, .107, .301, .501. Kyle responded that the elements of indorsement and delivery were not required for the transfer of ownership of corporate stock. *See, e.g.*, *Dutcher v. Dutcher-Phipps Crane & Rigging, Inc.*, 510 S.W.3d 592, 598 (Tex. App.—El Paso 2016, pet. denied) ("Article 8 [of the UCC] is not the exclusive mechanism for

[5] Ordinarily, an unambiguous contract will be enforced as written. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam). Courts will not consider parol or other extrinsic evidence "for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Id.* "Only where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument.'" *Id.* at 450–51 (quoting *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam)). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Id.* at 451 (quoting *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)). Thus, the rule about parol evidence applies on appeal only to the extent that the construction of the KTA is currently in dispute.

resolving disputes involving the ownership and transfer of securities. As established above, Texas common law permits courts to consider the intent of the parties in determining what, if any, securities were transferred.").

Kyle presses these arguments on appeal, but again fails to connect his arguments to a reversal of any portion of the trial court's judgment relative to the Shares. The applicability of the UCC provisions cited above was material to Kyle's declaratory-judgment and breach-of-contract claims against Christy, but not his tort claims against Inwood Bank. As the claims against Christy are not before us, and her ownership was established on summary judgment, we need not resolve this issue.

We overrule Kyle's second issue as moot.

C. Kyle's Tort Claims

In his third issue, Kyle contends that the trial court erred in granting summary judgment on his claims against Inwood Bank for fraud, negligent misrepresentation, and tortious interference with contract, asserting: "Did Roy True's inaccurate statements to Ms. Fagin constitute sufficient evidence of tortious interference and further support of a fact issue related to [Kyle]'s fraud and negligent entrustment [*sic*] claims?" We address each cause of action in turn.

1. Fraud

In Kyle's second amended petition, he asserted a claim for fraud against Inwood Bank on the theory that the Bank "made affirmative representations of fact to [Kyle] that [Inwood Bank] approved the transfer and that the stock certificates

would be issued" to the Kyle Trust. This theory was based on Roy True's February 18, 2016, email to Brett Flagg stating that "[t]he bank notified me yesterday and I will complete the transfers next week." Inwood Bank moved for summary judgment on this claim on the ground that there was no evidence that this statement was false when True made it. Specifically, the Bank argued that there was no evidence that True knew that Christy would later decide to repudiate the KTA and refuse to submit her certificate for cancellation, a requirement that True had communicated to Flagg two months prior.

The elements of fraud are (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff should act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff thereby suffered injury. *See Baleares Link Exp., S.L. v. GE Engine Servs.-Dallas, LP*, 335 S.W.3d 833, 839 (Tex. App.—Dallas 2011, no pet.). To prove the knowledge element of fraud, the plaintiff must show that the defendant's representation "was either known to be false when made or was asserted without knowledge of its truth." *Tex. Champps Americana, Inc. v. Comerica Bank*, 643 S.W.3d 738, 750 (Tex. App.—Dallas 2022, pet. denied). "If the alleged representation involves a promise to do an act in the future, the plaintiff must also prove that, at the time the defendant made the promise, the defendant had no intent

of performing the act." *K. Griff Investigations, Inc. v. Cronin*, 633 S.W.3d 81, 92 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

Here, there was no evidence that True knew, at the time he told Flagg that he would "complete the transfers next week," that Christy would repudiate the KTA. Indeed, as Kyle's statement of facts shows, at the time of True's February 18, 2016, email to Flagg, Christy still intended to transfer the Shares to the Kyle Trust. It was not until the following month, when Christy spoke with Gary Tipton, that she formed an intent to repudiate the KTA. Accordingly, there was no evidence that, when True made the promise to effectuate the transfer, he knew his statement was false or "had no intent of performing the act." *See id.* at 92.

Kyle also argues that Inwood Bank made false statements in the shareholder consent agreement and shareholder subscription agreement to the effect that the Kyle Trust "became" a shareholder of IBI and "receiv[ed]" the Shares. We need not address these arguments as Kyle's theory of fraud in his second amended petition identified only True's representations in his February 18 email to Flagg.[6] Inwood Bank moved for summary judgment on that theory of Kyle's fraud claim and was not required to negate Kyle's unpleaded theories of fraud based on allegedly false statements in the agreements. *See Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018) (upholding reversal of the judgment for the plaintiff on a defamation claim because

[6] Although Kyle generically asserted that Inwood Bank made affirmative representation of fact, other than the identified documents and Kyle's interpretation as to their meaning and effect, no specific representation is attributed to Inwood Bank other than True's email.

the judgment was based on a factual theory that did not conform to the factual theory pleaded in the petition); *see also Pelletier v. Victoria Air Conditioning, Ltd.*, No. 13-20-00011-CV, 2022 WL 52810, at *9 (Tex. App.—Corpus Christi–Edinburg Jan. 6, 2022, no pet.) (collecting cases).

We conclude the trial court did not err in granting summary judgment on Kyle's claim for fraud.

2. Negligent Misrepresentation

In Kyle's second amended petition, he asserted a claim for negligent misrepresentation on the theory that Inwood Bank "supplied [Kyle] with false information and/or negligently failed to fully and adequately inform [Kyle] of material facts when they were duty-bound to do so." In its amended motion for summary judgment, Inwood Bank consolidated its summary-judgment grounds as to Kyle's claims for fraud and negligent misrepresentation. Inwood Bank moved for summary judgment on this claim in the same section of its motion in which it addressed Kyle's fraud claim, averring that there was no evidence True's statements in the February 18, 2016, email were false when he made them and the email "was, therefore, *not* a misrepresentation of any kind - - and, thus, was neither a fraudulent nor a negligent misrepresentation."

The elements of a negligent misrepresentation cause of action are: (1) the representation is made by a defendant in the course of his 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. *AKB Hendrick, LP v. Musgrave Enters., Inc.*, 380 S.W.3d 221, 237 (Tex. App.—Dallas 2012, no pet.). "Significantly, the sort of 'false information' contemplated in a negligent misrepresentation case is a misstatement of existing fact." *Id.* (quoting *Airborne Freight Corp., Inc. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 294 (Tex. App.—El Paso 1992, writ denied)). A promise to do or refrain from doing an act in the future is not actionable because it is not a misrepresentation of an existing fact. *See id.* at 237–38 (citing *Allied Vista Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (false information contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a promise of future conduct); and *Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (promise to do or refrain from doing an act in the future is not actionable because it is not a misrepresentation of an existing fact)).

Like his fraud claim, Kyle's negligent misrepresentation claim fails because there is no evidence that True's statements in the February 18, 2016, email were false when he made them. According to Kyle's own evidence, Christy still intended to go forward with the transaction at the time of the February 18 email. Additionally, True's statement that he would "complete the transfers next week" was not a false

statement, but rather a promise to do an act in the future, which is not actionable as a negligent misrepresentation. *See id.* We also reject Kyle's argument about Inwood Bank's negligent nondisclosure of the necessary documents needed to complete the transfer. The record reflects True had already disclosed what documents were required to effectuate the transfer, one of which was Christy's stock certificate bearing her endorsement, and True's email of February 18 did not state otherwise.

We conclude the trial court did not err in granting summary judgment on Kyle's claim for negligent misrepresentation.

3. Tortious Interference

As to his third cause of action, Kyle argues that the trial court erred in granting summary judgment, averring that there are questions of fact as to the truthfulness of Mr. Tipton's representations to Ms. Fagin and Inwood Bank's tortious interference with a contract.[7] Kyle added his claim for tortious interference to his second amended petition, filed two days after Christy's deposition, in which Christy testified that she revoked her consent to the transfer based on her conversation with Gary Tipton, the Bank's president. Thus, Kyle alleged that the Bank "intentionally interfered with [the KTA] by working with [Christy's] father Terry Worrell to convince [Christy] to revoke her transfer of the [Shares] to the [Kyle Trust]." Kyle

[7] The elements of a claim for tortious interference with a contract are: (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) which proximately caused the plaintiff's injury, and (4) caused actual damages or loss. *Prudential Ins. Co. of Am. v. Fin. Rev. Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

alleged that the "Defendants were motivated by their own self-interest when interfering with the contract" and "would gain financially if they were able to satisfy the request of one of its main shareholders and bank customers Terry Worrell."

The Bank moved for summary judgment on the ground that Tipton's statements were true, arguing that what Christy learned in March of 2016 was "accurate information," and such "undisputed material facts constitute an absolute total defense to a claim for tortious interference." The Bank relied on *Robles v. Consol. Graphics, Inc.*, 965 S.W.2d 552, 561 (Tex. App.—Houston [14th Dist.] 1997, pet. denied), in which our sister court adopted § 772 of the Restatement (Second) of Torts as a defense to a claim for tortious interference with prospective business relationships. *See also Tarleton State Univ. v. Rosiere*, 867 S.W.2d 948, 953 (Tex. App.—Eastland 1993, writ dism'd by agr.) (adopting truth as defense for tortious interference with prospective business relationships).

Robles and *Tarleton State* are inapposite because they involve truth as an affirmative defense to tortious interference with *prospective* business relations, not tortious interference with an existing contract. *See Robles*, 965 S.W.2d at 561, *Tarleton State*, 867 S.W.2d at 953. Inwood Bank offers no authority, nor have we found any, in which a Texas court recognized truth as a stand-alone affirmative defense to tortious interference with an existing contract, the claim asserted by Kyle in this case. In one reported case, the Fourteenth Court of Appeals extended *Robles* to a claim for tortious interference with an existing contract. *Roof Sys., Inc. v. Johns*

Manville Corp., 130 S.W.3d 430, 435 (Tex. App.—Houston [14th Dist.] 2004, no pet.). However, the court considered truth not as a stand-alone defense, but rather an alternative means of proving the affirmative defense of justification. *See id.* at 435–36. A similar issue was before the supreme court in *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017). There, the Court was asked to adopt truth, again not as an affirmative defense, but as an alternative means of proving the existing affirmative defense of privilege. *See Id.* at 700. Because the Court disposed of the case on other grounds, it reserved the issue for a future case. *Id.* We must therefore consider whether we have the authority to be the first appellate court in Texas to recognize truth as a stand-alone affirmative defense to tortious interference with a contract.[8]

We conclude that we do not. The power to change Texas common law rests with the Legislature and Supreme Court of Texas. *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002) ("It is not the function of a court of appeals to abrogate or modify established precedent. That function lies solely with this Court." (internal citation omitted)); *Jackson Walker, LLP v. Kinsel*, 518 S.W.3d 1, 10 (Tex. App.—Amarillo 2015) (declining to recognize new cause of action because doing so would be "tantamount to creating a new law," a power constitutionally delegated to the Legislature); *see also Archer v. Anderson*, 556

[8] Unlike *Hansen*, we cannot dispose of this issue on other grounds because the truth defense was the sole basis on which the bank sought summary judgment on Kyle's tortious-interference claim.

S.W.3d 228, 231 (Tex. 2018) (quoting favorably appellate court holding that "neither the appellate courts nor the trial courts should recognize [a cause of action] 'in the first instance'"). We have in the past refused to recognize new causes of action that were not yet recognized by the supreme court. *See, e.g.*, *Simmons Airlines v. Lagrotte*, 50 S.W.3d 748, 752 (Tex. App.—Dallas 2001, pet. denied) ("It is not for an intermediate appellate court to undertake to enlarge or extend the grounds for wrongful discharge under the employment-at-will doctrine. If such an exception is to be created, the Texas Supreme Court should do it."). We have made similar rulings about affirmative defenses. *See, e.g.*, *Guandolo v. Stanek*, No. 05-19-01550-CV, 2022 WL 842748, at *2 (Tex. App.—Dallas Mar. 22, 2022, no pet.) (mem. op.) (concluding the trial court did not err in granting summary judgment on an unrecognized affirmative defense).

Before *Anderson* was appealed to the supreme court, our sister court in Austin declined to recognize a cause of action for tortious interference with an inheritance due in part to the consequences of recognizing such a tort. *See Anderson v. Archer*, 490 S.W.3d 175, 179 (Tex. App.—Austin 2016), *aff'd*, 556 S.W.3d 228 (Tex. 2018). Ultimately, the court concluded that recognizing the tort would "raise a litany of questions regarding the contours and scope of the cause of action—questions that should properly be resolved by the Legislature or Texas Supreme Court first." *Id.* In *Kinsel*, our sister court in Amarillo reached the same conclusion and declined to follow prior decisions that had recognized the new cause of action:

> [N]either this court, the courts in *Valdez*, *Clark*, and *Russell*[9], nor the trial court below can legitimately recognize, in the first instance, a cause of action for tortiously interfering with one's inheritance. Doing so lies within the province of the Texas Supreme Court or the Texas Legislature. And, because the trial court failed to heed that principle, it erred.

Kinsel, 518 S.W.3d at 10.

We agree with our sister courts' reasoning. As with affirmative claims, recognizing an affirmative defense that the supreme court has expressly declined to adopt raises a "litany of questions regarding the contours and scope" of the defense that we are ill-suited to answer.[10] We conclude that neither this court nor the trial court below can legitimately recognize, in the first instance, an affirmative defense of truth to a claim for tortious interference with an existing contract.[11]

For these reasons, we reverse the trial court's summary judgment as to Kyle's claim for tortious interference with a contract.

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[9] *In re Estate of Valdez*, 406 S.W.3d 228, 233 (Tex. App.—San Antonio 2013, pet. denied), overruled by *Archer*, 556 S.W.3d at 239; *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887-CV, 2010 WL 2306418, at *5 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.), abrogated by *Archer*, 556 S.W.3d at 239; *In re Estate of Russell*, 311 S.W.3d 528, 535 (Tex. App.—El Paso 2009, no pet.), overruled by *Archer*, 556 S.W.3d at 239.

[10] For example, the parties do not address whether truth a stand-alone affirmative defense or an alternative means of proving the existing defenses of justification or privilege. *Cf. Robles*, 965 S.W.2d at 561 (truth is part of the justification defense); *Tarleton State*, 867 S.W.2d at 953 (same); *Hansen*, 525 S.W.3d at 700 (considering whether truth is part of the privilege defense); *see Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 857 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (listing the elements of the justification and privilege defenses). Also, the parties appear to disagree about (1) whether all or merely some of the statements must be true in order for the defense to apply, (2) whether there must be evidence that the breaching party relied exclusively on the true portions of the statements, and (3) whether the statements that induced the breach must be material. These questions pertain to the "contours and scope" of the truth defense and should be answered by the supreme court in the first instance. *See Anderson*, 490 S.W.3d at 179.

[11] Even if we were inclined to recognize truth as a stand-alone affirmative defense or as an alternative means of proving the affirmative defense of justification, we could not do so in this case because the Bank failed to plead either defense. *Cf.* TEX. R. CIV. P. 94 (providing that affirmative defenses must be pleaded).

D. Conversion

In his fourth issue, Kyle contends that the trial court erred in granting summary judgment on his conversion claim against Inwood Bank, questioning whether a bank can refuse to allow withdrawals or the cashing of checks without a court order. "To establish a claim for conversion of personal property, a plaintiff must prove that: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property." *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.). Kyle's conversion claim is based on the Bank's refusal to cash two checks made out to Kyle against Kyle and Christy's joint checking account, despite the Bank continuing to allow Christy access to the funds.

Inwood Bank moved for summary judgment solely on the ground that Kyle's claim for conversion fails as a matter of law,[12] relying on our sister court's opinion in *Hodge v. N. Tr. Bank of Tex., N.A.*, 54 S.W.3d 518, 522 (Tex. App.—Eastland

[12] Although Inwood Bank stated in its motion that it sought summary judgment on both traditional and no-evidence grounds, it did not identify any element of Kyle's conversion claim for which there was no evidence. *Cf.* TEX. R. CIV. P. 166a(i) ("The [no-evidence] motion must state the elements as to which there is no evidence."). The motion therefore could not support the trial court's grant of summary judgment as to the conversion claim on no-evidence grounds. *See Coleman v. Prospere*, 510 S.W.3d 516, 519 (Tex. App.—Dallas 2014, no pet.) ("A no-evidence motion that only generally challenges the sufficiency of the non-movant's case and fails to state the specific elements that the movant contends lack supporting evidence is fundamentally defective and cannot support summary judgment as a matter of law.").

2001, pet. denied). In *Hodge*, the court considered whether the statute of limitations had lapsed on the plaintiff's conversion claim as to funds deposited with the defendant bank. *Id.* at 522–23. As a threshold issue, the court examined the difference between general and special deposits:

> Texas law divides bank deposits into "general deposits" and "special deposits." Ordinarily, a general deposit of money with a bank creates a creditor-debtor relationship between the depositor and the Bank. Title to the money passes to the Bank, subject to the depositor's demand for payment. A "special deposit" creates a bailor-bailee relationship whereby the Bank keeps or transmits identical property or funds entrusted to it. The Bank receives no title to money deposited for a special purpose but instead becomes responsible for the safekeeping, return, or disbursement of the money in question.
>
> The designation of a deposit has great significance in an attempted action for conversion. Because a general deposit becomes the property of the Bank, the depositor has no action for conversion when the Bank wrongfully pays out the deposit. A special deposit, on the other hand, remains the property of the depositor and is subject to an action for conversion.

Id. at 522 (internal citations omitted). Inwood Bank argued that it could not be held liable for conversion because "a general deposit becomes the property of the Bank, [and] the depositor has no action for conversion when the Bank wrongfully pays out a deposit." *See id.*

The trial court granted summary judgment on Kyle's conversion claim without stating its basis. On appeal, Kyle argues that there was evidence for each element of his conversion claim but does not address whether the funds were in a general or special deposit account. An appellant must attack every ground relied on for which summary judgment could have been granted in order to obtain a reversal.

Trevino & Associates Mech., L.P. v. Frost Nat. Bank, 400 S.W.3d 139, 144 (Tex. App.—Dallas 2013, no pet.). If an appellant fails to challenge one of the grounds for summary judgment, an appellate court may affirm the summary judgment on that ground alone. *Id.* Because Kyle did not address the status of the account in which the funds were held, the sole ground raised in the trial court, we cannot conclude that the trial court erred in granting summary judgment on his conversion claim.

We overrule Kyle's fourth issue.

CONCLUSION

We conclude the trial court erred in granting summary judgment on Kyle's claim for tortious interference with contract. In all other respects, we affirm the trial court's judgment. We remand this cause to the trial court for further proceedings consistent with this opinion.

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

D. KYLE FAGIN, INDIVIDUALLY AND AS TRUSTEE AND BENEFICIARY OF THE D. KYLE FAGIN QUALIFIED SUBCHAPTER S TRUST, Appellant

No. 05-21-00878-CV V.

INWOOD NATIONAL BANK AND INWOOD BANCSHARES, INC., AND CHRISTY FAGIN, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-01688. Opinion delivered by Justice Goldstein. Justices Pedersen, III and Smith participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment granting summary judgment on appellant's claim for tortious interference with contract. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant D. KYLE FAGIN, INDIVIDUALLY AND AS TRUSTEE AND BENEFICIARY OF THE D. KYLE FAGIN QUALIFIED SUBCHAPTER S TRUST recover his costs of this appeal from appellee INWOOD NATIONAL BANK AND INWOOD BANCSHARES, INC.

Judgment entered this 9th day of October, 2023.