

NO. 09-0093

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

SONDRA L. GROHMAN,
formerly known as SONDRA GROHMAN-KAHLIG,

Petitioner/Cross-Respondent,

vs.

CLARENCE J. KAHLIG, ET AL.,

Respondents/Cross-Petitioners.

*On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas*

RESPONDENTS' RESPONSE TO SONDRA'S BRIEF ON THE MERITS

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STATEMENT OF JURISDICTION

As explained in Respondents/Cross-Petitioners’ merits brief, the Court has appellate jurisdiction over the claims of all parties under TEX. GOV’T CODE § 22.001(a)(6) (Vernon 2004) because the court of appeals’ misinterpretation of the common term “dispose”—which is used in countless security agreements throughout Texas and the United States—injects uncertainty into numerous commercial transactions. *See* Resp. Br. viii.

Respondents disagree with Sondra’s assertion that this Court has appellate jurisdiction under TEX. GOV’T CODE ANN. § 22.001(a)(2) (Vernon 2004), however. The court of appeals’ opinion simply does not conflict with any of the cases that Sondra cites.

As explained in Part I.B, *infra*,¹ the “render before remand” rule trumpeted by Sondra determines the *order* in which a reviewing court considers a party’s arguments when some require rendition and some require remand, such as when an appellant argues that the evidence at trial was both legally and factually insufficient to support the jury’s verdict. *See, e.g., Nat’l Union Fire Ins. Co. v. Macias*, 864 S.W.2d 85, 87 (Tex. App.—El Paso 1993, writ denied) (“Where an appellant raises both legal and factual insufficiency points of error, we consider legal sufficiency questions before reaching issues of factual sufficiency because we must consider points calling for rendition of a judgment before those requiring remand.”). Here, by contrast, Sondra challenges the court of appeals’ actual disposition of the appeal, arguing that the court should have

¹ All internal cross references are to the argument section of this brief.

rendered some kind of judgment on damages rather than remand for a new trial on damages.

Sondra's conclusory assertion of a conflict between the court of appeals' opinion and this Court's decisions in *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965), and *Brown v. Goldstein*, 685 S.W.2d 640 (Tex. 1985), is likewise flawed. There is no evidence to support any of Sondra's tort claims. *See infra* Part II.B. But even if there were, the court of appeals affirmed the trial court's failure to submit some of her claims on duty grounds (fraud by nondisclosure) or waiver (negligence and gross negligence), not based on any kind of evidentiary review. *See Grohman-Kahlig v. Kahlig*, No. 04-07-00468-CV, 2008 WL 4735591, at *6-7 (Tex. App.—San Antonio Oct. 29, 2008, pet. filed). *Garza* and *Alviar* are therefore completely inapposite. So, too, is *Earthman's Inc. v. Earthman*, 526 S.W.2d 192 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See infra* Part II.C.

ISSUES PRESENTED

1. Whether, after erroneously holding that Clarence breached the Security Agreement as a matter of law, the court of appeals properly remanded for a new trial on damages.
2. Whether the court of appeals properly affirmed the trial court's refusal to submit Sondra's tort claims to the jury.

STATEMENT OF FACTS

The facts of this case are fully set forth in Respondents/Cross-Petitioners' Brief on the Merits. *See* Resp. Br. 1-5. Respondents therefore include only an abbreviated statement of the facts here to correct misstatements and omissions in Sondra's Brief on the Merits. *See* TEX. R. APP. P. 55.3(b).

I. The uncontroverted evidence shows that Clarence refused to convert the Companies absent a favorable private letter ruling from the IRS, which he did not receive until 2003.

Sondra points out that Clarence sought the advice of an attorney in 1999 regarding the possibility of converting the Companies from corporations to limited partnerships and suggests that he purposefully “delayed” the conversion “until after the divorce” in order to defraud her. Pet. Br. 1. But as the court of appeals recognized, “the uncontroverted evidence established that Kahlig refused to pursue a conversion absent a private letter ruling from the IRS that the conversion would not adversely affect the accounting method relating to the dealership’s inventory,” and “the IRS refused to provide such a . . . ruling . . . before the parties’ [April 2001] divorce was finalized.” *Grohman-Kahlig*, 2008 WL 4735591, at *6.

Indeed, Clarence first requested a private letter ruling in September 1999, and the IRS responded in January 2000 that it could not fulfill his request without further study. 5 RR 187-88; 6 RR 159. Clarence eventually received a favorable private letter ruling in March 2003—two years after the divorce—and converted the companies shortly thereafter. 4 RR 85; 5 RR 189-90; *see also* 6 RR 180.

II. Upon learning of the conversion, Sondra initiates yet more litigation against Clarence.

Sondra learned of the conversion in 2005 in connection with her motion to disqualify Clarence's long-time lawyers from representing him in one of the numerous lawsuits Sondra filed against Clarence after the parties' divorce. 5 RR 123-24. In accordance with paragraph 4 of the Security Agreement,² Sondra requested that Clarence sign a UCC financing statement describing the Collateral, Px 6-7,³ which Clarence did. Px 8. But Sondra never filed the statement with the secretary of state. Px 8-9. Instead, Sondra sent Clarence a letter alleging that he was in default of the Security Agreement and threatening to accelerate the then-remaining \$7.5 million balance of the loan if he did not reconvert the Companies to corporations within 10 days. Px 7, 9.

A mere 18 days later, Sondra filed suit against Clarence. 1 CR 1. She alleged breach of the Security Agreement and sought accelerated payment of the balance of the loan, 15% interest on the balance from the date of conversion, pre- and post-judgment interest, and other damages. 1 CR 1-45. She later added declaratory judgment claims against the Companies and various tort claims against Clarence. 1 CR 264-76.

² Paragraph 4 provides in relevant part as follows:

No Financing Statement covering any Collateral or any proceeds thereof is on file in any public office. . . . From time to time, at the request of Secured Party, Borrower shall execute one or more Financing Statements and such other documents and do such other acts and things, all as the Secured Party may reasonably request to establish and maintain a valid security interest in the Collateral . . . to secure payment of the Obligations.

Px 2 ¶ 4.

³ All of plaintiff's exhibits are located in volume 8 of the reporter's record.

III. The jury did not resolve disputed factual issues upon which Sondra’s right of acceleration depends because it failed to find breach.

The parties proceeded to trial before a jury, where Clarence vigorously argued that (a) converting the Companies to limited partnerships was within his “full power and authority” under the Security Agreement, *see* Px 2 ¶ 8; Resp. Br. 2, 6-8; and that (b) even if the conversion resulted in some hypertechnical default of the Security Agreement, under Texas law, Sondra was not entitled to accelerate maturity of the Promissory Note because (i) she had not acted in good faith, and (ii) had waived any right of acceleration by failing to file the UCC financing statement that Clarence had signed upon her request. 3 RR 159-65; 5 RR 20; 7 RR 64.

After the close of the evidence, the trial court submitted a charge asking the jury to determine in Question 1 whether Clarence “fail[ed] to comply with the terms of the parties’ Promissory Note, Security Agreement, or Escrow Agreement by converting the corporations to partnerships[.]” 2 CR 597. The charge also included several questions concerning Sondra’s entitlement to damages that were conditioned on the jury’s answering “yes” to Question 1, including Question 4, which asked whether “Sondra Grohman fail[ed] to exercise good faith in accelerating the Promissory Note,” and Question 5, which asked whether “Sondra Grohman waive[d] her right to accelerate the Promissory Note.” 2 CR 600-01. Although Sondra tendered questions relating to her fraud, negligence, and gross negligence claims, the trial court refused to submit them because there was no evidence to support one or more elements of each claim. 2 CR 540-51.

Because the jury failed to find that Clarence breached the Security Agreement, it never answered Questions 4 or 5 relating to Sondra's right of acceleration. *See* 2 CR 600-01. The trial court rendered judgment on the jury's verdict that Sondra take nothing. 2 CR 622-24.

IV. Despite erroneously holding that Clarence breached the Security Agreement as a matter of law, the court of appeals correctly remanded rather than render a judgment on damages and correctly affirmed the trial court's refusal to submit Sondra's tort claims.

The court of appeals affirmed in part and reversed in part. The court first held that Clarence breached the Security Agreement as a matter of law by converting the Companies from corporations to limited partnerships, *see Grohman-Kahlig*, 2008 WL 4735591, at *4-5, which holding is the subject of Respondents' own petition and related briefing. "Because the jury answered question number one in the negative" and "did not reach the issue of damages," the court remanded for a new trial on "[a]ll legal and equitable issues related to damages or other relief that may or may not be appropriate" in light of "the circumstances of the case, including the substitution of the collateral and the increased value of the entities." *Grohman-Kahlig*, 2008 WL 4735591, at *5.

The court further upheld the trial court's refusal to submit Sondra's tort claims to the jury, albeit on slightly different grounds than the trial court had given. *See id.* at *6. First addressing Sondra's fraud-by-nondisclosure claim, the court noted that "Grohman [had] not cite[d] any law to support her contention that Kahlig had a duty to disclose [his alleged plan to pursue a conversion of the Companies] under the circumstances" and that the court had likewise "found none." *Id.*

Regarding Sondra's claim that Clarence fraudulently misrepresented his intention to protect the Collateral, the court observed (i) that "[t]he only evidence Grohman reference[d] in her brief [was] the evidence that Kahlig contemplated the conversion in 1999 but did not disclose that information"; (ii) that "Grohman [had] not cite[d] to any evidence raising a fact issue with regard to whether Kahlig intended not to protect the collateral at the time he signed the Security Agreement"; (iii) that Clarence "testified that he always intended to protect the collateral"; and (iv) that "[m]any [other] witnesses testified that the collateral was protected because the security interest in the stock became a security interest in the partnership units." *Id.* Finally, the court summarily rejected Sondra's negligence arguments, commenting that the "sum total of [her] analysis on the failure to submit questions of negligence and gross negligence" was a single, conclusory sentence and that, accordingly, any such complaint had been waived through inadequate briefing. *Id.* at *7 (citing former TEX. R. APP. P. 38.1(h) (current version in TEX. R. APP. P. 38.1(i))).

Although Clarence paid off the remainder of the Note in December 2008, satisfying his obligations under it, *see* Resp. Br. 5 & n.6, Sondra still seeks millions of dollars in interest. Specifically, she claims that because Clarence's alleged default entitled her to accelerate repayment of the entire Note, she can recover interest on the amount owing at the time of acceleration at a rate of 15% per annum until the Note was paid off. 4 RR 32-33; *see* Px 1 ¶ 1 (providing for an interest rate of 7.5% per annum on Clarence's annual installment payments but a rate of 15% per annum on "[m]atured

unpaid principal and interest”). Sondra also seeks hundreds of thousands of dollars in attorney’s fees. *See* 2 CR 267, 274.

SUMMARY OF THE ARGUMENT

Sondra’s confusing brief does not accurately portray the procedural history of this case or the law applicable to her claims. Indeed, she essentially ignores the court of appeals’ reasoning with respect to the holdings of which she complains.

For example, notably absent from her brief is any discussion of two key factual issues upon which her right to acceleration damages depends—her good faith in accelerating repayment of the loan and whether her conduct after learning of the conversion resulted in a waiver of that right. These issues were hotly contested at trial, but the jury never reached them because it failed to find that Clarence breached the Security Agreement.

Sondra’s arguments (or lack thereof) with respect to her tort claims are equally perplexing. Sondra blatantly ignores the court of appeals’ express reasons for affirming the trial court’s judgment on these claims, including the court’s holding that Sondra’s inadequate briefing waived any challenge to the trial court’s refusal to submit her negligence and gross negligence claims. Instead, she asserts various irrelevant and nonsensical arguments that serve only to expose her claims’ fatal legal and factual flaws.

Ultimately, Sondra’s own treatment of her claims reflects their feebleness. The court of appeals’ decisions to remand for a new trial on damages and affirm the trial court’s refusal to submit Sondra’s tort claims were correct.

ARGUMENT

I. The court of appeals properly remanded for a new trial on damages.

It is difficult to determine from Sondra's brief how exactly she believes the court of appeals erred in remanding for consideration of "[a]ll legal and equitable issues relating to damages" after it concluded that Clarence breached the Security Agreement as a matter of law. *Grohman-Kahlig*, 2008 WL 4735591, at *5. But whatever Sondra's theory of error may be, it is wrong.

A. The court of appeals could not render a judgment on damages because the jury never determined key factual issues upon which Sondra's right of acceleration depends.

First, to the extent Sondra is arguing, as she did in her petition for review, that the court of appeals should have rendered a judgment that she recover damages (generally or in a particular amount) based on the acceleration provision in the Security Agreement, this argument ignores the existence of key factual issues that have not been resolved by a jury: (i) whether Sondra accelerated the Note in good faith, and (ii) whether Sondra waived any right of acceleration.

Under applicable provisions of the UCC, a creditor's acceleration of a debt must be made in good faith. *See* TEX. BUS. & COM. CODE ANN. § 1.304 (Vernon 2009) ("Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."); *id.* § 1.309 (creditor contractually entitled to accelerate indebtedness at will must "in good faith believe[] that the prospect of payment or

performance is impaired”).⁴ Additionally, as a matter of common law, Texas courts have long recognized that “acceleration is a harsh remedy [deserving] close scrutiny,” *Davis v. Fletcher*, 727 S.W.2d 29, 35 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.), and “required that acceleration be reasonable in light of the facts” of the case. *Am. Bank of Waco v. Waco Airmotive, Inc.*, 818 S.W.2d 163, 172 (Tex. App.—Waco 1991, writ denied). The reasonableness of a creditor’s acceleration “must be resolved by the trier of fact,” *id.*, and the jury may consider “[c]ircumstances which tend to show that the holder has exercised his option to accelerate, not for the purpose of protecting his debt or preserving the security therefor[e], but for the purpose of coercing the maker to pay the then balance remaining unpaid on the note.” *Davis*, 727 S.W.2d at 35-36.

Clarence presented substantial evidence that Sondra could not “in good faith [have] believe[d] that the prospect of” Clarence’s timely repayment of the Note was “impaired” by the conversion, TEX. BUS. & COM. CODE § 1.309, and that she had accelerated maturity of the Note “for the purpose of coercing [Clarence] to pay the [remaining] balance,” rather than to “preserv[e] [her] security.” *Davis*, 727 S.W.2d at 35-36. This evidence included:

- Sondra’s concession that Clarence had never missed or made an untimely payment, 5 RR 78-79;

⁴ See also *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1378 (9th Cir. 1979) (applying Texas law) (holding that former § 1.208 (current § 1.309) applied to clause allowing acceleration upon default at “the option of the Secured Party”); *Am. Bank of Waco v. Waco Airmotive, Inc.*, 818 S.W.2d 163, 172 (Tex. App.—Waco 1991, writ denied) (citing *Brown* with approval and applying former § 1.208 to clause allowing bank to accelerate note if specified events occurred).

- evidence that in 2003, Clarence took out a \$10 million life-insurance policy on himself to ensure that the Note would be repaid in the event of his death, 6 RR 155;
- the Companies' plans of conversion, pursuant to which shares of the Companies' stock were automatically converted to shares in the limited partnerships, Px 11 ¶ 4; Px 14 ¶ 4;
- testimony by Robert Gilliam, a CPA and independent auditor for the Companies, that the Companies increased in value after being converted to limited partnerships, that Sondra's security interest was unaffected by the conversion, and that Clarence had a history of paying his debts in a timely fashion, 5 RR 199;
- evidence that Sondra never filed the UCC financing statement defining the Collateral as partnership units, Px 8-9; and
- the fact that Sondra initiated the present lawsuit shortly after having been sanctioned for filing a frivolous motion to disqualify Clarence's lawyers in another proceeding, 5 RR 122-23; 9 RR Dx 8.

A creditor may also waive her contractual right of acceleration under Texas law. *See, e.g., Dhanani Inv., Inc. v. Second Master Bilt Homes, Inc.*, 650 S.W.2d 220, 222 (Tex. App.—Fort Worth 1983, no writ) (holding that appellee had waived right to accelerate payment of a note and foreclose on collateral by accepting several late payments); *see also Guzman v. Ugly Duckling Care Sales of Tex., L.L.P.*, 63 S.W.3d 522, 528 (Tex. App.—San Antonio 2001, pet. denied) (noting that “any . . . contractual provision” may be waived). This issue, too, is “ordinarily a question of fact,” *Voorhies v. Frankel Family Trust*, No. 05-08-00475, 2009 WL 793847, at *5 (Tex. App.—Dallas Mar. 27, 2009, no pet.) (mem. op.), and Clarence presented evidence at trial that Sondra waived her contractual right of acceleration by failing to file the UCC financing statement that he had signed upon her request. 7 RR 64; Px 8-9.

The trial court therefore correctly determined that even if Clarence had breached the Security Agreement, Sondra would not be entitled to damages if she had “fail[ed] to exercise good faith in accelerating the Promissory Note” (Question 4) or if she had “waive[d] her right to accelerate the Promissory Note” (Question 5). 2 CR 600-01. Because the jury failed to find that Clarence breached the Security Agreement, however, it never reached these issues. 2 CR 597, 600-01. Thus, the absence of jury findings on these disputed issues prevented the court of appeals from rendering any judgment with respect to Sondra’s entitlement to acceleration damages.

B. The court of appeals did not err in failing to decide whether Sondra’s notices of default, intent to accelerate, and acceleration were legally effective.

Second, Sondra now appears to be arguing that even if the court of appeals properly remanded for a new trial on some issues pertaining to damages,⁵ the court should nonetheless have held, “declar[ed],”⁶ or “render[ed]”⁷ judgment that her notices of default, intent to accelerate, and acceleration were legally effective. *See* Pet. Br. 8, 15. She further suggests that the court of appeals’ failure to do so violates Texas Rule of Appellate Procedure 43.3 and “public policies such as the law of the case, judicial economy, and uniformity of decisions.” Pet. Br. 8.

As an initial matter, the effectiveness of Sondra’s default and acceleration notices is yet another issue that must be resolved by the trial court or a jury on remand

⁵ Sondra thrice suggests that her remedies on remand include foreclosing on the “substituted collateral.” *See* Pet. Br. 14-15. But since Clarence has paid off the Note, Sondra is not entitled to this relief. *See* Px 2 ¶ 5 (“At the time of full payment of the Note, all stock pledged will be released.”).

⁶ Pet. Br. 8.

⁷ Pet. Br. 15.

before Sondra is entitled to recover damages for Clarence’s alleged breach of the Security Agreement. *See Ogden v. Gibraltar Sav. Ass’n*, 640 S.W.2d 232, 233 (Tex. 1982) (“Where the holder of a promissory note has the option to accelerate maturity of the note upon the maker’s default, equity demands notice be given of the intent to exercise the option.”); 15 MIKE BAGGETT, TEXAS FORECLOSURE: LAW AND PRACTICE § 1.12 (“Even if the secured party has given all the required notices (or has succeeded in obtaining effective waivers of notice) and has complied with the contractual provisions in the deed of trust, security agreement, loan agreement, or note, the debtor still has some remaining defenses to acceleration.”). But even if this predicate issue were undisputed, none of the authorities cited by Sondra supports an argument that the court of appeals should even have addressed it.

Indeed, Sondra’s argument is contrary to the plain language of the rule on which she chiefly relies: “When reversing a trial court’s judgment, the court must render the judgment that the trial court should have rendered, *except when . . . a remand is necessary for further proceedings.*” TEX. R. APP. P. 43.3(a). Citing *Natural Gas Pipeline Co. v. Pool*, 124 S.W.3d 188, 201-02 (Tex. 2003), and *Bradley’s Electric, Inc. v. Cigna Lloyds Insurance Co.*, 995 S.W.2d 675, 677 (Tex. 1999), Sondra further contends that “a retrial of [various] issues” pertaining to damages would “undermine[] the public policy goal of judicial economy by creating needless expense and delay.” Pet. Br. 15. Despite Sondra’s argument to the contrary, *see id.*, *Pool* and *Bradley’s Electric* are classic Rule 43.3 cases that merely address the *order* in which an appellate court should take up points of error when some require rendition and some require remand. *See*

Bradley's Electric, 995 S.W.2d at 676-77 (where court of appeals reversed trial court's venue decision and remanded for a new trial without deciding insurer-appellant's argument that it did not have a duty to defend insured-appellee as a matter of law, "conclud[ing] that the court of appeals erred by not deciding the rendition issue before remand issue"); *Pool*, 124 S.W.3d at 201 (citing *Bradley's Electric* in support of Court's decision to resolve case on ground that lessees had established adverse possession of leasehold as a matter of law, which resulted in Court's rendering judgment in favor of lessees, rather than to consider whether leases terminated due to cessation of production, which may have required remand). Neither case supports Sondra's suggestion that an appellate court can simply choose to resolve disputed legal or factual issues that have not been addressed by a trial court or jury in the first instance because it would be more expeditious to do so. *Cf. Atl. Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 450-51 (Tex. App.—Texarkana 1993, writ denied) (where court of appeals concluded that "trial court erred in failing to award attorney's fees," rejecting appellant's argument that court of appeals should "render" judgment for amount of fees "in accordance with . . . evidence" that "conclusively establishe[d] the amount owed" because "[a]n appellate court should not usurp the factfinding function of the trial court").

The no-evidence cases cited by Sondra are similarly irrelevant. *See* Pet. Br. 11 ("This Court has ruled time and time again that a court of appeals must render where such relief is requested and where a legal sufficiency issue is sustained on an issue in which the appellant has the burden of proof at trial." (citing cases)). Each stands for the unremarkable proposition that where an appellate court sustains a no-evidence point

urged by a defendant-appellant, the court must render judgment in favor of the defendant *that the plaintiff take nothing*.⁸ The logical reason for this rule is that where a plaintiff cannot prevail as a matter of law, there is nothing for the trial court to do on remand. As explained above and in Respondents' merits brief, however, the procedural posture of this case is far different. Sondra's no-evidence cases are therefore simply inapplicable.

C. The court of appeals' remand language is not confusing or otherwise erroneous.

In an apparent last-ditch effort to find error with the court of appeals' decision to remand for consideration of “[a]ll legal and equitable issues relating to damages,” *Grohman-Kahlig*, 2008 WL 4735591, at *5, Sondra finally argues that the language the court uses is “confusing,” Pet. Br. 13, because it does not enumerate every potential subissue of damages to be decided on remand. *See id.* at 14-15. None of the cases cited by Sondra supports her contentions that such precision is required or that there is anything remarkable about the court of appeals' choice of words in this case. *See id.* at 14. Moreover, Sondra's argument is undermined by the numerous decisions by this Court remanding cases “for further proceedings consistent with [the Court's] opinion”—a

⁸ *See Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 270 (Tex. 2002) (after trial court rendered judgment on jury verdict for plaintiff Gil-Perez, and court of appeals affirmed, holding that “[b]ecause the evidence was legally insufficient to support the jury's finding that [defendant] Southwest Keys' negligence proximately caused Gil-Perez's injury,” the court would “reverse the court of appeals' judgment and render judgment that Gil-Perez take nothing”); *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 177 (Tex. 1986) (rendering judgment for defendant where there was no evidence to support jury's damages finding); *Nat'l Life & Accident Ins. Co.*, 438 S.W.2d 905, 909 (Tex. 1969) (holding that under predecessor to TRAP 43.3, court of appeals should have rendered judgment for defendant after determining that no evidence supported jury's verdict for plaintiff); *see also In re J.F.C.*, 96 S.W.3d 256, 266 & n.34 (citing *Southwest Key* and *Vista Chevrolet* for proposition that “[r]endition of judgment in favor of the parent” in a parental termination case “would generally be required if there is legally sufficient evidence” to support trial court's judgment terminating parent-child relationship).

command far less detailed than the one issued by the court of appeals here. *City of Houston v. Trail Enters., Inc.*, ---S.W.3d---, No. 08-0413, 2009 WL 3494980, at *2 (Tex. Oct. 30, 2009); *see also Akin, Gump, Strauss, Hauer & Feld v. Nat’l Dev. & Research Corp.*, ---S.W.3d---, 2009 WL 3494978, at *16 (Tex. Oct. 30, 2009) (“The claim for attorney’s fees and expenses is remanded to the court of appeals for further proceedings consistent with this opinion.”); *Barr v. City of Stinton*, 295 S.W.3d 287, 308 (Tex. 2009) (“Because the trial court did not reach the issues of appropriate injunctive relief, actual damages, and attorney’s fees, we remand the case to the trial court for further proceedings in accordance with this opinion.”).

In sum, although the court of appeals erred in holding that Clarence breached the Security Agreement as a matter of law, there is nothing wrong with the court’s decision or language remanding the case for a new trial on damages based on that holding. Sondra’s arguments to the contrary, whatever they may be, are meritless.

II. The court of appeals properly affirmed the trial court’s refusal to submit Sondra’s frivolous tort claims to the jury.

A. Sondra has waived any error with respect to the lower courts’ treatment of her tort claims.

Sondra’s wholesale failure to address the court of appeals’ express reasons for affirming the trial court’s judgment on her tort claims is equally perplexing and results in Sondra’s having waived any error with respect to the lower courts’ treatment of these claims.

For example, the court of appeals rejected Sondra’s main claim that Clarence committed fraud by failing to disclose his “plan[.]”⁹ to convert the Companies on the ground that Clarence “did not have a duty to disclose [any such] plan[.] to Grohman.” *Grohman-Kahlig*, 2008 WL 4735591, at *6. Yet Sondra’s only effort to address this holding in her merits brief is a conclusory assertion that “Kahlig . . . knew that Grohman was ignorant of [the conversion “plan”] and had no equal opportunity to discover [the] truth because Kahlig had consulted an attorney, James Hopson, who was working independently to effectuate the conversion for him.” Pet. Br. 18. Whether the particular circumstances of a case give rise to a duty to disclose “is a question of law.” *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). But as in the court of appeals, Sondra “does not cite any law to support her contention that Kahlig had a duty to disclose under the circumstances.” *Grohman-Kahlig*, 2008 WL 4735591, at *6; *see* Pet. Br. 18.

Sondra pays even less attention to the court of appeals’ rejection of her alternative claim that Clarence affirmatively “misrepresent[ed] that he would protect the collateral.” *Grohman-Kahlig*, 2008 WL 4735591, at *6. Sondra neither acknowledges the court of appeals’ holding that there is no evidence that Clarence “entered into the Security Agreement with[out] [any] intention of protecting the collateral”¹⁰ nor points to any evidence that Clarence in fact executed the Agreement with the requisite fraudulent intent. *See* Pet. Br. 17-20. She has therefore waived any error with respect to this claim

⁹ Pet. Br. 18.

¹⁰ *Grohman-Kahlig*, 2008 WL 4735591, at *6; *see also id.* (“Grohman does not cite to any evidence raising a fact issue with regard to whether Kahlig intended not to protect the collateral at the time he signed the Security Agreement.”).

too. *See* TEX. R. APP. P. 55.2(i); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999) (“Sipriano waived his argument . . . because he did not argue it in his brief on the merits.”).

It is the same story with respect to Sondra’s negligence and gross-negligence claims. Sondra completely ignores the court of appeals’ holding that she waived both of these claims by failing to adequately brief them,¹¹ instead devoting two of her two-and-one-half pages on negligence to a misleading discussion of when a party’s breach of contract may give rise to an independent tort claim. *See* Pet. Br. 20-21. Indeed, Sondra does not mention her now-abandoned gross-negligence claim at all (although she does inexplicably reference a never before asserted “[n]egligence per se” claim). *See id.* at 20-22.

Although the Court should grant both petitions to address the court of appeals’ dangerous holding that Clarence’s conversion of the Companies from corporations to limited partnerships effected a “disposition” of the Collateral under the parties’ standard Security Agreement, Sondra’s utter refusal to address the court of

¹¹ As the court of appeals observed, the “sum total of Grohman’s analysis [in her briefing below] on the failure to submit questions of negligence and gross negligence [was] the following sentence, ‘The court erred by not submitting fraud and therefore the lesser claims of negligence and gross negligence.’” *Grohman-Kahlig*, 2008 WL 4735591, at *7. The court’s determination that this lone, nonsensical sentence failed to comply with Texas Rule of Appellate Procedure 38.1(i) is amply supported by case law. *See, e.g., Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 799 (Tex. App.—Dallas 2008, pet. granted) (holding that argument raised in single sentence devoid of “discussion, legal authority, or analysis” was waived pursuant to former Rule 38.1(h)); *French v. Gilbert*, No. 01-07-00168-CV, 2008 WL 5003740, at *1 n.1 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, no pet.) (mem. op.) (argument waived under former Rule 38.1(h) where “[t]he Frenches provide[d] no citations to the record and no authorities in support of their single sentence of argument”).

appeals' analysis with respect to her tort claims entitles the Court to affirm the court of appeals' judgment on these claims without more.

B. Sondra's tort claims fail as a matter of law.

But even if the Court were to consider Sondra's fraud-by-nondisclosure and negligence claims—the only two tort claims that she arguably briefs—there is simply no evidence to support either one. First, both claims would require Sondra to show that she was harmed by Clarence's conversion of the Companies,¹² an evidentiary burden that she does not even attempt to meet.

Sondra asserts conclusorily that she “suffered injuries as a result of” Clarence's failure to disclose his alleged “plan” to convert the Companies but neither explains what those injuries are nor point to any evidence of their existence. *See* Pet. Br. 18; *see also id.* at 20-22 (negligence discussion). Not only is there none, but the evidence conclusively shows otherwise: (i) Clarence has paid off the Note in its entirety, *see* Resp. Br. 5; (ii) he never missed or made an untimely payment while the Note was still outstanding, 5 RR 78-79, 156, 199; (iii) Sondra's security interest attached to the partnership units upon the conversion and then reattached to the corporate stock when Clarence converted the Companies back to corporations in January 2007, 5 RR 199; 6 RR 164; and (iv) the conversion caused the Companies to *increase* in value, 5 RR 199. *See Grohman-Kahlig*, 2008 WL 4735591, at *6 (“Many witnesses testified that the collateral

¹² *See D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002) (negligence requires “a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach”); *Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001) (elements of fraud-by-nondisclosure include the plaintiff's “suffer[ing] injury as a result of acting without knowledge of the undisclosed fact”).

was protected because the security interest in the stock became a security interest in the partnership units.”).

Second, Sondra’s fraud-by-nondisclosure claim fails for the additional reason that there is no evidence (i) of the “material fact” that Clarence failed to disclose—his “*plan[]* to convert the corporate stock to partnership assets during the marriage and after his execution of the Note and Security Agreement”—or (ii) that Clarence failed to disclose this “plan” for the purpose of “induc[ing] [Sondra] into the settlement agreement.” Pet. Br. 18 (emphasis added). Sondra’s allegations are based entirely on Clarence’s pre-divorce consultation with attorney Hopson about the *possibility* of converting the corporations to limited partnerships, and Hopson’s testimony at trial that he *thinks* Clarence delayed the conversion until after the divorce in order to avoid “throw[ing] any additional issues into [an] already complex case”:

Now, this is totally, I mean – the answer is honestly no; but what I think I remember, but I am not certain that I remember this – I don’t remember when the domestic relations issue started. But I think we started the conversation, and then the domestic relation issue came into play and that Mr. Kahlig did not want to throw any additional issues into [sic] already a complex case, and the conversion was delayed until, I think until after the divorce, or after the settlement agreement or something.

See Pet. Br. 18; 4 RR 50.

But Clarence’s merely having looked into or contemplated a conversion pre-divorce is simply not evidence that he “planned” one, particularly in light of the “uncontroverted evidence . . . that [Clarence] refused to pursue a conversion absent a private letter ruling from the IRS that the conversion would not adversely affect the

[Companies'] accounting method," which ruling "the IRS refused to provide . . . before the parties' divorce was finalized." *Grohman-Kahlig*, 2008 WL 4735591, at *6; 4 RR 85; 5 RR 187-90; 6 RR 159, 180. And under well-established law, a party's mere contemplation of some action is not a "material fact" that can give rise to fraud liability. *See, e.g., Ryan v. Collins*, 496 S.W.2d 205, 210 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) ("It is well settled that in order to constitute actionable fraud the representation complained of must concern a material fact as distinguished from a mere matter of opinion, judgment, *probability or expectation*." (emphasis added)).

Hopson's speculative testimony about Clarence's motives is likewise incompetent. *See Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983))); *id.* ("To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. Evidence that is so slight as to make any inference a guess is in legal effect no evidence.").

Third, Sondra's negligence claim also fails as a matter of law because the duty that she maintains was breached—"a duty not to injure her secured interest in the Collateral"¹³—arises solely from the Security Agreement, and the only damages she claims are economic (acceleration) damages provided for in that Agreement. *See Sw. Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("When the only loss or

¹³ Pet. Br. 21-22.

damage is the subject matter of the contract, the plaintiff's action is ordinarily on the contract."); *id.* at 495 ("When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone." (quoting *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986))).

C. *Earthman's, Inc. v. Earthman* is irrelevant to the issues presented in this case.

Finally, there is no merit to Sondra's unexplained reliance on *Earthman's, Inc. v. Earthman*, 526 S.W.2d 192 (Tex. App.—Houston [1st Dist.] 1975, no writ), to manufacture a conflict under Section 22.001(a)(2) of the Government Code or to support her tort arguments in this case. *See* Pet. Br. xii, 16-17. Unlike the facts here, *Earthman's* involved a wife who was awarded *outright ownership* of (not a security interest in) stock in a divorce and then sued her ex-husband for the *tort of conversion* (not any change in business form) when he refused to transfer the stock into her name. *See Earthman's*, 526 S.W.2d at 196.

After determining that the jury's verdict was tainted by charge error and remanding for a new trial, the court of appeals expressed its "view" in dicta "that in an appropriate case and upon proper pleading *and proof* exemplary damages may be properly awarded in a stock conversion case." *Id.* at 205-06, 208 (emphasis added). Sondra's reliance on this portion of the opinion to suggest that she is entitled to a jury finding on her tort claims and request for exemplary damages merely because this case also involves "former marriage partners," stock, and some kind of conversion, *see* Pet.

Br. 16-17, is contrary to the opinion’s plain language, basic Texas law, and all common sense.

PRAYER

The issues raised in Sondra’s petition and brief are meritless, but the “disposition” issue raised in Respondents’ petition and brief is of extreme importance to the jurisprudence of the state. Respondents therefore respectfully urge the Court to grant both petitions for review and, either by per curiam opinion or a signed opinion after argument, reverse the court of appeals’ judgment with respect to its holding that Clarence breached the Security Agreement as a matter of law, but affirm the court’s judgment in all other respects.

Respectfully submitted,

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