

**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 2-03-294-CV

ERNEST REYNOLDS, III

APPELLANT

V.

MICHAEL
F/K/A

MURPHY
APPELLEES

A/K/A

AND

JOHN MICHAEL MURPHY AND PHILLIPS
INVESTMENT RESOURCES, L.L.C.

FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY

OPINION

Introduction

This case of first impression involves the potential liability of an author and publisher of an investment-related newsletter to one of its subscribers who alleges that he incurred losses as a result of making investments in accordance with recommendations in the newsletter. Appellant Ernest Reynolds, III appeals from a summary judgment granted in favor of appellees Michael Murphy a/k/a and f/k/a John Michael Murphy and Phillips Investment Resources, L.L.C. Reynolds challenges the summary judgment in nine issues, complaining specifically that (1) the United States Supreme Court holding in *Lowe v. Securities and Exchange Commission*,¹

protecting publishers from prior restraint of free speech by federal agencies, does not extend to abolish all private causes of action for the consequences of a misuse of speech, (2) the limited First Amendment protection of *Lowe* should not be extended to shield publishers and nonpublisher authors of harmful speech from liability for their actions, (3) the no-evidence motion for summary judgment was premature, (4) the trial court abused its discretion by denying Reynolds's motion for continuance because the discovery deadline had not passed and appellees refused to adequately respond to discovery, (5) Reynolds presented sufficient evidence on each of his causes of action to defeat appellees' no-evidence motion for summary judgment, (6) Reynolds established genuine questions of material fact as to each challenged element of his various causes of action,² (7) the trial court erred by considering appellees' objections to Reynolds's evidence filed for the first time on the date of the motion for summary judgment hearing, (8) the trial court erred by its evidentiary rulings, and (9) the trial court erred by denying Reynolds's motion to reform the order. We affirm in part and reverse and remand in part.

Background

In 1999, Reynolds received an advertisement for *Technology Investing*, a newsletter published by Phillips and authored by Murphy. Reynolds ordered a subscription by phone and began receiving the newsletter as well as supplemental faxes and email bulletins. In his

pleadings, Reynolds alleges that he relied on the newsletter for “research and information in making investment decisions” and that he attempted to follow the advice given in the newsletter.³ Reynolds also alleges in his pleadings that in 2001 he became concerned about the advice he was receiving in the newsletter. Specifically, he was not seeing the returns on his investments that the newsletter described. Eventually, he sold those stocks at a loss despite Murphy’s recommendation to hold the stock as a long-term investment.⁴

Reynolds sued appellees for breach of contract, negligence, negligent misrepresentation, fraud and misrepresentation, and violations of the Texas Deceptive Trade Practices Act⁵ (DTPA). Appellees filed no-evidence and traditional motions for summary judgment. The trial court granted summary judgment for appellees without stating the grounds upon which the judgment was based.

Procedural Issues

Reynolds appeals several procedural matters, some of which we must address before turning to the substance of the summary judgment issues. Appellees filed both a no-evidence and a traditional motion for summary judgment. Several of Reynolds’s complaints relate to the discovery process; Reynolds contends generally that appellees stonewalled him during discovery and that he did not have enough time to complete discovery and obtain evidence to defeat the no-evidence motion,

through no fault of his own.⁶ Although when both no-evidence and traditional summary judgment motions are filed we usually address the no-evidence motion first, see *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004), here we will review the propriety of granting the traditional summary judgment first because it is dispositive of the majority of Reynolds's claims.⁷ Therefore, we need not address Reynolds's third through fifth, and the part of Reynolds's ninth, issues pertaining to discovery matters. See TEX. R. APP. P. 47.1; *Tex. Mut. Ins. Co. v. Surety Bank, N.A.*, 156 S.W.3d 125, 131 n.4 (Tex. App.—Fort Worth 2005, no pet.).

The remainder of Reynolds's ninth issue relates to whether the trial court should have granted Reynolds's motion to reform the judgment to specify the grounds upon which it granted summary judgment. We find no authority, nor does Reynolds cite any, requiring a trial court to specify the grounds upon which it grants summary judgment. *Cf. Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003) (citing long-standing rule that trial court order granting summary judgment without specifying grounds must be affirmed if any theories presented to trial court and preserved for appellate review are meritorious). Thus, we overrule the remainder of Reynolds's ninth issue and turn to his evidentiary and discovery issues.

Reynolds's seventh and eighth issues complain about the trial court's rulings on the parties' summary judgment evidence. The trial court denied Reynolds's objections to appellees' evidence and granted appellees' objections to Reynolds's evidence. A trial court's rulings admitting or excluding evidence are reviewable under an abuse of discretion standard. *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

In his seventh issue, Reynolds claims that the trial court erred by considering appellees' objections to his responsive summary judgment evidence because their objections were untimely filed. Appellees did not file their objections to Reynolds's evidence until the day of the summary judgment hearing. Generally, the nonmovant must file its response or reply (including any objections to the movant's evidence) "not later than seven days prior to the day of [the] hearing." TEX. R. CIV. P. 166a(c). A movant's exceptions should be filed at least three days before the hearing. TEX. R. CIV. P. 21; *McConnell v. Southside ISD*, 858 S.W.2d 337, 343 n.7 (Tex. 1993).⁸ But a movant's objections to a nonmovant's response that are filed the day of the hearing are not untimely and may be considered and ruled upon by the trial court. *Shelton*, 144 S.W.3d at 119. Thus, we overrule Reynolds's seventh issue.

In his eighth issue, Reynolds contends that the trial court erred by granting appellees' objections to his summary judgment evidence and by denying his objections to some of appellees' evidence. As an initial matter, we need not determine if the trial court abused its discretion by denying Reynolds's objections to appellees' summary judgment evidence because, as we explain below, even disregarding that evidence, Reynolds did not raise a fact issue on appellees' summary judgment grounds. See TEX. R. APP. P. 47.1. As to appellees' objections to Reynolds's evidence, which the trial court granted in its order granting summary judgment, Reynolds presented the following items as summary judgment evidence: his affidavit, a set of requests for admissions that he claimed were deemed, an excerpt from a publication entitled *Overpriced Stock Service*, and a copy of an article purporting to be from TheStreet.com. Appellees timely objected to the purported deemed admissions, claiming that they were not deemed because appellees timely filed a motion for protective order with respect to the requests within the thirty-day period set forth in the rules. See TEX. R. CIV. P. 192.4, 192.6, 198.2; *In re Edge Capital Group, Inc.*, 161 S.W.3d 764, 766-67 (Tex. App.—Beaumont 2005, orig. proceeding) (noting that trial court has discretion to narrow scope of discovery to protect party's legitimate interests, but also acknowledging rule 192.6's admonishment that a motion for protective order should not be filed when an objection or assertion of privilege is appropriate). Reynolds claims that the motion for

protective order did not prevent the requests from being deemed admitted because the trial court never ruled on the motion. Thus, Reynolds contends that appellees' supplemental response was their first one, that it was untimely, and that the admissions were deemed admitted. We disagree.

A "party must state specifically the legal or factual basis for [its] objection [to propounded discovery] and the extent to which the party is refusing to comply with the request." TEX. R. CIV. P. 193.2(a). An objection that is not made within the time required by the discovery rules or by court order, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown. TEX. R. CIV. P. 193.1, 193.2(e). A party from whom discovery is sought may also, within the time for a response, move for a protective order. TEX. R. CIV. P. 192.6(a). A party should not move for protection when an objection is appropriate, but a motion for protective order does not waive any objections. *Id.* A trial court may grant a protective order to protect a party from "undue burden, unnecessary expense, [or] harassment." TEX. R. CIV. P. 192.6(b).

Appellees claimed in their motion for protective order that the 498 requests for admission—Reynolds's third set—were unduly burdensome and harassing. In addition to their general contention, appellees objected to some of the admissions on specific grounds. After the thirty-day period

expired, appellees filed what they called a supplemental response, answering some of the admissions and objecting to others. The trial court never ruled on the motion for protective order.

Appellees' summary judgment evidence shows that in addition to the motion for protective order, which was filed on May 20, 2003, appellees also attached to the motion answers to the requests that asserted appellees' general objections and also contained more specific objections to certain, but not all, of the requests. Reynolds contends that the general objections were not sufficient to constitute a complete response. See TEX. R. CIV. P. 193.1. But requiring appellees to file specific objections to each request before obtaining a ruling on their motion would defeat the purpose of filing a motion in the first place, which is expressly allowed by the rules. See TEX. R. CIV. P. 192.6(b); *cf. Grass v. Golden*, 153 S.W.3d 659, 662 (Tex. App.—Tyler 2004, orig. proceeding) (noting that under rule 192.6(a), party seeking protection from time and place of discovery must state a *reasonable* time and place for discovery with which it will comply). In addition, Reynolds cites no authority in his brief directing us to hold otherwise. See, e.g., *Shelton*, 144 S.W.3d at 119 (waiving point on appeal for failure to cite authority). He does not cite any authority, nor have we found any, holding that the filing of a motion for protective order within the time period for answering requests for admissions is not sufficient to prevent those admissions from being deemed if the court does not

eventually rule on the motion. See *id.* Furthermore, although rule 192.6 does not specify whether the party seeking a protective order or the party opposing a protective order has the burden to request a hearing on such a motion, rule 193.4(a) provides that any party may request a hearing on an objection made under rule 193. TEX. R. CIV. P. 192.6, 193.2, 193.4(a); see *Franco v. Franco*, 81 S.W.3d 319, 342 (Tex. App.—El Paso 2002, no pet.). “If neither party asks for a hearing [on the objections], the party who sent the request for discovery waives the requested discovery.” MICHOLO’CONNOR, O’CONNOR’S TEXAS RULES * CIVIL TRIALS 341 (Michol O’Connor & Byron P. Davis eds., 2005). Thus, Reynolds was responsible for obtaining a hearing on this matter, and he did not. We conclude that the trial court did not abuse its discretion by concluding that the requests were not deemed admitted and by granting appellees’ objections to the requests for admissions attached to Reynolds’s response.

Reynolds also complains about the trial court’s granting appellees’ objections to his affidavit. Appellees objected to nearly every sentence in the affidavit. But we need not address each objection. Considering the affidavit in the light most favorable to Reynolds, as we must, and ignoring all conclusory statements in the affidavit, which are not proper summary judgment evidence,⁹ we glean the following from his affidavit:

- Appellees routinely and repeatedly used the United States mail and interstate telephone lines to solicit, contact, and deliver information to Reynolds;
- Reynolds paid appellees many hundreds of dollars, which appellees collected in payment more than once;

- Appellees made representations to and contracted with Reynolds with respect to the newsletter, and it appears appellees sold the same thing to many others in Texas, the United States, and outside the United States;
- Reynolds believed and trusted appellees and came to believe the *Technology Investing* newsletter was reliable and read it regularly. He also regularly called the hotline for Murphy's advice and received and read many of the flash bulletins. He got a lot of information and advice from appellees who advertised and promoted Murphy;
- Appellees represented that Murphy had special experience, knowledge, skill, and special contacts and had developed a new, but successful and tested method for selecting the best and most profitable investments, that he could "safely lead . . . subscribers down the path to build . . . big profits over time";
- Murphy was represented as a person who managed successful investment funds for individuals and managed mutual funds;
- Appellees tried to tell the court that a book and articles about Murphy told of some of the more sordid and revealing true facts about Murphy, but appellees did not previously provide that book and those articles to Reynolds. Reynolds knew nothing of these facts until April 30, 2002;
- Reynolds initially began paying for his subscription in November 1999 and renewed his subscription until around November 2001;
- Murphy said another analyst "might be headed for 'hell' because of [that analyst's] short comings as an analyst," and Murphy made frequent references to his "wall of shame" for analysts whom he claimed he had outperformed;
- Appellees purported to sell advice and expertise to Reynolds, and Reynolds paid appellees for that advice and expertise;
- Part of the subscription fee pays for the newsletter. Reynolds also received fax updates to the newsletter and access to telephone hotlines;
- Appellees promoted Murphy aggressively as a stock guru referring to him as legendary for his alleged skill in finding and selecting investments;
- Murphy eventually made statements on the hotline and in the publication admitting directly or indirectly that his earlier strategy and recommendations were fundamentally wrong; and
- Reynolds would not have subscribed to the newsletter had he been informed of Murphy's criminal history, past drug use, and poor performance as a fund manager.¹⁰

As explained below, none of this evidence creates a fact issue on any of appellees' grounds for summary judgment. Thus, we overrule Reynolds's eighth issue to the extent that the affidavit contains conclusory statements.

But we need not determine whether the remainder of the issue should be sustained because even considering the remaining evidence that the trial court agreed was objectionable, the affidavit does not create a fact issue on Reynolds's claims. Having dispensed with Reynolds's issues related to procedural matters, we now turn to his substantive issues involving the propriety of granting the traditional motion for summary judgment.

Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met its summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *S.W. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *S.W. Elec. Power Co.*, 73 S.W.3d at 215; *Sci. Spectrum, Inc.*, 941 at 911; *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.*, 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. *Harwell v. State Farm Mut.*

Auto. Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am.*, 391 S.W.2d at 47.

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action or defense as a matter of law. *Clear Creek Basin*, 589 S.W.2d at 678. If the uncontroverted evidence is from an interested witness, it does nothing more than raise a fact issue unless it is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. TEX. R. CIV. P. 166a(c); *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997).

A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999). The defendant as movant must present summary judgment evidence that negates an element of the plaintiff's claim. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Id.*

First Amendment Protection - Negligence and Negligent Misrepresentation

In his first and second issues, Reynolds contends that a First Amendment case relied on by appellees, *Lowe*, does not provide authority for summary judgment on all of his claims against appellees. 472 U.S. at 181, 105 S. Ct. at 2557.¹¹ He contends that *Lowe* does not address the specific issues in this case and that it cannot be used to shield a publisher and author for wrongful speech. Thus, we begin with an analysis of the *Lowe* case.

The issue in *Lowe* was whether the Securities and Exchange Commission (SEC) could obtain a permanent injunction prohibiting the publication of securities newsletters containing “nonpersonalized investment advice and commentary.” *Id.* at 183, 105 S. Ct. at 2559. The

Court described the publications at issue in that case as follows:

A typical issue of the *Lowe* Investment and Financial Letter contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion. The newsletter advertised a “telephone hotline” over which subscribers could call to get current information. The number of subscribers to the newsletter ranged from 3,000 to 19,000. It was advertised as a semimonthly publication, but only eight issues were published in . . . 15 months. . . .

. . . .

The *Lowe* Stock Advisory had only 278 paid subscribers and had published only four issues between May 1981 and its last issue in March 1982. It also analyzed and commented on the securities and bullion markets, but specialized in lower-priced stocks. Subscribers were advised that they could receive

periodic letters with updated recommendations about specific securities and also could make use of the telephone hotline.

Id. at 185 & n.7, 105 S. Ct. at 2560 & n.7. The Supreme Court held that the newsletter was a bona fide publication of general circulation. Thus, it was not an “investment adviser” subject to federal regulation, and the government could not impose a prior restraint on its publication. *Id.* at 211, 105 S. Ct. at 2573.

We agree that *Lowe* is not directly on point. This case does not involve an attempt by a governmental entity to restrain speech. It concerns a private litigant’s attempt to impose liability on a publisher and author. In addition, the First Amendment does not protect fraudulent or deceptive speech, see, e.g., *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 612, 123 S. Ct. 1829, 1836 (2003), nor does it give one the right to breach a contract or make false warranties. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420, 112 S. Ct. 2538, 2563 (1992) (Stevens, J., concurring). Thus, summary judgment would not have been proper on First Amendment grounds as to Reynolds’s breach of contract, fraud and misrepresentation, and DTPA claims. We have found no Texas authority construing *Lowe*, nor have we found any Texas case in which a subscriber to or reader of a publication sued the publication and its author based on nondefamatory content contained within the publication. But since *Lowe* was decided, two cases in other jurisdictions have explored whether publishers¹² of similar newsletters could be liable to private litigants for negligent investment “advice” given in a similar format. Those cases held that subscription newsletters similar to the one at issue here could not be held liable for

negligence and negligent misrepresentation. See *Ginsburg*, 915 F. Supp. at 739-40; *Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334, 336-40 (N.Y. Civ. Ct. 1987).

The court in *Ginsburg* granted the motion to dismiss of the defendants, the author and publisher of an investment newsletter. 915 F. Supp. at 734, 740. The plaintiff had sued the defendants because he relied on investment advice contained in the newsletter that turned out to be based on inaccurate assumptions, which the author later admitted in the newsletter. *Id.* at 734. In determining that *Ginsburg*'s claims for negligent misrepresentation should be dismissed, the court noted that "[t]he publication is offered to the general public and the information provided in the publication is of a general nature, that is, it is not specifically tailored to [the] financial situation of any individual subscriber." *Id.* at 739. The court held that the newsletter, which was similar to the newsletter at issue here, was "subject to the same protection under the First Amendment as any other publication." *Id.* Based on First Amendment concerns and concerns of unlimited liability because of the scope of publication of such newsletters,¹³ the court held that *Ginsburg*'s negligent misrepresentation claims should be dismissed. *Id.* at 738-40.

In *Daniel*, the plaintiff subscribed to an online news service accessible via access codes and passwords. 520 N.Y.S.2d at 335. The plaintiff claimed that the service negligently published a news story that was false

and misleading because it omitted a material fact. *Id.* The court granted the defendant's motion to dismiss the cause of action, holding that the relationship of the parties was "functionally identical to that of a purchaser of a newspaper" and consequently there was no special relationship between the parties upon which to impose liability for negligent misrepresentation.¹⁴ *Id.* at 336-38. The court also held that the news service was entitled to the same First Amendment protection as newspapers, which precludes liability for nondefamatory, negligently untruthful news. *Id.* at 339.

We agree with the analysis and holdings of these cases. If the summary judgment evidence shows that appellees authored and published an investment newsletter of general circulation, similar to those at issue in *Lowe* and *Ginsburg*, then appellees are entitled to First Amendment protection from Reynolds's negligence and negligent misrepresentation claims.

Appellees' summary judgment evidence includes affidavits from Murphy and David Bishop, Senior Vice President of Phillips. In his affidavit, Bishop avers that

6.Beginning in January 1999 and continuing each month since then through the present time, the [*Technology Investing*] Newsletter was prepared by Murphy and his staff and provided to Phillips which, in turn, published it and sent copies to Newsletter subscribers every month.

7.Murphy also prepared supplements to the monthly Newsletter for distribution by Phillips called Flash Bulletins and hotline updates.

8.The Newsletter is available to the public and can be obtained for an annual subscription price.

....

10.Subscriptions to the newsletter were advertised in a free report (the "Free Report"). . . . The Free Report was advertised in a separate advertisement (the "Advertisement"). . . . In 1999, the Advertisement was sent to approximately 1,000,000 people. The Free Report advertises a subscription to the Newsletter, which includes receiving the Newsletter and special reports. . . .

....

16.Reynolds'[s] subscriptions to the Newsletter, like all other subscriptions to the Newsletter, included receiving the Newsletter and supplemental information via Flash Bulletins by fax or e-mail and access to Internet hotline updates by e-mail, fax or a recorded telephone message.

....

19.Reynolds received and/or had access to the same Newsletters, Flash Bulletins and hotline updates that were sent or made available to every subscriber of the Newsletter.

....

29.Phillips has no knowledge of Reynolds'[s] individual, personalized financial conditions or any other personal matter of Reynolds.

Reynolds avers in his affidavit that the newsletter, as supplemented with faxed updates and access to a telephone hotline, is much different from the investment information in a newspaper or magazine, like the New York Times, the Fort Worth Star Telegram or U.S. News. . . . The New York Times and the Fort Worth Star-Telegram are regular newspapers. They can both be bought freely at newsstands in many places, including street corners, stores and even at airports. The Murphy Technology Investing Newsletter cannot be purchased at any of these types of locations. . . . The only way to get access to

the Murphy TI Newsletter is to buy a subscription. . . . The newsletter informs the subscribers that it is not supposed to be shown to anyone who is not a subscriber. It can also be accessed on line; but again it is not supposed to be shown to anyone who is not a subscriber. In order to access it on line one must have an access code. The code is changed frequently. The subscription also allows a series of telephone access hotline updates. To access . . . Hotlines for the phone updates, one must first call a phone number, and then use a special access code. Again, the code is changed often.

According to Reynolds's affidavit, the purpose of the access code is to prevent nonsubscribers from accessing the hotline. Reynolds also avers that the fax updates are limited to subscribers and are not supposed to be shared with anyone else. Reynolds further avers that "[b]y contrast, the newspapers and U.S. News do not offer subscribers Hotlines or Flash Bulletins. The purchased information can be shared freely and without restriction." According to his affidavit, these types of publications are available at public libraries, but *Technology Investing* is not.

We hold that the summary judgment evidence established as a matter of law that *Technology Investing*, like the newsletters at issue in *Lowe* and *Ginsburg*, "is offered to the general public and the information provided in the publication is of a general nature, that is, it is not specifically tailored to [the] financial situation of any individual subscriber." *Ginsburg*, 915 F. Supp. at 739. That the newsletter was available only to subscribers, was supplemented by hotline access and "Flash Bulletins," and is not as widely published as many well-known newspapers does not change the general nature of the publication. The focus in *Lowe* was not the number of

subscribers to a particular publication but the generalized nature of content of the publication. *Lowe*, 472 U.S. at 208, 105 S. Ct. at 2572. Here, there is no evidence that the pool of potential subscribers was limited only to a certain group or that any of the advice contained in the newsletter, flash bulletins, or hotline updates was specifically tailored to the financial condition or other circumstances of any individual subscriber. To the contrary, the issues of the newsletter included in the summary judgment evidence show that general advice was given. Accordingly, the trial court did not err by granting summary judgment on First Amendment grounds on Reynolds's negligence and negligent misrepresentation claims.¹⁵ We overrule Reynolds's first and second issues.

Because summary judgment would not have been proper on First Amendment grounds as to Reynolds's breach of contract, fraud and misrepresentation, and DTPA claims, we must examine the other summary judgment grounds asserted by appellees with respect to those claims.

Breach of Contract

Appellees contend that they are entitled to summary judgment as a matter of law on Reynolds's breach of contract claim because the evidence shows that they complied with the only agreement between the parties—to supply an investment newsletter. Appellees presented evidence showing that they sent Reynolds issues of the newsletter in accordance with his subscription. Reynolds does not claim that he did not receive the

newsletter as promised. Instead, he complains about the quality of the advice in the newsletter. He claims that he and appellees agreed that appellees would provide him with expert advice and they did not.¹⁶

Specifically, Reynolds contends (1) that Murphy promised his subscribers that if they followed his advice, they would make money and (2) that Murphy did not give his best advice; therefore, he failed to meet his contractual obligations. Reynolds points to evidence that

Murphy advised *Technology Investing Newsletter* subscribers to “hold” onto Microsoft anticipating a growth value;¹⁷ . . . and, at the same time provided advice to subscribers to a different service to sell their Microsoft stock anticipating a drop in value. . . . Reynolds followed the advice to hold Microsoft, having never received Murphy’s advice to sell it. . . . As a result he lost money in that time period as his shares lost value.

Appellees attached to their summary judgment motion a copy of the initial mailing Reynolds received and a copy of the free report that he ordered as solicited in the mailing. A review of those mailings shows that much of the so-called promises are puffery.¹⁸ For example, the newsletter states, “And for the past years, I’ve made money for other people — people like you. . . .” It also claims that Murphy’s method is “[t]he safest possible way to invest in the future,” and that it “can help you invest in the future so that you multiply your wealth up to five times over the next 10 years.”¹⁹ None of these statements makes any specific promises, however.

Towards the end of the free report is a list entitled, “Besides making you rich, what can I do for you?” Among the items listed are “**I will tell you**

what you're not being told about what's really going on in technology stocks," "I will give you the safest way to invest in very high growth companies," and "I will give you the confidence to invest in things you understand." Reynolds does not allege that appellees broke any of these specific promises. In the same list is an item stating, "**But I cannot give you overnight fortunes . . . our perspective is long term.**"

The only specific example of bad advice that Reynolds alleges is the different advice given about Microsoft stock. Attached to his summary judgment response are copies of pages from the August 2000 *Overpriced Stock Service*, which states at the beginning, "WARNING! SUBSTANTIAL SHORT SELLING IS FOR PROFESSIONALS AND SOPHISTICATED INDIVIDUAL INVESTORS ONLY. START SMALL! DIVERSIFY AND SET FIRM STOP LOSS POINTS. PLEASE USE DISCRETION IN DISCUSSING SHORT SALE IDEAS WITH THE PRESS OR NONSUBSCRIBERS." It further notes, "Let us explain exactly why we turned short-term negative on the technology stocks and recommended several trading shorts on the Hotline." It later states that "although we like many of these stocks long term, the money directly ahead looks to us to be on the short side."

As evidence that different advice was given in the August 2000 issue of *Technology Investing*, Reynolds points us to an exhibit attached as evidence to his motion for continuance. But this evidence does not show

that the advice in the *Overpriced Stock Service* was any better or worse than the advice given in the *Technology Investing* newsletter. In fact, the advice appears to be almost identical. An excerpt from that issue is as follows:

I want you to sell EMC [a different company's stock] . . . I am moving all of our other stocks [including Microsoft] to a "hold" until it looks as though we're nearing the bottom of the slump. I will tell you immediately on the Hotline . . . as soon as it's safe to resume buying. Long-term investors don't have to sell any other *Technology Investing* recommendations—they will be higher by year's end or early in 2001 as business comes back strongly in the fourth quarter. Shorter-term investors with taxable gains also shouldn't sell anything else

However, shorter-term investors who can offset realized gains and losses, or those who have tax-free accounts, may want to lock in your gains and take some money off the table that would be available to reinvest at the lower prices I see coming. The most vulnerable of our stocks probably are . . . MSFT [defined earlier as Microsoft]. If you are going to take some short-term profits, those would be the stocks to trade on any up days during the slump.

Assuming Murphy is the author of the *Overpriced Stock Service*, which we find no evidence of, this evidence does not raise a fact issue on whether appellees breached any promises to Reynolds. The two publications appear to have exactly the same advice with respect to short-selling Microsoft stock. The information regarding holding Microsoft stock was contained in the *Technology Investing* newsletter but not the *Overpriced Stock Service*; however, the evidence shows that the *Overpriced Stock Service* was geared toward short-selling, and the *Technology Investing* newsletter was geared toward long-term gains.

Because Reynolds did not present evidence raising a fact issue as to whether appellees breached any agreement with him, we hold that appellees were entitled to summary judgment on Reynolds's breach of contract claim.

Fraud and Misrepresentation

Reynolds further contends that he raised a fact issue as to whether appellees engaged in fraud and misrepresentation by failing to disclose that Murphy has a prior criminal record and a past history of drug use and by misrepresenting Murphy's qualifications and experience. Reynolds alleges that

on April 30, 2002, [he] learned for the first time . . . the facts that Murphy had undergone a mind altering experience after he had taken LSD in the [1960s] and that, afterward, Murphy had robbed a bank when he fell on hard times and that Murphy was convicted for that crime of bank robbery in a federal court.

Reynolds also alleged that he learned Murphy had robbed more than one bank and that he had used a pistol in the commission of the offenses. It was as a result of these discoveries, Reynolds alleges, that he realized Murphy and Phillips were perpetrating a scam.

Appellees attached to their summary judgment motion an affidavit from Murphy, in which he averred that in 1966 he was convicted of "federal crimes which could commonly be called bank robbery" and that "President Nixon pardoned [him] of those crimes." A copy of the pardon is also attached to the motion. He also averred that he has disclosed these

matters in “various published articles” and in one of his books. Murphy also avers that in the 1960s he “twice used morning glory seeds, an LSD analogue, before LSD was made illegal.”

A person commits fraud if he (1) makes a false, material misrepresentation (2) that he either knows to be false or asserts recklessly without knowledge of its truth (3) with the intent that it be acted upon, (4) and the person to whom the misrepresentation is made acts in reliance upon it (5) and is injured as a result. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998) (op. on reh'g); *Miller v. Kennedy & Minshew, Prof'l Corp.*, 142 S.W.3d 325, 345 (Tex. App.—Fort Worth 2003, pet. denied). A misrepresentation may consist of the concealment or nondisclosure of a material fact when there is a duty to disclose. *Custom Leasing, Inc. v. Tex. Bank & Trust Co.*, 516 S.W.2d 138, 142 (Tex. 1974); *Miller*, 142 S.W.3d at 345. The duty to disclose arises when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth. *Miller*, 142 S.W.3d at 345. A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question. *Custom Leasing*, 516 S.W.2d at 142; *Miller*, 142 S.W.3d at 345.

As stated by appellees, “[t]he issue in this case is whether a reasonable person would decide to subscribe to a newsletter based on the personal history of the author from some 30 years ago.” Appellees contend

that as a matter of law, Murphy's 1966 convictions and his use of morning glory seeds twice in the 1960s are not material facts that, if known, would cause a reasonable person to refrain from subscribing to his newsletter. They point to a federal regulation governing investment advisers that requires disclosure only of material facts with respect to certain matters. 17 C.F.R. § 275.206(4)-4(a) (2004). That rule also creates a rebuttable presumption that a "legal or disciplinary event" is "material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients" for only ten years from the time of the event if the event was not "subsequently reversed, suspended, or vacated." *Id.* § 275.206(4)-4(b) (2004). Appellees claim that if Murphy were subject to the regulations and presumably higher standards governing an investment adviser under federal law,²⁰ then he would be entitled to a rebuttable presumption that his past history from the 1960s is not material and thus, cannot support a claim for fraud and misrepresentation for failure to disclose. Appellees argue that the fact that a highly-regulated investment adviser is subject to such a rebuttable presumption is evidence that Murphy's past history is not material.

We agree that under these facts as shown in the summary judgment record, Reynolds has not raised a fact issue as to the materiality of Murphy's two episodes of drug use and almost forty-year-old criminal convictions. Both the drug use and bank robberies are far-removed in time

from Murphy's current investment-related activities. There is no evidence of any drug use or criminal activity since that time. Additionally, Murphy received a presidential pardon for the criminal convictions. Finally, Reynolds has not brought forward any evidence linking these forty-year-old events to Murphy's performance or the quality of his investment advice. Appellees presented summary judgment evidence that Murphy has been a stock analyst since at least the early 1970s and has been praised for his work in that time.²¹ Although Reynolds presented evidence that two technology funds Murphy managed himself were poor performers, there is no evidence that this poor performance was related to Murphy's past history. Even if Murphy did give bad advice to Reynolds, there is no evidence linking that advice to Murphy's past episodes of drug use and criminal activity. Thus, we conclude that Reynolds failed to raise a fact issue as to the materiality of the information that he claims appellees had a duty to disclose.

Reynolds further alleges that appellees represented Murphy's "talents and skills in an untrue light." According to Reynolds, appellees "held Murphy out as an 'expert,' a 'guru,' yet at the same time withheld information that might lead people to question his judgment. The fact that he committed armed robbery in his salad days,²² used drugs, *and managed poorly performing funds.*" [Emphasis added.]

As we have already discussed, appellees proved as a matter of law that Murphy's past indiscretions are not material to his current performance as a stock analyst. But appellees moved for summary judgment on Reynolds's fraud and misrepresentation claims only with respect to the nondisclosure of Murphy's past history. They did not move for summary judgment as to Reynolds's allegation that appellees misrepresented Murphy's "talents and skills." A trial court cannot grant summary judgment except on the grounds expressly presented in the motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *Sci. Spectrum, Inc.*, 941 S.W.2d at 912. Thus, a traditional summary judgment would not have been proper on this ground. Moreover, appellees' no-evidence summary judgment was also premised only on "the nondisclosure of Murphy's personal history." Thus, a no-evidence summary judgment would not have been proper on this ground either. *Hinkle v. Adams*, 74 S.W.3d 189, 193 (Tex. App.—Texarkana 2002, no pet.).

Accordingly, we hold that the trial court did not err by granting summary judgment for appellees on Reynolds's fraud and misrepresentation claims with respect to the nondisclosure of Murphy's past drug use and criminal history. But we further hold that because appellees did not move for summary judgment as to whether appellees misrepresented Murphy's "talents and skills," they were not entitled to

either a traditional or no-evidence summary judgment on that particular claim.

Violation of DTPA

Appellees moved for summary judgment on five grounds as to Reynolds's DTPA claims. We turn first to appellees' contention that no statements of appellees support a DTPA claim because it is dispositive. See TEX. R. APP. P. 47.1. In his second amended petition, Reynolds

claimed that appellees made the following misrepresentations:

- Murphy had special skill and expertise in the field of investing and more especially technology investments;
- Murphy was an expert in technology investing with great experience and expertise;
- Murphy created an investment methodology based on highly reliable principles and that those who invested in accordance with his philosophy would realize great returns on investments. The growth flow method developed by Murphy was proven;
- Murphy is an investment adviser with twenty years of experience who carefully and personally researched companies before he gave advice;
- Murphy would safely guide investors so they could invest and make profits safely, and he had special knowledge and expertise that enabled him to do this;
- Murphy was a person who ran investment funds and even managed private investment portfolios; and
- Murphy gave constant, strong, equivocal assurances that the market would rebound and go even higher than ever and investors should maintain and not sell his recommended core holdings.

Reynolds also claims that appellees violated the DTPA by failing to disclose Murphy's two episodes of drug use and his past criminal history.

To prove his DTPA claims, Reynolds must show that appellees engaged in a false, misleading, or deceptive act or practice enumerated under section 17.46(b) of the DTPA. TEX. BUS. & COM. CODE ANN. §

17.46(b); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995); *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 501 (Tex. App.—Eastland 2002, pet. denied). Reynolds alleges specifically that these alleged misrepresentations violate the following subsections of

17.46(b):

(b) Except as provided in Subsection (d) of this section, the term “false, misleading, or deceptive acts or practices” includes, but is not limited to, the following acts:

.....

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

.....

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

.....

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

.....

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (8), (12), (24).

We have already determined that appellees showed that the information about Murphy's past history is not material as a matter of law. Thus, it cannot support a claim under section 17.46(b)(24). See, e.g. *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 125 (Tex. App.—Texarkana 1994, writ denied). Thus, we will review whether appellees were entitled to summary judgment for alleged violations of sections (5), (7), (8), and (12).

Reynolds's claims under section 17.46(b)(5), (7), and (12) relate to his claims that appellees misrepresented Murphy's skill and expertise as a stock analyst. Appellees attached as summary judgment evidence excerpts from third party books and articles including Murphy in a list of experts, describing him as "the man many regard as America's top technology guru," and a "near-legend in . . . Silicon Valley for his stock-picking prowess." One article says Murphy's model portfolio ranked fifth best among 77 newsletters tracked by Hulbert Financial Digest. See *supra* page 32, n. 21. Appellees' summary judgment evidence also references the fact that Murphy has been involved in stock analysis in some form or fashion since the late 1960s.

We have discussed previously most of the evidence Reynolds points to as raising a fact issue on his claims, specifically the advice given in the *Overpriced Stock Service* about Microsoft and Murphy's past history.

Reynolds also attached to his summary judgment other evidence that he claims shows Murphy is in fact a failure at analyzing and picking tech stocks, even though he claims he is a success. This evidence consists of a copy of an article purporting to be from TheStreet.com dated February 20,

2002.²³ Part of this article is entitled “The Definition of Chutzpah”:

There’s a fellow named Michael Murphy who, despite a truly dismal record as a fund manager, keeps spamming investors about his latest picks.

Murphy’s emails, replete with grammatical and spelling errors, urge recipients to sign up for a free trial of his Technology Investing newsletter. I’ll refrain from linking to Murphy’s site, where you’ll find a biography touting him as “America’s premier technology stock analyst” and former head of an unnamed software company. He’s the author of Every Investor’s Guide to High Tech Stocks and Mutual Funds and pens two other newsletters, The California Technology Stock Letter and Biotech Investing. Murphy hadn’t returned a call seeking comment as of Wednesday afternoon.

On his site, Murphy, a Harvard grad who’s no stranger to the investment conference circuit, touts a 66.4% cumulative return since starting his newsletter in late 1998, though no specific dates are provided on his bio page. That looks good vs. the Nasdaq Composite, but it doesn’t really match up with the returns of his two tech funds, two of the wormiest apples in that ravaged bin.

The Monterey Murphy New World Technology fund, which he’s run since its 1993 launch, averages a stunning 20% annual loss over the past five years, compared with a 6% annual gain for its average peer. That’s dead last among all tech funds, according to Chicago research house Morningstar.

The Monterey Murphy New World Core Technology fund, which lives in the convertible bond fund category, has amassed an equally stunning record. Murphy started running the fund in 1996, and it averages an annual 7.5% loss over the past five years.

Adding insult to injury, both funds carry a 1.99% annual expense ratio, well above their average peer's 1.73%. A subscription to this guru's newsletter costs \$195 per year, though it's only \$375 for two years.

What a bargain.

But appellees' summary judgment evidence contains a copy of the March 2000 issue of *Technology Investing*, in which Murphy states, The mutual funds I manage are aggressive, and I raised about 50% cash at the end of 1999. (I didn't advise you to do this since we have a more conservative, long-term approach in *Technology Investing*.) But I've now put most of that money back to work as individual stocks came down, and I want you to do the same.

The issues of *Technology Investing* relied on by both appellees and Reynolds consistently emphasize the long-term investment approach described in that publication as opposed to more aggressive or short-term methods advocated by Murphy in different contexts, including, apparently, the investment funds he manages. We hold that Reynolds did not raise a fact issue as to his claims under section 17.46(b)(5) and (12).

Although the poor performance records of Murphy's investment funds cited in the article are over a relatively long-term period, we do not believe this raises a fact issue under section 17.46(b)(7) because the newsletter clearly indicates that the investment funds Murphy managed were separate from the investments recommended in *Technology Investing* and involved a different strategy. But even if this evidence raises a fact issue as to whether Murphy misrepresented his experience and expertise in

picking investments, it does not raise a fact issue as to appellees' liability under section 17.46(b)(7). Appellees also moved for summary judgment on Reynolds's DTPA claims on the ground that Reynolds could not prove causation because he admits he did not follow Murphy's advice to "hold" the recommended stocks long-term; thus, Reynolds's losses were caused by his decision to sell his stocks against Murphy's advice rather than any representations about Murphy's stock-picking prowess. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 2002) (DTPA cause of action may be maintained when deceptive act a "producing cause" of economic or mental anguish damages); *Brown v. Bank of Galveston, Nat'l Assoc.*, 963 S.W.2d 511, 514 (Tex. 1998) ("Producing cause requires that the acts be both a cause-in-fact and a 'substantial factor' in causing the injuries."). We agree and hold that Reynolds failed to raise a fact issue under section 17.46(b)(7).

We further hold that Reynolds did not raise a fact issue on his claim under section 17.46(b)(8). That section applies only to misrepresentations of fact, not opinion. See *Tweedell v. Hochheim Prairie Farm Mut. Ins. Ass'n*, 1 S.W.3d 304, 309 n.10 (Tex. App.—Corpus Christi 1999, no pet.). The statements Reynolds attributes to Murphy regarding other analysts—that one analyst was headed for hell because of his stock picks and that he had a "wall of shame" for analysts he claimed were poor performers—are

statements of opinion, not fact. Thus, Reynolds's summary judgment evidence does not raise a fact issue on his section 17.46(b)(8) claim.

Accordingly, we overrule Reynolds's sixth issue as to his fraud and misrepresentation claims based on nondisclosure and his negligence, negligent misrepresentation, breach of contract, and DTPA claims. We sustain his sixth issue as to his fraud and misrepresentation claims based on the allegation that appellees represented Murphy's talents and skills in an untrue light.

Conclusion

Having determined that appellees were entitled to summary judgment on all of Reynolds's claims except his claim that appellees engaged in fraud and misrepresentation by representing Murphy's talents and skills in an untrue light, we affirm the trial court's judgment except as to that claim. We reverse and remand the claim that appellees engaged in fraud and misrepresentation by representing Murphy's talents and skills in an untrue light for further proceedings consistent with this opinion.

TERRIE LIVINGSTON
JUSTICE

PANEL B: LIVINGSTON, GARDNER, and MCCOY, JJ.

DELIVERED: July 14, 2005

NOTES

1. 472 U.S. 181, 105 S. Ct. 2557 (1985).

2. Appellees contend Reynolds waived his challenge to the summary judgment because he failed to address each ground appellees asserted in their motion. But Reynolds has presented a general issue on appeal with respect to the propriety of the summary judgment; thus, he has not waived his challenge to the propriety of the summary judgment in appellees' favor. See TEX. R. APP. P. 38.9; *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); see also *Plexchem Int'l, Inc. v. Harris Appraisal Dist.*, 922 S.W.2d 930, 930 (Tex. 1996).

3. Reynolds does not specify any particular advice that he followed or stocks he purchased or sold in reliance on the advice in the newsletter, other than to allege that instead of selling Microsoft stock when its price fell, he "held" it in accordance with Murphy's advice. But Reynolds does admit that he eventually sold his Microsoft stock at a loss against Murphy's advice.

4. Although this appears to be an admission that the cause of Reynolds's losses was his own failure to follow the advice in the newsletter, it is not dispositive of all of Reynolds's claims because appellees did not allege this admission as a ground for summary judgment on all of Reynolds's claims. See *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997).

5. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (8), (12), (24) (Vernon Supp. 2004-05).

6. Although we do not condone gamesmanship in the discovery process, we do not address those issues in this case because other issues are dispositive.

7. Although one of Reynolds's complaints is that the trial court improperly granted summary judgment before the deadline for completing discovery in the case, we note that a traditional summary judgment is not subject to the same restrictions as a no-evidence summary judgment, which may not be granted until an adequate time for discovery has passed. See TEX. R. CIV. P. 166a(c), 166a(i); *Clemmons v. Citizens Med. Ctr.*, 54 S.W.3d 463, 466 (Tex. App.—Corpus Christi 2001, no pet.).

8. A movant's exception in these circumstances is a complaint that the issues identified in the nonmovant's response as defeating summary judgment are unclear or ambiguous. See *McConnell*, 858 S.W.2d at 343; *Shelton v. Sargent*, 144 S.W.3d 113, 119 (Tex. App.—Fort Worth 2004, pet. denied).

9. See *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 653-54 (Tex. App.—Fort Worth 2004, no pet.).

10. Other evidence appellees objected to but that we consider in our holding is detailed later in this opinion.

11. Reynolds contends that a summary judgment based on this ground would be improper because it was raised for the first time on appeal. But appellees raised this as a general ground as to all of Reynolds's claims in their motion for summary judgment.

12. The *Ginsburg* case also addressed the potential liability of the author of such a newsletter. *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 733-40 (D. Md. 1995).

13. The court relied on the holding in the *Daniel* case as well as *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898 (1986).

14. The court held that the plaintiff and defendants did not have the type of special relationship contemplated by section 552 of the Restatement (Second) of Torts. *Id.* at 336-38. Section 552 of the Restatement (Second) of Torts has been adopted by the Texas Supreme Court. *Fed. Land Bank Assoc. of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). "Under section 552(2), liability is limited to loss suffered: . . . by the person or one of a limited group of persons for whose benefit and guidance [one] intends to supply the information or knows that the recipient intends to supply it" *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

15. Accordingly, summary judgment was also proper on Reynolds's negligence per se claim. See *Zavala v. Trujillo*, 883 S.W.2d 242, 246 (Tex. App.—El Paso 1994, writ denied) (holding that "negligence per se is not a cause of action separate and independent from a common law negligence cause of action. Negligence per se is merely one method of **proving**, through proof of an unexcused violation of a penal statute designed to protect the class of persons to which the injured party belongs, the breach of duty required in any negligence cause of action, establishing negligence as a matter of law" (citation and footnote omitted)).

16. Some of the newsletters appellees presented as summary judgment evidence contain a one-sentence disclaimer in small type, which states, "Michael Murphy's Technology Investing bases its recommendations and forecasts on analytical techniques and sources found to be reliable in the past, but future accuracy and profitable results cannot be guaranteed." The disclaimer is located at the bottom of the page in the middle of other information about the newsletter, such as the date of the copyright and instructions for making address changes. The disclaimer is not bolded, italicized, or in any other way set apart from the other information, nor is it included in the body of the newsletter.

17. Reynolds does not specify whether he bought Microsoft stock initially in reliance on the advice in *Technology Investing*, only that he did not sell it when the price dropped in reliance on Murphy's advice.

18. “Puffery” is an expression of opinion by a seller not made as a representation of fact. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982).

19. Other examples from the free report are, “If you are on the right side of this revolution your investments will ride high indeed over the next several months,” “You don’t need to guess how to make a fortune from the new ‘invisible computer’ revolution . . . because I will tell you exactly how to do it,” and “I would like the opportunity to guide you through this wonderful feast, and give you a way to savor . . . **the riches of the future, today.**”

20. Because we have determined that in his capacity as author of the newsletter Murphy did not act as an “investment adviser” for purposes of the Investment Advisers Act, section 275.206(4)-4(b) does not control this case. See *supra* pages 23-24; *Lowe*, 472 U.S. at 211, 105 S. Ct. at 2573.

21. Appellees attached as summary judgment evidence an excerpt from a book entitled *Wall Street’s Picks for 1997* by Kirk Kazanjian. Murphy’s name is listed under the heading “Includes Expert Recommendations From.” In a page from the book, Murphy was described as “the man many regard as America’s top technology guru.” Appellees also attached a copy of a purported *Nation’s Business* article dated May 1993 entitled *Picking the high-tech winners*. That article states that Murphy is “a near-legend in . . . Silicon Valley for his stock-picking prowess.” The article also says that Murphy is the editor of California Technology Stock Letter, “whose model portfolio ranked fifth best among 77 newsletters tracked by Hulbert Financial Digest.”

22. Defined by Webster’s Dictionary as “days of youthful inexperience or indiscretion.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2002 (3d ed. 2002).

23. Reynolds does not reference this evidence in his briefs; however, we will nevertheless discuss it as part of our review of the summary judgment evidence.