Rel: 12/21/2012

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1091758

Target Media Partners Operating Company, LLC, and Ed Leader

v.

Specialty Marketing Corporation d/b/a Truck Market News

Appeal from Calhoun Circuit Court (CV-07-900201)

MAIN, Justice.

Target Media Partners Operating Company, LLC ("Target Media"), and Specialty Marketing Corporation d/b/a Truck Market News ("Specialty Marketing"), both publishers of magazines directed to long-haul truck drivers and to the

truck-driving industry, have litigated a commercial-contract dispute since 2007 in which each party alleged breach-of-contract claims against the other. Specialty Marketing, a plaintiff below, also alleged fraudulent-misrepresentation and promissory-fraud claims against Target Media and Ed Leader, Target Media's vice president of trucking, and sought punitive damages in addition to compensatory damages. The litigation culminated in a jury trial that lasted several days. The jury returned a verdict in favor of Specialty Marketing on its breach-of-contract and promissory-fraud claims against Target Media, in favor of Leader on the promissory-fraud claim against him, in favor of Specialty Marketing on its fraudulent-misrepresentation claim against Target Media and Leader, and in favor of Target Media on its breach-of-contract counterclaim against Specialty Marketing. Target Media and Leader appeal from that aspect of the judgment entered on the jury verdict in favor of Specialty Marketing on its claims against Target Media and Leader. Specialty Marketing does not appeal the judgment insofar as it found in favor of Target Media on Target Media's counterclaim. We affirm in part, reverse in part, and remand.

I. Factual Background and Procedural History

Target Media, which sometimes does business as "Target Distribution Partners" or "Target Media Partners," publishes a number of magazines that contain advertisements for items of interest to truck drivers and the trucking industry, such as driver recruitment and sales of commercial trucks and products used by truck drivers. It distributes the magazines nationally to truck stops, rest stops, and similar locations frequented by truck drivers. These magazines are free of charge. Target Media has a major distribution hub for these magazines in Oxford.

Specialty Marketing also publishes a free magazine directed to the truck-driving industry called Truck Market News that is published monthly and that contains advertisements for products such as new and used commercial trucks, parts, and trailers. Specialty Marketing distributes Truck Market News to many of the same locations where Target Media distributes its magazines. Specialty Marketing is a family business headquartered in Dallas, Texas, that has been in operation for over 35 years. It is run by Terry W. Davis and his sister, Kathleen Daniels, who have continued the

business started by their father and who together own all the stock in Specialty Marketing.

In 2000, Target Media purchased two businesses in Calhoun County, Pollard Publishing and J.B. Scott, that published free magazines for distribution to truck drivers. Target Media then employed Gordon Adams and his brother Wallace Adams, both of whom had formerly worked for Pollard Publishing. After the purchases, Leader relocated to Oxford where, in addition to heading the trucking division of Target Media, he was also in charge of the distribution hub the company operated in Oxford.

In the fall of 2002, Jack Humphreville, Target Media's vice president of acquisitions, contacted Davis to discuss whether Davis and Daniels would be interested in selling Specialty Marketing to Target Media. When Davis and Daniels decided against selling Specialty Marketing, Davis and Humphreville began to discuss a business venture between the companies pursuant to which Target Media would distribute Truck Market News for Specialty Marketing. Davis testified that Humphreville told him he felt that Specialty Marketing could increase its advertising revenue by 20% annually if it

used Target Media's distribution services. Humphreville put Davis in touch with Gordon Adams, who was at that time Target Media's distribution manager in Oxford, and Davis and Adams negotiated a contract they executed on November 21, 2002 ("the 2002 distribution contract"). However, Gordon Adams testified that Leader told him what to say to Davis during the negotiations and that he had to obtain Leader's approval of the terms of the 2002 distribution contract before it could be executed.

The contract stated:

> "Target Distribution Partners (TDP) is pleased to bid on delivery of Truck Market News. TDP has carved out a niche in the highly competitive truck stop delivery market because of our High Response Delivery System. As such, TDP can help you maximize your advertising, marketing, and magazine movement needs by:
>
> "Hand Delivery and display nationwide
>
> "Documentation that includes proof of delivery, returned (non-picked up) magazines, store stamps and photos upon request
>
> "Delivery twice a month
>
> "Guaranteed prominent display at each location
>
> "Use of Target Media Partners Circulation, Sales and Distribution program (TMPCSD) for hand delivery locations only

"We have priced our delivery services of Truck Market News on a per stop basis. This price includes all slotting fees and hand delivery. This price also includes distribution in our racks and four quad boxes. The price does not include any costs associated with shipments of your product to our warehouses. This will also afford you the same cost even when your magazine adds more pages. We believe that this all-inclusive pricing structure is easier to understand than a structure based on price per pound plus various add-ons.

"Your price structure is identified on Exhibit A attached hereto.

"The above is contingent on your gaining approval, if necessary, from each Truck Stop chain or location. We will be glad to assist you in gaining these approvals.

"As a partner with TDP, you will be able to use our proprietary TMPCSD software program to further enhance the benefits of our High Response Delivery System. With the help of the information provided by TMPCSD, you are able to adjust various parameters (such as the number of [magazines] placed at individual locations and the return factor) that influence the draw algorithm, which in turn helps you improve or optimize the number of [magazines] that you print. This can result in savings or better utilization of your printing dollars. This service is unmatched by any other truck stop distribution company.

"Truck Market News agrees to supply TDP's warehouses with the magazines in a form and time acceptable to TDP. TDP's delivery cycle begins on the 28th and 15th of each month and all shipments must be in our warehouses by those dates.

"Truck Market News agrees to pay for all deliveries and services provided for or paid for by TDP within

10 days upon receipt of invoice. We anticipate a monthly billing cycle.

"Truck Market News agrees to endorse TDP as its recommended Delivery Company for Truck Market News and agrees to let TDP advertise Truck Market News as a preferred customer. Truck Market News agrees not to use any misleading statements to customers, that may confuse or misrepresent the actual duties performed for Truck Market News, by TDP.

"Either party for any reason upon 60 days prior written notice may amend by agreement of both parties or terminate this agreement.

"This contract is subject to periodic review for customer compliance.

"We want to be more than a delivery company for you. We want to be a business partner. One that delivers your product, gives you accesses [sic] to thousands of locations and gives you accurate information to help you optimize your printing and distribution costs.

"....

"Exhibit A

"Location	# of Locations	Pocket Rate	Monthly Cost
"Petro Shopping Centers	27	$55	$1,485
"Travel Centers of America	53	$55	$2,915
"Williams Travel Centers	41	$45	$1,845
"AMBEST	41	$35	$1,435
"Independent Truck Stops	113	$25	$2,825
"Total	275		$10,505"

The 2002 distribution contract was signed by Gordon Adams as "General Manager" of "Target Distribution Partners" and by Davis as the "Publisher" of "Truck Market News." The parties subsequently agreed to adjust the total paid to Target Media per month by Specialty Marketing from $10,505 to $9,750.

The monthly delivery process under the 2002 distribution contract began when Trend Offset Printing ("Trend") in Dallas printed the magazines published by Target Media and Specialty Marketing. Trend printed between 36,000 and 42,000 copies of Truck Market News each month. Trend shipped most of Target Media's magazines and approximately 7,500 copies of Truck Market News to Target Media's Oxford facility. A certain number of both Target Media's magazines and Truck Market News were shipped directly from Trend to more than 60 terminals and warehouses operated by Con-way, Inc., nationwide for the delivery drivers' use in restocking along their routes. Davis himself picked up several hundred copies of Truck Market News and delivered those to small "mom-and-pop" truck stops in the area around Dallas that were not covered by Target Media's delivery routes. The remainder of Target Media's magazines and Truck Market News remained at Trend for route delivery. Target Media contracted with an independent driver in Dallas,

Bonnie Hargis, to pick up and distribute those magazines. Hargis employed additional personnel to assist her in picking up and delivering the magazines. They all made several trips to Trend each month to load all the magazines they were employed to deliver.

When a monthly shipment from Trend was received at Target Media's Oxford facility, the magazines were unloaded at the warehouse. Thereafter, the process called for Target Media's delivery drivers to pick up the various magazines, load their vehicles, and deliver the magazines to the stops on each delivery route, where they placed the various magazines into display racks located at each stop. Some drivers made multiple trips to the Oxford warehouse to pick up magazines for delivery. A certain number of magazines were left at the warehouse for the drivers to pick up in the middle of the month when they traveled their routes a second time to restock. At the beginning of the next month, the drivers would remove any copies of the previous month's magazines remaining in the racks on their routes and replace them with current magazines, then dispose of the old magazines. The drivers were not allowed to return any of the previous month's magazines to the warehouse.

Several former Target Media employees at the Oxford facility testified in the trial. Gordon Adams, who was ultimately in charge of magazine distribution in Oxford, in Dallas, and at the Con-way locations, worked for Target Media from 2000 until September 2004. Wallace Adams took over for his brother as acting manager of distribution until January 2006, when Target Media decided against promoting Wallace Adams to the manager's position and hired someone else for the job. Tommy Fowler also worked in Oxford for Target Media as its audit manager.

These three former Target Media employees testified that Target Media did not comply with the delivery requirements of the 2002 distribution contract from the beginning. Gordon Adams, Wallace Adams, and Fowler all testified that Target Media discarded most of the <u>Truck Market News</u> magazines before the magazines were ever loaded onto Target Media's delivery trucks and vans. Often, they stated, the magazines that were thrown away were still in the plastic wrap in which they had been delivered from Trend, with the bands holding bundles of magazines still in place. Occasionally whole pallets of <u>Truck Market News</u> magazines were taken to a nearby recycling plant without being unloaded at the Oxford facility at all. Gordon

Adams, Wallace Adams, and Fowler also testified that when Target Media's delivery personnel picked up magazines for distribution, they were under company orders to load all of Target Media's magazines into their delivery vehicles first and to load magazines delivered for other companies, such as Truck Market News, only if there was room in the vehicle after Target Media's magazines were loaded. The three former Target Media employees testified that often there was no room left in the delivery vehicles for any magazines other than the ones published by Target Media, so other magazines were simply thrown away or delivered to the recycling plant.

Furthermore, testimony reflected that Target Media had prepared a schematic for its employees directing the placement of magazines in the racks at its delivery destinations. In many instances, the racks had room only for Target Media magazines, so the magazines for which there was no room in the racks were thrown away at the truck stops or other delivery points. Gordon Adams, Wallace Adams, and Fowler all testified that they knew it was wrong to dispose of new magazines before delivery had ever been attempted but that they followed orders from Leader in order to keep their jobs. They testified that, at times, approximately 90% of the copies of Truck Market News

that were shipped to the Oxford facility were thrown away at the beginning of the month, meaning that only 10% of the magazines shipped to Oxford were delivered to Specialty Marketing's intended readers.

Glynis Ford, a former clerical employee with Target Media, testified that her job was to enter figures from the delivery drivers' route sheets into Target Media's computer system. For each magazine title, the drivers were supposed to note on their route sheets the number of magazines loaded for delivery at the first of the month, the number restocked at the middle of the month, and the number of undelivered magazines ("returns") disposed of at the end of the month. Ford testified that she was ordered by Leader and her other superiors at Target Media to make up numbers if the drivers had not supplied numbers. She said she was instructed to supply numbers that would make the delivery and return results "look good." Ford further testified that falsifying numbers for the reports "bothered" her but that she needed her job and therefore did what she was told.

From February 2003 through August 2004, Target Media provided Specialty Marketing with spreadsheets that contained delivery data for Truck Market News from the Oxford facility.

The spreadsheets were designed to report the locations to which Truck Market News was delivered, the total number of magazines delivered to each location, and the total number of returns at the end of the month. It was undisputed that disposing of the returns was proper procedure because once a new monthly magazine was published, the previous month's publication was no longer of any use. It was also undisputed, however, that disposing of new magazines, still banded and encased in plastic, was highly improper. Davis testified that one of the reasons he agreed to pay Target Media to deliver Truck Market News was its promise that it would report the number of deliveries and returns to him so that he could maximize his printing costs, having more magazines shipped to locations where they moved well and fewer delivered to locations where more magazines were returned at the end of the month. During the time Davis was receiving the spreadsheets, he testified that he was not aware that most of the numbers in the reports had been fabricated by the Target Media employees in Oxford.

Steve Burt was employed by Target Media from the fall of 2002 until February 2007, when he resigned to deliver Truck Market News for Specialty Marketing. Burt had taken

photographs at Target Media's request during his delivery routes, which the company used as proof of magazine delivery and as a method to audit its drivers by reviewing photographs taken of magazines placed in the display racks. Burt initially purchased disposable cameras but later began taking the photographs with a digital camera. At some point, Burt began to photograph various new magazines, including Truck Market News, that were being thrown into dumpsters or left on the loading dock of a nearby recycling plant. Sometime in late 2006, Burt learned from Hargis that Davis had asked her to check the racks in the truck stops on her delivery routes in Dallas and to let him know if a magazine published by a competitor other than Target Media was replacing Truck Market News in the racks. She contacted Burt because she thought he might have some photographs that would shed light on the problem.

In January 2007, Burt traveled to Dallas to meet with Davis and Daniels. Burt testified that he told them that the competitor's magazine was not their problem but that Target Media was. Burt showed Davis and Daniels his photographs of the magazines that were being thrown away every month at Target Media, including numerous photographs depicting

packages of Truck Market News, still banded and wrapped in plastic, on the warehouse docks at Target Media, in dumpsters, and at the recycling facility that accepted many of Target Media's magazines for disposal. He admitted to Davis and Daniels that he was guilty of throwing away their new magazines and told them that only a small percentage of Truck Market News shipped to the Oxford facility was being delivered by Target Media drivers. After this meeting, Davis decided to end his contract with Target Media, and he hired Burt to deliver his magazines. On January 19, 2007, Specialty Marketing and Burt executed a three-year contract under which Burt agreed to deliver Truck Market News for $9,500 per month.

Davis testified that he and Daniels were stunned and shocked when they talked with Burt and saw his photographs. They knew that their business had not sustained the growth Humphreville had estimated they would see if they employed Target Media to deliver Truck Market News but had not realized that only a small percentage of their magazines entrusted to Target Media in Oxford were being delivered. Davis testified as to not only the money Specialty Marketing had paid Target Media for delivery of copies of Truck Market News that were instead being thrown away, but also as to the monthly cost of

printing Truck Market News and the monthly delivery fees necessary to have thousands of copies of the magazine delivered to Target Media's Oxford facility. Davis calculated that Specialty Marketing had paid Target Media approximately $430,000 in fees under the 2002 distribution contract and that Specialty Marketing had incurred over $900,000 in printing costs from December 2002 through January 2007 for magazines most of which had been discarded.

On October 5, 2007, Specialty Marketing, Davis, and Daniels sued Target Media,[1] Leader, Gordon Adams, Wallace Adams, Fowler, and Paul Bannister (a former manager with Target Media), alleging breach of contract, promissory fraud, intentional interference with business relations, negligence and wantonness, and fraudulent misrepresentation. Specialty Marketing, Davis, and Daniels sought punitive damages as well as compensatory damages in their complaint. Target Media later filed a counterclaim against Specialty Marketing, alleging breach of contract and money owed on an open account.

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[1]In addition to Target Media Partners Operating Company, LLC, Specialty Marketing also sued Target Media Partners, Inc., and Target Media Partners Operating Company. After learning that Target Media's correct corporate name is "Target Media Partners Operating Company, LLC," Specialty Marketing proceeded with the lawsuit only against that entity.

Shortly after litigation began, Specialty Marketing, Davis, and Daniels dismissed Bannister as a defendant. All remaining parties actively pursued their claims and engaged in extensive discovery. They also filed summary-judgment motions, but the trial court denied all of those motions. Before trial, the trial court dismissed Davis and Daniels as plaintiffs and dismissed Specialty Marketing's claims alleging negligence and wantonness and intentional interference with business relations. The case proceeded to a jury trial beginning on May 3, 2010, on Specialty Marketing's breach-of-contract, promissory-fraud, and fraudulent-misrepresentation claims and Target Media's counterclaim. During the trial, the court dismissed Gordon Adams, Wallace Adams, and Fowler as defendants. Target Media and Leader moved for a judgment as a matter of law ("JML") as to Specialty Marketing's claims at the close of Specialty Marketing's evidence, and all parties moved for a JML at the close of all the evidence. The trial court prepared separate verdict forms that required the jury to make a determination of liability as to each of Specialty Marketing's claims--breach of contract against Target Media, promissory fraud against Target Media and Leader, and fraudulent misrepresentation against Target Media and Leader,

and as to Target Media's claims--breach of contract and open account against Specialty Marketing. The forms required the jury to return a separate compensatory-damages award for each claim and counterclaim and allowed the jury to award punitive damages to Specialty Marketing as to its promissory-fraud and fraudulent-misrepresentation claims if the jury found such damages appropriate.

The jury returned verdicts in favor of Specialty Marketing on its breach-of-contract claim, awarding compensatory damages of $851,552; in favor of Target Media on its breach-of-contract counterclaim, awarding compensatory damages of $48,800; in favor of Specialty Marketing and against Target Media on Specialty Marketing's promissory-fraud claim, awarding compensatory damages of $210,000 and punitive damages of $630,000; in favor of Leader on Specialty Marketing's promissory-fraud claim; and in favor of Specialty Marketing and against Target Media and Leader on Specialty Marketing's fraudulent-misrepresentation claim, awarding compensatory damages of $167,800 and punitive damages of $503,400.

The trial court entered a judgment on the verdicts on May 13, 2010. On June 11, Target Media filed a postjudgment

motion to alter or amend the judgment to reflect its correct corporate name, Target Media Partners Operating Company, LLC, instead of "Target Media" as the judgment referred to it. On June 14, Target Media and Leader filed a postjudgment motion renewing their motion for a JML and requesting a new trial and/or a remittitur; in addition, they filed a separate motion on June 14 asking the court to allow them to submit their financial statements under seal. On August 30, the trial court entered an order amending the judgment to reflect the correct corporate name for Target Media. Also on August 30, the trial court entered an order denying the postjudgment motion for a JML, new trial, and/or remittitur filed by Target Media and Leader. On September 2, Specialty Marketing filed a motion asking the trial court to amend its August 30 order denying Target Media and Leader's postjudgment motion to state the factors the court considered when it denied the motion. On September 7, Target Media and Leader filed a response to Specialty Marketing's motion in which they "again request[ed] a hearing on their post trial motions including all hearings required by Hammond v. City of Gadsden, 439 So. 2d 1374 (Ala. 1986) and Alabama Code [§]6-11-23 (1975)." On September 13, the trial court set all pending motions for a hearing on

November 9.[2] On September 21, Target Media and Leader appealed. Specialty Marketing did not cross-appeal from the judgment against it on Target Media's counterclaim.

II. Standard of Review

A. Motion for a JML

> "When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

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[2]On November 8, the trial court canceled the hearing set for November 9 because, it said, as a result of the filing of a notice of appeal on September 21, 2010, it was "without jurisdiction to rule on any pending motions at this time due to the appellate status of this case."

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).

B. Motion for a New Trial

> "In discussing the standard of review in an appeal from a judgment based on a jury verdict where the trial court has denied a motion for a new trial, this Court has stated:
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> > "'"Jury verdicts are presumed correct, and this presumption is strengthened by the trial court's denial of a motion for a new trial. Therefore, a judgment based on a jury verdict will not be reversed unless it is 'plainly and palpably' wrong."'
>
> "Tanksley v. Alabama Gas Corp., 568 So. 2d 731, 734 (Ala. 1990) (quoting Davis v. Ulin, 545 So. 2d 14, 15 (Ala. 1989))."

Petty-Fitzmaurice v. Steen, 871 So. 2d 771, 773 (Ala. 2003).

III. Analysis

We first address Specialty Marketing's argument that Target Media and Leader's appeal should be dismissed as being from a nonfinal judgment. We then address whether the trial court properly denied Target Media and Leader's postjudgment motion.

A. The Judgment

Specialty Marketing argues that the trial court's August 30, 2010, order denying Target Media and Leader's postjudgment motion was not a final order because, it argues, the August 30

order did not completely adjudicate all matters in controversy between the parties. Therefore, Specialty Marketing argues, because the appeal is taken from a nonfinal judgment, this Court should dismiss the appeal. In response, Target Media and Leader argue that the August 30 order was final and that they filed a timely notice of appeal within 42 days of the issuance of the August 30 order. We agree.

The trial court entered a judgment on the jury's verdicts on May 13, 2010. On June 14, Target Media and Leader filed a timely postjudgment motion pursuant to Rules 50(b) and 59(a) and (f), Ala. R. Civ. P., renewing their motion for a JML, requesting a new trial, and/or requesting a remittitur of the punitive-damages awards. They also filed a separate motion to allow them to submit their financial statements under seal. Target Media and Leader requested a hearing on their postjudgment motion, and the portion of the motion requesting a remittitur specifically included a request for a hearing on the issue of punitive damages pursuant to this Court's decisions in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). According to Rule 4(a)(3), Ala. R. App. P., such a

postjudgment motion suspends the time in which a party must appeal from a final judgment:

> "The filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure ([Ala. R. Civ. P.]) shall suspend the running of the time for filing a notice of appeal. In cases where post-judgment motions are filed, the full time fixed for filing a notice of appeal shall be computed from the date of the entry in the civil docket of an order granting or denying such motion. ..."

When the trial court entered its order on August 30 denying Target Media and Leader's postjudgment motion, they then had 42 days from August 30 in which to appeal.

Even though the trial court's order of August 30 disposed of all motions then pending, Specialty Marketing filed a motion on September 2 asking the trial court to amend its August 30 order to state the factors on which the court relied in denying the postjudgment motion. Then, on September 7, Target Media and Leader renewed their motion for a hearing on their postjudgment motion, including the hearing on punitive damages pursuant to Hammond and Green Oil. Specialty Marketing relies on the pendency of these two motions in arguing that the August 30 order was not final. Specialty Marketing also argues that Target Media's June 14 motion seeking to file its financial records under seal remained

pending after the trial court entered its August 30 order because, it argues, it is not the kind of motion that can be denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. Because these three motions were still pending, Specialty Marketing argues, the August 30 order was not final because, it says, the trial court did not "completely adjudicate all matters in controversy between the parties." Specialty Marketing's brief, at 28.

This Court considered a similar situation in Southeast Environmental Infrastructure, L.L.C. v. Rivers, 12 So. 3d 32 (Ala. 2008). In that case the losing party at trial, Southeast Environmental Infrastructure ("SEI"), filed a postjudgment motion together with a motion for a remittitur and requested a Hammond/Green Oil hearing . The trial court scheduled a hearing, but informed the parties that it would consider all other postjudgment motions at the hearing and that it would schedule another hearing on the motion for a remittitur. Instead, the trial court entered an order denying SEI's postjudgment motions for a new trial, a JML, and a remittitur. The winning party, Rivers, then filed a motion for the court to hold a hearing on SEI's remittitur motion. SEI opposed Rivers's motion, arguing that the trial court's

denial of its postjudgment motions left the trial court without jurisdiction to hold a hearing on its motion for a remittitur. SEI contended that its only remedy was to appeal the order denying its postjudgment motions. The trial court rejected SEI's arguments and held that SEI had waived its right to a remittitur hearing or had invited any error resulting from the absence of such a hearing. This Court agreed with SEI that after the trial court denied SEI's postjudgment motions, the trial court "lost jurisdiction to 'reconsider' those postjudgment motions." 12 So. 3d at 49. The Court continued:

> "In Ex parte Allstate Life Ins. Co., 741 So. 2d 1066, 1070 (Ala. 1999), this Court stated:
>
> > "....
> >
> > "... 'This Court has clearly warned the bench and the bar not to attempt to use a Rule 59 or Rule 60 motion as a substitute for an appeal. "In view of the fact that this case presents to us that situation, we take this opportunity to point out to the bench and bar that the Rules of Civil Procedure do not authorize a movant to file a motion to reconsider the trial judge's ruling on his own post-judgment motion." [Ex parte Dowling,] 477 So. 2d [400,] 404 [(Ala. 1985)]. Just recently, this Court has reiterated: "[I]f a party has his own post-judgment motion denied, the review of that denial is by appeal. The rules do not provide for a 'motion to reconsider' the denial of one's own post-judgment motion."

> Ex parte Mutual Savings Life Ins. Co., [765 So. 2d 649, 651 (Ala. 1998)].
>
> "'The Court of Civil Appeals has also stated that the rule that a trial court cannot entertain a motion to "reconsider" its previous order denying a post-judgment motion is more than a mere "technicality" under the Alabama Rules of Civil Procedure, but is based on the court's loss of jurisdiction over the case. Package Express Center, Inc. v. Motley, 717 So. 2d 378 (Ala. Civ. App. 1998).'

"See also Pinkerton Sec. & Investigation Servs., Inc. v. Chamblee, 961 So. 2d 97, 101-02 (Ala. 2006), in which this Court stated:

> "'A motion to reconsider the trial court's denial of a postjudgment motion is barred because after the denial the trial court loses jurisdiction over the action. Ex parte Allstate Life Ins. Co., 741 So. 2d 1066, 1070 (Ala. 1999) ....
>
> "'Thus, "'when a post-judgment motion is denied, the review of that denial is by appeal, not by a motion to reconsider.'" Ex parte Mutual Sav. Life Ins. Co., 765 So. 2d 649, 651 (Ala. 1998) (quoting McAlister v. Deatherage, 523 So. 2d 387, 389 (Ala. 1988)).'

"Accordingly, SEI was correct in arguing that, after its December 11, 2006, order denying the postjudgment motions, the trial court did not have jurisdiction to hold a hearing on SEI's motion for a remittitur."

12 So. 3d at 49-50 (footnote omitted).

Applying SEI to the facts of this case, we conclude that, after the trial court entered its order of August 30, 2010, it

lost jurisdiction over the case. The motions filed on September 2 and September 7 by Specialty Marketing and Target Media, respectively, were, in effect, motions to "reconsider" and were therefore ineffective. Furthermore, the trial court had no authority to enter the order of September 13 purporting to schedule a hearing on the remittitur motion. The August 30 order denying Target Media and Leader's postjudgment motions was clearly a final order, and Target Media and Leader properly filed their notice of appeal. We conclude that the notice of appeal filed on September 21 was timely and that this appeal was taken from a final judgment.

B. Breach of Contract

Target Media first argues that it did not breach the 2002 distribution contract. In order to establish that the breach of contract alleged in its complaint occurred, Specialty Marketing needed to prove "'(1) the existence of a valid contract binding the parties in the action, (2) [Specialty Marketing's] own performance under the contract, (3) [Target Media's] nonperformance, and (4) damages.'" Employees' Benefit Ass'n v. Grissett, 732 So. 2d 968, 975 (Ala. 1998)

(quoting Southern Med. Health Sys., Inc. v. Vaughn, 669 So. 2d 98, 99 (Ala. 1995) (citations omitted)).[3]

As to the first element, it is undisputed that a valid contract--the 2002 distribution contract--existed. Under the contract, Target Media agreed to:

- Hand deliver the magazine Truck Market News and display it nationwide.
- Provide documentation (proof of delivery, magazines not picked up, etc.).
- Deliver the magazine twice a month to approximately 275 locations.
- Prominently display the magazine at each location.
- Allow Specialty Marketing to use a proprietary software program to enhance the benefits of Target Media's "High Response Delivery System."

Under the contract, Specialty Marketing agreed to:

- Deliver magazines to Target Media's warehouses (7,500 to Oxford facility, remainder stayed in Dallas).
- Pay Target Media $9,750 per month for delivery services.

The written contract was offered in evidence, and the jurors were able to read the contract for themselves.

[3]Because Specialty Marketing did not cross-appeal the judgment in favor of Target Media on its counterclaim, we need not discuss how Target Media needed to establish that the breach of contract alleged in its counterclaim occurred.

As to the second element, Specialty Marketing produced copies of the checks by which it paid for Target Media's delivery services from 2002 through most of 2006, from which the jury could have concluded that Specialty Marketing proved its performance under the contract, except for approximately five months when Specialty Marketing did not pay the invoices from Target Media.

As to the third element, Specialty Marketing's witnesses testified as to the destruction of large numbers of new magazines published by Specialty Marketing, as to Target Media's orders to its delivery drivers that Truck Market News was to be loaded and delivered only if there was room left in their vehicles after Target Media's magazines were loaded, and as to Target Media's schematics of the display racks that left no room for Truck Market News. Specialty Marketing presented photographs of magazines still banded and encased in plastic that had been thrown into dumpsters or taken to a recycling plant and presented Ford's testimony that she "made up" the numbers necessary to complete distribution reports that were forwarded to Specialty Marketing. Target Media introduced testimony that Gordon Adams and Wallace Adams were responsible for the destruction of magazines and explaining the

instructions to Target Media employees to invent numbers for reports and Leader's testimony that he never ordered employees to destroy new magazines. Target Media attacked Burt, portraying him as an opportunist who staged the photographs he showed Davis and Daniels in order to obtain a lucrative delivery contract for himself and emphasizing his admission that he had destroyed thousands of copies of Truck Market News. The jury had ample evidence from which it could have determined either that the Adams brothers, Fowler, and Burt were credible witnesses or that Leader was a credible witness. The jury apparently believed Specialty Marketing's witnesses and determined that Target Media had failed to perform under the 2002 distribution contract.

Finally, as we will discuss hereinafter, the jury heard ample evidence from which it could have found harm to Specialty Marketing as a result of the breach of contract. Therefore, the trial court properly submitted Specialty Marketing's breach-of-contract claim, based on an alleged breach of the 2002 distribution contract, to the jury. Moreover, after reviewing the terms of the 2002 distribution contract and the evidence presented at trial, we find

substantial evidence from which the jury could have found that Target Media breached the contract.

Target Media next notes that the trial court instructed the jury, without objection, that Specialty Marketing claimed a breach of contract because, Target Media says, "all" the copies of Truck Market News were not delivered each month. Target Media then argues that Specialty Marketing did not prove a breach of contract because, it argues, Davis testified that, under the 2002 distribution contract, he did not, in fact, expect Target Media to deliver "all" the copies of Truck Market News. Target Media contends that unchallenged jury instructions become the law of the case, citing Louisville & Nashville R.R. v. Atkins, 435 So. 2d 1275, 1278-79 (Ala. 1983), and that the jury must follow the trial court's instructions even if they are erroneous, citing Lee v. Gidley, 252 Ala. 156, 157-58, 40 So. 2d 80, 82 (1949).

In response, Specialty Marketing argues that it presented overwhelming evidence that Target Media breached the 2002 distribution contract and that Target Media is wrong when it argues that the trial court's use of the word "all" in its jury instruction means that Specialty Marketing could not prove a breach of contract. Citing Treadway v. Brantley, 437 So. 2d 93, 97 (Ala. 1983), Specialty Marketing says that

Target Media's argument "ignores the record and unjustly twists a part of the larger set of jury instructions which must be read and considered in their entirety." Specialty Marketing's brief, at 48.

The trial court charged the jury as follows:

> "Now, ladies and gentlemen, ... the first charge in the complaint is that for breach of contract. So let me talk to you for a minute about breach of contract.
>
> "Now, ... the plaintiff in this case, Specialty Marketing, has said ... that Specialty Marketing and the defendant, which is Target Media, entered into a contract for the distribution of Truck Market News, the magazines.
>
> "And the plaintiff in this case, Specialty Marketing, says that the defendant, Target Media, breached or broke this contract by failing to deliver all of the magazines. The defendant in this case, which is Target Media, denies these claims.
>
> "Now, the contract, what is a contract and what are the elements of a contract? The plaintiff here ... says that the parties had a contract and the contract is simply an agreement to do or not do a certain thing. Here it was a contract to do a certain thing which we've talked about[;] the contract[] [has] been introduced. You can look at that.
>
> "....
>
> "In this action, Specialty Marketing claims damages of Target Media that result [from] a breach of contract that was entered into by Specialty Marketing and Target Media on November 21, 2002, whereby Specialty Marketing agreed to provide its magazines for delivery and pay $9,750 per month to

Target Media for this service. Target Media agreed to deliver the magazines to 275 locations.

"Specialty Marketing contends that it has performed its part of the contract but that Target Media has breached the contract by failing to deliver all the magazines. Specialty Marketing alleges it was damaged as a result of the breach.

"Target Media admits entering into the contract with Specialty Marketing, but in defense of Specialty Marketing's claim, contend[s] that Specialty Marketing should not recover because Target Media delivered Specialty Marketing's magazines pursuant to the terms of the contract.

"Additionally, Target Media has filed a counterclaim against Specialty Marketing whereby Target Media seeks damages from Specialty Marketing as a result of Specialty Marketing's failing to pay for that delivery.

"The contract, being admitted by both parties, it will be your duty to determine from the evidence whether either party breached the contract, and if so, the amount of damages, if any, suffered by the other party as a result thereof.

"Now, a contract is breached or broken when a party does not do what was promised to do in the contract. To recover damages from the defendant in this case, from Target Media, for breach of contract, Specialty Marketing must prove to your reasonable satisfaction all the following:

"That Specialty Marketing and Target Media entered into a contract;

"That Specialty Marketing did all the things that the contract required [it] to do;

"That Target Media failed to do the things that the contract required [it] to do;

> "And that Specialty Marketing was harmed by that failure.
>
> "....
>
> "Now, there's been partial performance of a contract when performance has been commenced but has not been substantially completed. Where a contractor has partially performed a contract but has not performed all the important parts of the contract, if the failure to perform the balance of the contract is not excused, the contractor cannot recover for partial performance on the contract.
>
> "Substantial performance ... of a contract ... is performance of all its important parts but does not require a full or exact performance of every slight or unimportant detail.
>
> "If you decide that Specialty Marketing has proved [its] claim against Target Media for breach of contract, you also must decide how much money will reasonably compensate Specialty Marketing for the harm caused by the breach. This compensation is called damages. The purpose for such damages is to put Specialty Marketing in as good a position as [it] would have been had Target Media not broken the contract."

"In reviewing the trial court's instruction to the jury, this Court reads and considers the entire charge as a whole." Cooper & Co. v. Lester, 832 So. 2d 628, 641 (Ala. 2000). Viewing the entire jury charge as a whole, we cannot say that the trial court's use of the word "all" when describing Specialty Marketing's argument forecloses recovery by Specialty Marketing for breach of the 2002 distribution contract. The trial court described the contract, the

elements of a breach-of-contract claim, and the parties' arguments. Moreover, the contract itself was admitted into evidence and was made available to the jury, so the jurors were able to look at the contract for themselves when deliberating on the breach-of-contract claim. Therefore, we conclude that the trial court's statement to the jury that Specialty Marketing's breach-of-contract claim alleged that Target Media "did not deliver all the magazines" was not a error warranting our overturning the jury's verdict as to Specialty Marketing's breach-of-contract claim.

Target Media also argues that Specialty Marketing was not damaged by any alleged breach of contract. Our review of the record reflects otherwise. The evidence before the jury indicates that Specialty Marketing paid Target Media approximately $400,000 over a four-year period for delivery services that, if the jury believed Specialty Marketing's witnesses, were not performed; that Specialty Marketing paid approximately $900,000 in printing costs over a four-year period, approximately $200,000 of which the jury could have attributed to printing magazines that were thrown away in Oxford, and that Specialty Marketing lost business and profits.

In addition, Target Media argues that the damages awarded by the jury were excessive. Target Media contends that there was no evidence from which the jury could have computed compensatory damages for breach of contract in the amount of $851,552.

> "'"'It is well settled that damages awarded for breach of contract should return the injured party to the position he would have been in had the contract been fully performed.'"' Mannington Wood Floors, Inc. v. Port Epes Transp., Inc., 669 So. 2d 817, 822 (Ala. 1995) (quoting Med Plus Props. v. Colcock Constr. Group, Inc., 628 So. 2d 370, 375 (Ala. 1993), quoting in turn Cobbs v. Fred Burgos Constr. Co., 477 So. 2d 335, 338 (Ala. 1985)). The Mannington Wood Floors Court also recognized:
>
>> "'In computing damages for breach of contract, a jury need not achieve "mathematical precision." Indeed, "'the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount.'" Thus, a "'plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.'"'
>
> "669 So. 2d at 822 (citations omitted)."

Parsons v. Aaron, 849 So. 2d 932, 949 (Ala. 2002). Davis testified that from late 2002 through late 2006, his costs for

printing thousands of copies of Truck Market News and then shipping those magazines to Oxford, in addition to the amount he paid Target Media for delivery services, were in excess of $1.5 million, and the jury could well have determined the damages awarded based on a percentage of the magazines it determined had been thrown away instead of being delivered. We conclude that the trial court properly upheld the damages award to Specialty Marketing on its breach-of-contract claim.

Finally, Target Media argues that the jury's verdict in favor of Specialty Marketing on its breach-of-contract claim cannot be sustained because, it argues, the verdict is inconsistent with the jury's verdict in favor of Target Media on its counterclaim alleging breach of contract. The jury's verdict form on the breach-of-contract claim stated:

> "Breach of Contract
>
> "Specialty Marketing[,] Plaintiff vs. Target Media[,] Defendant
>
> "WE, THE JURY, FIND:
>
> "in favor of the plaintiff and against the defendant and assess plaintiff's damages at Eight Hundred & Fifty One Thousand, Five Hundred Fifty Two dollars [($851,552.00)].
>
> "We further find in favor of the defendant & against the plaintiff on the defendant's counterclaim and assess damages at Forty Eight Thousand & Eight Hundred dollars [($48,800.00)]."

We agree that on its face, the verdict form allowing the jury to find in favor of both parties on their breach-of-contract claims is inconsistent. Nevertheless, we cannot conclude that the inconsistent verdicts constitute reversible error because none of the parties objected to the use of the verdict form.

After the trial court charged the jury and before the jury began deliberations, the following exchange occurred:

> "THE COURT: Now, ladies and gentlemen, before I send you back with all the exhibits and with my verdict forms [which the trial court read to the jury during its charge], I need to check with each side and see if they are satisfied with my charge, give them that opportunity. And so first for the plaintiff, I need to ask, is the plaintiff satisfied with the charge?
>
> "SPECIALTY MARKETING'S ATTORNEY: With the exception of the defendant's requested jury charge number 4, Your Honor. We expressed that earlier.
>
> "THE COURT: That's fine. That one is reserved. Anything from the defendants?
>
> "TARGET MEDIA'S AND LEADER'S ATTORNEY: Yeah, we have no objections to the charge."

In order to preserve the inconsistent-verdict issue for review, Target Media's counsel should have objected to the verdict form that is now being challenged as inconsistent after the trial court read it to the jury and provided the written verdict form to the jury. Counsel was presented with an opportunity to do so after the trial court instructed the

jury; however, he not only failed to object to the verdict form, but he also stated that he was satisfied with it. When counsel is presented with an opportunity at the end of the trial court's charge to the jury to state any objection he or she has to the charge as given and does not do so, no error as to that charge is preserved for appellate review. Empiregas, Inc. of Ardmore v. Hardy, 487 So. 2d 244 (Ala. 1986). Therefore, the trial court's order denying Target Media's postjudgment motion as to Specialty Marketing's breach-of-contract claim is due to be affirmed.

C. Fraudulent Misrepresentation

We first address Target Media's argument that Specialty Marketing's reliance upon the representations made by Target Media and Leader was unreasonable as a matter of law. In order to prove a claim of fraudulent misrepresentation, Specialty Marketing needed to establish "(1) that [Target Media and Leader] made a false representation, (2) that the misrepresentation involved a material fact, (3) that [Specialty Marketing] relied on the misrepresentation, and (4) that the misrepresentation damaged [Specialty Marketing]." AmerUs Life Ins. Co. v. Smith, 5 So. 3d 1200, 1207 (Ala. 2008). This Court has held that "for a plaintiff to state a fraud claim, he must show that a misrepresentation induced him

to act in a way that he would not otherwise have acted, that is, that he took a different course of action because of the misrepresentation." Hunt Petroleum Corp. v. State, 901 So. 2d 1, 5 (Ala. 2004). In analyzing whether a fraud claim is applicable in a breach-of-contract action, then Justice Gorman Houston, in his special concurrence in Hunt Petroleum Corp., explained:

> "'[I]t is clear that to assert a fraud claim that stems from the same general facts as one's breach-of-contract claim, the fraud claim must be based on representations independent from the promises in the contract and must independently satisfy the elements of fraud. Deupree [v. Butner], 522 So. 2d [242,] 245 [(Ala. 1988)].'"

901 So. 2d at 10-11 (quoting Dickinson v. Land Developers Constr. Co., 882 So. 2d 291, 304 (Ala. 2003) (emphasis omitted)).

Moreover, a plaintiff must prove that he or she reasonably relied on the defendant's misrepresentation in order to recover damages for fraud. AmerUs, 5 So. 3d at 1207. Specialty Marketing alleged in its complaint that,

> "[i]n or about November 2002 until early 2007, plaintiff[] delivered its newly printed magazine to the defendants on a monthly basis for distribution by the defendants to truck stops and/or retail establishments across the United States. Each month, the plaintiff[] received an invoice from the

> defendants in the amount of $9,750.00. This amount represented the amount due to the defendants for delivery of all of the plaintiff['s] magazines. In addition to the invoices, plaintiff[] periodically received copies of 'route sheets' from the defendants. These 'route sheets' were represented to the plaintiffs to have been filled out by agents or employees of the defendants who were responsible for the actual distribution of the magazines. These 'route sheets' indicated that all of plaintiff['s] magazines were being distributed to the appropriate retail establishments. In addition to the 'route sheets' the plaintiff[] [was] periodically provided summaries of the distribution of plaintiff['s] magazines. These summaries also indicated delivery of all of plaintiff['s] magazines. In addition to the documents, between 2003 and December 2006, plaintiff[] [was] assured by Defendants Wallace Adams, Gordon Adams, and Ed Leader that all of plaintiff['s] magazines were being distributed appropriately."

Target Media and Leader contend that Specialty Marketing failed to offer substantial evidence that either of them represented that all the <u>Truck Market News</u> magazines had been or were being delivered or that the information contained in the spreadsheets was false. Specialty Marketing argues that it presented sufficient evidence to support its fraudulent-misrepresentation claim, including evidence indicating that Target Media and Leader represented to it that its magazines were moving well when, in fact, they were not, and evidence indicating that many of the numbers on the spreadsheets had been fabricated to make the information "look good." To the

extent that Specialty Marketing argues that the inaccurate information and documentation Target Media provided were misrepresentations, we cannot agree. Without question, the 2002 distribution contract required Target Media to provide documentation on its delivery of Truck Market News, and it was reasonable for Specialty Marketing to expect that documentation to be accurate. Nevertheless, although Target Media's failure to provide accurate documentation and other information can properly be considered a breach of contract, it does not necessarily follow that a party's failure to perform under a contract is fraudulent.

Our focus in this case is on Specialty Marketing's contention that its reliance on Target Media's and Leader's representations was reasonable. In its brief to this Court, Specialty Marketing argues:

> "The representations to Terry Davis, as the owner of Specialty Marketing, were material. His reliance on them was reasonable, given the values involved, the importance of the activities to his company, Target Media's status as a major distribution [sic], and its apparent expertise at the activities--of which Target Media and its employees assured him. Only an insider of the Defendant could have known that the representations and promises were false."

Specialty Marketing's brief, at 49. Other than its brief explanation of its contention that Davis's reliance on Target

Media's representations was reasonable, however, Specialty Marketing has not discussed the reliance issue further.

During the trial, in response to questions asked by Specialty Marketing's attorney regarding Davis's receipt of the documentation discussed in the 2002 distribution contract, Davis testified:

> "Q. Are [the exhibits Davis was examining] copies of the spreadsheets that you received from Target?
>
> "A. Yes.
>
> "Q. And do you recognize them as that?
>
> "A. Yes, sir.
>
> "Q. Do you remember receiving them?
>
> "A. I remember receiving some.
>
> "Q. Well, the ones that are in your hands?
>
> "A. Yes, sir.
>
> "Q. Do you know, Terry, these are the only ones we have copies of, and you provided these to me. Do you know if there were others that you received that we just don't have copies of here today?
>
> "A. No. This is all.
>
> "....
>
> "Q. ... What information, Terry, did you try to get? Why did you look at them? What did you learn from these spreadsheets?

"A. I wanted to see how our [magazines] were moving. I wanted to see what was left in those racks.

"Q. So the 'return' column was important to you?

"A. It was the most important.

"Q. Whether it was mid month or any time?

"A. That's right.

"Q. And did you rely, Terry, on these spreadsheets in determining how your [magazine] was doing as it was being distributed by Target?

"A. Oh, yeah.

"Q. Now, we said that you received those from '[0]3 till '04, some time in August of '04, I believe. Did you receive any after that time frame or after that day?

"A. No.

"Q. Did you ask for it?

"A. Yes.

"Q. Did you ask for something?

"A. Well, I kept asking, my sister and I both asked Gordon and then Wally [Adams], we'd ask for sheets and they just said they were behind."

Despite the fact that Davis testified that he relied on the spreadsheets provided by Target Media, however, the record reflects that Specialty Marketing continued to work with Target Media for more than two years after Davis received the last spreadsheet. Although Davis testified that he asked

Gordon Adams and Wallace Adams for the documentation required by the 2002 distribution contract, there is no evidence in the record that Davis or Daniels ever made any inquiry as to the reason Target Media was not sending the information on which Davis testified they relied.

Later during the trial, in response to questions asked by Specialty Marketing's attorney regarding the company's sales during the years the 2002 distribution contract was in place, Davis testified:

> "Q. ... Terry, ... during the time that you were with Target [Media], did Truck Market News or did your business, in fact, grow? Did your sales increase from year to year?
>
> "A. From the time I was with Target [Media]?
>
> "Q. Yes.
>
> "A. No.
>
> "Q. In fact, during those years, your sales remained fairly flat, didn't they?
>
> "A. Um-hum.
>
> "....
>
> "Q. ... Is that number on each of the tax returns, Terry, the number that you refer to as your sales for the year?
>
> "A. Yes.
>
> "Q. And is that number the one that you were hoping, expecting to grow during your relationship with Target [Media]?

"A. Yes.

"Q. What, from your perspective, and I don't want you to tell me what anybody said to you, but what, from your perspective, Terry Davis, selling adds for Truck Market News during that four-year period or so to five, what changed? What was different, if anything, between before you and Target [Media] during the time frame that you were with Target [Media]?

"A. Well, we had to--the biggest problem we had was that, with the phone calls not coming in.

"Q. From your advertisers?

"A. From the advertisers.

"Q. What did you do when you weren't just getting phone calls, what did you have to do to find people?

"A. We had to cut deals, we had to ... give them a half page for a full page--a full page for a half-page price or two pages price of one, things like that.

"Q. And am I correct at saying that the whole time you've been with Target [Media], you had to cut deals to some extent?

"A. Oh, yeah, we cut deals to--everybody cuts deals.

"Q. Did you find yourself having to work harder?

"A. Yes, to convince these people to run [advertisements].

"Q. Traditionally, Terry, ... was Truck Market News able to make enough money each month to pay for the next month or did you borrow money as you went along?

"A. We had to start borrowing money.

"Q. Before you were with Target [Media], did you borrow money at all?

"A. No, no, not at all."

The evidence in the record shows that with the exception of one year, Specialty Marketing's income was decreasing during the years it was associated with Target Media. Despite that fact, however, Davis did not testify that he or Daniels ever investigated the reasons for the decrease in income. In fact, Davis testified as follows on cross-examination:

"Q. Okay. Now, you mentioned when we first started this that you -- like, [Target Media's] failure to do the things that they were promising you that they were going to do had resulted in your business fall-off; true?

"A. Yes.

"Q. Did you ever have any conversations with anyone at Target [Media] about that?

"A. Yeah, I had it with Gordon and Wally [Adams] both, but ... it never crossed my mind that the problem was with Target [Media]....

"....

"A. I was told that [Truck Market News] was moving great by Gordy and Wally [Adams], and even Ed [Leader] told me that the [magazine] was moving well.

"Q. You have to use your own common sense, don't you, Mr. Davis?

> "A. No, I have to use the sense of the people I'm paying the money to, that I have to trust somebody.
>
> "Q. And so you don't use your own common sense at all?
>
> "A. What did you expect me to do, call them liars?
>
> "Q. No, sir. I'm just asking you, in any business transaction, should you also be required to use your own common sense?
>
> "A. I did what I thought was right and I thought they were doing their job .... I would never have thought that Target Media had anything to do with this."

In light of the foregoing testimony, it cannot be said that Specialty Marketing reasonably relied on Target Media's representations. As this Court stated in Torres v. State Farm Fire & Casualty Co., 438 So. 2d 757, 759 (Ala. 1983): "[T]he right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests." Here, Specialty Marketing took no precautions to safeguard its interests. If nothing else, Target Media's failure to provide the spreadsheets after August 2004 and Specialty Marketing's continued decline in business and income should have provoked inquiry or an investigation of the facts by Davis and Daniels. There is no evidence indicating that Davis or Daniels ever made any effort

beyond occasional telephone inquiries to investigate Target Media's distribution facility or its procedures during the entire four years they worked with Target Media. Based upon the record before us, we conclude that Specialty Marketing took no precautions to safeguard its own interests but, instead, blindly trusted Target Media's representations.

Specialty Marketing and Target Media, both corporations, negotiated the 2002 distribution contract on equal footing. From our review of the record, it is clear that they can be viewed as equals in fact and in the eyes of the law. The negotiations between the corporations culminated in Davis's and Gordon Adams's executing the contract on behalf of Specialty Marketing and Target Media d/b/a Target Distribution Partners, respectively. The contract is clear and unambiguous. It sets out Target Media's promise to deliver Truck Market News monthly to 275 locations, its guarantee to prominently display Truck Market News, and its promise to provide documentation of the delivery and display to Specialty Marketing. Because the jury could have concluded that Target Media threw away large portions of Truck Market News each month without attempting to deliver most of the magazines, much less prominently display them, and, in addition, stopped providing documentation to Specialty Marketing after

approximately two years, we have held herein that the jury properly considered whether Target Media breached the contract. However, we are unable to find any evidence to suggest that Specialty Marketing's reliance on Target Media's representations was reasonable as a matter of law. Consequently, we conclude that, as a matter of law, Specialty Marketing's fraudulent-misrepresentation claim should not have been submitted to the jury.

D. Promissory Fraud

We next address Specialty Marketing's promissory-fraud claim. "A claim of promissory fraud is 'one based upon a promise to act or not to act in the future.'" Ex parte Michelin North America, Inc., 795 So. 2d 674, 678 (Ala. 2001) (quoting Padgett v. Hughes, 535 So. 2d 140, 142 (Ala. 1988)). "The law places a heavier burden upon the plaintiff in promissory-fraud cases than in ordinary fraud cases." Heisz v. Galt Indus., Inc., 93 So. 3d 918, 928 (Ala. 2012).

> "'The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation. To prevail on a promissory fraud claim such as that at issue here, that is, one based upon a promise to act or not to act in the future, two additional elements must be satisfied: (5) proof that at the time of the

> misrepresentation, the defendant had the intention not to perform the act promised, and (6) proof that the defendant had an intent to deceive.'"

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1160 (Ala. 2003) (quoting Padgett v. Hughes, 535 So. 2d 140, 142 (Ala. 1988)).

In response to questions from Specialty Marketing's attorney during his direct examination, Gordon Adams testified as follows about his negotiations with Davis resulting in the execution of the 2002 distribution contract.

> "Q. Now, was it your intention, as the general manager of Target Distribution Partners in November 2002, assuming Specialty Marketing accepted your terms, to live up to this contract?
>
> "A. It was my intentions, yes, sir.
>
> "Q. And you were acting on behalf of the corporation?
>
> "A. Corporation? Target Distribution.
>
> "Q. Target Distribution Partners?
>
> "A. Yes, sir.
>
> "....
>
> "Q. Then there was also a promise there would be documentation that includes proof of delivery. When you wrote this contract and signed it and you signed it and then sent it to Terry for him to sign it; correct?

"A. Yes, sir.

"Q. When you wrote it and signed it, were you serious on behalf of Target Distribution Partners that the customer, if he accepted this contract, was going to be given documentation to prove delivery?

"A. Yes.

"....

"Q. ... Would it be fair to say that you, as the general manager, negotiating in this agreement for Target Distribution Partners, intended for the customer to believe that you would perform what you were doing and not mislead them?

"A. True.

"Q. You wanted the customer to rely on you, didn't you?

"A. Yes, sir."

Furthermore, Leader, who was Gordon Adams's supervisor and who provided input concerning the contract negotiations, testified as follows in response to questions from Specialty Marketing's attorney about the 2002 distribution contract:

"Q. Now, the next item is delivery twice a month; correct?

"A. On the contract, sir?

"Q. Yes.

"A. Yes, I believe so. ...

"....

"Q. ... Now, the next item is guaranteed prominent display of each location; correct?

"A. That is correct.

"Q. What does the word 'guaranteed' mean to you?

"A. That it's guaranteed.

"Q. That means no exceptions, doesn't it?

"A. Yeah.

"....

"Q. So your company was serious about making that promise?

"A. Yes."

Specialty Marketing had the burden of proving that, when Gordon Adams and Leader negotiated the 2002 distribution contract on behalf of Target Media, they intended not to perform under the contract as promised and they intended to deceive Specialty Marketing. Their testimony at trial, however, clearly shows that Specialty Marketing did not meet its burden. Even though the evidence at trial showed that Target Media did not, in fact, perform as promised, this Court has said that a defendant's failure to perform is not enough to show a present intent not to perform. Heisz, 93 So. 3d at 925. Consequently, we conclude that, as a matter of law,

Specialty Marketing's promissory-fraud claim should not have been submitted to the jury.

E. Disposition of Target Media and Leader's Motion for a JML

We conclude that Specialty Marketing failed to offer substantial evidence showing that Target Media or Leader made a false representation or that Target Media made any representation with the intention not to perform the act promised. Because, as a matter of law, the evidence does not support a finding of fraudulent misrepresentation or promissory fraud, the trial court erred in denying Target Media and Leader's motion for a JML as to Specialty Marketing's fraudulent-misrepresentation claim and Target Media's motion for a JML as to the promissory-fraud claim. Therefore, those claims should not have been submitted to the jury, and that portion of the trial court's order denying Target Media and Leader's motion for a JML as to Specialty Marketing's fraudulent-misrepresentation and promissory-fraud claims is due to be reversed.

As to Specialty Marketing's breach-of-contract claim, however, we conclude that Specialty Marketing offered substantial evidence that Target Media breached the contract; therefore, the trial court did not err in denying Target Media's motion for a JML as to Specialty Marketing's breach-

of-contract claim, and that claim was properly submitted to the jury.

F. Motion for a New Trial

We next address whether the trial court should have granted Target Media's motion for a new trial as to Specialty Marketing's breach-of-contract claim. Because we hold that the trial court properly submitted the breach-of-contract claim to the jury based on Target Media's failure to object to the trial court's use of the verdict form that allowed the jury to return inconsistent verdicts, we conclude that the jury's verdicts in favor of Specialty Marketing as to its breach-of-contract claim and in favor of Target Media as to its breach-of-contract counterclaim are due to be affirmed. We likewise conclude that sufficient evidence was presented to support the jury's damages awards for breach of contract. Therefore, the trial court properly denied Target Media's motion for a new trial as to the breach-of-contract claims.

G. Motion for a Remittitur

Because we have concluded that the trial court should have granted a JML for Target Media and Leader as to Specialty Marketing's fraudulent-misrepresentation claim and for Target Media as to its promissory-fraud claim, we need not review the punitive-damages awards associated with those claims, and

there is likewise no need to reach Target Media's and Leader's arguments as to the necessity of a remittitur.

IV. Conclusion

We affirm the trial court's order denying Target Media's motion for a JML and/or a new trial as to Specialty Marketing's breach-of-contract claim. We reverse the trial court's order denying Target Media and Leader's motion for a JML as to Specialty Marketing's fraudulent-misrepresentation and promissory-fraud claims. We remand the cause and direct the trial court to enter a JML in favor of Target Media and Leader as to Specialty Marketing's fraudulent-misrepresentation claim and to enter a JML in favor of Target Media as to Specialty Marketing's promissory-fraud claim. Because we conclude that the trial court should have granted a JML as to Specialty Marketing's fraudulent-misrepresentation and promissory-fraud claims, we pretermit consideration of the other arguments made by the parties regarding those claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Malone, C.J., and Woodall, Stuart, Bolin, and Parker, JJ., concur.

Shaw and Wise, JJ., concur in part and dissent in part.

Murdock, J., concurs in the result in part and dissents in part.

SHAW, Justice (concurring in part and dissenting in part).

I concur with the holding of the main opinion that Specialty Marketing Corporation's breach-of-contract claim against Target Media Partners Operating Company, LLC, was properly submitted to the jury. I respectfully dissent from the portion of the main opinion reversing the trial court's order denying Target Media and Ed Leader's joint motion for a judgment as a matter of law ("JML") on Specialty Marketing's fraudulent-misrepresentation claim and for a JML on Specialty Marketing's promissory-fraud claim against Target Media. I believe that Specialty Marketing presented substantial evidence as to each element of those claims. To the extent that the main opinion purports to adopt the proposition that, in the context of an action stemming from a contract, any fraud claim must be based on representations independent of the promises in the contract and must independently satisfy the elements of fraud, I also dissent. That proposition was not advanced by Target Media or Leader in either their oral motion for a JML at the close of Speciality Marketing's evidence, in their written brief in support of that motion, or even in their postjudgment motions. Further, this argument was not presented by any party on appeal. Thus, it cannot form a basis on which to reverse the judgment of the trial

court. Brannon v. BankTrust, Inc., 50 So. 3d 397, 405 n.8 (Ala. 2010) ("This Court will not reverse a judgment on a ground not argued to the trial court."); Hart v. Pugh, 878 So. 2d 1150, 1157 (Ala. 2003) ("[W]hen we are asked to reverse a lower court's ruling, we address only the issues and arguments the appellant chooses to present."); and Radenhausen v. Doss, 819 So. 2d 616, 619 n.1 (Ala. 2001) ("[N]either party has raised this issue below or on appeal; therefore, it is not before this Court.").

Wise, J., concurs.

MURDOCK, Justice (concurring in the result in part and dissenting in part).

I strongly disagree in two respects with the manner in which the main opinion analyzes the issue of fraud in this case. First, the manner in which the main opinion addresses the issue of reasonable reliance entails an overlooking of certain evidence, a reweighing of other evidence, and a substitution of this Court's opinion for that of the jury. Even more troubling, however, is that aspect of the main opinion that endorses a view heretofore embraced only by a single Justice of this Court to the effect that fraud claims cannot arise out of contractual relationships. In so doing, the main opinion essentially abolishes the cause of action of fraud in an important category of cases. I discuss these two concerns in Parts I.A. and B. hereof.

I also believe the main opinion overlooks and reweighs evidence and accordingly substitutes the judgment of this Court for that of the jury as to the promissory-fraud claim. This issue is discussed in Part II below.

For the reasons discussed herein, I dissent as to the analysis and result reached by the main opinion as to the aforesaid issues. I concur in the result as to the affirmance

of the trial court's judgment in favor of Specialty Marketing Corporation on its breach-of-contract claim.

I. Fraud

A. Reasonable Reliance

The primary ground upon which the main opinion reverses the trial court's judgment awarding damages to Specialty Marketing for the fraudulent conduct of Target Media Partners Operating Company, LLC ("Target Media"), and at least one of its principals is the asserted failure of Specialty Marketing to prove the element of "reasonable reliance." In assessing this rationale, it is important, I believe, to first take note of the various ways in which Target Media and its principals committed the fraud in question. These included the following:

1. Monthly Invoices from the defendants in which Target Media billed Specialty Marketing each month for the full amount due under the contract. In other words, each month, from the very beginning of the contract until its end, Target Media sent a written statement to Specialty Marketing that implicitly represented that all of Specialty Marketing's magazines due to be distributed by Target Media during the prior month had in fact been distributed by Target Media.

2. Target Media periodically sent to Specialty Marketing "route sheets," represented by Target Media to have been filled out by its agents or employees, again representing that all of Specialty Marketing's magazines were being distributed to the appropriate retail establishments.

3. Target Media periodically provided to Specialty Marketing "summaries" indicating delivery of all Specialty Marketing's magazines.

4. Between 2003 and December 2006, Specialty Marketing was repeatedly assured orally by defendants Wallace Adams, Gordon Adams, and Ed Leader that all of its magazines were being distributed appropriately.

The record contains substantial evidence that during much, if not all, of the contract term, the above-described representations were false and were knowingly made by Target Media and its principals as false representations. See also the discussion of the evidence in Part II below. In fact, there appears to be no dispute in this case that the jurors reasonably could have found that Target Media and its principals made fraudulent misrepresentations.

The only remaining question is whether there was substantial evidence from which jurors could have inferred that Specialty Marketing relied on these representations and whether its reliance was reasonable. In this regard, Specialty Marketing argues as follows:

> "The representations to Terry Davis, as the owner of Specialty Marketing, were material. His reliance on them was reasonable, given the values involved, the importance of the activities to his company, Target Media's status as a major distribut[or], and its apparent expertise at the activities--of which Target Media and its employees assured him. Only an insider of the Defendant could have known that the representations and promises were false."

Specialty Marketing's brief, at 49. I find Specialty Marketing's position entirely plausible, as did, apparently, the jury. Indeed, the record contains substantial evidence, including the express testimony of Davis regarding Specialty Marketing's reliance upon some of, if not all, the misrepresentations described above, from which the jury could have inferred that Specialty Marketing repeatedly and continually relied on these representations to pay Target Media's invoices month after month after month and persist in its contractual relationship with Target Media.

The main opinion acknowledges the fact that Davis explicitly testified to his reliance on the so-called "spreadsheets." It makes much of the fact, however, that Specialty Marketing "continued to work with Target Media for more than two years after Davis received the last spreadsheet." ___ So. 3d at ___. This reasoning, however, ignores the fact that the jury was free to believe that, although the spreadsheets stopped coming at some point, Specialty Marketing and Davis reasonably could have relied upon, and did rely upon, those spreadsheets to make payments to Target Media during the period that Target Media did provide them. Moreover, it ignores the other misrepresentations made by Target Media and its principals as

described above, including the implicit misrepresentations by Target Media, through its invoices, that all of Specialty Marketing's magazines were being distributed each month. These other misrepresentations by Target Media clearly continued until the end of the contract term.

Nor do I see how this Court can conclude that the jury was not free to infer that Specialty Marketing's reliance on all of these misrepresentations, including the monthly invoices, was reasonable. Davis testified that he trusted Target Media and its principals and that "it never crossed [his] mind" that Target Media was repeatedly lying to him. The main opinion's conclusion that Specialty Marketing's reliance was unreasonable appears to be based on a two-part premise: (a) that the only reason Specialty Marketing's business was not more successful was that Target Media was not distributing its magazines properly, and (b) that Specialty Marketing should have known this to be the case. I see no evidence in the record to support either part of this premise.

To the contrary, Davis testified that he had no reason to believe that his company's declining income was caused by Target Media because all the feedback he received from Target Media indicated that Specialty Marketing's magazines were being distributed to the display sites and that customers were

picking up the magazines. The jury heard Davis testify that he had to rely upon "the people I'm paying the money to, that I have to trust somebody" and that he "did what I thought was right and I thought they were doing their job ... I would never have thought that Target Media had anything to do with this." I do not believe this Court properly can hold as a matter of law, as we must in order to reverse the judgment entered on the jury's verdict in this case, that the circumstances with which Davis and Specialty Marketing were faced required them to assume that Target Media and its various principals were all lying to Davis and Specialty Marketing on a regular basis, despite possessing no knowledge that this was the case.

To the contrary, finding as the main opinion does that Specialty Marketing did not "reasonably" rely on Target Media's continual misrepresentations simply because Davis and Daniels knew that Specialty Marketing's income was declining imposes an unfair burden on the plaintiff. As a Supreme Court in a sister state has observed,

> "'[a] party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract.' (Tourek et al., Bucking the 'Trend': The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and

> Misrepresentation (1999) 84 Iowa L. Rev. 875, 894.) No rational party would enter into a contract anticipating that they are or will be lied to. 'While parties, perhaps because of their technical expertise and sophistication, can be presumed to understand and allocate the risks relating to negligent product design or manufacture, those same parties cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.' (Id. at p. 909.)."

Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 993, 102 P.3d 268, 275-76 (2004).

This Court is not a fact-finding body. It is not our job to decide the credibility of or to assign weight to testimony and other evidence of fraud and the reliance thereon that purportedly occurred in this case. It was up to the jury to do this and to decide whether it was reasonable for Specialty Marketing to rely upon Target Media's continual misrepresentations throughout the four-year term of that company's contract with Target Media. Given the evidence before us, I see no basis for this Court to decide as a matter of law that the jury in this case could not reasonably have found that Speciality Marketing reasonably relied upon Target Media's invoices, route sheets, summaries, and regular oral assurances to persist in its contractual relationship with Target Media and to continue paying Target Media's invoices each month.

B. Abolishment of Fraud as a Cause of Action Arising Out of Contractual Relationships

The main opinion includes an alternative ground for reversing the trial court's judgment with regard to the fraudulent-misrepresentation claim that is even more troubling than its treatment of the jury's factual finding as to the issue of reasonable reliance. Specifically, the main opinion today embraces -- the first time a majority of this Court has done so -- a restrictive view of the availability of fraud claims arising out of contractual relationships heretofore espoused only by a single Justice of this Court eight years ago in Hunt Petroleum Corp. v. State, 901 So. 2d 1 (Ala. 2004). None of the other Justices in Hunt joined that Justice in this view. To the contrary, in both Hunt and in the more recent case of Exxon Mobil Corp. v. Alabama Department of Conservation & Natural Resources, 986 So. 2d 1093 (Ala. 2007), the Court engaged in a substantial analysis of the elements of fraud, particularly the element of reasonable reliance, that would have been completely unnecessary had the cause of action not been viable.

Specifically, the majority of this Court today quotes and relies upon the following position stated by Justice Houston

in Hunt and in Dickinson v. Land Developers Construction Co., 882 So. 2d 291 (Ala. 2003):

> "'[I]t is clear that to assert a fraud claim that stems from the same general facts as one's breach-of-contract claim, the fraud claim must be based on representations independent from the promises in the contract and must independently satisfy the elements of fraud. Deupree [v. Butner], 522 So. 2d [242,] 245 [(Ala. 1988)].'"

Hunt Petroleum Corp., 901 So. 2d at 10-11 (Houston, J., concurring specially) (quoting Dickinson, 882 So. 2d at 304 (Houston, J., concurring specially)); see ___ So. 3d at ___. Based on this view of the law, the main opinion concludes that, "[t]o the extent that Specialty Marketing argues that the inaccurate information and documentation Target Media provided were misrepresentations, we cannot agree." ___ So. 3d at ___.

That is, the main opinion accepts the view proposed by Justice Houston that, to the extent a misrepresentation concerns a party's performance under a contract, the misrepresenter cannot be liable for fraud. The main opinion apparently overlooks, however, the fact that, at least until

now, Justice Houston's writings simply have not accurately reflected Alabama law on this point.[4]

In his writing in Dickinson, Justice Houston admitted that "a plaintiff can, in some instances, maintain a cause of action for fraud and breach of contract arising from the same general factual circumstances," citing the facts in Deupree v. Butner, 522 So. 2d 242 (Ala. 1988), as an example. Dickinson, 882 So. 2d at 303 (Houston, J., concurring specially). Justice Houston insisted, however, that "Deupree does not stand for the proposition that one can maintain a fraud claim based merely on an alleged misrepresentation that, or suppression of the fact that, a party has not properly performed, or has intentionally not performed, a contractual obligation." Hunt Petroleum Corp., 901 So. 2d at 13 (Houston, J., concurring specially).

Despite Justice Houston's protestations concerning Deupree, both the facts of that case and language in the

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[4]Given the difficulty of proving an advance intent to deceive necessary for a successful promissory-fraud claim (indeed, see the main opinion's treatment of this very issue in the present case, ___ So. 3d at ___), the main opinion also overlooks the fact that such a rule would provide a ready-made mechanism -- simply entering into a contract with the opposite party -- for a party intent on cheating another to greatly reduce the risk of liability for fraud and, specifically, the risk of suffering a punitive-damages award.

opinion indicate that an intentional misrepresentation concerning the performance of a contract can support a claim of fraud. In Deupree, the plaintiffs, the Butners, purchased a townhouse from a developer, Deupree, pursuant to a sales contract that required the developer to build a boat slip for the townhouse.[5] Deupree encountered numerous problems with the Florida Department of Natural Resources in obtaining "submerged land leases" for the boat slips associated with the townhouses. In fact, evidence at trial indicated that it would have been difficult, if not nearly impossible, to get government approval for the boat slips in the development area. Deupree told the Butners, however, that there would be no problem in getting permission from the state to build the boat slips. "According to the Butners, they had already closed on the townhome contract of purchase when they determined that a usable private boat slip would not be provided." 522 So. 2d at 243. The Butners sued Deupree alleging breach of contract and fraud, and the jury returned a verdict in favor of the Butners on both claims, awarding both compensatory and punitive damages.

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[5]It was "undisputed that a boat slip adds substantially to the value of the land to which it is appurtenant." Deupree, 522 So. 2d at 243.

On appeal, the Deupree Court addressed Deupree's argument that "the recovery for both fraud and breach of contract was improper because both claims arose from the same transaction and the Butners were thus allowed a double recovery." 522 So. 2d at 244. The Court disagreed, stating that "[i]n Alabama, a single transaction can support an award of damages for both breach of contract and fraud." Id. (citing Herring v. Prestwood, 414 So. 2d 52 (Ala. 1982) (emphasis added)). In fact, the Deupree Court held that "the fraud alleged in this case was not fraud in the inception of the contract, but in fraudulent concealments after the contract was made, and that the facts of this case could support both a breach of contract claim and a fraud claim." Id. (emphasis added).

Justice Houston dismissed the above-quoted language from Deupree by insisting -- despite the above-emphasized explicit statement of the Court to the contrary -- that Deupree involved fraudulent inducement, not fraud during the performance of the contract.[6]

> "While the Deupree decision characterized the alleged fraud at issue in that case as fraudulent

[6]Fraudulent inducement necessarily involves representations that are separate from any breach of the contract in question because they are made before any contract comes into existence.

> suppression, ... given the fact that the plaintiffs had not yet closed on their townhome and the fact that they alleged that they would not have closed on the townhome if they had not been lied to, the fraud alleged in Deupree appears to favor a claim for fraudulent inducement (to close on the townhome and 'complete' the contract)."

Dickinson, 882 So. 2d at 304.

In a special writing in Exxon, Justice Lyons expressly rejected Justice Houston's position. Justice Lyons explained that the facts in Deupree did, in fact, support the characterization of the fraud in that case as fraud during the performance of the contract. In doing so, Justice Lyons confirmed that Alabama law permits actions alleging both breach of contract and fraud based on the same facts.

> "This Court has recognized the availability of a tort remedy between parties to a contract not involving insurance in instances where, after entering into the contract, the injured party can show fraud by the other party. ...
>
> "The leading case is Deupree v. Butner, 522 So. 2d 242 (Ala. 1988), in which a developer represented to prospective purchasers of a townhome that it would give the purchasers of the townhome access to the purchasers' own boat slip. At the time of the negotiations and up until the closing, the developer experienced serious ongoing problems with regulatory authorities that cast substantial doubt on its ability to perform. Over two months after the closing and at a time when the ongoing problems had not been resolved, the developer wrote a letter reiterating its ability to construct the boat slip, stating that it was merely a matter of time before it did so. The developer ultimately failed to

perform, and the purchasers sued, alleging fraudulent concealment in the inducement of the contract and fraudulent concealment during the performance of the agreement, as evidenced by the letter written after the closing. This Court, affirming a judgment entered on a jury verdict in favor of the purchasers, recognized the availability of a cause of action based on fraudulent concealment relating to the events both before and after the closing. With respect to events after the closing, this Court stated:

> "'The [purchasers'] fraud claim was based on [the developer's] concealment of the difficulties he was having with getting approval of the boat slips. [The developer] wrote a letter to [one of the purchasers] on July 26, 1983 [over two months after the closing], and stated that it was simply "a matter of time" until the permits would be issued.'

"522 So. 2d at 246.[7]

"It is hornbook law that fraud is composed of multiple elements, namely, a false statement of a material fact or concealment of such a fact under circumstances where there is a duty to speak and reasonable reliance to the detriment of the victim. See, e.g., Padgett v. Hughes, 535 So. 2d 140, 142 (Ala. 1988). In Hunt Petroleum Corp. v. State, 901 So. 2d 1 (Ala. 2004), a case in which I recused

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[7]Although it is not entirely clear to me from my reading of Deupree and Justice Lyons's review of it in Exxon exactly what reliance was made by the purchasers in Deupree upon the representations made by the developer after the closing or what damage the purchasers suffered as a result of that post-closing reliance, the difference in the positions as expressed by Justice Houston and Justice Lyons does not turn upon this issue but, instead, upon the more fundamental question: whether the law would ever permit a claim of fraud where the misrepresented fact concerns a party's performance under the contract.

> myself, this Court did not dwell on the availability of a remedy for fraud in the performance of a contract very similar to the contract here presented; instead, it moved directly to an examination of the evidence of reliance and found it wanting. Such approach, of necessity, assumed, without deciding, the availability of fraud in the performance of the contract under the facts presented in that case. Only Justice Houston, in his special concurrence, 901 So. 2d at 9, probed the availability of a remedy for fraud. In so doing, he attempted to limit the holding in Deupree to pre-closing suppression, beyond, I respectfully submit, the previously quoted holding of the Court clearly recognizing post-closing conduct as part of the basis for the fraud claim. In Bethel v. Thorn, 757 So. 2d 1154 (Ala. 1999), this Court had previously embraced a broader view of Deupree than that of Justice Houston in his special writing in Hunt Petroleum. We observed, citing Deupree: 'This Court has recognized that fraudulent concealment of facts after a contract has been made can support both a breach-of-contract claim and a fraud claim.' 757 So. 2d at 1162 (emphasis added)."

Exxon Mobil Corp., 986 So. 2d at 1130-31 (Lyons, J., concurring in part and concurring in the result) (some emphasis added).

The view of Alabama law explained by Justice Lyons and apparently relied upon by the remainder of the Court in Hunt Petroleum and Exxon finds ample support in other precedents. In Herring v. Prestwood, 414 So. 2d 52, 58 (Ala. 1982), this Court explained:

> "Herring's complaint alleged fraudulent suppression of the fact that Prestwood had decided not to sell the land after signing the option offer. In this

> situation, the plaintiff need not forego seeking damages for breach of contract in order to recover for the fraud."

See also Bethel v. Thorn, 757 So. 2d 1154, 1162 (Ala. 1999) ("This Court has recognized that fraudulent concealment of facts after a contract has been made can support both a breach-of-contract claim and a fraud claim. See Deupree v. Butner, 522 So. 2d 242, 244-45 (Ala. 1988); Herring v. Prestwood, 414 So. 2d 52, 57-58 (Ala. 1982)."). In yet another case, the United States Court of Appeals for the Eleventh Circuit held:

> "ConAgra notes correctly that under Alabama law a 'mere breach of a contractual provision is not sufficient to support a charge of fraud.' Brown-Marx Assocs., Ltd. v. Emigrant Sav. Bank, 703 F.2d 1361, 1370-71 (11th Cir. 1983). We disagree, however, with ConAgra's assertion that its failure to weigh the broilers accurately was merely a breach of one of the contract provisions and therefore could not give rise to a fraud claim. ConAgra contracted to pay the growers based on the weight of the broilers. It failed to perform that act by committing a fraud, misrepresenting the weight of the broilers. Because of this fraud, the growers accepted lower payments than called for under their contracts."

Braswell v. Conagra, Inc., 936 F.2d 1169, 1173 (11th Cir. 1991).

Until today, fraudulent misrepresentations made during the course of the performance of a contract to induce the opposite party to persist in the contractual relationship and

to continue its performance thereunder have been actionable as fraud, assuming the other elements of fraud are present. As Justice Lyons noted in relation to the Hunt case, if this were not true, this Court has engaged in a great deal of needless analysis of the evidence supporting the various elements of fraud, especially the element of reasonable reliance, in such cases as Hunt and Exxon.

Put differently, fraudulent misrepresentations are no less actionable because they are misrepresentations as to the misrepresenter's performance under the contract as opposed to some independent fact or event. If the misrepresented fact is of the misrepresenter's performance, this simply means that there may also be a parallel cause of action for breach of contract. Only one recovery may be had of course, but Alabama law has always recognized both causes of action.

Today's decision appears to abolish the former cause of action. This is surprising in its own right, but even more so given the fact that the main opinion expends significant time and energy on its separate and primary rationale that there was no "reasonable reliance" by Specialty Marketing in this case, a rationale that, if germane, would be sufficient unto itself to achieve the reversal of the trial court's judgment, yet, as in Hunt Petroleum and Exxon, need not have detained

the Court at all if Alabama law does not in the first place even recognize a cause of action for fraud arising from a contract.

II. Promissory Fraud

> "To state a claim of promissory fraud, the plaintiff must allege facts showing '(1) a false representation; (2) of an existing material fact; (3) that is [reasonably] relied upon; (4) damage resulting as a proximate cause[; (5) that] at the time of the misrepresentation, the defendant had the intention not to perform the promised act[;] and (6) that the defendant had an intent to deceive.'"

Bethel, 757 So. 2d at 1159 (quoting Pinyan v. Community Bank, 644 So.2d 919, 923 (Ala. 1994)).

The main opinion takes the position that Specialty Marketing failed to present evidence indicating that Target Media intended not to perform under the 2002 distribution contract and intended to deceive Specialty Marketing at the time it negotiated the 2002 distribution contract. In making this argument, the main opinion relies exclusively on testimony from Target Media executives Ed Leader and Gordon Adams, noting that both essentially testified that they intended to perform the contract when they entered into it and, specifically, that neither of them testified that he had an intent not to perform or an intent to deceive at the time the contract was formed. ___ So. 3d at ___.

The main opinion overlooks the fact that the jury was free to, and obviously did, assign little or no credibility or weight to the testimony of Leader and Adams. Clearly, the absence of an admission of an intent to deceive by one who harbors an intent to deceive cannot be the sine qua non of a viable promissory-fraud action. Were it otherwise, there would be little point in this Court's continuing to espouse the view that promissory fraud remains a viable action under Alabama law. By focusing on the lack of an admission by the alleged tortfeasors, and their apparently noncredible protestations of innocence, the main opinion overlooks the substantial circumstantial evidence of promissory fraud and, in the process, reweighs the evidence that was presented to the jury.

The main opinion fails to acknowledge that circumstantial evidence can be used to establish an intent not to perform and an intent to deceive. Indeed, because proof of an alleged tortfeasor's thoughts is, by its nature, so difficult, circumstantial evidence often is the only way to prove promissory fraud.

> "'While the mere failure to perform the promised act is not by itself sufficient evidence of fraudulent intent, for purposes of a promissory-fraud claim, "the

> factfinder may consider that failure, together with other circumstances, in determining whether, at the time the promise was made, the promisor intended to deceive."'
>
> "Ex parte Grand Manor, Inc., 778 So. 2d 173, 182 (Ala. 2000) (quoting Murphy v. Droke, 668 So. 2d 513, 516 (Ala. 1995)). A defendant's intent to deceive can be established through circumstantial evidence that relates to events that occurred after the alleged misrepresentations were made. Vance v. Huff, 568 So. 2d 745, 750 (Ala. 1990)."

Byrd v. Lamar, 846 So. 2d 334, 343 (Ala. 2002).

The circumstantial evidence that warranted submission of the promissory-fraud claim to the jury and upon which the jury reasonably could have inferred an intent on Target Media's part not to perform the promised undertakings, includes the following:

1. Target Media was engaging in the deceptive practice of failing to distribute other publishers' magazines leading up to and at the time it negotiated and entered into its contract with Specialty Marketing. Target Media warehouseman Justin Thurman testified concerning Target Media's practices during the months leading up to Specialty Marketing's contracting with Target Media. He stated that Target Media had a preexisting practice of throwing away large quantities of customers' current magazines before they were ever delivered.

2. The jury could infer that, from the very beginning of the contract period, Target Media engaged in a practice of prioritizing the loading and delivery of its magazines over the loading and delivery of Specialty Marketing's magazines. Gordon Adams, Wallace Adams, and Tommy Fowler testified that when Target Media's delivery personnel picked up magazines for distribution, they were under

company orders to load all of Target Media's magazines into their delivery vehicles first and to load magazines delivered for other companies, such as Specialty Marketing, only if there was room left in the delivery vehicle. The Target Media employees testified that often there was no room left in the delivery vehicles for any magazines other than the ones published by Target Media, so other magazines were simply thrown away or delivered to the recycling plant. Specialty Marketing notes in its brief that "[t]he schematics Ed Leader approved, by which [magazines] were loaded for delivery and display, never included the Plaintiff's [magazines], and the practice of throwing away new [magazines] which never had been loaded was in place at the time of the promises." Specialty Marketing's brief, p. 53.

Gordon Adams testified that the schematics -- which were essentially blueprints telling truckers in what order to load the deliveries on their truck and what layout was to be used for magazine displays at the delivery locations -- did not include Speciality Marketing's magazine. Steve Burt, a truck driver for Target Media, likewise testified that the schematics never included Specialty Marketing's magazine. Given that these schematics existed from the start of the contract, this testimony constitutes evidence that Target Media never intended to fulfill its contract with Speciality Marketing.

3. Target Media failed to perform its contractual obligations beginning during the first year of the 2002 distribution contract. The main opinion characterizes Target Media's fraudulent practices as occurring "from the beginning" of the contract.[8]

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[8] "These three former Target Media employees testified that Target Media did not comply with the delivery requirements of the 2002 distribution contract from the beginning. Gordon Adams, Wallace Adams, and Fowler all testified that Target Media discarded most of the Truck Market News magazines before the magazines were ever loaded onto Target Media's delivery trucks

4. Burt also testified that he was instructed by Target Media to falsify route sheets to show that magazines had been delivered that in fact had not been delivered. Other witnesses also testified that Target Media had a practice of instructing their drivers to falsify their route reports to make the numbers look good.

5. The jury had before it substantial evidence of Target Media's business practices and general willingness to deceive Specialty Marketing for its own gain.

The foregoing certainly constitutes substantial evidence from which the jury could have inferred promissory fraud by Target Media, i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer" that Target Media made its promises to Specialty Marketing without ever having had an intent to keep them. See West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). This Court's reversal of the judgment entered on the jury's promissory-fraud verdict against Target Media and our reversal of the trial court's

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> and vans. Often, they stated, the magazines that were thrown away were still in the plastic wrap in which they had been delivered ..., with the bands holding bundles of magazines still in place. Occasionally whole pallets of Truck Market News magazines were taken to a nearby recycling plant without being unloaded at the Oxford facility at all."

___ So. 3d at ___.

denial of Target Media's motion for a judgment as a matter of law regarding the promissory-fraud claim can, in my view, be accomplished only by reweighing the evidence and substituting our factual findings for those of the jury.