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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
September 13, 2022 Session

**RICKY L. BOREN ET AL. v. HILL BOREN PC ET AL.**

**Appeal from the Chancery Court for Madison County  
No. 75056 Robert E. Lee Davies, Senior Judge**

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**No. W2021-00478-COA-R3-CV**

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This is an appeal arising from allegations of fraud and breach of contract in a dispute surrounding a stock transfer agreement that, among other things, provided for the transfer of controlling interest in a law firm from attorney Robert Hill to attorney Ricky Boren. Whereas many claims were resolved at summary judgment, others were tried before a jury and resolved in the Plaintiffs' favor. The parties present a plethora of issues for our consideration, and for the reasons stated herein, we affirm the judgment of the trial court and remand the case for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed and Remanded**

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and KENNY ARMSTRONG, JJ., joined.

Tamara Hill, Jackson, Tennessee, for the appellant, T. Robert Hill.<sup>1</sup>

Teresa A. Luna and Lewis L. Cobb, Jackson Tennessee, for the appellees, Ricky Lee Boren and Jeffrey P. Boyd.

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<sup>1</sup> Both Tamara Hill and T. Robert Hill purported to file briefs in this matter on behalf of Hill Boren, PC. For the reasons discussed herein, there is an absence of standing with regard to the issues purported to be raised by the law firm in this appeal. Although Mr. Hill has filed papers with this Court appearing to participate in this case as an advocate on his own behalf, the cover pages of the appellate briefing submitted on his behalf indicate that Ms. Hill filed those briefs as his counsel; in terms of Mr. Hill's role as an advocate in reference to the briefs submitted, Mr. Hill is simply identified on those cover pages as purported counsel for the law firm.

## OPINION

### BACKGROUND AND PROCEDURAL HISTORY

As we noted in a prior appeal of this matter, “[t]he present controversy relates to fallout over an agreement reached between attorneys T. Robert Hill and Ricky Boren concerning the ownership and control of the Hill Boren, PC law firm.” *Boren v. Hill Boren PC*, No. W2019-02235-COA-R3-CV, 2021 WL 1109992, at \*1 (Tenn. Ct. App. Mar. 23, 2021) (internal footnote omitted). The record reveals there to be a morass of filings in the case, including requests for recusal of the trial court judge, efforts to seek interlocutory appeals, a motion for referral of alleged perjury to law enforcement authorities, and, of course, the assertion of various claims by the parties involved in the proceedings. Rather than attempt to chronicle every aspect of the litigation, including prior appeals, we find it most helpful to initially provide a basic sketch of the background of the case and summarize the procedural events that gave rise to our present review.<sup>2</sup>

The aforementioned agreement between Mr. Hill and Mr. Boren, hereinafter frequently referred to as the stock transfer agreement, was entered into in 2012 in connection with Mr. Hill’s desire to reduce his professional responsibilities and retire from the active practice of law. The stock transfer agreement provided in relevant part that, in consideration of the benefits received by Mr. Hill during the ensuing four-and-a-half year term of the agreement, he would transfer twenty-three shares of law firm stock to Mr. Boren on December 31, 2016. The agreement indicated that such a transfer would establish controlling interest of the law firm in Mr. Boren. As for the remaining shares Mr. Hill had in the firm, the stock transfer agreement provided that they would be divided equally among certain other firm attorneys provided that those attorneys remained firm employees in good standing. One such identified attorney was Jeffrey Boyd, who signed the stock transfer agreement as a third-party beneficiary.<sup>3</sup> Of note, Mr. Boren and Mr. Boyd also signed employment agreements with the law firm, and those agreements provided in relevant part that, in the event of an attorney’s resignation or termination, the firm “shall be entitled to no less than fifty (50) [percent] of any fee collected” if the client elects to still be represented by the attorney.

As they would later allege in their complaint in this matter, Mr. Boren and Mr. Boyd contend that Mr. Hill made various promises prior to the signing of the stock transfer agreement in order to induce them to execute that agreement and the employment agreements. According to their trial testimony, Mr. Hill promised, among other things, that he would convey controlling ownership interest in the firm at the end of 2016, that he

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<sup>2</sup> As is necessary for context surrounding certain discrete issues raised in this appeal, other litigation history will be detailed separately in connection with our later analysis of individual issues.

<sup>3</sup> Also signing the agreement as third-party beneficiaries were attorneys James Krenis and Mr. Hill’s wife, Tamara Hill.

would provide required advertising for the firm and manage the firm well, and that his wife, another firm employee, would be retiring with him. Regarding firm advertising, the stock transfer agreement itself contained a provision governing minimum expenditures for firm advertising in 2013-2016.

Mr. Boren and Mr. Boyd have maintained in this case that Mr. Hill's wife ceased working on a full-time basis subsequent to the execution of the stock transfer agreement, and Mr. Hill acknowledged at trial that his wife had sent out letters to attorneys discussing the subject of her availability on cases in connection with his retirement and travel plans. As was typical of these letters, which were sent in May 2015, one such letter read as follows:

As you may know, my husband is T. Robert Hill and he has decided to retire and work on his bucket list, which includes extensive travel. I cannot devote my full time and attention to the cases and travel with my husband. I will remain somewhat involved with most of them, at the clients' requests, but I will not always be available.

I am writing to let you know that we have associated Morgan and Morgan on my remaining cases. You should receive correspondence from Morgan and Morgan shortly, if you haven't already, as well as notices of appearance. I wish you well.

The heart of the present dispute subsequently manifested the following year in the fall of 2016, shortly before the contemplated December 2016 transfer of stock under the stock transfer agreement was to occur. In correspondence dated September 23, 2016, Mr. Boren wrote Ms. Hill outlining how her employment contract with the firm ran to December 31, 2016, and that, out of an abundance of caution, he wanted to provide written notice that her contract would "not be renewed effective January 1, 2017." Thereafter, on November 21, 2016, through hand-delivered letters to Mr. Boren's attorney, Mr. Hill noted his intent that Mr. Boren and Mr. Boyd would not be offered employment for 2017 and that, due to an alleged breach by Mr. Boren of the stock transfer agreement, he had "no choice but to dissolve" the law firm. Notice was also provided as to a future December 1, 2016, stockholders' meeting of the law firm, which was to address, among other things, "[p]resentation of plan for the dissolution of the [law firm]."

Subsequently, the noticed stockholders' meeting was delayed to December 15, 2016, but on December 6, 2016, the present litigation ensued when Mr. Boren and Mr. Boyd filed a complaint in the Madison County Chancery Court. Several claims were asserted, including for fraud in the inducement, breach of contract, and anticipatory breach of contract. Concerning one of the contract disputes, Mr. Boren alleged for his part that he had adequately complied with the stock transfer agreement but that Mr. Hill had stated that he "has no intention of honoring any of the terms of the Contract." The complaint also

alleged that Mr. Hill had refused to spend the required money on advertising and that the firm's income had significantly declined as a result. Further, the complaint included Mr. Boren's assertion of a derivative claim on behalf of the firm against Mr. Hill for alleged breaches of fiduciary duty to the law firm. As articulated in a later-filed amended complaint, Mr. Boren and Mr. Boyd averred that they were "entitled to specific performance of the Stock Transfer Agreement and/or compensation for all losses . . . occasioned by the [contractual] breaches," and asked that they be awarded "other appropriate damages" for asserted fraud and other claims, as well as punitive damages.

Chancellor James Butler recused himself from this case after the commencement of litigation. Senior Judge Robert E. Lee Davies ("the trial judge") was then assigned the case, and on December 8, 2016, he entered a temporary restraining order. Among other things, this order decreed that Mr. Hill was enjoined from holding a special stockholders' meeting "until after the Court has had the opportunity to hear the claims involved in the present lawsuit" and, further, that Mr. Hill was enjoined from taking any steps to terminate employees and dissolve the law firm. The order concluded by stating that the matter would be set for hearing on December 20, 2016.

Following this December 20, 2016, proceeding, in an order entered on January 9, 2017, the trial court noted that Mr. Hill had previously suggested that the issue of dissolution be tabled until resolution of the underlying case. The trial court itself concluded that tabling the issue of dissolution until resolution of the case would further prevent irreparable injury to Mr. Boren and Mr. Boyd, the law firm's employees, and the law firm's clients, and it expressly held in the January 9, 2017, order that "there will be no dissolution . . . until the underlying case is resolved." In view of further maintaining the status quo, the trial court additionally ordered, among other things, that Mr. Boren and Mr. Boyd would be allowed to possess their client files, "all of Hill Boren P.C.'s computers . . . necessary for Boren and Boyd to carry out their law practices," and "the phone lines and phone numbers used by Hill Boren, P.C."

Several claims were also asserted against Mr. Boren and Mr. Boyd during the litigation. For instance, Mr. Hill alleged that Mr. Boren was in breach of the stock transfer agreement and asserted that Mr. Boyd had intentionally interfered with Mr. Boren and Mr. Hill's business relationship. Moreover, the law firm asserted claims against Mr. Boren and Mr. Boyd for, among other things, breach of their employment agreements and alleged breach of the duty of loyalty. As is relevant to one of the issues discussed later in this Opinion, counsel from Milan, Tennessee, were eventually retained to represent the law firm and Mr. Hill, and on February 2, 2018, these counsel entered a notice of appearance.

Many of the claims involved in this case were adjudicated at summary judgment, and a jury decided remaining claims in favor of Mr. Boren and Mr. Boyd. As noted by the trial court in its judgment, the jury found that Mr. Hill had anticipatorily breached the stock transfer agreement, breached the stock transfer agreement as to its advertising provision,

and fraudulently induced Mr. Boren and Mr. Boyd. Mr. Boren and Mr. Boyd were awarded damages, including punitive damages,<sup>4</sup> and as to the issue of the stock transfer, the trial court awarded specific performance of the shares that were to transfer in accordance with Mr. Boren and Mr. Hill's contract. Subsequent to its entry of judgment, and upon noting that Mr. Hill had not transferred the stock at issue and had "not moved for a stay . . . or posted the appropriate bond or security," the trial court decreed in accordance with Rule 70 of the Tennessee Rules of Civil Procedure that this stock was divested from Mr. Hill and vested in Mr. Boren and Mr. Boyd. The present appeal would eventually ensue following the adjudication of several post-trial motions.<sup>5</sup>

## DISCUSSION

To say that this appeal presents numerous issues for this Court's consideration would be an understatement. The principal appellate brief ("the Principal Brief") submitted on behalf of Mr. Hill denominates forty issues for this Court's review in the brief's "Statement of Issues," a section which itself spans approximately fifteen pages of text. Although a comprehensive review of the Principal Brief, including the argument section, indicates that some of the issues raised are actually overlapping or duplicative in scope, Mr. Boren and Mr. Boyd (hereinafter, collectively, "the Appellees") endeavor to defend the trial court's judgment and try to be responsive to the Principal Brief's articulated concerns by restating, and responding to, over fifty issues, which they present under the umbrella of approximately twenty discrete "topics." Herein, we will attempt to respond to each of the concerns we perceive to be raised by the Principal Brief, condensing or restating issues as is appropriate during the course of our discussion and analysis.<sup>6</sup>

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<sup>4</sup> The specific amounts of awarded punitive damages were later remitted to fall within the statutory cap on punitive damages codified at Tennessee Code Annotated section 29-39-104.

<sup>5</sup> We also note that a prior appeal by Mr. Hill was dismissed for lack of finality. *See Boren*, 2021 WL 1109992, at \*2 (observing the lack of conclusive resolution as to the question of remitting punitive damages).

<sup>6</sup> We have confined our substantive review to issues that are both raised and supported by argument. We observe that the Principal Brief itself comprises over 135 pages, and argument appears to be interspersed throughout the brief. The argument section itself, however, starts at page 85. Although the version of the appellate rules in effect at the time of the filing of the Principal Brief allowed a party to include up to fifty pages in the argument portion of the principal brief, we will not consider substantive argument to the extent that it is interspersed outside of the denominated argument section given the referenced fifty-page limitation.

We note that the Appellees have raised an objection to the extent that the Principal Brief not only raises issues for Mr. Hill but actually also purports to raise issues on behalf of the law firm. Indeed, in addition to substantively responding to issues raised in this appeal, the Appellees have argued that this Court should "deny HBPC's appeal of any of the issues in this case." The Appellees' position is predicated legally on the general proposition of standing that the proper party to bring a claim on behalf of a corporation is the corporation itself acting through its directors or a majority of its shareholders. *See Keller v. Estate of McRedmond*, 495 S.W.3d 852, 867 (Tenn. 2016). Here, the Appellees note, Mr. Hill is no longer a director of the firm and does not have a majority of the firm stock, and they specifically point to the fact that the trial court has already entered an order divesting Mr. Hill of his controlling firm interest.

In connection with our efforts to address the matters raised, we preliminarily note that our ability to review appellate issues is impacted by parties' compliance, or lack thereof, with briefing requirements imposed by the Tennessee Rules of Appellate Procedure and the rules of this Court. As certain requirements in these rules are implicated in our review of multiple appellate issues, we outline them here at the outset.

Rule 27(a) of the Tennessee Rules of Appellate Procedure provides that the brief of the appellant shall contain the following under appropriate headings:

- (1) A table of contents, with references to the pages in the brief;
- (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;
- (3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;
- (4) A statement of the issues presented for review;
- (5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;
- (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
- (7) An argument, which may be preceded by a summary of argument, setting forth:**
  - (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on;** and
  - (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
- (8) A short conclusion, stating the precise relief sought.

Tenn. R. App. P. 27(a) (emphasis added). As evident from the emphasized text above, a

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Notably, as discussed in the background section of this Opinion, that order from the trial court observed the absence of a motion for a stay and the lack of posting of an appropriate bond or security. Insofar as we understand the events in this case as evidenced by the record, Mr. Hill does not in fact have control of the firm at this time, and there thus appears to be merit to the Appellees' suggestion that a few of the presented issues in this appeal (specifically concerning claims by the law firm) should be foreclosed on grounds of lack of standing. That point will be referenced herein to the extent it bears relevance to any of the issues raised, and of note, the reply brief filed in this appeal does not appear to respond to the standing issue raised by the Appellees.

brief's included argument must not only reflect the "contentions of the appellant with respect to the issues presented, and the reasons therefor," it must also include "citations to the authorities and appropriate references to the record . . . relied on." *Id.*

This Court's rules also provide for certain appellate briefing requirements. Specifically, Rule 6 of the Rules of the Court of Appeals of Tennessee provides in pertinent part as follows:

(a) Written argument in regard to each issue on appeal shall contain:

(1) A statement by the appellant of the alleged erroneous action of the trial court which raises the issue and a statement by the appellee of any action of the trial court which is relied upon to correct the alleged error, with citation to the record where the erroneous or corrective action is recorded.

(2) A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.

(3) A statement reciting wherein appellant was prejudiced by such alleged error, with citations to the record showing where the resultant prejudice is recorded.

(4) A statement of each determinative fact relied upon with citation to the record where evidence of each such fact may be found.

(b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Tenn. Ct. App. R. 6.

Collectively, these rules are critical to ensuring that this Court is properly apprised of what is at stake in a given appeal and why the raised issues are deserving of redress. They also have the practical effect, by requiring proper citations to the record, of promoting judicial efficiency. As it is often stated, judges "are not like pigs, hunting for truffles." *Cartwright v. Jackson Cap. Partners, Ltd. P'ship*, 478 S.W.3d 596, 616 (Tenn. Ct. App. 2015) (quoting *Flowers v. Bd. of Pro. Resp.*, 314 S.W.3d 882, 899 n.35 (Tenn. 2010)). Such a concern is of especial importance in an appeal involving a voluminous record such as the present one, where the various aspects of the record total well over a hundred separate volumes. If a party fails to comply with the applicable rules of appellate procedure

or rules of this Court, the party's failure can result in a waiver of the issues raised for review. *See Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000).

Our ability to review appellate issues is, of course, also impacted by parties' actions or inactions in the trial court. It is well-settled law, for instance, "that an issue not raised in the trial court cannot be raised on appeal." *PNC Multifamily Cap. Institutional Fund XXVI Ltd. P'ship v. Mabry*, 402 S.W.3d 654, 663 (Tenn. Ct. App. 2012). Moreover, as is relevant to several issues in this appeal which attempt to challenge the sufficiency of the evidence offered as to certain claims, we note the following case law:

The question of whether evidence is sufficient to support a jury verdict is tested by a motion for a directed verdict, and in order for the trial court to consider the sufficiency of the evidence in a post trial motion, the moving party must have made a motion for a directed verdict at the conclusion of all of the proof. Tenn. R. Civ. P. 50.01 & 50.02; *Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 894 (Tenn. Ct. App. 1996). Similarly, in order for this Court to review the sufficiency of the evidence on appeal, the motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict. *Cortez*, 941 S.W.2d at 894; *See also* Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* §§ 12-1(a) 12-1(d)—(1999) (discussing Rules 50.01 and 50.02 of the Tennessee Rules of Civil Procedure).

*Steele v. Columbia/HCA Health Care Corp.*, No. W2001-01692-COA-R3-CV, 2002 WL 1000181, at \*3 (Tenn. Ct. App. May 13, 2002).

With all of the above in mind, we turn to the various issues we perceive to be raised in this appeal. We will, as noted earlier, condense or restate issues as is appropriate, but given the vast array of concerns raised by the parties, much of the ensuing presentation will necessarily appear somewhat haphazard, jumping from issue to issue as is required for a complete and thorough review.

#### *Derivative Action Issue*

In the issue labeled "Erroneous Derivative Action,"<sup>7</sup> the Principal Brief asserts error in relation to Mr. Boren's maintenance of a derivative action in the trial court. Although the presented issue concludes by simply asking whether the trial court erred in "allowing the derivative action allegation to go to the jury," possibly implicating a sufficiency of the

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<sup>7</sup> Herein, we frequently refer to the labels given to the issues raised by the Principal Brief, while also quoting from questions the Principal Brief poses at the end of raised issues, questions which appear to focus and distill the raised concerns. Whereas these labels and questions are, within the Principal Brief, presented in capital letters and italics, respectively, our quoted references herein do not use these emphasizing features.



evidence concern, other prefatory statements within the presented issue appear to take umbrage at Mr. Boren’s alleged noncompliance with filing requirements. It is also stated that Mr. Boren waived the right to bring a derivative action. Just as the phrased issue itself does not appear to be limited to a single concern, the accompanying argument on the derivative issue appears to attempt to embrace a number of matters. We conclude that the included argument is lacking, however, inasmuch as it is not clear what specific orders or actions of the trial court are being challenged with respect to all of the articulated grievances. Relatedly, there is notable noncompliance with Rule 6 of the Rules of the Court of Appeals of Tennessee, as there is an absence of statements showing where the various alleged errors were called to the attention of the trial court. *See* Tenn. Ct. App. R. 6. Such statements, of course, must also be accompanied by “citation to that part of the record where appellant’s challenge of the alleged error is recorded.” *Id.*<sup>8</sup> The absence of appropriate compliance with the briefing requirements results in a waiver of the interjected concerns. *See Bean*, 40 S.W.3d at 54–55 (noting that the Supreme Court has held that it will not find this Court in error for not considering a case on its merits where a party did not comply with this Court’s rules). In any event, to the extent that the issue raises a sufficiency of the evidence argument by specifically asking whether the trial court erred in allowing the derivative claim to “go to the jury,” such an inquiry itself is waived in light of Mr. Hill’s failure to move for a directed verdict following the close of all the proof. As touched on earlier, “[f]or this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury’s verdict.” *McLemore ex rel. McLemore v. Elizabethton Med. Invs., Ltd. P’ship*, 389 S.W.3d 764, 778 (Tenn. Ct. App. 2012). Under the law, it matters not that Mr. Hill’s trial counsel orally moved for a directed verdict after the Appellees put on their proof as plaintiffs. Indeed, “[i]f the defendant puts on proof, he may renew his motion for directed verdict at the conclusion of the proof. In fact, failure to renew the motion at the end of all the proof waives any error in the denial of the previous motion for directed verdict.” Lawrence A. Pivnick, 2 Tenn. Cir. Ct. Prac. § 24:18 (Dec. 2022 update); *see also Searle v. Bryant*, 713 S.W.2d 62, 66 (Tenn. 1986) (“It is well-settled that a defendant waives his right to rely on error in the denial of his motion for directed verdict made at the end of the plaintiff’s proof if he goes forward with his own proof rather than resting on the motion.”).<sup>9</sup>

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<sup>8</sup> Even ignoring the absence of the statement required by Rule 6, the argument even lacks bare citations to the portions of the trial court record where Mr. Hill would apparently now like to focus our attention. We say that in light of the various citations included in the reply brief through which Mr. Hill attempts to support the notion that the complained-of derivative issues were raised in the trial court. Indeed, none of these citations appear to be included within the Principal Brief’s argument section concerning the derivative issues. As for the efforts to show in the reply brief where the issues were supposedly properly raised, we note that reply briefs are not vehicles to correct deficiencies in initial briefs. *See Ingram v. Ingram*, No. W2017-00640-COA-R3-CV, 2018 WL 2749633, at \*11 n.4 (Tenn. Ct. App. June 7, 2018).

<sup>9</sup> Although Mr. Hill, through a separate issue, in effect asks that this Court retire these long-standing principles and precedent, we decline the invitation. *See Parker v. Epstein Enters., LLC*, No. W2019-00311-COA-R3-CV, 2020 WL 2731234, at \*12 (Tenn. Ct. App. May 26, 2020) (collecting cases regarding the consequences of failing to make a motion for directed verdict at the close of all the proof and noting that it

### *Temporary Injunctive Relief Issue*

In the issue labeled “Erroneous TRO,” the Principal Brief asks whether the trial court erred in issuing temporary injunctive relief pending a decision on the merits. We are somewhat confused by the current efforts to review this matter following a trial on the merits. We deem the issue moot. *See Bean v. Wilson Cty. Sch. Sys.*, 488 S.W.3d 782, 791–92 (Tenn. Ct. App. 2015) (opining that no redress was available concerning a “Temporary Injunctive Order” and that interlocutory restrictions on conduct were moot after final order was entered after a full hearing).

### *Economic Loss Doctrine Issues*

A couple of the Principal Brief’s raised issues embrace the same concern, i.e., that certain of the Appellees’ claims are barred by the economic loss doctrine. Respectfully, we hold that these issues are waived. We reach this conclusion because these issues were never raised in the trial court.<sup>10</sup> *See PNC Multifamily Cap. Institutional Fund XXVI Ltd. P’ship*, 402 S.W.3d at 663 (“It is well established that an issue not raised in the trial court cannot be raised on appeal.”).

### *Parol Evidence Issues*

A couple of the Principal Brief’s issues relate to parol evidence. Whereas one issue asks whether the trial court erred in allowing certain parol evidence in this case, another issue is nominally concerned with whether the trial court erred in excluding parol evidence allegedly favorable to Mr. Hill.<sup>11</sup>

Concerning the Principal Brief’s complaint regarding the admission of certain evidence at trial, we hold that the issue is not deserving of any redress herein. First, we note that the argument section on this issue does not contain “[a] statement showing how [the] alleged error was seasonably called to the attention of the trial judge.” *See* Tenn. Ct. App. R. 6. In any event, even if we were to overlook this deficiency, the Appellees have

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is not the role of this Court to depart from the well-established law on the issue); *see also Hogue v. P&C Invs., Inc.*, No. M2021-01335-COA-R3-CV, 2022 WL 17175608, at \*5-7 (Tenn. Ct. App. Nov. 23, 2022) (discussing *Parker*, declining the appellant’s invitation to depart from prior case law, and stating that “[i]n keeping with this precedent, we find that because Mr. Catalogne failed to renew his . . . motion for directed verdict at the close of all proof, he waived appellate review of whether the evidence of Ms. Hogue’s due diligence was sufficient to support the jury’s verdict”). The failure to make a motion for directed verdict upon the conclusion of all the proof in this case impacts several issues in this appeal, as will be evident from our discussion herein.

<sup>10</sup> The Principal Brief itself fails to direct this Court to any place in the record where the matter of the economic loss doctrine was raised.

<sup>11</sup> Interestingly, as to the asserted issue complaining of the *allowance* of evidence, we observe that Mr. Hill had offered argument prior to trial speaking to circumstances when “parol evidence should be considered.”

pointed out that opposing trial counsel agreed at trial that the complained-of evidence could be admissible for purposes of the pursued fraud claims and had stated, “I agree. And I don’t disagree with that ruling,” in reference to the trial court’s ruling about same.

Despite this noted theoretical agreement with the trial court, it appears that Mr. Hill is nonetheless of the opinion that the complained-of evidence was improper because, supposedly, there was no fraud. In other words, as best as we understand his position, even if the complained-of evidence would, in theory, be properly admissible in support of a fraud claim, there was no actionable fraud based on certain *pre-trial* admissions by the Appellees. We are somewhat confused by this argument inasmuch as fraud claims were at issue during the trial. In effect, the argument appears to put the cart before the horse, as the trial court more or less noted in response to an argument made on the matter by Mr. Hill’s counsel at trial:

Okay. Well, I don’t know that, but you can, I guess, argue that. But I’m not going to restrict the evidence at this point because I don’t know that. I’m going to wait -- they’d have to wait to get on the stand to say [they did not rely on anything].

For all of the above reasons, there is no merit to the raised issue concerning the allowance of the complained-of evidence.

As for the issue nominally challenging the *exclusion* of parol evidence, we have been unable to locate any discernible argument in the argument section of the Principal Brief that sheds light onto the nature of the supposed grievance connected to this raised issue. The issue is accordingly waived. *See Bean*, 40 S.W.3d at 56 (“[A]n issue is waived where it is simply raised without any argument regarding its merits.”).

#### *Denial of Motion to Amend Answer*

One issue in the Principal Brief asserts that the trial court committed error in not allowing Mr. Hill to add a statute of limitations defense post-trial. The specific motion at issue, which was brought under Rule 15.02 of the Tennessee Rules of Civil Procedure, was predicated upon the notion that Mr. Boren had supposedly changed his testimony at trial. In addition to seeking to amend Mr. Hill’s answer to add a statute of limitations defense, the motion argued that Mr. Boren’s fraud claim should be dismissed. Mr. Boren opposed the motion and argued, among other things, that: (1) “Rule 15.02 is a method to affirm what happened at trial and not to overturn what happened at trial”; (2) “Rules 59.0 or 60.0 are the primary vehicle[s] for post-judgment relief and Rule 15.02 cannot be used as an alternative”; (3) Mr. Hill “waived any affirmative defenses under Rules 8.03 and 12.08”;<sup>12</sup>

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<sup>12</sup> Regarding this point, Mr. Boren noted that the amended complaint “clearly lays out” when the fraud occurred.

and (4) the statute of limitations issue was not tried by consent at trial, but if it was, Mr. Hill lost. In reference to the argument Mr. Hill was asserting as to dismissal, Mr. Boren also argued that, whereas the fraud “initially occurred in 2012, it was not discovered . . . until at least 2015.” When the trial court later denied Mr. Hill’s motion to amend his answer to add a post-trial statute of limitations defense, it stated that “the issue raised by Hill was not tried with either express or implied consent because there was no notice to Plaintiffs.”

We discern no error in the trial court’s decision in light of this finding. Indeed, Rule 15.02, which was the basis for Mr. Hill’s request to amend his answer, states in pertinent part as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Tenn. R. Civ. P. 15.02. We note that “[t]he determination of whether there was implied consent rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse.” *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 891 (Tenn. 1980). Interestingly, the Principal Brief itself appears to point to the fact that a statute of limitations defense was not litigated at trial, as in one section of argument the Principal Brief refers to how “trial counsel should have raised” the defense. Of course, the mere fact that there were dates referenced at trial, supposedly evidencing a basis for a statute of limitations defense, does not reveal that the defense was tried by consent of the parties. *Christmas Lumber Co., Inc. v. Valiga*, 99 S.W.3d 585, 593 (Tenn. Ct. App. 2002) (“Simply because relevant dates were introduced at trial does not mean Valiga was aware of or acquiesced in this issue being tried.”). We find no merit in this issue, which insofar as we can tell, has in effect attempted to use Rule 15.02 as a means to assert a new issue post-trial and reverse the trial court’s judgment. The trial court’s decision to deny Mr. Hill’s post-trial motion to amend his answer is therefore affirmed.

### *Issues Regarding Jury Instructions*

The Principal Brief raises three issues pertaining to jury instructions, the first two of which concern instructions given about Mr. Boren.<sup>13</sup> The third issue asserts error with

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<sup>13</sup> The accompanying argument regarding the first two issues appears to be broader than what is specifically raised in the “Statement of Issues” section, as the argument section also offers a conclusory assertion of the trial court’s “fail[ure] to give instructions at all in multiple areas.” Even assuming the concern regarding “multiple areas” was regarded as a raised issue, we observe that this broad concern and what the “multiple areas” are do not appear to be developed in any way. To the extent that the first two

respect to the trial court's alleged truncation of statutory authority by way of its use of a "partial instruction." Although it is clear that the Principal Brief asserts that the trial court committed error regarding the jury instructions given in this case, the brief fails to achieve compliance with the rules of this Court. Indeed, nowhere in the accompanying argument regarding these issues do we find a "statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded." Tenn. Ct. App. R. 6(a). Accordingly, we deem that these issues are waived.<sup>14</sup> See *Bean*, 40 S.W.3d at 54–55 (noting that the Supreme Court has held that it will not find this Court in error for not considering a case on its merits where a party did not comply with this Court's rules).

*Impartiality/Issues with Certain Findings/Sufficiency of Punitive Damages Evidence*

Two of the Principal Brief's issues are labeled as "Impartiality Denied" and appear to allege that the trial court was not an impartial, neutral arbiter in the case. The second of these issues specifically takes umbrage at a finding that Mr. Hill was guilty of theft of services. According to the suggestion proffered through the raised issue, this finding by the court was improper and made by acting upon argument of counsel. Although we have searched the argument section, we have been unable to locate where this specific finding concerning "theft of services" was challenged by way of a developed argument. Accordingly, we deem that this particular concern, i.e., that impartiality was denied because of the theft of services finding, is waived.<sup>15</sup>

The other "Impartiality Denied" issue raised by the Principal Brief is less specific and generically accuses the trial court of taking "sides" in the case. Although not readily clear upon an initial review of the brief,<sup>16</sup> this issue, as best as we can tell, relates to the included argument that the trial court failed to make independent findings of fact and conclusions of law in connection with examining the punitive damages award. According to the Principal Brief, there was "reverse engineering" with "plaintiffs' counsel [doing the order] for the court." Although there was an attempt to support this argument by way of providing record citations to proposed findings of fact and conclusions of law submitted

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issues, as raised in the "Statement of Issues" section, appear to relate to a claim that the law firm asserted in this litigation, those issues of course are foreclosed due to the standing concern referenced earlier in this Opinion, even assuming these issues had otherwise been appropriately briefed.

<sup>14</sup> As briefly touched on earlier in this Opinion, the concern for compliance with the rules (and the promotion of judicial efficiency by way of compliance) is particularly important here given that the record transmitted to us spans thousands upon thousands of pages.

<sup>15</sup> Although the issue is seemingly broached in the "Statement of the Case" on page 44 of the Principal Brief, even there no record citations are provided as would be required for argument under the rules of appellate procedure.

<sup>16</sup> The specific framing and notion of the trial court taking "sides" does not appear to be referenced outside of the statement of the issues.

by the Appellees in September 2019, as well as to the trial court's November 27, 2019, "Order on Punitive Damages," we agree with the Appellees that a review of the court's order reveals that the argument lacks merit.

Another issue raised concerning the subject of written findings is the issue labeled "Final Orders Written by Parties." As phrased in the exposition of the issue in the statement of the issues section, this issue specifically challenges the fact that the jury verdict forms supposedly differ from the findings reflected in the August 12, 2019, order entered by the court. Although there does not appear to be a defined, separate portion of the argument section specifically devoted to this raised issue, there are a couple of places in the Principal Brief where some argument appears to be devoted to jury verdict form matters, even if in relation to other pursued issues. Ultimately, however, the presented brief does not facilitate a potential review of the raised concern pertaining to the verdict forms, as no record citations to the jury verdict forms are provided. For instance, when discussing an issue concerning unclean hands, the Principal Brief contains argument that "the jury verdict form does not specify any actions or inactions by Hill that support a finding of unclean hands." A footnote related to this statement references a jury verdict form generally but without any type of actual citation to the record. Inasmuch as the Principal Brief fails to direct us to the record in support of the assertions made, this issue is waived.<sup>17</sup>

As noted in one of the paragraphs above, the Principal Brief asserts a challenge to the award of punitive damages by questioning the independence of the trial court's order. Although we addressed that matter earlier, the Principal Brief also raises a separate issue pertaining to punitive damages, namely that there supposedly was "No Evidence To Support Punitive Damages." The chief criticism voiced by this issue, at least as articulated in the statement of the issues section itself, appears to be connected to the proof, or lack thereof, formally heard during the second phase of trial after the jury determined liability for punitive damages existed. *See generally Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (noting that, in a trial where punitive damages are sought, a second phase of trial concerning the amount of damages shall take place after liability for punitive damages is determined in the first phase). Although the Principal Brief complains that the Appellees rested on evidence presented during the first phase of trial, seemingly arguing that the Appellees should have been required to formally re-present this evidence during the second phase, this issue was never raised during the trial itself according to the trial court. Indeed, when discussing the matter in one of its orders, the trial court noted that there had been no objection when the Appellees elected to rely on the evidence presented in the first phase of trial, evidence the Appellees apparently believed was sufficiently responsive to factors that should guide a determination of the amount of punitive damages

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<sup>17</sup> It appears that the verdict forms were never transmitted to us as part of the record on appeal. At one place, the Principal Brief references the jury verdict forms as being in "Appendix 1." Of note, the heading of that appendix indicates that the material appearing therein is "NOT CERTIFIED." Moreover, merely including documents in a brief's appendix does not make the documents a part of the appellate record. *In re Dakota C.R.*, 404 S.W.3d 484, 502 (Tenn. Ct. App. 2012).

in this case and need not be re-presented.<sup>18</sup>

The Principal Brief's argument section concerning this issue also more generally challenges the sufficiency of the evidence to support a punitive damages award, arguing, for instance, that because there was allegedly not sufficient evidence to support a finding of fraud, there was no basis for punitive damages on a fraud claim. Indeed, the Principal Brief broadly contends that there was no evidentiary basis to justify punitive damages. To the extent this issue therefore implicates the sufficiency of the evidence presented at trial and whether that evidence was sufficient to hold Mr. Hill liable for punitive damages, we hold that the issue is waived. The waiver of the issue is grounded in Mr. Hill's failure to move for a directed verdict following the close of all the proof because, as we have previously explained, "[f]or this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict." *McLemore*, 389 S.W.3d at 778.

### *Unclean Hands Issues*

The Principal Brief raises two issues pertaining to unclean hands. First, the Principal Brief suggests that the trial court erred "in asking the jury to determine whether Hill had unclean hands." In part, this issue appears to challenge the notion that an unclean hands defense should have even been theoretically available to the Appellees, but in the accompanying argument section on the matter in the Principal Brief, we find no statement showing where the issue was raised with the trial court. Moreover, the majority of the included argument on this issue actually focuses on what proof was offered by the Appellees, which, when considered alongside the denominated issue's focus on whether the court erred "in asking the jury to determine whether Hill had unclean hands," appears to implicate a sufficiency of the evidence concern. We note again, however, that "[f]or this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict." *Id.* This issue is accordingly waived.<sup>19</sup>

Another unclean hands issue raised on appeal focuses on whether the trial court

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<sup>18</sup> That the Appellees relied on their evidence from the first phase of trial in the second phase does not mean that the trial court allowed, over the objection of the opposing side, evidence in the first phase of trial that can only be considered in the second phase. Indeed, as the Principal Brief itself points to, when certain personal financial information of Mr. Hill's was broadly inquired into by counsel for the Appellees during the first phase of trial, trial counsel for Mr. Hill objected, following which the Appellees' counsel offered to rephrase his question and the trial court judge stated that he was "going to sustain the objection."

<sup>19</sup> There is also a passing assertion in the argument section for this issue concerning the jury verdict form allegedly not supporting a finding of unclean hands. We addressed this concern in connection with our review of the issue labeled "Final Orders Written by Parties."

erred “in allowing [the Appellees’] claims to go to the jury while restricting presentation of any evidence of [the Appellees’] fraud and unclean hands.” As developed in the argument section, this issue, as best as we can understand, appears to interpose two concerns. First, the Principal Brief appears to challenge the trial court’s denial of a motion for summary judgment on the issue of unclean hands, pointing to multiple pre-trial filings in the record that supposedly chronicle the Appellees’ “intentional inequitable acts.” To the extent that this issue asserts an error connected to the court’s denial of a motion for summary judgment on the unclean hands defense, it is not reviewable given that the matter was later resolved through trial. Indeed, Tennessee law is clear that “[w]hen a trial court denies a motion for summary judgment based on the existence of disputed material facts, the denial is not appealable after a trial on the merits.” *In re Estate of Link*, 542 S.W.3d 438, 453 (Tenn. Ct. App. 2017). In addition to partially implicating the foregoing subject matter, the raised issue about the Appellees’ alleged unclean hands also appears to interpose an evidentiary challenge to the conduct of the trial in the case. This issue is without merit, however, because it does not appear from the referenced citation to the record<sup>20</sup> that the court definitively restricted the presentation of evidence of the Appellees’ unclean hands. Indeed, the referenced comments from the trial court, which relate to statements made by the trial court during a pre-trial conference, show that the court was going to “wait and see how you bring it up,” indicating that it would give Mr. Hill’s counsel an opportunity to potentially explore the issue at trial. It was thus incumbent on Mr. Hill to pursue the matter further if he wanted to preserve the issue, but it does not appear that he did so.<sup>21</sup>

*Various Summary Judgment Grievances and Issues Related to Stock Ownership and the Appellees’ Purported Termination from the Firm*

Several issues attempt to litigate many of the trial court’s dispositions at summary judgment. To the extent that such issues generally challenge the denial of summary judgment on claims that were later tried before the jury, the issues are without merit. As just stated herein, “[w]hen a trial court denies a motion for summary judgment based on the existence of disputed material facts, the denial is not appealable after a trial on the merits.” *Id.*

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<sup>20</sup> The Principal Brief technically references Mr. Hill’s own reproduction of the relevant transcript, presented as an excerpt within a motion to disqualify, rather than directly citing to the transcript itself.

<sup>21</sup> Although the Principal Brief cites to an “offer of proof” as if to suggest that Mr. Hill did attempt to put forth evidence at trial relating to this matter but was denied the ability to do so, such a suggestion is a misleading one. The referenced “offer of proof” is to a document appended to a memorandum filed in support of a post-trial motion. Mr. Hill fails to demonstrate through his argument on this issue that the complained-of evidence, supposedly wrongly excluded, was set forth by way of an actual offer of proof at trial. Indeed, the accompanying argument provides no indication that Mr. Hill ever attempted to pursue this matter during the actual trial or was prevented by the trial court from doing so.



In addition to these types of summary judgment challenges, the Principal Brief also raises a few issues concerning claims that the law firm had asserted in this litigation but for which summary judgment was entered against it. Such issues are presently opposed by the Appellees, who note that they are now the current directors and officers of the firm and that Mr. Hill, having not taken advantage of relevant stay provisions, does not now have a controlling interest in the firm. Given this posture, we agree with the Appellees that Mr. Hill does not have standing to have the law firm assert such issues on appeal.<sup>22</sup>

One of the specific grievances interposed by the Principal Brief, in apparent relation to the trial court's actions at both summary judgment and after trial, concerns the ability of the Appellees to own stock in the law firm and their rights under the law firm employment contracts. Among other contentions, it has been argued that the Appellees started a competing firm which resulted in their termination and inability to own stock. In one summary judgment order, the court opined that whether the Appellees breached their employment agreements potentially depended in part on which party had breached the stock transfer agreement primarily at issue in this case, which the court noted was a disputed fact. The court also held that the issue of the Appellees' alleged termination involved genuine issues for trial. Putting aside any other concerns, it thus appears from the record that the issues of the Appellees' termination, or lack thereof, and whether they breached their employment contracts, were decided by the jury.

As to asserted stock ownership concerns more generally, we observe initially that the accompanying argument in the Principal Brief appears to rely, in part, on "Jury Verdict Forms" to support a couple of the contentions made. As with other issues discussed elsewhere in this Opinion, such references to jury verdict forms are devoid of any actual citation to the record, and it appears that such forms were not actually transmitted as part of the record. As noted in a previous footnote, although the Principal Brief, at one place, references jury verdict forms as being in "Appendix 1," the heading of that appendix actually indicates that the material appearing therein is "NOT CERTIFIED." Again, merely including documents in a brief's appendix does not make the documents a part of the appellate record. *In re Dakota C.R.*, 404 S.W.3d at 502.

In any event, concerning the Appellees' efforts to practice law in the face of an announced planned dissolution of the law firm at issue, we observe that the Appellees argue that they had begun to make plans to practice law in order to serve their clients after Mr. Hill had announced an intent to dissolve the firm and that the trial court had then entered an order which they note "stopped the dissolution of HBPC and put rules in place for the continuation of the law practices for all involved." Among other things, and as noted

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<sup>22</sup> As an aside, and regarding one of the issues the Principal Brief purports to raise on behalf of the law firm, we note as follows: when claiming to provide support for the alleged erroneous summary judgment dismissal of the involved claim, the Principal Brief actually cites to a post-trial order concerning punitive damages.

earlier, this order allowed Mr. Boren and Mr. Boyd to possess “all of Hill Boren P.C.’s computers . . . necessary for Boren and Boyd to carry out their law practices” and allowed them to possess “the phone lines and phone numbers used by Hill Boren, P.C.” Although Mr. Hill had maintained in the trial court that the court should rule that Mr. Boren and Mr. Boyd could not hold stock, the trial court addressed this issue by taking note of the allegations against Mr. Hill, namely that Mr. Hill’s announced intent to dissolve the law firm was an anticipatory breach of the stock transfer agreement. As aptly argued by the Appellees on appeal:

[The trial court] found that disputed facts still existed as to who breached the [stock transfer agreement] – Hill or Boren. It further held . . . that **if** Hill was later found to have breached the [stock transfer agreement], **then** he would be estopped from arguing that Boren was ineligible to hold stock in [the law firm].

The trial court also noted that many disputed facts surrounded the rights of Mr. Boyd, and it was, of course, after trial that the jury returned a verdict finding that Mr. Hill anticipatorily breached the stock transfer agreement. We fail to discern what error exists in relation to this issue or why any error exists in relation to the trial court’s ultimate award of stock to the Appellees given the jury’s findings in the case concerning Mr. Hill’s breach and the Appellees’ request for specific performance. The jury found that Mr. Hill had breached the contract at issue, and that contract had provided for a transfer of firm ownership shares from Mr. Hill.

#### *Various Issues Concerning the Appellees’ Remedies*

In connection with the above discussion regarding the transfer of stock to the Appellees and the issues of remedies in general, we turn specifically to several issues the Principal Brief raises concerning the remedies pursued in this case. Three of these issues are labeled “Inconsistent Relief,” of which the first and third issues so labeled appear initially overlapping. The other “Inconsistent Relief” issue seemingly overlaps with another presented issue, taking specific umbrage with the court’s award of specific performance in the face of supposedly adequate damages.

Regarding the two issues specifically labeled “Inconsistent Relief” that we stated appeared “initially overlapping,” we note that the object of the first of these issues is clear. Indeed, it is suggested through the raised issue that the Appellees waived the right to pursue damages for fraud when rescission of the stock transfer agreement was not sought. Although another “Inconsistent Relief” issue appears to possibly attempt to broach the same subject by way of some of the initial prefatory exposition in the phrased issue, the posed concluding question of the raised issue does not. Rather, the posed question, inquiring into what was awarded after the jury awarded “damages for breach of [the contract],” actually appears to relate more closely to the other set of issues referenced

above.<sup>23</sup> We will, of course, deal with the concern from that set of issues below, but to first address the raised concern that the Appellees supposedly waived the right to pursue damages for fraud, we note that the Appellees have argued this “waiver” defense is itself waived because Mr. Hill did not assert waiver as an affirmative defense in his amended answer. Moreover, at the oral argument of this matter, counsel for the Appellees stated that Mr. Hill never raised this waiver issue before the trial court. As it concerns this point, although we have located accompanying argument in the Principal Brief discussing the notion of waiver and stating in that vein that the “fraud claim should have been dismissed,” this offered argument notably does not actually point to where this “waiver” issue was raised in the trial court or where Mr. Hill requested dismissal of a fraud claim on this basis. Further of note, when the reply brief purports to correct the Appellees’ assertions that certain issues relative to fraud were not raised with the trial court, the presented list of issues that Mr. Hill supposedly raised does not mention the “waiver” contention pursued on appeal.<sup>24</sup> The above-discussed failures of the Principal Brief’s argument on this issue justifies a rejection of Mr. Hill’s advanced concern regarding a “waiver” of the fraud allegations, *see Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC*, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at \*17 (Tenn. Ct. App. Aug. 6, 2018) (noting that it is “not this Court’s duty to comb through the appellate record to find support for an appellant’s assertions of error” and that “[i]n the absence of an appropriate statement in [the] brief noting where this issue was seasonably called to the trial court’s attention, this issue is waived”), although we note that it appears that some type of similar issue was seemingly raised at some point based on our review of one particular order of the trial court. Indeed, in an order entered after trial, the trial court noted it had previously rejected an argument that an action for fraud could not be maintained. Further, though, the order went on to hold that Mr. Hill had “waived” any defense based on a supposed inconsistency between the types of damages that were awarded. This finding by the trial court that Mr. Hill waived a defense regarding the supposed inconsistency in damages sought is no doubt of relevance inasmuch as the trial court’s waiver holding on this matter does not appear to be challenged by way of an issue on appeal, which of course, results in a waiver of any issue regarding the trial court’s finding of waiver.

It should be noted, however, that the trial court nonetheless addressed the substantive grievance Mr. Hill had interposed regarding an alleged inconsistency in remedies, perhaps in anticipation that its waiver finding might be appealed. In pertinent part, the trial court rejected Mr. Hill’s contention and noted that the jury had awarded separate damages that did not overlap. In support of its opinion that the relief awarded was appropriate, the trial court cited to this Court’s decision in *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230 (Tenn. Ct. App. 1998), which endorsed the notion that a plaintiff can

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<sup>23</sup> The issue as a whole is somewhat unclear given the apparent lack of coherency between some of the prefatory exposition and the concluding posed question, and in addition to that, we note that the purported quote beginning the prefatory exposition does not exist in the case law referenced.

<sup>24</sup> Nor is it presented in another more general list of “other” issues the reply brief posits were, in fact, raised in the trial court.

recover for fraud if he can show that the damages incurred were beyond those awarded for breach of contract. *Id.* at 238.<sup>25</sup> As the *Shahrdar* decision reasoned, the law is that “[t]he injured party should be compensated for the actual injuries sustained by placing him in the same position he would have occupied had the wrongdoer performed and the fraud not occurred.” *Id.* As the Appellees aptly noted before the trial court when addressing this issue below, the jury was specifically informed of these legal principles and was also specifically instructed not to award twice for the same injury. “The jury is presumed to have followed the instructions of the trial court.” *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 374 (Tenn. 2006).

As to the few issues that generally question the trial court’s award of specific performance because damages, supposedly otherwise adequate, were awarded, we find no merit in the raised contentions. Although somewhat sparsely developed by way of an actual argument in reference to the raised issues, the suggestion in the Principal Brief seems to be that the Appellees had adequate relief without a transfer of stock to them or that the award of stock shares somehow constituted an excess recovery. There was nothing erroneous in awarding damages relative to, for instance, Mr. Hill’s breach of the stock transfer agreement’s advertising provision, while at the same time ordering that the contracted-for law firm shares be transferred. Indeed, these remedies involved different concerns, and they were entirely appropriate together in view of ensuring full relief. *See, e.g., Shahan v. Franklin Cty.*, No. M2002-00725-COA-R3-CV, 2003 WL 23093836, at \*9 (Tenn. Ct. App. Dec. 30, 2003) (quoting 12 CORBIN ON CONTRACTS § 1160, at 254-55) (discussing what will make the injured party whole and noting that “in other existing non-performance, money damages will be awarded along with the decree for specific performance”).<sup>26</sup>

### *Sufficiency of Fraud Claims and Related Concerns*

Through one of its raised issues, labeled “Insufficiently Pled Claims,” the Principal Brief queries whether the trial court erred in “allowing fraud claims to go to the jury where both specificity of pleading and admissible evidence of fraud were absent.” As is evident from this phrasing, as well as from accompanying exposition included in the “Statement of Issues” section, this issue appears to embrace two concerns: (1) that the Appellees’ allegations of fraud were not pled with particularity and (2) that there was not sufficient evidence to support sending the fraud claims to the jury. Neither of these concerns is deserving of any redress on appeal. As to the first concern, i.e., the particularity, or lack

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<sup>25</sup> The trial court also cited to case law signaling that a plaintiff who allegedly is induced by fraud could treat a contract as existing and still sue for damages in tort.

<sup>26</sup> Although a lot of the issues are overlapping as noted, another issue raised concerning specific performance appears to posit that specific performance was erroneously granted in light of certain testimony from Mr. Boren. Because that referenced testimony does not appear to be engaged with or referenced in what is a kernel of an argument ostensibly intended to relate to the raised issue, the issue is waived. Raised issues must be supported and developed by accompanying argument.

thereof, of the Appellees' pleading, the Principal Brief does not appear to provide any statement showing that this issue was raised in the trial court, and the Appellees, urging waiver, have themselves argued that they were unable to find any record of a timely filed motion in the trial court on the issue. We agree with the Appellees that the particularity concern is waived, as there is no indication from the Principal Brief that it was timely raised in the trial court. Although the submitted *reply* brief attempts to rebut the Appellees' assertion that this issue was not timely raised in the trial court, we observe that all of the citations offered in support correspond to post-trial motions. "[T]here is little difference between an issue improperly raised before the trial court at the last minute and one that was not raised at all." *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001); *see also Induction Techs., Inc. v. Justus*, 295 S.W.3d 264, 268–69 (Tenn. Ct. App. 2008) ("Generally, therefore, an issue presented for the first time in a post-trial motion to alter or amend is waived as too late."); *Eledge v. Eledge*, No. M2015-01055-COA-R3-CV, 2016 WL 3178537, at \*5-7 (Tenn. Ct. App. May 26, 2016) (involving argument on appeal that the trial court erred in refusing to dismiss complaint on ground that opposing party failed to plead fraud with particularity, where this Court noted said defense was mentioned for the first time during the appellant's opening statement in the trial court and held, among other things, that "Son waived the affirmative defense of failing to state a claim upon which relief can be granted because he failed to set forth the affirmative defense in his answer and he failed to file a Rule 12.02 motion to dismiss the fraud claim prior to filing his answer to the complaint").

To the extent that this issue also challenges the sufficiency of the evidence concerning the Appellees' allegations of fraud and argues that the evidence was insufficient to create a jury question, this concern is barred due to the failure to make a motion for directed verdict upon the conclusion of all proof. As we have explained, in order "[f]or this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict." *McLemore*, 389 S.W.3d at 778. The same fate befalls other issues that the Principal Brief separately lists concerning the fraud claims and whether it was error for the court to allow those claims to go to the jury.<sup>27</sup>

#### *Contract Interpretation and Condition Precedent/Conditional Gift Concerns*

Two of the issues in the Principal Brief are labeled "Contract Interpretation." One of these issues asserts error in the trial court "allowing the case to proceed" where Mr. Boren allegedly violated a condition precedent of the contract at issue. Upon initial review,

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<sup>27</sup> One of these other issues, labeled in part "Nullification" and which asks whether the court erred "in allowing [the Appellees'] claims of promissory fraud to go to the jury," itself seemingly overlaps with a broader issue not strictly limited to the fraud claims, also labeled "Nullification," and which generally questions whether the court erred in permitting "issues" to go to the jury given alleged contradictions in testimony.

it is not immediately clear about which specific action of the trial court the Principal Brief is complaining. Of note, when the argument that appears to be offered in support of this issue recites that “[t]he trial court erred in allowing Boren and Boyd to proceed with their breach of contract lawsuit once Boren failed to meet the condition precedent,” no citation is provided to direct our attention to any particular action of the trial court. Thus, when the next sentence in the argument references how Mr. Boren’s “failure should have resulted in dismissal,” we are as a technical matter left to wonder what stage of litigation with which the Principal Brief is asserting error. As noted before, the brief should contain “[a] statement by the appellant of the alleged erroneous action of the trial court which raises the issue . . . **with citation to the record where the erroneous . . . action is recorded.**” Tenn. Ct. App. R. 6 (emphasis added). Relatedly, there should be “[a] statement showing how [the] alleged error was seasonably called to the attention of the trial judge.” *Id.*

These particular briefing concerns notwithstanding, and in an effort to review this issue and discern the nature of the grievance the Principal Brief is attempting to raise, we note that, in the nearby sentences from the Principal Brief that precede its quotations referenced above, citations are provided to trial testimony and evidence. As best as we can understand, therefore, this “condition precedent” issue appears to be raising a challenge to the sufficiency of the evidence, namely, that in light of the evidence referenced in this section of argument, the contract claim against Mr. Hill should have been dismissed. Once again, to the extent a sufficiency of the evidence concern is being lodged and Mr. Hill is arguing that the evidence was insufficient to create a jury question on a particular claim, the issue is barred due to the failure to make a motion for directed verdict upon the conclusion of all proof.

The second issue labeled “Contract Interpretation” appears to posit that the contract in this case was really a “conditional gift,” stating that the trial court erred in declining to consider that the parties’ agreement “was a conditional gift and was, therefore, unenforceable once Boren notified Hill of his intent not to fulfill required conditions.” The accompanying argument section does not specifically explain the action or order of the trial court that is at issue, and in that vein, like the “condition precedent” issue discussed above, the argument is deficient from a briefing perspective. Indeed, the argument does not evidence exactly what trial court action is the subject of the Principal Brief’s ire and thus does not develop what may perhaps otherwise be raised through the presented issue. Regarding this point, we observe that although the argument section highlights certain evidence in ostensible support for the notion that the parties’ agreement constituted a conditional gift and generally references case law indicating that the donor of a conditional gift is entitled to seek a remedy if there is no compliance with the conditions, no citation to the record is provided when the argument concludes by stating that “Hill sought rescission as a remedy.” Likewise, no record reference is provided to show where the trial court supposedly engaged with or rejected such an argument.

In his reply brief, Mr. Hill attempts to show that he has properly preserved this issue for review. Moreover, in contending that he raised the conditional gift issue with the trial court, he cites to a string of footnotes from the Principal Brief supposedly evidencing such. These footnotes from the Principal Brief, which include various record citations to, among other things, depositions, trial testimony, and exhibits, mostly relate to the factual information discussed in the associated section of argument. The reference to all of these footnotes is somewhat indiscriminate, as only one appears to include a record citation that actually relates to Mr. Hill raising a conditional gift issue in the trial court (albeit in a post-trial motion). Of course, as our earlier discussion should admit, the argument itself is devoid of any reference to the trial court's engagement with such an issue. The argument simply does not explain what trial court action was error. Indeed, although a record citation included within the Principal Brief's "Statement of Issues" section (but *not* in the accompanying argument section) appears to signal that the trial court action challenged under this issue actually relates to the court's disposition of the aforementioned post-trial motion, the argument itself fails to develop any such matter, as we note again that the argument section on this issue does not specifically explain the action or order of the trial court that is being challenged. As there is not an appropriately-developed argument in relation to the raised issue concerning a "conditional gift," the issue is waived.<sup>28</sup>

*Various Issues Related to Mr. Hill's Trial Counsel, Mr. Hill's Trial Participation, and Filings by Mr. and Ms. Hill*

One issue raised by the Principal Brief states that certain motions filed by Ms. Hill were "denied without a hearing" and asks whether it was error for the trial court to decline to consider these motions. Insofar as we can discern from the included presentation, the accompanying argument on this issue consists simply of two sentences, with the first sentence referencing a couple<sup>29</sup> of the motions at issue and the second sentence noting that the trial court had declined to entertain any motion filed by Ms. Hill. Sparse as it is, this argument suggests disagreement with the trial court's October 12, 2018, order. In that order, the trial court noted that it had received four motions filed by Ms. Hill and that "all of these motions are not signed by lead counsel." In emphasizing the relevancy of this fact to its decision not to entertain Ms. Hill's submissions, the court continued by stating as follows:

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<sup>28</sup> Although we need not substantively engage with the matter due to the absence of a developed argument connected to the raised issue, we note that the order referenced in the Principal Brief's "Statement of Issues" section opined that the parties' agreement was "[c]learly . . . not a gift," with the court noting the agreement was "a contract which required Plaintiffs to perform for four and a half years before they were entitled to receive their shares of stock." Further, to the extent a sufficiency of the evidence concern is perhaps being lodged (we observe the many references to Mr. Boren and Mr. Boyd's testimony and other evidence) and Mr. Hill is arguing that the contract claim should not have been sent to the jury in light of that evidence, the issue is barred due to the failure to make a motion for directed verdict upon the conclusion of all proof.

<sup>29</sup> Based on the citations provided, only two motions are specifically referenced.

[Lead counsel] appeared before this Court at least as early as February 8, 2018, and indicated they would be representing both Defendants in this case. At the time of their first appearance before the Court, the Court inquired who was going to be “the captain of the ship” since Mr. Hill had been representing himself and Mrs. Hill had been representing HBPC. It was made clear to the Court that [lead counsel] were the “captain of the ship.”, and that is how this case has progressed until the filing of these four motions by Mrs. Hill.

The Court will not entertain any motion or pleading that is not signed by someone representing lead counsel in this case. There can only be one captain; otherwise, the administration of this case will dissolve into chaos.

....

The Court will consider all motions and pleadings of Defendants which are approved and signed by lead counsel.

The trial court clearly was intending to promote an organized administration of the trial litigation, and it should be noted that the referenced lead counsel continued to represent Mr. Hill and the law firm after the October 12, 2018, order was entered, although it does no longer.

Even assuming arguendo that it was error for the trial court to not countenance these motions on the basis that they were not submitted by the lead counsel of record at the time, it is unclear to us why any relief should be available in this appeal. The trial court’s order unmistakably signaled that it would consider any motions signed by lead counsel, and there is no indication that any efforts were made to have the complained-of motions resubmitted in the manner referenced by the court. There was nothing impeding Mr. Hill from having lead counsel submit these motions if he actually wanted them to be heard, but apparently he opted not to do so. Under these circumstances, he cannot now complain about this issue. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”).

Another issue that is raised in this appeal specifically concerns the efforts of the prior lead counsel referenced above, namely that there has been a denial of justice “based on . . . perceived errors by trial counsel.” The issue raised posits that “relief may be granted based on ineffective assistance of counsel.” The issue also appears to voice a concern that Mr. Hill was denied participation as an attorney for himself.

As to this latter point, the accompanying argument provides citations to a number of instances where the trial court interjected to various comments or objections Mr. Hill



made when testifying as a witness. It is unclear to us how there is any error here, as it appears that the trial court was simply directing that objections to evidence be made by Mr. Hill's counsel not the witness Mr. Hill, that Mr. Hill not offer gratuitous comments not prompted by questions, and that Mr. Hill not argue in response to questions asked of him. We observe that some of the citations to the transcript referenced in the Principal Brief actually correspond to colloquies where Mr. Hill essentially acknowledged he had overstepped his role as a witness, with Mr. Hill often offering the apology "I'm sorry" or something similar before the court. By way of example, consider the following exchange that occurred during the direct examination by the Appellees' counsel:

[The Appellees' counsel:] Let me -- let me ask you this way. If you make \$10 and have \$5 of expenses, you have 5 left; right?

[Mr. Hill:] Have you ever done any advertising, Mr. Cobb?

THE COURT: Now, now, Mr. Hill --

[The Appellees' counsel:] I've done some math --

[Mr. Hill]: I withdraw the question.

Mr. Hill then followed up by stating, "Sorry, Judge."

Another complained-of matter (by way of the referenced citations to trial testimony) corresponds to Mr. Hill asking at trial if he can explain a particular answer and whether that would be "appropriate." The trial court responded by simply stating that, "if [your counsel] wants you to, he'll ask you to." Respectfully, there is in our view no error with such a response by the trial court, and likewise, there is no issue with the court, as it did at another point during the trial, reminding Mr. Hill that "there's no question out there" after Mr. Hill had offered four sentences of testimony that were not directly prompted by way of an actual question from the examining counsel.

To the extent that an "ineffective assistance of counsel" issue is raised concerning the efforts of trial counsel, we note that, as a general matter, relief in civil cases may not be premised on an ineffective assistance of counsel theory. *Thornburgh v. Thornburgh*, 937 S.W.2d 925, 926 (Tenn. Ct. App. 1996). Some relief, however, may be granted if "the facts are so egregious that justice may require some relief." *Id.* When explaining these principles in *Mincy v. Mincy*, this Court stated as follows:

Generally, there is no constitutional right to effective assistance of counsel in civil cases. *Thornburgh v. Thornburgh*, 937 S.W.2d 925, 926 (Tenn.Ct.App.1996). Therefore, relief generally "may not be premised upon the theory of ineffective assistance of counsel" in civil cases. *Id.* Some relief

may be granted, however, if “the facts are so egregious that justice may require some relief.” *Id.* In *Thornburgh*, the appellant contended that her attorney “fail[ed] to pursue discovery procedures, fail[ed] to notify-in accordance with a local rule-opposing counsel of the witnesses [the attorney] intended to call, which resulted in their testimony being excluded, fail[ed] to make an offer of proof regarding the excluded testimony and fail[ed] to seek a continuance.” *Id.* We held that such facts were not so egregious as to require relief. *Id.*

We are of the opinion that the failure of Mother’s former counsel to object to the admissibility of Tillery’s letter and the method by which it was submitted to the trial court is not “so egregious that justice may require some relief.” *Id.* Accordingly, we find and hold that the trial court did not err in denying Mother’s motion to reconsider on the ground that her former attorney did not properly represent her.

*Mincy v. Mincy*, No. E1999-02304-COA-R3-CV, 2000 WL 502840, at \*4 (Tenn. Ct. App. Apr. 28, 2000).

The Appellees argue in their brief that this issue should be waived because the record is “void of [an ineffective assistance of counsel] argument made below.” Putting that particular question aside, we find the issue is still waived based on the appellate briefing submitted. Within its argument section on this issue, the Principal Brief does not cite to the standard discussed above and in that vein offers no substantive argument on the question of why the facts in this case are “so egregious” as to require relief.<sup>30</sup> The issue is thus waived for failing to offer an argument in reference to the required standard under the case law.

An additional issue raised on appeal concerns sanctions that were awarded in this case by the trial court. Incidentally, these sanctions, which totaled \$925.00, were awarded against both Mr. and Ms. Hill for a sanctions motion that the Hills themselves had filed as counsel in the case on behalf of Mr. Hill and the law firm.<sup>31</sup> The trial court concluded that the “Hills’ objective in filing their own Rule 11.02 motion appears to be nothing more than to harass, cause unnecessary delay, and needlessly increase the cost of litigation. Moreover, it appears the legal arguments contained in the motion are not warranted by existing law and are frivolous.” Although the included argument on this issue contains a section heading labeled “SANCTIONS WERE INAPPROPRIATE” and contains a statement that authority had been provided to the trial court regarding the Rule 11 motion,

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<sup>30</sup> Much of the argument is actually devoted to explaining why certain actions by trial counsel were merely “perceived mistakes.”

<sup>31</sup> It appears that the formerly-discussed trial lead counsel was no longer providing representation at this time.

there does not appear to be any argument actually challenging the trial court's findings regarding delay and harassment, and of note, the majority of the offered argument is devoted to the idea that the filed motion would have been appropriate under Rule 60.02 of the Tennessee Rules of Civil Procedure "[e]ven if not appropriate to bring under Rule 11." The filed motion, of course, specifically sought relief pursuant to Rule 11. We, therefore, conclude that there is no reason to disturb the sanctions that were awarded.

### *Arbitration*

Another issue<sup>32</sup> raised in the Principal Brief relates to a motion that sought to compel arbitration of a fee issue concerning *the law firm* ("the Motion for Arbitration"). The Motion for Arbitration specifically sought to have the trial court grant arbitration on the basis of arbitration agreements contained in the Appellees' employment contracts and argued in pertinent part as follows:

Both Boren and Boyd were employees . . . of the Defendant Corporation, Hill Boren, PC. Each's respective employment agreement contained an arbitration agreement regarding fee division in the event either left the employ of the Corporation and no agreement could be reached.

. . . .

The appropriate fee percentage to be allocated to the Corporation and to Boren or Boyd, individually, on all the Corporation's cases existing in its inventory as of December 31, 2016 is an appropriate issue for arbitration under Tennessee law and the employment contract signed by both Boren and Boyd.

(internal footnote omitted). In response to the Motion for Arbitration, the Appellees offered several reasons why the requested arbitration relief should not be given. Among other concerns, and in addition to arguing that the right to demand arbitration had been waived, the Appellees contended that the complained-of fee matter was not ripe. Specifically, they argued that the arbitration provision at issue concerned fees collected after resignation or termination and noted that the trial court had already "stepped in . . . to rule that the status quo of HBPC would be maintained pending the resolution of the issues in this lawsuit." In expounding on their viewpoint on the matter, they argued as follows:

If at the conclusion of the present lawsuit, this Court were to determine that

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<sup>32</sup> Although primarily addressed in one raised issue, we observe that the phrasing of one of the other issues in the Principal Brief (dealing with a grant of summary judgment) also technically appears to assert error in relation to "the question of arbitration." We deal with the arbitration concern here in a single section of discussion.

T. Robert Hill must transfer his shares of stock in HBPC in accordance with the [agreement], there will be no dispute over Boren's and Boyd's fees as Boren will have controlling interest in HBPC at that time and there will not have been any "Resignation or Termination." And, in that event, T. Robert Hill would have no standing to assert a fee dispute, as he (personally) was not a party to the employment agreements. If Defendants were to win this lawsuit, there could be a possible fee dispute, making the arbitration provision ripe at that time.

The record reflects that the trial court agreed with this position, as it later entered an order concluding that "the relief sought . . . is not yet ripe for adjudication" and further holding that the Motion for Arbitration was denied "without prejudice to its refile at a later date."

Although the Principal Brief asks whether the trial court erred in "retaining jurisdiction of this case and refusing to order arbitration" and ultimately argues that "the trial court should have never entertained this case," the Appellees have aptly noted that the Motion for Arbitration itself concerned a specific fee allocation issue involving the law firm, not the entire "case." This bears on another point. Indeed, although the issue for which arbitration was sought concerned an interest of the corporate law firm, control of the law firm has *already* shifted as noted earlier in this Opinion. Given that Mr. Hill no longer has controlling interest in the firm, the Appellees have challenged Mr. Hill's standing to have the firm assert this issue on appeal. We agree that this standing concern has merit in light of our earlier discussion on standing and therefore do not disturb the trial court's order regarding arbitration.

#### *Issue Concerning the Trial Judge's Communication with the Jury*

Finally, we turn to an issue raised about the trial judge's contact with the jury outside the presence of counsel and the parties. The standard guiding review of such an issue is as follows:

[A] trial judge's *ex parte* communication with a jury in a civil case does not require reversal per se, but reversal is required where a *timely* complaining party shows specific prejudice or where, owing to the nature of the *ex parte* communication, the reviewing court is unable to determine whether the action was actually harmless.

*Guy v. Vieth*, 754 S.W.2d 601, 605 (Tenn. 1988). Here, the Principal Brief specifically complains of an instance in which the trial judge was photographed with the jury and a cake. When the trial judge responded to a complaint raised about this incident in the trial court, he noted as follows:

It is true that one of the jurors baked a cake for the Court after the Court

explained that it would miss its anniversary with his wife because of the trial. The Court did not ask the juror to bake a cake, but it certainly was appreciative, thanked all the jurors, and had a piece of cake, which by the way was delicious. At no time did the Court ever discuss with any member of the jury any issue involving the facts of the case. There is no nexus between being cordial to the jury and Mr. Hill's allegation of bias or lack of impartiality towards him. Frankly, this allegation smacks of desperation.

Having considered this issue, we discern no reversible error here. There is no indication whatsoever that any matters concerning the case were discussed during the complained-of ex parte communication. Instructive to our disposition on this matter is this Court's prior discussion in *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV, 2013 WL 5676268 (Tenn. Ct. App. Oct. 18, 2013). In *Burchfield*, the appellants had argued that we were unable to determine whether the ex parte communications at issue there were harmless because we could not determine "whether the judge might have said or done something that influenced the jury in some fashion." *Id.* at \*8. We ultimately rejected the appellants' position, and in citing to prior Tennessee Supreme Court decisions, explained our reasoning as follows:

Precedent on this issue leads us to disagree with the Burchfields' contention. In the seminal case of *Guy v. Vieth*, 754 S.W.2d 601 (Tenn. 1988), as explained above, the Supreme Court was faced with the allegation that the trial judge entered the jury room alone, spoke to the jury for approximately two minutes with the door closed, and then emerged, announcing that the jury wished to go to lunch. *Id.* at 601. The trial judge stated that he did not "recall any such entry in the jury room." *Id.* at 602. He further stated that if such an incident did occur, "it was only to excuse the jury for lunch or to take some other break," and that if the door had shut, "it was only momentarily and by accident." *Id.*

The Supreme Court reviewed the allegations, concluding, "every indication is that the communication between the trial judge and the jury concerned administrative matters, that is, the excusing of the jury for lunch." *Id.* The Court ultimately found that by failing to timely object to this communication, the plaintiffs had waived their right to complain. *Id.* The Court's analysis suggests, however, that the Court did not find a reason to question its ability to determine whether the action was actually harmless simply because the judge briefly spoke to the jury alone.

Similarly, in *Spencer*, it was alleged that one of the attorneys observed the judge speaking to the jury foreperson outside the jury room alone. *See* 880 S.W.2d at 939. The judge later disclosed that the foreperson told him the jury wanted to know if they could simply pro rate damages

between both defendants. *Id.* at 940. The judge stated that he told the foreperson that the jury could not pro rate damages, but rather had to determine which defendant was liable and assess damages. *Id.* The defendant who was ultimately found to be liable by the jury asserted that this *ex parte* communication constituted reversible error. *Id.*

The Supreme Court concluded that the defendant had the opportunity to demonstrate whether specific prejudice had resulted, but failed to do so. *Spencer*, 880 S.W.2d at 941. The Court reasoned that there was no evidence that this communication (1) tainted the deliberative process of the jury, (2) was even relayed to the jury by the foreperson, or (3) influenced the foreperson individually. *Id.* Again, despite the fact that the judge briefly spoke to the foreperson alone, the Court did not find this to be an issue, and did not speculate regarding what “might” have occurred. *Id.* The Court simply concluded that, having found no evidence of specific prejudice, the error was harmless. *Id.*

Similarly, in the case at bar, the trial court did not prejudice either party by refusing to allow the jury to take the relevant Tennessee Code Annotated sections into the jury room, as to do so would have been improper. Having found no evidence of specific prejudice, we determine that the trial court’s error in having such *ex parte* communications with the jury was harmless and does not constitute reversible error.

The second alleged incident of improper *ex parte* communications occurred when the jury transmitted a written inquiry to the court regarding whether it was possible to find that Dr. Renfree had not committed medical malpractice but still award damages to the Burchfields. The juror’s affidavit states that the jury foreperson, after communicating with the trial court, advised the jury that the court’s response to this question was in the negative. Again, it is unclear from the affidavit whether the judge’s response to the foreperson was written or oral. We find no reference to this incident in the record.

The Burchfields do not take issue with the correctness of the judge’s response; rather, their complaint is that during the exchange, the judge could possibly have said or done something that influenced the jury. There is no evidence that anything improper occurred during the exchange between the judge and jury foreperson. Further, there is no evidence that anything other than the judge’s response was communicated by the foreperson to the jury. As stated above, while it is correct that the judge should not have undertaken any *ex parte* communication with the jury, such error is harmless in this instance, where the Burchfields have failed to present evidence of any

resulting prejudice.

*Id.* at \*8–9.

Likewise, here, no prejudice has been shown in connection with the cake incident, and as noted earlier, there is no indication that the complained-of contact with the jury involved any discussion of matters concerning the case. We therefore consider the trial judge's contact with the jury to be harmless error.

### CONCLUSION

For the reasons stated herein, we affirm the judgment of the trial court and remand this case for further proceedings consistent with this Opinion.

s/ Arnold B. Goldin  
ARNOLD B. GOLDIN, JUDGE