IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 17, 2016 Session

BENJAMIN J. BUFFINGTON v. LEGACY & EXIT PLANNING LLC, ET AL.

Appeal from the Chancery Court for Shelby County
No. CH-11-1283 Walter L. Evans, Chancellor

No. W2016-00315-COA-R3-CV

The plaintiff in this case, Benjamin Buffington ("Mr. Buffington"), is a former member of Legacy & Exit Planning, LLC ("Legacy"). Mr. Buffington sued the Appellants on the basis that they had not made certain required contractual payments incident to his departure from Legacy. In response, the Appellants asserted various counterclaims predicated upon Mr. Buffington's acquisition of a company that had been a former client of a company affiliated with Legacy. The trial court dismissed the Appellants' counterclaims upon Mr. Buffington's motion for partial summary judgment, and following a trial, it held that the Appellants were jointly and severally liable for the outstanding payments owed to Mr. Buffington. Having reviewed the record transmitted to us on appeal, we affirm and remand 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 BRANDON O. GIBSON, J., and DAVID R. FARMER, SP. J., joined.

Michael G. McLaren and Kristine E. Nelson, Memphis, Tennessee, for the appellants, Legacy & Exit Planning, LLC and Executive Financial Services, Inc.

John J. Heflin and Jack F. Heflin, Memphis, Tennessee, for the appellee, Benjamin J. Buffington.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

Mr. Buffington founded Legacy in the fall of 2006 with Kelly Finnell ("Mr. Finnell"). Legacy was in the business of providing consulting services with respect to employee stock ownership plans ("ESOPs") and often worked closely with another company owned by Mr. Finnell, Executive Financial Services, Inc. ("EFS"). Legacy's work was performed and billed under EFS's name, and through EFS, Legacy also engaged in the business of marketing and selling retirement plans, stock appreciation rights plans, and life insurance products. Although Mr. Buffington was compensated solely by Legacy, he was provided with EFS business cards, and EFS marketed his services as if he were an EFS employee.

Approximately four years after they founded Legacy, Mr. Buffington and Mr. Finnell began discussions about the potential dissolution of Legacy and/or Mr. Buffington's departure from the company. Although the Legacy Operating Agreement contained a provision that governed Mr. Buffington's compensation related to a withdrawal, Mr. Finnell was unwilling to pay Mr. Buffington under the terms of the Operating Agreement. As a result, the parties soon began negotiations over the terms of Mr. Buffington's departure. On October 20, 2010, Mr. Finnell sent Mr. Buffington an email with a subject line that read "Transition Agreement." Following receipt of this email, Mr. Buffington sent Mr. Finnell a letter dated November 24, 2010. The body of each item of correspondence is reproduced below.

> Ben,
>
> I appreciate your patience and reasonable approach as we've worked through your transition out of EFS/LEP. I am writing to summarize the terms of our transition agreement.
>
> You will receive your guaranteed payment on the 15th and on the last day of the month through January 31, 2011, at which point all guaranteed payments will cease.
>
> You will be paid 20% of the "net" revenue received on the following cases when EFS/LEP is paid: Midlands, Stepherson's, Waddell, Energique, Security Seed and Mock. "Net" revenue is defined as total revenue less any payments made to referral sources.
>
> You will be paid 10% of "net" EFS ESOP consulting revenue (exclusive of the cases listed above) received during 2011. This will be paid on a monthly basis as received.
>
> The above payments are conditioned on the terms listed in the following paragraphs.

You will be available through December 31, 2010 to do everything possible on a timely basis to assist with the orderly transition of work in process including client work, marketing projects, contacts, files, etc. to the appropriate EFS party. You also will work in the office on EFS business on a full-time basis through November 24. After carefully reviewing my calendar and our WIP, I feel that this is essential so that we are able to properly serve the clients we have developed and for whom we are closing transactions in order that each of us will benefit from the revenue generated. This will include you doing the FL Crane employee communication meetings.

You will vacate your office over the Thanksgiving Day weekend. You will leave with EFS all property, equipment, files, including electronic files and data. You will not erase or remove any data on the EFS server. However you may take your EFS laptop.

You will submit a letter of resignation acknowledging the termination, by mutual consent, of the LEP Operating Agreement and your employment effective Nov. 24, 2010. In the letter you will state that you have forfeited all rights to payment under that Agreement in lieu of the payments outlined above.

Let's meet today at Starbucks today to discuss and hopefully finalize this agreement. I'm available any time between 10:00-3:00.

Kelly O. Finnell, J.D., CLU, AIF®
Executive Financial Services, Inc.
7660 Poplar Pike, 2nd Floor
Germantown, TN 38138
Phone 901-259-7979
Fax 901-682-8653
kfin@execfin.com

Please visit our website www.esopcoach.com.

Kelly,

Per our discussion outlined in the attached email dated October 20, 2010, please accept this Letter as my formal resignation as a Member of Legacy & Exit Planning, LLC, effective today, November 24, 2010.

I acknowledge that I have terminated my membership from the Company by mutual consent and have agreed to accept payment for my Membership Interest as defined below in lieu of the terms defined in the Operating Agreement. By accepting the terms listed below, I forfeit all rights to payment under the Agreement in lieu of the payment terms outlined below.

- The Company, Executive Financial Services, Inc., and/or Kelly Finnell will remit guaranteed payments to Buffington to be paid on the 15th and on the last day of the month through January 31, 2011, at which point all guaranteed payments will cease.

- The Company will pay Buffington 20% of the "net" revenue received on the following cases when EFS/LEP is paid: Midlands, Stepherson's, Waddell, Energique, Security Seed and Mock. "Net" revenue is defined as total revenue less any payments made to referral sources.

- Legacy & Exit Planning, LLC, Executive Financial Services, Inc., or its successors or assigns will pay Buffington 10% of "net" ESOP consulting revenue (exclusive of the cases listed above) received during 2011. This will be paid on a monthly basis as received.

Otherwise, I will be available through 12/31/10 to do everything possible on a timely basis to assist with the orderly transition of work in process including client work, marketing projects, contacts, files, etc. to the appropriate EFS party.

I will vacate my office over the Thanksgiving Day weekend. I will leave with EFS all property, equipment, files, including electronic files and data. I will not erase or remove any data on the EFS server. However I will take the EFS laptop which I have been using.

Very best regards,

[Original signature redacted]

Benjamin J. Buffington

Although Mr. Buffington subsequently received certain payments to facilitate his withdrawal from Legacy between November 30, 2010 and December 31, 2010, these payments soon ceased. As explained by EFS and Legacy in their appellate brief, Mr. Buffington stopped receiving payments after it was discovered that he had taken efforts to acquire Mock, Inc. ("Mock"), a former client of EFS. Mock is a Tennessee corporation that, among other things, provides electrical motor maintenance and industrial crane servicing. In August 2010, EFS and Mock had entered into an agreement under which EFS would prepare a "Transaction Description" regarding the formation of a potential ESOP for Mock. According to Legacy and EFS, by virtue of his acquisition of Mock, Mr. Buffington severed the business relationship between EFS and Mock.

On August 2, 2011, after his payments had ceased, Mr. Buffington filed suit in the Shelby County Chancery Court against Mr. Finnell, Legacy, and EFS. In his complaint, Mr. Buffington averred that an enforceable contract had been created by his November 24, 2010 letter to Mr. Finnell. He prayed for a declaratory judgment on this issue and asserted that Legacy and EFS had failed to make the payments that were required of them by the contract. In order to correctly determine the outstanding amounts owed to him, Mr. Buffington also requested that Mr. Finnell be ordered to provide a full accounting of the accounts that were mentioned in Mr. Buffington's November 24, 2010 letter.

On September 2, 2011, Legacy, EFS, and Mr. Finnell filed an answer to the complaint wherein they denied that Mr. Buffington was entitled to any of his requested relief. Contemporaneous with the filing of their answer, they also asserted a number of counterclaims predicated upon Mr. Buffington's efforts in acquiring Mock. Mr. Buffington filed an answer to the asserted counterclaims on September 22, 2011 and denied that a recovery was available against him on any theory or basis.

On January 17, 2012, following some initial discovery, Mr. Buffington filed a motion for partial summary judgment requesting that the counterclaims asserted against

him be dismissed. The motion was supported by a number of affidavits, a legal memorandum, and a statement of undisputed material facts. In pertinent part, Mr. Buffington asserted that he did not discuss acquiring Mock until after he had left Legacy's employ. Moreover, he asserted that by the time discussions regarding his potential acquisition of Mock took place, it had already been determined that an ESOP transaction was not feasible.

On November 21, 2013, following the exchange of further discovery, Mr. Buffington filed a supplemental memorandum in support of his motion for partial summary judgment. Mr. Buffington asserted that the additional discovery that had taken place confirmed the facts underpinning his motion for partial summary judgment. On November 26, 2013, Mr. Finnell, Legacy, and EFS filed a response to Mr. Buffington's motion for partial summary judgment. On the same date, they also filed a response to Mr. Buffington's statement of undisputed material facts and set forth additional material facts that they claimed were not in dispute. A few weeks later, on December 9, 2013, Mr. Finnell, Legacy, and EFS filed a supplemental memorandum in opposition to Mr. Buffington's motion for summary judgment. This filing was soon followed by Mr. Buffington's submission of a second supplemental memorandum in support of his motion on December 12, 2013.

A hearing on Mr. Buffington's motion for partial summary judgment was held on December 17, 2013. Over a month later, by order entered January 29, 2014, the Chancery Court granted Mr. Buffington's motion and dismissed all of the counterclaims that had been asserted against him. In connection with its dismissal of the counterclaims, the Chancery Court determined that the October 20, 2010 and November 24, 2010 correspondence between Mr. Buffington and Mr. Finnell created a binding contract.

On April 21, 2014, a consent order was entered substituting counsel for Mr. Finnell, Legacy, and EFS. The newly substituted counsel subsequently filed a motion on behalf of his clients asking the trial court to reconsider its January 29, 2014 order. Within their motion to reconsider, Legacy, EFS, and Mr. Finnell argued that certain evidence material to each of the counterclaims was not considered at summary judgment. Specifically, they noted that "multiple key pieces of evidence . . . were not specifically brought to the Court's attention by counsel or specifically addressed by the Court in making its ruling." On August 27, 2014, the trial court entered an order denying the motion to reconsider.

On April 1, 2015, prior to a trial on his claims, Mr. Buffington filed a motion in limine requesting that the trial court exclude from trial all evidence that would be offered by the Defendants to undermine or contradict matters already determined in the trial court's January 29, 2014 order. The trial court granted this motion by order entered April

30, 2015 and stated that the "facts determined by the Court [in its January 29 order] were determined not only for purposes of dismissal of the counterclaim[s] but also for purposes of any affirmative defenses which would be based on contradicting those facts."

A hearing on Mr. Buffington's claims took place in July 2015. At the conclusion of the proceedings, the trial court invited the attorneys on both sides to submit proposed findings of fact and conclusions of law. The trial court issued its own findings of fact and conclusions of law on December 10, 2015, and on January 6, 2016, it entered a final order of judgment. Pursuant to its final order, the trial court held that Legacy and EFS were jointly and severally liable to Mr. Buffington for $99,351.90. According to the trial court, this sum comprised the amount of contract damages owed to Mr. Buffington and the prejudgment interest that had accrued. In addition to this award, the trial court determined that Legacy, EFS, and Mr. Finnell were jointly and severally liable to Mr. Buffington for certain attorney's fees and costs. Following the entry of the trial court's judgment, Legacy and EFS filed a timely appeal.[1]

ISSUES PRESENTED

In their appellate brief, Legacy and EFS (collectively "the Appellants") raise the following issues for our review, restated verbatim as follows:

1. Whether the trial court erred in finding that Legacy & Exit Planning, LLC and Executive Financial Services, Inc. are jointly and severally liable to Plaintiff in contract damages, given that the parties to the subject contract were Benjamin J. Buffington and Legacy & Exit Planning, LLC, alone, and not Executive Financial Services, Inc.

2. Whether the trial court erred in granting Benjamin J. Buffington's Motion for Partial Summary Judgment and dismissing the counterclaim of Legacy & Exit Planning, LLC and Executive Financial Services, Inc.[2]

[1] Following the filing of the appeal, Mr. Buffington filed a notice of partial satisfaction of judgment in the trial court. This notice indicated that the award of attorney's fees and costs, which had been assessed against Legacy, EFS, and Mr. Finnell, had been satisfied. This award of attorney's fees and costs is not at issue on appeal.

[2] Although the "Answer and Counterclaim" filed by the Appellants was also filed by Mr. Finnell and expressly identified Mr. Finnell as a counter-plaintiff, we note that Mr. Finnell is not a party to this appeal.

3. Whether the trial court erred in striking the affirmative defenses of Legacy & Exit Planning, LLC and Executive Financial Services, Inc., as addressed in the trial court's "Order Granting Plaintiff's Motion in Limine," entered on April 30, 2015.

STANDARD OF REVIEW

In this appeal, our review is primarily devoted to two orders. In addition to examining the propriety of the trial court's January 6, 2016 final judgment, which incorporated by reference the trial court's findings of fact and conclusions of law entered on December 10, 2015, we review whether the Appellants' counterclaims were erroneously dismissed pursuant to the partial summary judgment order entered on January 29, 2014. Review of each of these orders entails the application of different standards. The January 6, 2016 final judgment was entered following a bench trial. As a result, we accord the findings of fact established therein a presumption of correctness and will not disturb them unless the preponderance of the evidence is otherwise. *C-Wood Lumber Co., Inc. v. Wayne Cnty. Bank*, 233 S.W.3d 263, 271-72 (Tenn. Ct. App. 2007) (citations omitted). In order for the evidence to preponderate against a trial court's factual finding, "it must support another finding of fact with greater convincing effect." *Id.* at 272 (citation omitted). In contrast to our review of the trial court's factual findings, we do not afford any presumption of correctness to the trial court's legal conclusions. *Id.*

Our review of the trial court's January 29, 2014 summary judgment order involves a question of law. Accordingly, our standard of review is de novo, and we afford no presumption of correctness to the trial court's determination. *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 703 (Tenn. 2008) (citations omitted). In determining whether a grant of summary judgment was proper, we are obligated to make a fresh determination that the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012) (citations omitted). By rule, a motion for summary judgment should only be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

"The moving party has the ultimate burden of persuading the court that . . . there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Town of Crossville Hous. Auth. v. Murphy*, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citation omitted). If the moving party makes a properly supported motion for summary judgment, the burden of production then shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact. *Id.* (citation omitted).

As the Tennessee Supreme Court has recently explained, the proper framework for evaluating summary judgment orders is found in its decision in *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235 (Tenn. 2015). *See Am. Heritage Apartments, Inc. v. Hamilton Cnty. Water and Wastewater Treatment Auth.*, 494 S.W.3d 31, 39-40 (Tenn. 2016) (noting that although the trial court considered the motion for summary judgment pursuant to the standard set forth in Tennessee Code Annotated section 20-16-101 because the lawsuit had been filed after July 2011, the *Rye* standards applied); *Wallis v. Brainerd Baptist Church*, -- S.W.3d ---, 2016 WL 7407485, at *6 (Tenn. 2016) (noting that the *Rye* standards do, in fact, apply to cases commenced after July 1, 2011). Consequently, our review is guided by the following standards:

> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has

> been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65 (emphasis in original).

DISCUSSION

Trial Court's Order on Mr. Buffington's Motion in Limine

We begin our discussion by addressing the last of the Appellants' raised issues. As phrased in the "Statement of the Issues" section of their brief, the Appellants' third issue invites us to consider whether the trial court erred in striking their affirmative defenses in its April 30, 2015 order. We can dispense with this question rather quickly.

The trial court's April 30, 2015 order was entered in response to Mr. Buffington's motion in limine that requested the exclusion of any evidence that might be offered to contradict matters already determined in the trial court's January 29, 2014 partial summary judgment order. In granting the relief requested in Mr. Buffington's motion in limine, the trial court ruled that the facts in its January 29, 2014 order were "determined not only for purposes of dismissal of the counterclaim[s] but also for [the] purposes of any affirmative defenses which would be based on contradicting those facts." Contrary to the suggestion embedded in the Appellants' phrasing of their third issue, the trial court's April 30, 2015 order did not "strike" or otherwise dismiss their affirmative defenses. As we read the order, it merely held that any facts established in the court's prior summary judgment order could not be attacked anew at trial with contradictory evidence. To the extent that the plain language of the Appellants' third issue challenges the alleged striking of their affirmative defenses, it misapprehends the actions of the trial court and thus fails to present an issue that is capable of redress. Again, the trial court's April 30, 2015 order did not strike the Appellants' affirmative defenses. The order merely prohibited the introduction of evidence at trial that might be offered to contradict the facts established in the partial summary judgment order that had been entered previously.

In any event, despite the phrasing of the Appellants' third issue, we note that the argument section of their brief is devoid of any discussion about their affirmative defenses. As developed in the body of their brief, the Appellants' objection to the trial court's April 30, 2015 order is related solely to the dismissal of their counterclaims.

They note that Mr. Buffington's motion in limine was predicated on the assumption that their counterclaims were properly dismissed. Because they contend that their counterclaims were erroneously dismissed, they argue that the April 30, 2015 order should be reversed in connection with any reversal of the trial court's order granting partial summary judgment. Indeed, in concluding their argument section on this issue, they submit as follows: "The counterclaim should proceed to trial and all relevant and material evidence should be allowed." We would not dispute this notion. If we were to reverse the trial court's dismissal of any counterclaims, the Appellants should be allowed to introduce evidence related to those counterclaims in any trial on remand. Of course, whether the trial court properly dismissed the counterclaims at summary judgment is a separate question, and we address it below.

Trial Court's Partial Summary Judgment Order

When the Appellants answered Mr. Buffington's complaint in September 2011, they also asserted five counterclaims, each of which was predicated on Mr. Buffington's actions in acquiring Mock. The Appellants asserted that they had been damaged as a result of Mr. Buffington's actions, the theory being that Mr. Buffington's wrongful purchase of Mock had prevented them from further facilitating a Mock ESOP transaction. In seeking relief, the Appellants brought claims for breach of contract, breach of fiduciary duty, tortious interference with contract, and tortious interference with prospective economic advantage. Moreover, in conjunction with their request for damages related to Mr. Buffington's purchase of Mock, the Appellants specifically sought damages stemming from Mr. Buffington's alleged misuse of confidential information. According to the Appellants, because Mr. Buffington had misused confidential information *prior to his resignation from Legacy*, other entities had expressed a hesitance to continue existing business relationships or enter into new ones. Although this second basis for damages was specifically denominated as count five among the Appellants' counterclaims, the Appellants' brief on appeal clarifies that this count is actually a species of damages stemming from the other causes of action.

The trial court's January 29, 2014 order dismissed each of the Appellants' counterclaims upon Mr. Buffington's motion for partial summary judgment. On appeal, the Appellants challenge the dismissal of every counterclaim, save for the dismissal of their claim for tortious interference with contract. For the reasons that follow, we affirm the trial court's grant of summary judgment. *See White v. Empire Express, Inc.*, 395 S.W.3d 696, 717 (Tenn. Ct. App. 2012) (citing *Hill v. Lamberth*, 73 S.W.3d 131, 136 (Tenn. Ct. App. 2001) (noting that this Court can affirm the trial court's grant of summary judgment on different grounds).[3]

[3] Except as stated herein, we express no opinion as to the propriety of the trial court's reasons for

We turn first to the Appellants' fifth counterclaim, which asserts that Mr. Buffington's misuse of confidential information injured the Appellants' business reputations. As previously noted, this counterclaim seeks an element of damages stemming from the other counterclaims. According to their pleading, we note that the Appellants' specific charge against Mr. Buffington is that he misused confidential information prior to his resignation from Legacy. Indeed, we consider the allegations that compose the fifth counterclaim, including the allegations of the other counterclaims that are incorporated into the fifth counterclaim by reference:

COUNT 1 – BREACH OF CONTRACT

21. Defendants/Counter-Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth herein.

22. Upon information and belief, **Buffington used confidential, proprietary or secret information for his own private purposes rather than for Company purposes *prior to* his resignation from Legacy** when he acted to acquire Mock and become its Chairman and Chief Administrative Officer.

23. Upon information and belief, Buffington diverted Mock away from doing business with or patronizing EFS and Legacy prior to his resignation from Legacy, and in any event within the twelve (12) month period following his resignation from Legacy when he acted to acquire Mock rather than allow it to proceed with the proposed ESOP creation.

24. Buffington's conduct with respect to Mock was fraudulent and/or dishonest, and was in violation of Articles XVI and XVIII of the Operating Agreement and was not undertaken in "good faith" as required by the Principles of Equity and in violation of the equitable Maxim that "No Person Bound to Act for Another Can, as to that Matter, Act for Himself."

25. Defendants/Counter-Plaintiffs were damaged as a result of the breach of contract.

. . . .

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dismissing the counterclaims to the extent that the trial court's reasons depart from our own.

COUNT 5 – INJURY TO BUSINESS REPUTATION

> 39. **Defendants/Counter-Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth herein**.
>
> 40. **As a result of Buffington's misuse of confidential information**, entities which might otherwise do business with Finnell, EFS, or Legacy have expressed their hesitance to continue existing business relationships and/or enter into new business relationships.
>
> 41. The reputations of Finnell, EFS, and Legacy in the community have been injured as a result of Buffington's misuse of confidential information.
>
> 42. Defendants/Counter-Plaintiffs were damaged as a result of the injury to their reputations.

(emphasis added).

Paragraph 22, which asserts that Mr. Buffington used confidential information, alleges that he used this information *prior to* his resignation from Legacy. This restriction as to the timing of the allegations against Mr. Buffington is in plain contrast with the more expansive assertions regarding Mr. Buffington's alleged diversion of Mock, which are found in paragraph 23. Indeed, under paragraph 23, it is asserted that Mr. Buffington diverted Mock "prior to his resignation from Legacy, and in any event within the twelve (12) month period following his resignation."

Thus, the scope of alleged wrongdoing regarding Mr. Buffington's use of confidential information is quite clear. Paragraph 22, which is incorporated by reference into the fifth counterclaim, charges that Mr. Buffington used confidential information prior to his resignation from Legacy. Inasmuch as the fifth counterclaim is predicated on Mr. Buffington's "misuse of confidential information," it is therefore based on his use of confidential information prior to his departure from Legacy.

With this in mind, we note that the facts established at summary judgment countenance against the recovery desired under the fifth counterclaim. Indeed, whereas the basis of the counterclaim is tied to Mr. Buffington's use of confidential information prior to his resignation from Legacy, the facts indicate that Mr. Buffington did not use the information alleged to be confidential until after resigning from Legacy.

In general, there is no dispute that Mr. Buffington acquired certain information from the Appellants and used it in connection with his purchase of Mock. In fact, the

following statements of fact were not disputed by Mr. Buffington after they were set forth by the Appellants at summary judgment:

> 5. On November 29, 2010, Buffington requested "the models, the feas.[ability] study and the banker letter on Mock" from Ben Schultz, an employee of EFS/LEP.
>
> 6. Buffington used materials prepared by the Company, to prepare his "Transaction Overview and Loan Request" presentation to Trustmark Bank, for non-Company purposes: his purchase and the financing of his purchase of Mock.

(supporting citations to record omitted). With that said, we also note that when Mr. Buffington moved for partial summary judgment, he asserted the following statements of fact:

> 1. Buffington left Defendants' employ on November 24, 2010.
>
> 2. Buffington's first communication regarding potentially purchasing Mock, Inc. and its subsidiary, Hi-Speed, Inc. . . . was on November 29, 2010 with attorney Michael Adams, who represented two of Mock's significant shareholders constituting the majority ownership interest in Mock, and who responded to Buffington's announcement that he had left Defendants' employ by suggesting Buffington should purchase Mock since Adams and his client had by that time discarded the idea of proceeding with an ESOP transaction.

(supporting citations to record omitted). Whereas the first statement was admitted by the Appellants and the second statement was denied by them, we note that the Appellants did not support their denial of the second statement with a citation to any evidence. Accordingly, the second statement of fact set forth by Mr. Buffington was effectively admitted at summary judgment. *See Holland v. City of Memphis*, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003) (citations omitted) (noting that a party's opposition to summary judgment "may be made by pointing to the evidence in the record which indicates disputed material facts" and that "the material facts set forth in the statement of the moving party may be deemed admitted in the absence of a statement controverting them by the opposing party"); *see also* Tenn. R. Civ. P. 56.03 ("Each disputed fact must be supported by specific citation to the record.").

The facts at summary judgment thus established the following: (1) Mr. Buffington left Legacy on November 24, 2010; (2) Mr. Buffington did not discuss acquiring Mock

until November 29, 2010 when the idea was suggested to him by counsel for the majority ownership interest in Mock; and (3) Mr. Buffington requested certain information from EFS relating to Mock on November 29, 2010. Inasmuch as Mr. Buffington is charged with obtaining allegedly confidential information and using it in connection with his purchase of Mock, it is clear that such actions took place after November 24, 2010, the date he left Legacy. As such, there is no factual foundation for the claim that Mr. Buffington misused confidential information prior to his resignation from Legacy. We therefore affirm the trial court's summary dismissal of the fifth counterclaim.

On appeal, the Appellants argue that it would be error to read paragraph 22 as only charging Mr. Buffington as using confidential information prior to his resignation from Legacy. They note that Tennessee follows a notice pleading standard, and by citing to *Perlberg v. Brencor Asset Management, Inc.*, 63 S.W.3d 390 (Tenn. Ct. App. 2001), they further suggest that it is immaterial that they did not precisely allege that Mr. Buffington used confidential information "after" his resignation from Legacy.

In *Perlberg*, the plaintiff injured his back while working for the defendant. *Id.* at 391. The plaintiff did not work for several months due to his injury, and upon his return to work, he was terminated because his permanent restrictions were apparently not compatible with his job's requirements. *Id.* The plaintiff soon filed a lawsuit alleging that the defendant had violated the Tennessee Human Rights Act ("THRA") by not reasonably accommodating him. *Id.* Later, following the grant of summary judgment in the defendant's favor, the plaintiff filed a motion to alter or amend where, for the first time, he identified the Tennessee Handicap Act ("THA") as the statute under which he was pursuing a THRA claim. *Id.* at 391-92.

When the plaintiff challenged the dismissal of his case on appeal, the defendant alleged that we should not consider the handicap discrimination claim. In pertinent part, the defendant contended that the handicap discrimination claim had not been properly raised until after the trial court had granted summary judgment. *Id.* at 395. We disagreed and held that the plaintiff's complaint stated sufficient facts to apprise the defendant of a claim for employment-related handicap discrimination:

> [T]he only way to interpret that portion of the complaint specifically alleging that [the defendant] violated the THRA by failing to reasonably accommodate [the plaintiff] is to read the THRA in conjunction with the THA. This is because the concept of "reasonable accommodation" is not in the THRA *per se*, except to the extent that the THRA relates to a claim of housing discrimination, and this is obviously not a claim of housing discrimination. However, a claim regarding reasonable accommodation in employment does make sense in the context of a THA claim. . . . [T]he only

> reasonable interpretation of [the plaintiff's] complaint is that he is asserting a claim of employment-related discrimination with respect to his physical condition.

Id. We also noted that the "THA works in conjunction with the THRA to grant an individual a civil cause of action for wrongful discrimination based upon a handicap." *Id.* at 394 (citations omitted).

There is no question that Tennessee follows a notice pleading standard, *see Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894-95 (Tenn. 2011) (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)) (noting that "'the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court'"), but we disagree that *Perlberg* restricts us from viewing the pleadings as we have. *Perlberg* was concerned with whether sufficient facts were pled in order to give notice of a legal claim, and given the relationship between the THRA and THA, the only reasonable interpretation of the plaintiff's pleaded claim in that case was to read it in conjunction with the THA. Here, we are not so much concerned with what legal causes of action are pled, but rather, we are concerned with recognizing the factual allegations on which the discernible causes of action are actually based. Regarding Mr. Buffington's use of confidential information,[4] the pleadings are straightforward: they accuse Mr. Buffington of using confidential information prior to his resignation from Legacy, not after. Therefore, there is no notice that any recovery is sought on account of Mr. Buffington's use of any information after his departure from Legacy.

To the extent that the Appellants contend that such notice was somehow sufficiently provided, we note that their position on this issue is seemingly irreconcilable with certain arguments that they made in the trial court. Primarily, we refer to the Appellants' May 12, 2014 motion that asked the trial court to reconsider its prior order on partial summary judgment. In the course of advancing their argument in the motion to reconsider, the Appellants contended that two factual issues were "material" to each of their counterclaims, which includes their count for "injury to business reputation." As is pertinent to our discussion here, we observe that the Appellants presented the viability of their "injury to business reputation" count as being materially dependent on "when [Mr.] Buffington's employment and work for [the Appellants] ended." This understanding is entirely in accord with our own, as it correctly articulates the scope of wrongdoing that the Appellants pled concerning Mr. Buffington's alleged use of confidential information.

[4] Given our analysis herein, we need not specifically opine on whether the information Mr. Buffington acquired after his departure from Legacy was, in fact, confidential. With that said, we find no support in the record, other than Mr. Buffington's own unattested assertions, that he was asked by Mock to use the allegedly confidential information.

It is, however, a position that is in stark contrast to the Appellants' argument on appeal. Indeed, if the allegations concerning Mr. Buffington's misuse of confidential information are *not* limited to the period prior to his resignation, as the Appellants claim on appeal, then the date he departed the Appellants' employ cannot be considered a material fact for purposes of the fifth counterclaim.

Although the facts established at summary judgment do not provide a basis for business reputation damages in light of the factual predicate advanced for such damages in the trial pleadings, the Appellants seek more than purported damages to their goodwill. Through the Appellants' remaining counterclaims, they also seek to recover damages related to their inability to assist Mock in completing an ESOP transaction. As previously noted, the Appellants' theory is that Mr. Buffington's wrongful purchase of Mock prevented them from facilitating a Mock ESOP transaction. This theory of damages, which is the only discernible basis for damages apart from the fifth counterclaim, necessarily assumes that an ESOP transaction was viable at the time Mr. Buffington acted to acquire Mock.

On appeal, much ink has been spilled by the parties with respect to when a Mock ESOP transaction was not viable. Although the trial court noted that the evidence showed that an ESOP deal was not viable when Mr. Buffington began negotiating with Mock, the Appellants contend that there is a genuine issue of material fact regarding this matter. Respectfully, we disagree that the evidence at summary judgment created a genuine issue of fact as to the viability of an ESOP. In his motion for summary judgment, Mr. Buffington contended that the Appellants' counterclaims should fail because (a) his earliest discussions about acquiring Mock occurred after he left the Appellants' employ and (b) by that time, it had been determined that an ESOP transaction was not workable. In supporting this argument, he set forth the following statements of fact, which we have cited previously:

> 1. Buffington left Defendants' employ on November 24, 2010.
>
> 2. Buffington's first communication regarding potentially purchasing Mock, Inc. and its subsidiary, Hi-Speed, Inc. . . . was on November 29, 2010 with attorney Michael Adams, who represented two of Mock's significant shareholders constituting the majority ownership interest in Mock, and who responded to Buffington's announcement that he had left Defendants' employ by suggesting Buffington should purchase Mock since Adams and his client had by that time discarded the idea of proceeding with an ESOP transaction.

(supporting citations to record omitted). As already noted, although the Appellants denied the second of Mr. Buffington's statements, they did not cite to any evidence to support their denial. Thus, whereas Mr. Buffington properly adduced evidence showing that an ESOP was not viable at the time he acted to acquire Mock, the Appellants failed to present any evidence contesting this point. As a result, they failed to meet their summary judgment burden. Indeed, "[w]ith regard to presenting evidence, the nonmoving party must present specific facts establishing that issues of fact exist and may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials to show that there is a genuine issue for trial." *Mills v. Mills*, No. W2014-00855-COA-R3-CV, 2015 WL 3883176, at *8 (Tenn. Ct. App. June 24, 2015) (citation omitted). Because the Appellants did not marshal any evidence to counteract Mr. Buffington's evidence that an ESOP was not viable, the non-viability of an ESOP was effectively established at summary judgment.[5] Therefore, no damages are available on account of Mock's failure to complete an ESOP. Because the evidence presented at summary judgment factually negated the alleged bases for the Appellants' damages, the trial court did not err in dismissing their counterclaims.[6]

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[5] As previously noted, after the trial court granted summary judgment, the Appellants retained new counsel. The newly substituted counsel filed a motion to reconsider and stated that certain key pieces of evidence had not previously been brought to the trial court's attention; the newly substituted counsel also later filed a response attempting to amend the Appellants' answers to Mr. Buffington's statements of material fact. Even in the amended response to Mr. Buffington's statement of facts, we note that the Appellants did not provide any evidence supporting their denial of Mr. Buffington's second statement of fact (regarding his communications with Mock and the non-viability of an ESOP). In fact, the Appellants did not attempt to address Mr. Buffington's second statement of fact in their amended response.

[6] As a technical matter, we note that the unavailability of "ESOP damages" or business reputation damages does not, in and of itself, support a wholesale affirmance of the trial court's summary judgment order. Tennessee law recognizes the existence of nominal damages for a breach of contract, *see Stewart v. Peterson*, No. 1184, 1988 WL 130313, at *4 (Tenn. Ct. App. Dec. 7, 1988) ("[T]here exists an issue of material fact which makes summary judgment inappropriate as to Stewart's possible right of recovery for breach of the one-year contract. . . . However, the record suggests that, if proven, Stewart's allegations would entitle her to nominal damages only."), and here, a breach of contract counterclaim has been pursued by the Appellants. The mere non-existence of discernible damages, therefore, is not fatal to the claim. We must address the merits of the claim for the sake of completeness, even though our analysis overlaps in large part with the preceding discussion. The trial court dismissed the Appellants' breach of contract claim by determining that Mr. Finnell and Mr. Buffington had terminated the Legacy Operating Agreement by way of their correspondence in the fall of 2010. It therefore reasoned that "Buffington could not have breached [the contract] through his purchase of Mock after his employment with Legacy ended." Assuming *arguendo* that the trial court erred in holding that the Legacy Operating Agreement was terminated, we nonetheless find that the facts established at summary judgment support dismissal of the breach of contract counterclaim. The Appellants' breach of contract counterclaim alleged that the Legacy Operating Agreement had been breached in two primary respects. First, the claim alleged that "Buffington used confidential . . . information . . . prior to his resignation from Legacy." Second, the claim alleged that "Buffington diverted Mock away from doing business with or patronizing EFS and

Trial Court's Finding of Joint and Several Liability

Although the Legacy Operating Agreement entitled Mr. Buffington to receive specified compensation upon his withdrawal, he and Mr. Finnell negotiated different payment terms. As previously noted, Mr. Finnell sent Mr. Buffington an email with certain payment terms on October 20, 2010, and on November 24, 2010, Mr. Buffington sent Mr. Finnell a letter in response. Mr. Finnell's email was attached to Mr. Buffington's letter, and the particular payment terms offered by Mr. Finnell were tracked virtually word-for-word by Mr. Buffington. Mr. Finnell's email had specifically invited Mr. Buffington to submit a letter of resignation and to state that all rights of payment under the Legacy Operating Agreement were forfeited in lieu of the alternatively-negotiated payments, and Mr. Buffington's letter complied with this request. In pertinent part, Mr. Buffington's letter began as follows:

> Kelly,
>
> Per our discussion outlined in the attached email dated October 20, 2010, please accept this Letter as my formal resignation as a Member of Legacy & Exit Planning, LLC, effective today, November 24, 2010.
>
> I acknowledge that I have terminated my membership from the Company by mutual consent and have agreed to accept payment for my Membership Interest as defined below in lieu of the terms defined in the Operating Agreement. By accepting the terms listed below, I forfeit all rights to payment under the Agreement in lieu of the payment terms outlined below.

Legacy prior to his resignation from Legacy, and in any event within the twelve (12) month period following his resignation from Legacy." Both of these alleged violations are not factually supported. First, the facts at summary judgment established that there is no evidentiary foundation to the claim that Mr. Buffington misused confidential information prior to his resignation from Legacy. Second, the facts established that there was no "diversion" of Mock, as Mr. Buffington put forth evidence—which was not effectively disputed—that the idea of an ESOP had been discarded by the time he began communications about purchasing Mock. Therefore, even considering the legal possibility of nominal damages, we hold that the breach of contract counterclaim was properly dismissed. It is unclear from our research whether Tennessee law recognizes the availability of nominal damages for a breach of fiduciary duty; we note that courts from other jurisdictions are not uniform on the issue. *Compare Amerco v. Shoen*, 907 P.2d 536, 541-42 (Ariz. Ct. App. 1995) (breach of fiduciary duty will not justify award of nominal damages) *with Lane Cnty. v. Wood*, 691 P.2d 473, 477-80 (Or. 1984) (breach of fiduciary duty may justify nominal damages). Even assuming nominal damages could be available for a breach of fiduciary duty, we would affirm dismissal of the breach of fiduciary counterclaim for the same factual reasons as we did the breach of contract counterclaim, as the breach of fiduciary duty counterclaim is based on the same factual assertions, i.e., that Mr. Buffington used confidential information prior to his resignation and that Mr. Buffington diverted Mock from doing business with EFS and Legacy.

Although the Appellants submitted that the correspondence between Mr. Buffington and Mr. Finnell did not create a contract, the trial court held otherwise, reasoning as follows:

> "A binding contract [may be] entered into through the medium of correspondence by letter. . . ." *Neilson & Kittle Canning Co. v. F.G. Lowe & Co.*, 260 S.W. 142 (Tenn. 1924). The primary test as to whether correspondence should be treated as a binding contract is "the intention of the parties . . . the meeting of the minds, the intention to assume an obligation. . . ." 17 Am.Jur.2d *Contracts §* 1 (1964). Part performance can also "remove uncertainty and establish that a contract . . . has been formed." *Restatement (Second) of Contracts §* 34(2) (1979). After reviewing the correspondence between Buffington and Finnell, the Court finds that it constituted a binding contract which, among other things, terminated all terms of the Legacy operating agreement. The Court also finds that Finnell's subsequent payments per the terms of this correspondence further indicates an understanding between the parties that a contract had been formed.

The trial court's conclusion on this issue is not in error. Again, as we have already noted, Mr. Finnell's email invited Mr. Buffington to submit a letter of resignation and to state that the payments otherwise due under the Legacy Operating Agreement were forfeited in lieu of the alternatively-negotiated payments. Mr. Buffington submitted such a letter of resignation, attached Mr. Finnell's email to his letter, and tracked Mr. Finnell's alternative payment terms nearly word-for-word. There was clearly a meeting of the minds, and there is no dispute that certain payments consistent with the correspondence were made to Mr. Buffington following his letter of acceptance. Further, we note that Mr. Finnell specifically testified at his deposition that Mr. Buffington's letter did not fail to recite, in any way, what his October 20, 2010 email had requested.[7]

Although the Appellants disagree that the correspondence between Mr. Buffington and Mr. Finnell reflects a binding contract, they appear to concede that the withdrawal provisions of the Legacy Operating Agreement were ultimately forfeited in lieu of the alternatively-negotiated payment amounts. Indeed, in a footnote in their appellate brief,

[7] Outside of the agreement reflected by the parties' correspondence, we also note that Mr. Finnell acknowledged the existence of his agreement with Mr. Buffington (prior to Buffington's actual letter acceptance) when he contacted an attorney at the Butler Snow law firm seeking to execute formal documentation removing Mr. Buffington as a member. Indeed, Mr. Finnell's email on this subject stated in pertinent part as follows: "Ben and I have reached an agreement on the terms of our separation and fortunately it was a pretty simple and peaceful process. I am writing to see what, if any, documentation I need in order to remove him as a Member[.]"

they state as follows: "[The Appellants] disagree with the trial court's determination that the November 24, 2010 letter created a contract. . . . No contract was formed until Legacy expressed its mutual consent by making payments to Buffington." As we perceive it, the crux of their grievance on appeal is not necessarily that alternatively-negotiated payments are not owed to Mr. Buffington; rather, the Appellants' primary focus is that the trial court erred in holding EFS and Legacy jointly and severally liable. According to them, "any mutual assent to pay was exclusively between Buffington and . . . Legacy."

In determining that Legacy and EFS are jointly and severally liable for the outstanding payments owed in accordance with the Finnell-Buffington correspondence, the trial court made the following findings of fact and conclusions of law:

> 6. Although EFS and Legacy were separate entities, they functioned as one.
>
> 7. Both Mr. Buffington and Mr. Finnell testified that the services of Legacy were marketed through and in the name of EFS; and that employees of Legacy had only EFS business cards and their correspondence was on EFS station[e]ry.
>
> 8. Most importantly, Mr. Finnell testified that all bills, whether for the services of Legacy or EFS, went out under EFS' name; that all funds came into EFS.
>
> 9. Further, Mr. Finnell testified that the only way Legacy was funded was if he, as the person who controls the books and records of both EFS and Legacy caused funds to be deposited from EFS into Legacy's account.
>
> 10. In 2010, Mr. Buffington and Mr. Finnell discussed Mr. Buffington selling his membership interest in Legacy and leaving Legacy's employ and/or the dissolution of Legacy.
>
> 11. On October 20, 2010 Mr. Finnell emailed Mr. Buffington summarizing the terms of . . . Mr. Buffington's transition agreement.
>
> 12. On November 24, 2010 Mr. Buffington wrote a letter to Mr. Finnell confirming the terms agreed to by the parties.
>
> . . . .

14. When Mr. Finnell set out the terms of the agreement in his email to Mr. Buffington, he did so with his name appearing over the name of EFS, without Legacy's name.

15. Throughout his email to Mr. Buffington, Mr. Finnell referred to EFS and Legacy collectively.

16. Specifically, in the first paragraph of that email he referred to Mr. Buffington's "transition out of EFS/LEP" although technically Mr. Buffington was only a member and employee of Legacy.

17. Similarly, Mr. Finnell stated that Mr. Buffington would be paid 20% of amounts received from specified accounts "when EFS/LEP is paid" although he testified at trial that all billings were by EFS and all payments came in to EFS.

18. Later in the email Mr. Finnell referred to Mr. Buffington working "on EFS business on a full-time basis" until he left, to Mr. Buffington transitioning work in process "to the appropriate EFS party" and that Mr. Buffington would "leave with EFS all property" other than his "EFS laptop" although Mr. Buffington was an employee of Legacy, not EFS.

19. Mr. Buffington similarly referred to EFS and Legacy collectively in his resignation letter accepting the terms that had been offered by Mr. Finnell.

20. Specifically, when referring to the accounts on which he was to be paid twenty percent of the net revenue received, Mr. Buffington wrote that he would be paid "when EFS/LEP is paid" (exactly the same words Mr. Finnell had used in his email).

21. Also, when referring to the remaining accounts on which Mr. Buffington was to be paid ten percent of the revenue received, Mr. Buffington wrote that "Legacy & Exit Planning, LLC, Executive Financial Services, Inc., or its successors or assigns" would remit those payments to him on a monthly basis as received.

. . . .

35. Both EFS and Legacy were parties to the contract with Mr. Buffington, and as a result are jointly and severally liable to him for the obligations set forth in that contract.

. . . .

> 38. The contract plainly intended that Mr. Buffington be paid "when EFS/LEP is paid," so both the contract language and equity require that Legacy and EFS be and they are jointly and severally liable to Mr. Buffington for the obligations set forth in the contract.

Although it is true that Legacy, not EFS, is the entity that made certain payments consistent with the Finnell-Buffington correspondence following Mr. Buffington's departure from Legacy, we disagree with the Appellants' position that EFS is not jointly and severally liable with Legacy. Turning to the parties' correspondence, we observe, as the trial court did, that Mr. Finnell's email specifically ended with the following designation:

> *Kelly O. Finnell, J.D., CLU, AIF®*
> *Executive Financial Services, Inc.*
> *7660 Poplar Pike, 2nd Floor*
> *Germantown, TN 38138*
> *Phone 901-259-7979*
> *Fax 901-682-8653*
> *kfin@execfin.com*

Moreover, like the trial court, we note that the email began by referencing Mr. Buffington's "transition out of EFS/LEP" and that the specific payment terms called for him to receive certain *EFS* revenues and specific other revenues "when EFS/LEP is paid." The trial court was not incorrect in observing that Mr. Finnell's email referred to EFS and Legacy collectively, and it seems quite clear from the email that EFS is a party to the new transition agreement formed by the Finnell-Buffington correspondence. Mr. Buffington's reply letter is consistent with this understanding, as it specifically directs that EFS is to make certain payments. In this vein, we again note that Mr. Finnell testified in his deposition that Mr. Buffington's letter did not fail to recite, in any way, what his email had requested.

Further, although the parties' transition agreement dealt primarily with the replacement of the payment terms in the Legacy Operating Agreement, which was entered into nominally between Mr. Buffington and Mr. Finnell concerning their interest in *Legacy*, we note that the record contains evidence, consistent with Mr. Finnell's collective treatment of EFS and Legacy, that the Appellants regarded the Legacy Operating Agreement as involving Mr. Buffington, Mr. Finnell, and *EFS/Legacy*. Indeed, in their answer, which was submitted as an exhibit at trial, the Appellants state as follows: "Defendants . . . assert that Buffington was in breach of his existing agreements

with *Defendants* (i.e., the Operating Agreement for Legacy & Exit Planning), as described in the Counterclaim[.]" (emphasis added).

On appeal, the Appellants submit that even if EFS is responsible for some of the payments outlined in the Finnell-Buffington correspondence, EFS cannot be liable for the second of the three payment provisions identified. In support of this position, the Appellants argue that Mr. Buffington's letter specifically directs Legacy to assume this payment rather than EFS. It is true that, whereas Mr. Buffington's acceptance letter generally confirms that Legacy *or* EFS will be responsible for the alternatively-negotiated payments, his recitation of the middle payment provision reads as follows:

> - The Company will pay Buffington 20% of the "net" revenue received on the following cases when EFS/LEP is paid: Midlands, Stepherson's, Waddell, Energique, Security Seed and Mock. "Net" revenue is defined as total revenue less any payments made to referral sources.

There is no dispute among the parties that the "Company" means Legacy, and therefore, the Appellants reason that EFS cannot be responsible for paying under the 20% of net revenue provision. We disagree, however, that Mr. Buffington's acceptance letter, considered alongside Mr. Finnell's email, reflects an intention that only Legacy be responsible for this payment. Mr. Finnell's email does not reflect such an intention, as it was sent by Mr. Finnell, as a representative of EFS, and refers to EFS and Legacy collectively. We again note that Mr. Buffington attached this email to his letter of acceptance. Moreover, although Mr. Buffington's letter states that "[t]he Company will pay" with regard to the 20% of net revenue provision, his letter also clearly references that this revenue is to be received on cases "when *EFS/LEP* is paid." (emphasis added). Thus, notwithstanding the imprecision with which Mr. Buffington composed his acceptance of the middle of the three payment provisions in the Finnell-Buffington correspondence, a clear intention is expressed, consistent with Mr. Finnell's email, that Mr. Buffington will receive compensation "when EFS/LEP is paid." The trial court's finding of joint and several liability is therefore justified. *See Gurley v. King*, 183 S.W.3d 30, 34 (Tenn. Ct. App. 2005) (quoting *Van v. Fox*, 564 P.2d 695, 699 (Or. 1977) ("[N]either party should be allowed to avoid his contractual duties merely because the language which was utilized to express the agreement is less specific and complete than that which a careful lawyer would ordinarily employ."). In our opinion, the trial court's construction of the parties' contract is sound. The Finnell-Buffington correspondence treats EFS and Legacy as collectively one and the same, and it therefore expresses an intention that either EFS or Legacy will make the alternatively-negotiated payments due to Mr. Buffington.

Attorney's Fees

Finally, we observe that Mr. Buffington's appellate brief contains argument that he should be awarded certain costs on appeal. Namely, he argues that he should be reimbursed for attorney's fees expended in defending the Appellants' claims based on the Legacy Operating Agreement. Notwithstanding the argument that was devoted to this topic, the matter was not raised as an issue for our review in compliance with Rule 27 of the Tennessee Rules of Appellate Procedure. Accordingly, it is waived. *See Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn. Ct. App. 2011) (citation omitted) (noting that "[w]e may consider an issue waived where it is argued in the brief but not designated as an issue").

CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of the Appellants' counterclaims. We also affirm its finding that EFS and Legacy are jointly and severally liable for the outstanding payments owed to Mr. Buffington. We tax the costs of this appeal to the Appellants, Legacy & Exit Planning, LLC and Executive Financial Services, Inc., jointly and severally, and their surety, for all of which execution may issue if necessary. This case is remanded to the trial court for the collection of costs, enforcement of the judgment, and for such further proceedings as are necessary and consistent with this Opinion.

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ARNOLD B. GOLDIN, JUDGE