No. 02-19-00241-CV

IN THE

Court of Appeals

FOR THE SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

RICHARD WYLIE, JR.; KSW CPA, P.C.; HMSW CPA, P.L.L.C.;
AND CHEREE BISHOP,

Appellants,

v.

DAN SIMMONS; DS FAMILY, L.P.; FINANCIAL WORX, LTD.;
SEKURE CONNECT, LTD.; AND
SIMMONS & ASSOCIATES OF NORTH TEXAS, P.L.L.C.,

Appellees.

ON APPEAL FROM THE 141ST JUDICIAL DISTRICT COURT
OF TARRANT COUNTY, TEXAS
THE HONORABLE JOHN CHUPP PRESIDING

Initial Brief of Appellees

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Statement Regarding Oral Argument

Simmons's reply points are straightforward.[1] The appellants concede the covenants not to compete were independent covenants which forecloses their first issue. Recent supreme court precedent forecloses their second issue. They failed to prove any harm, let alone error, from the lack of an excuse-of-performance instruction and they concede that the trial court could construct a fraudulent-transfer remedy under Texas Business & Commerce Code 24.008. They just don't like the one it did. The jury was free not to believe a word of Richard Wylie's testimony and the appellants have failed to show any error or harm from the trial court's discovery rulings. There is more than enough evidence to support the jury's findings. Finally, the appellants have misstated facts, e.g., Simmons's "prior contract breach," his alleged breach of the two-year covenant not to compete, Bishop having received the assets in good faith—none of which the jury found, and ignored the applicable standards of review in their factual narratives. Given these considerations, Simmons does not believe oral argument would materially assist the Court in resolving the appeal.

[1] Appellees' reply points are couched as "Simmons" because the appellants appear to have waived any error regarding the other named parties. *See* Issue 10.

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Issues Presented

Issue No. 1

The trial court properly refused an instruction that Richard Wylie's performance under the promissory notes could be excused.

Issue No. 2

The trial court did not err by not including an instruction that Simmons's performance under the non-competition clauses could not be excused.

Issue No. 3

The trial court properly refused to submit a question, permitting jury to find fraudulent inducement.

Issue No. 4

The jury findings of alter ego and fraudulent transfer were supported by sufficient evidence.

Issue No. 5

The trial court did not abuse its discretion by awarding Simmons the full amount of his attorney's fees.

Issue No. 6

The jury was free to disbelieve Richard Wylie.

Issue No. 7

The final judgment properly imposed joint-and-several liability upon Cheree Bishop.

Issue No. 8

The final judgment properly imposed joint-and-several liability on KSW and HMSW.

Issue No. 9

The appellants have failed to show any error or harm from the trial court's discovery rulings.

Issue No. 10

The appellants have waived error, if any, by failing to raise issues on appeal.

Restatement of Issues—Reply Points

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(2), Simmons addresses certain jury-charge and no-evidence issues in a single reply point because they are related and overlap. The table below lists the appellant's issues and corresponding reply points and arguments.

Appellants' Issue Nos. in Issues Presented	Appellants' Issue Nos. in Table of Contents	Appellees' Reply Point
1	IV.A.1	1
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Statement of Facts

Dan Simmons entered into a purchase agreement with Simmons & Wylie, P.C. in July 2008 for certain identified assets of his accounting firm.[2] RR12, Pl. Ex. 1. The purchase price included two promissory notes executed by Richard Wylie, Jr. in his individual capacity. RR12, Ex. 1 at 4. The agreement also contemplated Simmons providing professional accounting and administrative services for a year following the sale. RR12, Ex. 1 at 12–14. KSW failed to pay Simmons for all of the services he provided and Richard Wylie, Jr. stopped payments on the promissory notes. *See* CR.20– 32. Simmons initiated suit, and the defendants countersued, alleging counterclaims and defenses. *See* CR.20–32; 33–64. The trial court entered a final judgment after a jury trial, awarding Simmons actual damages of $784,940.77 and attorney's fees of $195,000 jointly and severally against all named defendants based upon the jury's findings. CR.378–403.

Simmons's Background

Dan Simmons is a certified public accountant who maintains offices in Arlington and Southlake. RR6.98. He started his firm from scratch in 1982. RR6.99. He eventually purchased another firm in Fort Worth, and tied the firms together though a computer link. RR6.103–04. He later sold the Fort Worth office, and renamed his firm Simmons & Associates of Texas, P.C. RR6.104. The firm name contained a ge-

[2] Simmons & Wylie, P.C.'s name was later changed to KSW CPA, P.C. (hereinafter "KSW").

ographic designation because an engineering firm was already using the name Simmons & Associates. RR6.106–07. Both the Texas Board of Public Accounting and the Secretary of State approved the new name. RR106–07. In 2007, Simmons's firm was located solely in Arlington, had four employees, and was generating approximately $1 million to $1.1 million in revenue. RR6.99, 100.

Simmons's Decision to Sell

Simmons described public accounting practice is an all-consuming occupation. RR6.100, 108. The doors for tax season would kick open February 1st every year, and the firm hurriedly prepared tax returns, first in, first out, as fast as it could get them out. RR6.102–03. Most clients don't bring what's needed for their returns and his employees had to constantly beat the bushes with them about missing information. RR6.102. This made for long days, many lasting till 10:00 at night, or even longer. RR6.103.

He had been working through this hectic cycle for thirty-five years. RR6.103. His wife pressured him to slow down, to spend more time with his sons, to travel more often. RR6.101, 108, 110; RR7.25–26. He decided to sell the firm. RR6.108. Selling would allow him to slow down, travel, and pursue other business interests. RR6.112. But selling at that time didn't mean he had any intentions to retire or withdraw from public accounting entirely. RR6.112, 129. He was, after all, just fifty-five years old. RR6.112.

Listing of the Firm

He listed the firm with Accounting Practice Sales, a brokerage firm that specializes in accounting-firm sales. RR6.109, 113. There were different ways the sale could be structured, such an earnout arrangement. RR6.110; RR7.175–79. But an earnout wasn't even a consideration for Simmons. RR6.114, 114, 125. He had bought the prior firm, Wilkerson & Arthur, based on a fixed fee. RR6.111. He didn't have any confidence in other CPAs handling the business and generating the revenues as he had. RR6.111.

Richard Wylie, a certified public accountant also based in Arlington, responded to the broker's listing. RR6.113, 116; RR8.8. Simmons knew Wylie; they had been partners for a short time some twenty-five years before. RR6.116, 117. But they hadn't had any business dealings with each other since they dissolved that partnership, nor had they even run across each other's clients since then. RR6.117; RR8.8.

Wylie had started his own firm in 1994, and had already bought two other accounting firms when he responded to the inquiry. RR7.185, 224; RR8.186–187. He had purchased Tom Crouch's firm, after having inspected the filings and negotiating a purchase agreement. RR7.185–86. He moved Crouch's practice into his own office building once the sale was consummated. RR7.187. He had also purchased Doke Kiblinger's firm. RR7.224. He didn't move Kiblinger's old clients to his office building immediately, but instead leased Kiblinger's office location for a period of time. RR7.225–28.

Negotiations

Wylie initially wanted to purchase the firm based on a cash downpayment and an earnout, but he was enthusiastic about the quality of Simmons's practice and quickly entered into negotiations for a fixed price. RR6.113–14; RR7.195, 196; RR12, Pl. Ex. 179.

Wylie transmitted an offer of intent to buy the practice, and the negotiations got-started. RR6.118; RR 12, Pl. Exs. 143, 142. The negotiations involved a short-term lease of Simmons's building. RR6.119. This lease became part of Wylie's ability to finance the purchase of the practice. RR6.119. It would provide him working capital, and allow him to move the practice to his own building after he had made the necessary renovations to it. RR6.119–20, 167. Wylie also offered to personally guarantee any promissory notes associated with the sale. RR6.119.

The two discussed noncompete issues. RR6.124; RR12, Pl. Ex. 142. Wylie originally wanted a ten-year noncompete, but Simmons wanted to perform accounting work after a shorter period of time. RR6.128–129. Wylie consulted with an attorney several times about the non-competition agreements, and the parties eventually settled on a two-part agreement involving two and five years. RR6.128–29; RR8.9. The five-year agreement involved just the former clients of Simmons's firm. RR6.124.

Wylie wanted violations of section 6.26 of the agreement which involved Simmons's providing of services to be deemed "material breaches" of the agreement.

RR6.126. Simmons refused this language or interpretation. RR6.126–128. Sometime during the negotiations, Simmons was diagnosed with a blood disorder called polycemia vera, and shared this information with Wylie, although it was not his reason to sell.[3] RR6.109; RR7.28–32. The negotiations produced several drafts, all which were summed up in the purchase agreement which included a merger clause. RR7.77; RR12, Pl. Ex. 1, at § 10.11.

The purchase was being partially financed by an SBA loan with Community Bank. RR6.142. Simmons provided Wylie access to all information concerning the practice, including tax returns and client information. RR6.142–44. The bank, in turn, received this information, including interim financials, and performed an appraisal. RR6.142, 7.129–30, 140. The bank's attorneys scrutinized the non-competition provisions and the overall agreement. RR7.136, 142. The bank's appraisal of $1.3 million was consistent with the $900,000 loan it was providing for the purchase, along with promissory notes to be executed by Wylie individually. RR7.130; RR8.19.

Contract and Closing

The parties' agreement was summed up in a single written purchase agreement. RR6.130–31. The parties to the agreement were Dan Simmons and KSW [*formerly* Simmons & Wylie, P.C.], a newly created corporation that didn't have any assets.

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[3] Simmons listed the practice for sale in May 2007. RR6.109; RR7.29. He was diagnosed with polycythemia vera in May 2008. RR7.29.

RR6.150; RR8.13, 204. KSW. wasn't licensed to practice public accounting nor was it engaged in the practice of accounting. RR8.13, 14. The sale was for a fixed price for certain identified assets of Simmons's accounting practice, including the professional corporation of Simmons & Associates of Texas, P.C. RR6.132, 147; RR7.35; RR8.197. The sale didn't include goodwill or intangible assets outside of the identified clients and Target corporation. RR6.134; RR7.35–36.

The agreement identified Simmons & Associates of Texas, P.C. as the "Target." RR6.132, 163; RR12, Pl. Ex. 1 at § 8.7. KSW received the Target. RR7.115, 119, 133; RR8.15–16. The Target was to continue to operate as a professional accounting firm. RR6.146; RR7.38–41; RR8.10–11. The five-year covenant not to compete included in the agreement was expressly limited to the protection of the Target's business and professional accounting practice. RR6.163. KSW expressly retained the risk of client retention. RR6.147–49; RR8.12, 54.

All the assets concerning the sale were immediately transferred on the day of closing. RR6.135, 136; RR8.23, 63. KSW took ownership of 100% of the Target; Simmons was no longer a shareholder or director of the Target. RR6.159–60; RR7.120; RR8.15,136. The Target, as the firm being purchased, executed a note in favor of the bank. RR7.116. KSW, in turn, pledged the stock to Community Bank so the bank had collateral. RR7.120; RR8.15, 29. Richard Wylie executed the promissory notes in his individual capacity which were identified in the purchase

agreement as consideration for the asset transfer. RR6.138–39, 150–51; RR8.12, 49–50.

The purchase agreement prohibited the assignment of any rights or obligations to third parties. RR7.38, 56; RR8.65, 210. It expressly disallowed any rights or remedies for third-party beneficiaries. RR7.171–72. Any assignments or transfers required Simmons written consent. RR7.171. KSW never requested any such consent, and the agreement was never modified. RR6.131. The written document constituted the entire agreement of the parties. RR6.130. The sale closed on July 24, 2008.

KSW Takes Over the Target

The practice was located in Simmons's building before the sale. RR6.164. It wasn't moved immediately because Wylie didn't his office ready. RR6.164. Simmons was required to run it until it was moved in September. RR6.168–69; RR8.212. Wylie, KSW's sole owner, filed a false office member list required by the Texas State Board of Public Accounting on September 29, 2008, listing Simmons as the owner and a director of the Target, although Simmons had been divested of all his shares by the purchase agreement. RR7.15–16, 19–20. But the Target still operated as a professional accounting practice until the end of 2008. RR8.39, 42.

Richard Wylie formed Kiblinger, Simmons & Wylie, L.L.P. on January 1, 2009. RR8.29. The Target's clients and employees were transferred to the new firm.

RR61.76; RR7.53–55; RR8.51,176–181, 216–17; RR12, Pl. Exs. 27, 28, 51, 54, 143, 147,181, 190; *see also* RR8.36–39.[4] The Target ceased operating as a professional accounting practice in 2009. RR8.37, 40–42; RR12, Pl. Ex. 147 (tax returns and financial documents). The new firm demanded that Simmons pay prorated franchise taxes for the first half of 2008 per the purchase agreement. RR6.194; RR12, Pl. Exs. 27, 28. The firm deducted his portion of the franchise tax from monies owed to him. RR6.196–98; RR7.86–88; Pl. Exs. 27, 28. Richard Wylie pocketed the money, and never paid the franchise taxes. RR7.18, 80–88.

The purchase agreement contemplated Simmons providing professional accounting and administrative services for a year after the sale. RR6.173; see also RR12, Pl. Ex. 147 (Simmons checks). Simmons worked at the office daily, even referring new clients to the firm. RR6.174, 177–78. But the practice quickly became disorganized after it was moved to Wylie's building. RR7.189. Wylie's employees weren't competent; Wylie didn't continue with needed software; there were all kinds of communications issues. RR7.189, 191, 194, 197. Simmons did his best to preserve the goodwill of the Target, but Wylie began restricting his activities, and eventually cut him off from communicating directly with the firm's clients. RR6.171–73; RR7.44–46; RR8.136. The purchase agreement required that KSW produce an accounting of Simmons's services, but none was provided. RR6.182–85. Despite the problems, the firm's revenues the year following the sale were high-

[4] RR12, Pl. Ex. 147 in the record appears to contain a number of exhibits, such as tax returns, financial statements, a partnership agreement and withdrawal, and checks to Dan Simmons.

er than the year before. RR9.67–68. Wylie asked Simmons to extend his contractual commitment, but he declined. RR6.174; RR6.186; RR8.171. Simmons calculated that he had been shorted at least $28,412 at the end of the one-year period. RR6.182, 185; *see* RR9.45; RR12, Pl. Ex. 17.

Revenues dropped the following year; Wylie didn't know why. RR9.14–15. The corporate charter for the Target, Simmons & Associates, P.C., was forfeited on July 30, 2010. RR7.80–83; RR8.41. Richard Wylie had intended to corner the Arlington CPA market by purchasing the three accountants' firms. RR8.193, 203.

Simmons Forms an Entity

Simmons incorporated Danny G. Simmons, CPA online in December 2009 a year and half after the sale. RR6.161, 187–88; RR7.75; RR12, Pl. Ex. 55. He formed an online entity, but not an active office. RR7.78. He did not market the entity, advertise it, or conduct any business with it. RR6.161–62, 188, 191. He didn't register the entity with the Texas State Board of Public Accounting, and completed tax returns under his own personal license. RR6.188; RR7.48. He did not intend to practice public accounting until the two-year non-compete provision was over. RR6.162, 188–91; RR7.47, 90; RR8.79; RR12, Pl. Exs. 26, 54. Simmons changed the name of the firm to Simmons & Associates of North Texas, P.L.L.C. because he hired a CPA to begin working in August 2010. RR6.191–92; RR7.13, 92. Both the Board and the Secretary of State approved the new name that included a geograph-

ical distinction. RR6.192; RR7.24, 25, 90–92. Richard Wylie was aware that Simmons could re-enter public accounting after two years after July 24, 2008. RR9.72. And the Target wasn't a professional accounting practice when he did re-enter the market. RR9.27.

Wylie Stops Promissory-Note Payments

Richard Wylie had began paying the two promissory notes in February 2009. RR6.139. He prepaid interest on the notes from the proceeds of the bank loan. RR6.139–40; RR12, Pl. Ex. 2. He regularly cut two checks from his personal bank accounts, one for each promissory note. RR6.151, 153; RR8.12. He stopped payments in October 2010, more than two years after the date of closing, more than a year after Simmons's contractual services had ended. RR8.12, 13; RR12, Pl. Ex. 7. They remained unpaid up to the date of trial. RR6.151; *see* RR6.153–4; RR12, Pl. Ex. 6. He testified that he stopped paying the notes because Simmons "did not performed the duties to transition the clients." RR9.16.

Simmons and Exhibit-A Clients

When Richard Wylie stopped paying the promissory notes in October 2010, Simmons did not seek out his former clients to start providing accounting services to them. RR7.20. Instead, he ordered mailing lists from third parties, and instructed them to eliminate the Target's former clients. RR7.20–21, 172–73. His only other

advertising consisted of a website. RR7.21. His aim was to develop new clients, not service former ones. RR7.173.

But former clients began calling him, and he referred them back to Richard Wylie's firm. RR7.23. Wylie's firm, however, didn't help them, so he decided to service them. RR7.22–23, 94. He provided services to a small number of former clients, some of whom had more than a few separate entities. RR7.101, 146–54, 159, 169–70; RR12, Def. Ex. 285.

Subsequent and Fraudulent Transfers

Kiblinger, Simmons & Wylie, L.L.P. was merged into a Wylie-owned entity called Center Street, Ltd. RR8.67. Center Street later filed for bankruptcy protection in June 2011. RR9.31. Kiblinger, Simmons & Wylie's accounting clients were distributed out of Center Street, Ltd. and into KSW, which was wholly owned by Wylie. RR8.68, 77. Ironically, Coye Wylie, Richard Wylie's wife and the president of Center Street Management, Inc., the general partner of Center Street, Ltd., testified that she didn't know what had happened to the clients. RR8.181–83. In other words, they had been distributed in and out of so many entities that she couldn't keep track of them. RR8.181–83.

HMSW CPA, P.L.L.C., another Wylie-controlled entity, was formed and it "serviced" KSW's clients, including the Target's former clients, RR8.70, 79. In December 2015, while this case was in litigation, Wylie entered a Member Interest Trans-

fer Agreement as an individual seller to sell HMSW to his stepdaughter Cheree Bishop. RR8.89. HMSW didn't have any clients in it. so he distributed the KSW clients to himself individually and then "immediately" redistributed them to HMSW for the sale. RR8.69–70, 79. Bishop understood that her purchase of HMSW, a separate firm from KSW not in privity with Simmons, included all of Wylie's past clients. RR8.94, 96; R9.66. The value of the client base and assets was $1.8 million to $2.2 million. RR8.73, 90, 94; RR9.66. Bishop, without conducting any independent financial due diligence, paid just $252,000 for it, and those funds didn't come out of her pocket, but out of the firm's revenue. RR8.91, 92, 94. The sale wasn't disclosed to any third parties, and Bishop was aware of this litigation at the time of the sale. RR8.85, 87, 96. Bishop, a former KSW employee familiar with the client base, considered the sale an evolvement of Wylie's prior firm just with name changes. RR8.84, 89, 90, 95, 97.

This double distribution of all the clients of Wylie's past accounting-firm purchases left KSW without any clients, assets, or even proceeds from the sale. RR8.66, 72, 74, 77–78, 91–92; RR12, Pl. Ex. 152. Bishop and Wylie agreed that KSW would act only as an independent contractor for the firm, and Wylie would servicejust HMSW clients. RR8.79–88, 93. He had no other clients of his own. RR8.93. Wylie, however, continued to maintain a supervisory role in HMSW. RR8.104; *see also* RR8.104. The firm continued to publish its website years after the sale that touted to the public, prospective clients, and retained clients that Wylie

was still leading the firm as its CEO and executive managing partner. RR8.86–87; RR12, Pl. Ex. 184.

Summary of the Argument

The trial court properly declined to instruct the jury that it could find that Richard Wylie's failure to pay promissory notes was excusable. The notes went to the independent covenant of the purchase of assets and the assets were never returned. In the alternative, KSW treated the agreement as continuing so Wylie then could not elect the excuse remedy prior to judgment.

The trial court did not commit any error regarding its submission of covenant-not-to-compete questions to the jury. The jury was allowed to determine damages from their breach, if any, and decidedly find none. There was no ambiguity about this.

The trial court did not err in refusing to submit a fraudulent-inducement question to the jury because Simmons's purported oral representation was directly contradicted by the express, unambiguous terms of the purchase agreement which Wylie admitted was valid and enforceable.

The trial court did not abuse its discretion by sustaining Simmons's discovery objections. The appellants have conceded they received client invoices before trial that contained the information that they had sought. The jury was free to disbelieve Richard Wylie, and its findings of alter ego and fraudulent transfer were supported by sufficient evidence. And the trial court did not abuse its discretion in awarding Simmons the full amount of his attorney's fees as found by the jury, and the trial

court properly imposed joint-and-several liability upon the defendants based upon the jury findings.

Finally, the appellants have requested a new trial based on the points raised. They failed to raise appellate issues regarding Financial Worx, Ltd.; Sekure Connekt, Ltd.; DS Family, Ltd.; and Simmons & Associates of North Texas, P.L.L.C. so they have waived error, if any, concerning those parties. They also failed to raise any appellate issues regarding the trial court's denial of injunctive relief, so that, too, is waived.

The trial court did not commit any reversible error and the judgment is amply supported by sufficient evidence. This Court should affirm the judgment in all respects.

Issue No. 1

The trial court properly refused an instruction that Richard Wylie's performance under the promissory notes could be excused.

Standard of Review

A litigant has the right to have the jury properly instructed on the issues "authorized and supported by the law governing the case." *Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002). The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion, with the essential question being whether the instruction or definition aids the jury in answering the questions. *See Shape v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); Tex. R. Civ. P. 277. In determining whether an alleged error in the submission of instructions or definitions is reversible, "the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety." *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986). The error will constitute reversible error only if, when viewed in light of the totality of these circumstances, the error amounted to such a denial of the complaining party's rights as was reasonably calculated and probably did cause the rendition of an improper judgment. *Id*.

Argument and Authorities

The promissory notes were not mutually dependent covenants and Richard Wylie therefore was not entitled to such an excused-performance instruction.

Wylie did not execute the purchase agreement in his individual capacity. He concedes that he was not a party to the contract. Apps.Br. at 17. He therefore did not have contractual right to suspend payments on the promissory notes based upon Simmons's alleged failures to perform under the agreement. *See, e.g., Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) (holding that because a business owner did not sign a contract, he was not individually a party to a contract his company entered).

Wylie argues that the purchase agreement's non-competition provisions and promissory notes were mutually dependent covenants, but they were not.[5] This is demonstrated in *Hanks v. GAB Business Services, Inc.,* 644 S.W.2d 707 (Tex. 1982). In *Hanks,* Hanks contracted with GAB for the sale of his insurance adjustment business. *Id*. at 707. The contract price of $95,000 provided for a payment at closing, a payment one year from the date of closing, and the balance due two years from the date of closing. *Id*. at 707. The sale included a five-year covenant not to compete. *Id*. Hank began competing against GAB shortly after GAB paid the second installment. *Id*. GAB then refused to pay the last installment, arguing that it

[5] The appellants concede the covenants were not mutually dependent in issue two based on their arguments that Simmons's performance under the non-competition covenants could not be excused. Apps.Br. at 20.

was excused from paying because of Hanks's breach of the covenant not to compete. *Id*. at 708.

The Texas Supreme Court held that GAB was not excused from making the final payment. *Id*. at 708, 709. The court reasoned that a prerequisite to the remedy of excuse of performance is that covenants in a contract must be mutually dependent promises. *Id*., quoting *Morgan v. Singley*, 560 S.W.2d 746 (Tex. Civ. App.—Texarkana 1977, no writ). It observed that the mutually-dependent rule didn't apply to the covenant not to compete because the non-competition covenant was an independent covenant. *Id*. at 708. It reasoned that when a covenant in a contract or agreement goes only to part of the consideration on both sides and a breach may be compensated for in damages, it is to be regarded as an independent covenant, unless this is contrary to the expressed intent of the parties. *Id*., citing *World Broadcasting System, Inc. v. Eagle Broadcasting Co.*, 162 S.W.2d 463, 465 (Tex. Civ. App.—San Antonio 1942, writ dism'd), citing 17 C.J.S., Contracts, 344, at 800.

The same is true here. The express language in the purchase agreement demonstrates that covenants not to compete were independent covenants.[6]

> 8.9 Enforcement. The restrictive covenants contained in sections 8.7 and 8.8 are covenants independent of any other provision of this Agreement, and the existence of any claim that Seller may allege against any other party to this Agreement, whether based on this

[6] *Compare Greenstein v. Simpson*, 660 S.W.2d 155, 160 (Tex. App.—Waco 1983, writ ref'd n.r.e.) ("The record does not show the parties clearly indicated the non-competition covenant was to be considered an independent promise. . .") with Apps.Br. at 20.

> agreement or otherwise, shall not prevent enforcement of these covenants.

Pl. Ex. 1, at § 8.9.

They also contained their own remedies. RR12, Pl. Ex. 1, at §§ 8.9–8.9.3. Further, there is no express language in the purchase agreement indicating that the parties intended the covenants to be mutually dependent. *Cf. Hanks*, 644 S.W.2d at 708. The covenants, then, only give rise to a cause of action rather than affecting the enforceability of the purchase agreement or the promissory notes. *See Reinert v. Lawson*, 113 S.W.2d 293, 295 (Tex. Civ. App.—Waco 1938, no writ).

Wylie's argument also ignores the plain language of Section 3.1 of the purchase agreement that describes the price and payment terms of the "Assets." RR12, Pl. Ex. 1, at § 3.1. The "Assets" were defined as the "certain identified assets of and all of the Seller's equity interest in Simmons & Associates, P.C." RR12, Pl. Ex.1, at 1. All of the assets were transferred on the day of closing; none were withheld RR6.135–36, 159–60; RR8.23. KSW owned 100% of the Target and its assets on the day of closing, July 24, 2008. RR6.160. Wylie, therefore, received all consideration contemplated by the promissory notes that same day. RR12, Pl. Ex. 1, at E; s*ee* RR8.50; RR9.238–40.

If the Court finds that the non-competition covenants and promissory notes were somehow mutually dependent, Wylie's argument still fails. A party who elects to treat a contract as continuing deprives himself of any excuse of ceasing perfor-

mance on his own part. *Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006), quoting *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707, 708 (Tex. 1982). Under this theory, KSW could have elected to rescind the purchase agreement at the time of Simmons's breach, but it did not. Instead, it continued to retain the assets purchased through the agreement and chose to treat the contract with its non-competition covenants as continuing and enforceable, as evidenced by its pursuit of a temporary injunction. RR5.112–21.; *see Hanks,* 644 S.W.2d at 709 ("At all times during the dispute and subsequent litigation, GAB chose to treat the contract as continuing. GAB retained all the assets of the business and continued its operation. . . . Because GAB retained the assets of the business and chose to treat the contract as continuing, it could not elect the excuse remedy prior to judgment."). Wylie then, could not elect the excuse remedy prior to judgment, and the trial court did not err in refusing to instruct the jury that Wylie's performance under the terms of the promissory notes was excusable.

In the alternative, Wylie waived any error. A losing party can ask the court to render a judgment on the verdict without losing the right to challenge the judgment on appeal, but it must state that he: (1) disagrees with the content and result of the proposed judgment; (2) agrees only to the form of the proposed judgment; and (3) plans to challenge the judgment on appeal. *See First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). If he asks the court to render a judgment without reserving the right to appeal, the part cannot complain about the judgment on

appeal. *Casu v. Marathon Ref. Co.,* 896 S.W.2d 388, 391–92 (Tex. App.—Houston [1st Dist.] 1995, writ denied). But even if he asks the court to render judgment and reserves the right to appeal, he cannot take a position on appeal that is inconsistent with that judgment. *Hooks v. Samson Lone Star, L.P.,* 457 S.W.3d 52, 67 (Tex. 2015); *Casu*, 896 S.W.2d at 391; *see, e.g., Litton Indus. Prods. v. Gammage*, 668 S.W.2d 319, 321–22 (Tex. 1984) (defendant moved for judgment on amount of damages; on appeal, he could attack trebling of damages but could not attack sufficiency of evidence supporting damages). When a party asks the trial court to render judgment for a particular amount, and the court renders judgment for that amount, that party cannot challenge the judgment on appeal. *Casu*, 896 S.W.2d at 389.

Wylie submitted a final judgment to the trial court, rendering judgment against him in the amount of $758,528.57, which was comprised of damages from his nonpayment of the promissory notes. CR.204–11. This submission was not so he could initiate the appellate process or obtain a judgment on claims that he had won, but was in response to the appellees' motion for entry of a proposed judgment based on the jury's findings. *See Hooks*, 457 S.W.3d at 67. The trial court later entered a final judgment that included those actual damages in its calculation. Wylie thus waived his right to appeal $758,528.57 in actual damages from his failure to comply with the promissory notes.

Issue No. 2

The trial court did not err by not including an instruction that Simmons's performance under the non-competition clauses could not be excused.

Standard of Review

Whether a trial court should submit a theory by questions or instructions is to be reviewed under an abuse-of-discretion test. *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). In addition, the reversible error analysis applies to complaints about errors in the charge. *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 786–87 (Tex. 2001). In determining whether an alleged error in the jury charge is reversible, this Court considers the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986). An error will constitute reversible error only if, when viewed in light of the totality of the circumstances, the error amounted to such a denial of the complaining party's rights "as was reasonably calculated and probably did cause the rendition of an improper judgment." *Id.*

Argument and Authorities

A complaining party must make his objections to the charge before the court reads the charge to the jury. Tex. R. Civ. P. 272; *King Fisher Mar. Serv. v. Tamez*, 443

S.W.3d 838, 843 (Tex. 2014). A party must make timely and specific objections to the charge. *Burbage v. Burbage*, 447 S.W.3d 249, 256 (Tex. 2014); *Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012); Tex. R. App. P. 33.1(a)(1)(A). The objection must clearly identify the error and explain the grounds for the complaint. Tex. R. Civ. P. 274; *Burbage*, 447 S.W.3d at 256; *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 536 (Tex. 2012); *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). If the objection does not meet both these requirements, it will not preserve error. *Castleberry*, 721 S.W.2d at 276; *see* Tex. R. Civ. P. 274; *Burbage*, 447 S.W.3d at 256.

The appellants provide no record citation wherein they objected to the trial court's failure to include an instruction that Simmons's performance under the covenants not to compete could not be excused. They do not provide any citation showing that they clearly identified the error to the trial court and explained the grounds for their complaint. They also have not provided any citation demonstrating that they asked for such an instruction. Thus they have waived any error. *See also* Tex. R. Civ. P. 38.1(i); *In re B.A.B.*, 124 S.W.3d 417, 420 (Tex. App.—Dallas 2004, no pet.) ("The failure to adequately brief an issue, either by failing to specifically argue and analyze one's position or provide authorities and record citations, waives any error on appeal.").

The trial court submitted two questions to the jury regarding Simmons's performance under the covenants not to compete, one for each covenant. CR.387–88.

The trial court's two covenant-not-to-compete questions tracked the purchase agreement's construction that the covenants were independent covenants. And an affirmative answer to either provided for the possibility of damages. CR.384–86, 90. The jury found that Simmons did not fail to comply with the two-year covenant not to compete, but that he had failed to comply with the five-year covenant. CR.387–88 (Questions 4 & 5). The jury was then instructed to answer Question 6—what sum of money would fairly compensate KSW because of Simmons's failure to comply—because of its "Yes" to Question Five. CR.389. The jury answered zero for lost profits sustained in the past and those that KSW would sustain in the future. CR.389. The court cannot be deemed to have reversibly erred just because the jury found that KSW had failed to prove damages of lost profits. *See* CR.389. The jury was free to disbelieve Richard Wylie and apparently it did. *See* Issue 6.

In the alternative, the appellants invited the error, if any. Richard Wylie provided opinion testimony regarding lost profits that KSW (and HMSW?) sustained in the past and for the foreseeable future. RR9.50–60; RR13, Def. Exs. 276, 277. While this testimony dealt exclusively with the covenants not to compete, the appellants asserted that these damages were not limited to those covenants, but also constituted general contract damages.[7] RR9.61, 213–14. The trial court's charge indulged this request with its conditional sentence in Question 6. *See* CR.389. Simmons's breach of the purchase agreement could be excused, and the jury found that it was.

[7] The trial court cautioned the appellants that their strategic decision would make their opinion witnesses look like liars. They responded that they were willing to take that risk. RR9.61–62.

CR.385. But it was still required to answer Question 6 regardless (what error?). CR.389. The appellants cannot now complain on appeal about an action they asked the trial court to make and it did. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005). The appellants also submitted a proposed final judgment to the court that denied any relief to KSW. CR.204–11. Again, KSW cannot now complain on appeal about its lack of relief or damages. *Hooks v. Samson Lone Star, L.P.*, 457 S.W.3d 52, 67 (Tex. 2015).

In sum, the trial court did not commit any error regarding its questions or the appellants waived it. The appellants have also have failed to prove that the trial court's submission caused the rendition of an improper judgment—there is no ambiguity about zero.

Issue No. 3

The trial court properly refused to submit a question, permitting jury to find fraudulent inducement.

Standard of Review

The appellants aver that this Court reviews a trial court's failure to submit a requested instruction for an abuse of discretion. Apps.Br. at 16, citing *Allen v. Am. Gen. Fin., Inc.*, 251 S.W.3d 676, 685 (Tex. App.—San Antonio 2007, pet. granted). The Court may reverse for charge error only if the error probably caused the rendition of an improper judgment. *Id.*; *see* Apps.Br. at 16.

Argument and Authorities

The elements of a claim for fraudulent inducement are: (1) a material misrepresentation; (2) made with knowledge of its falsity or asserted without knowledge of its truth; (3) made with the intention that it should be acted on by the other party; (4) which the other party relied on; and (5) which caused injury. *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018). Because fraudulent inducement arises only in the context of a contract, the existence of a contract is an essential part of its proof. *Id.* A plaintiff must show actual and justifiable reliance to prevail on a fraud claim. *Grant Thorton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). Whether a party's actual reliance is also justifiable is ordinarily a fact question, but the element may be negated as a matter of law when circumstances exist

under which reliance cannot be justified. *See, e.g., Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015) ("[A] party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms."). Reliance based upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 559 (Tex. 2019), quoting *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858–59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc); *see also J.P. Morgan Chase Bank, N.A. v. Orca Assets G.P., L.L.P.*, 546 S.W.3d 648, 660 (Tex. 2018). To hold otherwise, would be to reward a party for signing a contract under false pretenses, promising to abide by the written terms while secretly intending to enforce the conflicting terms of an unwritten bargain. *Id*. Instead, a party who enters into a written agreement while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract. *DRC Parts,* 112 S.W.3d at 859.

Wylie's alleged reliance is directly contradicted by the unambiguous terms of the agreement. The contract here is the purchase agreement made between KSW [Simmons & Wylie, P.C.] and Dan Simmons as sole shareholder of Simmons & Associates of Texas, P.C. RR12, Pl. Ex. 1. The contract specified that Simmons would provide professional public accounting services for one year following the

date of closing. RR12, Pl. Ex. 1, at § 6.25.1; *see also* RR9.194. The contract also contemplated Simmons's re-entry into professional public accounting after just two years. 12RR, Pl. Ex. 1, at § 8.7.5. And he would have no restrictions whatsoever after five years, even with the clients made the subject of the purchase agreement. RR12, Pl. Ex. 1, at §§ 8.7–8.75.

Wylie, a sophisticated business owner since 1994, who had purchased two accounting firms before Simmons, consulted with an attorney several times about the covenants not to compete and accepted his suggested edits. RR7.185, 224; RR8.9, 186–187. Wylie admitted at trial that he was that the purchase agreement allowed Simmons to re-enter the public accounting market after two years and he still signed off on it. RR9.72. He also testified that the agreement was a valid and binding agreement. RR8.10.

Simmons's alleged oral representation, if made at all, was directly contradicted by the express, unambiguous terms of a written agreement between the parties. Wylie [KSW, as it was the party to the agreement] was therefore not justified in relying on the representation as a matter of law, and therefore the trial court could not and did not err in refusing the instruction. *See* RR9.194 (Court: "Your guy—defendant should have no expectation that he wasn't going to keep doing accounting, because part of the deal was he was going to keep doing accounting with the company, and if he didn't do accounting, he was not going to compete, and it wasn't a lifetime noncompete.").

In addition, or in the alternative, while a person may agree, in connection with the sale of his business, not to re-enter a similar competitive business for the remainder of his life, such an agreement must be reasonably limited as to geographic area to be valid. *York v. Dotson*, 271 S.W.2d 347, 348 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.). Simmons's alleged oral representation was open-ended as to geographic area. Wylie [KSW] therefore could not justifiably rely upon it because of this either. The appellants, moreover, sought only enforcement of the two- and five- year covenants not to compete that were contained in the purchase agreement, not a lifetime ban. This also demonstrates that Wylie [KSW] could not or did not justifiably rely upon Simmons's alleged representation.

In sum, neither Wylie nor any of the other appellants justifiably relied upon the alleged representation so the trial court did not err in refusing to submit the question to the jury.

Issue No. 4

The jury findings of alter ego and fraudulent transfer were supported by sufficient evidence.

Standard of Review

The test for legal sufficiency of the evidence is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). This Court credits favorable evidence if reasonable jurors could, and disregards contrary evidence unless reasonable jurors could not. *Id*. The jury is resolve conflicts in evidence. *See id*. at 820, 827. Evidence is legally insufficient to support a jury finding when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by the rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Crosstex N. Tex, Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 613 (Tex. 2016). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Caravez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996).

If a party is challenging a jury finding regarding an issue upon which that party had the burden of proof, the moving party must demonstrate that "the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem.*

Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). In determining this issue, this Court must first examine the record to determine if there is some evidence to support the finding; if such is the case, then the court of appeals must determine, in light of the entire record, whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its nonexistence. *Id*. at 241 (citation omitted). Whether the great weight challenge is to a finding or a nonfinding, "[a] court of appeals may reverse and remand a case for a new trial [only] if it concludes that the jury's 'failure to find' is against the great weight and preponderance of the evidence." *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989). As the reviewing court, this Court may not act as a factfinder and may not pass judgment on the credibility of witnesses or substitute its judgment for that of the trier of fact. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

Argument and Authorities

A party is entitled to have controlling and disputed fact issues submitted to the jury if they are properly pleaded and supported by the evidence. Tex. R. Civ. P. 278; *Aero Energy v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985). A controlling issue is one that requires a factual determination to render judgment in the case. *Lehmann v. Wieghat*, 917 S.W.2d 379, 382 (Tex. App.—Houston [14th Dist.] 1996,

writ denied). Here, the trial court submitted jury questions of alter ego to the jury pertaining to both KSW and HMSW. CR.159, 160. The court's instruction of alter ego followed the Texas Pattern Jury Instructions and was based upon the supreme court's discussion of alter ego in *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986) with the subsequent modifications of Tex. Bus. Orgs. Code § 21.223(a) and (a)(3). *See Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67 n. 3 (Tex. App.—Texarkana 2000, no pet.). The court also submitted questions to the jury regarding the fraudulent transfer of the clients, goodwill, member interests, and assets of KSW and HMSW. CR.157, 158. The court used the questions and instructions listed in the Texas Pattern Jury Instructions and the appellants didn't object to the instructions or to the inclusion of intangible assets. RR9.231–33. The evidence shows sufficient support for the jury's affirmative findings for each question.

Richard Wylie moved the professional accounting practice of the Target, Simmons & Associates of Texas, P.C. from KSW to Kiblinger, Simmons & Wylie, L.L.P. on January 1, 2009, and allowed the Target to become forfeited. Kiblinger, Simmons & Wylie, LLP took over the payments to Simmons for his services, but it (and KSW) failed to pay him $28,412 for the professional accounting and administrative services that he provided through July 21, 2009. RR6.182, 185; *see* RR9.45; RR12, Pl. Ex. 17. Richard Wylie stopped paying the promissory notes after October 2010. RR8.12, 13; Ex. 7. Wylie merged Kiblinger, Simmons & Wylie, L.L.P.

into Center Street, Ltd., a non-accounting firm, and took the merged entities into bankruptcy. RR9.31; RR12, Pl. Ex. 181. Coye Wylie, Richard Wylie's wife, the president of Center Street, Ltd. and the manager of the books and client accounts for Kiblinger, Simmons & Wylie, L.L.P. couldn't account for the location or ownership of the clients in the bankruptcy. RR.8.168–69; 181–83. Richard Wylie had distributed them out of Center Street, Ltd. to KSW, his wholly-owned corporation. RR8.68, 77. The value of the client base was approximately $1.5 million to $2.2 million. RR8.73, 90, 94. Wylie subsequently formed HMSW which didn't have any clients in it, but allegedly provided professional accounting services to KSW, including the Target's former clients, and another firm he purchased. RR8.70, 79. Cheree Bishop, Wylie's step-daughter, worked at KSW as an accountant, and was aware that Simmons had initiated litigation against Wylie and the firm. RR8.85. HMSW, newly formed, was a separate company from KSW that was not in privity with Simmons. *See* RR8.94.

In December 2015 while litigation was ongoing, Wylie entered a Member Interest Transfer Agreement as an individual seller to sell the accounting practice to his step-daughter Cheree Bishop. RR8.89. He did this by means of a simultaneous double distribution; he testified that he distributed the clients of KSW to himself and then "immediately" redistributed them to HMSW for the sale to Bishop. RR8.69–70, 79, 89 (KSW was not the seller). Bishop understood that her purchase of the firm included all of Wylie's past clients. RR8.94; R9.66. The value of the

client base was approximately $1.8 million, and the value of HMSW's assets was about $400,000.[8] RR8.66, 67, 73, 90, 94; RR9.66. Bishop, without any financial due diligence, paid just $252,000 for the firm, and those funds came out of the firm's revenue. RR8.91, 92, 94. The sale wasn't disclosed to any third parties. RR8.85, 87, 96. Bishop, an insider, considered HMSW an evolvement of a family firm, Wylie's prior firm with name changes. RR8.84, 89, 90, 95, 97.

This double distribution of all the clients of Wylie's past accounting-firm purchases left KSW a shell without any clients, assets, or even proceeds from the sale. RR8.66, 72, 74, 77–78, 94. Bishop and Wylie had formed an oral agreement that KSW would act as an independent contractor for the firm; it would service just HMSW clients. RR8.79–88, 93. Wylie continued with a set sum of $5,000 per week, even though he wasn't an employee. RR8.93. He, however, continued control of the firm. RR8.93. The firm continued to publish a website to the public, prospective clients, and retained clients, showing that Wylie was continuing to lead the firm as its CEO and executive managing parter. RR.8.87–88; RR12, Pl. Ex. 184. The website also touted that Kent Sharp had been with the firm for over twelve years when HMSW hadn't been in existence that long. RR9.26. Sharp testified that Wylie was his immediate supervisor and promoted him to partner in 2015. RR8.104.

[8] The appellants assert that the fraudulent transfer involved no physical assets. Apps.Br. at 30.

Richard Wylie presented opinion evidence concerning alleged lost profits. His calculations did not distinguish any differences between KSW and HMSW. *See* RR13, Def. Exs. 276, 277. His calculations for lost profits to KSW included utilization of HMSW's hard assets and personnel. *See* RR13, Def. Exs. 276, 277. He testified about the facts of expenses and repeatedly called HMSW "our firm," demonstrating to the jury that he still controlled the firm, its assets and personnel. RR9.51–55, 74–76. He also admitted that his lost-profits model for KSW was based upon HMSW's operations. RR9.51–55, 74–76. He extrapolated lost profits out to 2021, after he had supposedly transferred the firm to his daughter years earlier. *Compare* RR8.94 (Bishop testified the two were "different companies.") with RR9.53.

The jury had more that sufficient evidence to find alter ego for both HMSW and KSW, and that Richard Wylie had engaged in a fraudulent transfer of the assets, goodwill, and clients of those entities to his step-daughter Cheree Bishop.[9] Indeed, the appellants' own trial counsel didn't count them as separate, and their appellate

[9] Section 24.005(b) of the Texas Uniform Fraudulent Transfer Act lists several "badges" of fraud that a jury may consider in determining actual intent. The jury may make inferences about the fraudulent character of a transaction based on the facts and circumstances of a particular case, including any badges of fraud. *Flores v. Robinson Roofing & Constr. Co.*, 161 S.W.3d 750, 755 (Tex. App.—Fort Worth 2005, pet. denied). Intent is a fact question uniquely within the realm of the jury. *Id*. at 754.

counsel hasn't either.[10] *See* RR.9.190, 226 (counsel's statements representing Wylie and his entities were one and the same).

In addition, or in the alternative, Richard Wylie, Jr. and KSW waived these issues. They requested the trial court enter a judgment against them based upon the jury's findings of alter ego and fraudulent transfer. CR.204–11. They cannot now complain about an action or ruling which they requested the trial court to make. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005).

[10] The appellants collectively asserted claims and defenses during the course of the litigation without distinguishing their separate rights, obligations, and legal standing. Their appellate brief repeatedly does the same. *See, e.g.*, Apps.Br. at 22, 23 (arguing that Simmons committed fraudulent inducement against the "defendants," and that the "defendants" were entitled to such an instruction); Apps.Br. at 10 ("Defendants presented testimony as to their lost profits on that basis."); Apps.Br. at 11 ("Wylie had suffered significant losses as described above."). S*ee also* Apps.Br. at 13, 28 ("Defendants' claims for injunctive relief") and *compare with* Wylie was not a party to the purchase agreement. Apps.Br. at 17; *see also* RR9.226 (Wylie had no damages apart from KSW).

Issue No. 5

The trial court did not abuse its discretion by awarding Simmons the full amount of his attorney's fees.

Standard of Review

An award of attorney's fees is reviewed for abuse of discretion. *See Bocquet v Herring,* 972 S.W.2d 19, 20–21 (Tex. 1998). A trial court abuses its discretion if it acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Argument and Authorities

When a plaintiff pursues only claims for which attorney's fees are recoverable, the attorney is not required to segregate attorney's fees between claims. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006); *Sentinel Integrity Solutions, Inc. v. Mistras Grp.*, 414 S.W.3d 911, 929 (Tex. App.—Houston [1st Dist] 2013, pet. denied). If the plaintiff incurred attorney's fees related to claims for which attorney fees are both recoverable and unrecoverable, but the legal services provided were necessary for both types of claims, the plaintiff is not required to segregate fees between claims. *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007); *Tony Gullo Motors*, 212 S.W.3d at 313–14; *see, e.g., Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (no segregation required when attorney's

services were necessary for both suit on promissory note and defense to defendant's counterclaim).

In *Cajun Constructors, Inc. v. Velasco Drainage Dist.*, Cajun appealed a jury's award of attorney's fees to Velasco, arguing that Velasco wasn't entitled to attorney's fees because it failed to segregate them. 380 S.W.3d 819 (Tex. App.—Houston [14th Dist.] 2012, no writ). Velasco had prosecuted a breach-of-contract counterclaim which allowed for attorney's fees, but had defended against Cajun's claims of quantum meruit which did not. *Id*. at 827. The court denied Cajun's appeal, reasoning that the two claims depended upon the same essential facts, using the same documents and witnesses. *Id*. It also observed that Cajun's quantum-meruit claim arose out of the same transaction as the contract-based claims and required the same proof as those claims. *Id*. The court held that the legal work performed by Velasco's attorneys was so intertwined that segregation wasn't required. *Id*. at 828.

Here, Simmons sued Richard Wylie and KSW for breach of contract which allowed for the recovery of attorney's fees. CR20–32; Tex. Civ. Prac. & Rem. 38.001. The promissory notes also provided for the recovery of attorney's fees. RR12, Pl. Ex. 1, at Ex. E. He sued the defendants for the fraudulent transfer of assets, and pleaded for attorney's fees for the prosecution of these claims. CR27–28. The Texas Uniform Fraudulent Transfer Act allows the courts to award costs and reasonable attorney's fees as are equitable and just. Tex. Bus. & Comm. Code 24.013. Simmons's actions stemmed from Richard Wylie's material breach of two promissory

notes, KSW's material breach of the purchase agreement, and the appellants' fraudulent transfer of assets to perpetrate a fraud against him. His defense of the appellants' counterclaims, including defense of the non-competition clauses, defense of breach of contract, and the defense of his performance under that contract were intertwined with his own claims. *See* RR9.241–44; CR.35–37, 46–57. Indeed, the appellants themselves argued that covenants were mutually dependent and intertwined, *see* Issues 1, 2, and 3. Simmons was required to win his claims to defeat many or all of the appellants' claims. Both Coye Wylie and Cheree Bishop characterized HMSW as a continuation of the same firm, despite the fact that Richard Wylie's intent was to defraud Simmons by transferring KSW's assets beyond Simmons's reach. *See* RR8.95, 180. Simmons and his related entities were also required to defend breach-of-contract actions asserted by HMSW, a non-party to the purchase agreement, for much of the litigation. *See, e.g.*, CR.8–19 (HMSW was collectively joined with the others as the "Wylie Parties"); RR8.95; *Varner*, 218 S.W.3d at 69. Similar to Velasco's prosecution and defense of claims in *Cajun*, Simmons's claims and defenses depended upon the same essential facts, using the same documents and witnesses. *See, e.g.*, Issue 1 (defense of fraudulent inducement included prosecution of the unambiguous terms of written agreement). The primary witnesses at trial included Simmons and Richard Wylie, Kent Sharp, Coye Wylie, and Cheree Bishop who were or had been employees and/or owners of Wylie's "evolved" firm, and Tom Crouch and Doke Kiblinger, accountants who had also

sold their firms to Wylie and worked at his firm during Simmons's one-year service period.

The appellants argue that Simmons made no attempt to segregate fees based on his defense of the defendants' claims for injunctive relief but, again, these claims intertwined with Simmons's other claims arising under the purchase agreement and that purchase agreement expressly provided for the recovery of attorney's fees for successfully defending claims regarding the covenants not to compete. RR12, Pl. Ex. 1 at § 8.9.3. Moreover, the jury heard evidence that the claims were so intertwined that segregation was not possible, and it awarded Simmons the total amount of the requested fees. *See* RR8.119–20. Based on the facts, no segregation was necessary.

Additionally, Richard Wylie, Jr. and KSW initially submitted a proposed final judgment, requesting the trial court to enter a judgment of reasonable and necessary attorney's fees against them in the full amount of attorney's fees that the jury found were reasonable and necessary. CR.204–11. They cannot complain on appeal about an action or ruling which he requested the trial court do or make. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005). Moreover, the appellants submitted a second proposed final judgment, requesting the trial court to enter a judgment of reasonable and necessary attorney's fees against Simmons which included attorney's fees they themselves incurred with regard to the covenants not to compete. CR.300–10. They cannot now complain that the trial court erred by not

requiring segregation based on the non-competition agreements when they themselves sought an attorney-fee award for the same thing. *See id.*

The trial court did not abuse its discretion—act without reference to any guiding rules and principles—in awarding Simmons the full amount of attorney's fees as found reasonable and necessary by the jury.

Issue No. 6

The jury was free to disbelieve Richard Wylie.

Standard of Review

A party who had the burden of proof on an issue at trial and who wants to challenge a jury finding on that issue must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). If this Court finds some evidence to support the finding, it must determine whether the finding is so contrary to the overwhelming weight and preponderance of the evidence to be clearly wrong and manifestly unjust in light of the entire record. *Id*. at 241. Whether it is a finding or nonfinding, this Court may only reverse and remand the case for a new trial if it determines that the jury's "failure to find" was against the great weight and preponderance of the evidence. *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989); *see also Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988). While a court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition. *See Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). It may only reverse and remand for a new trial.

Argument and Authorities

As the trier of fact, the jury was the sole judge of the credibility of witnesses and the weight to be given their testimony. *L &F Distrib. v. Cruz*, 941 S.W.2d 274, 281

(Tex. App. – Corpus Christi 1996, writ denied); *Silva v. Enz*, 853 S.W.2d 815, 817 (Tex. App. – Corpus Christi 1993, writ denied). A Texas jury's prerogatives are broad. It may believe all of the testimony of a witness or none thereof. It may believe part of the testimony of a witness and disbelieve other parts of that same witness' testimony. *St. Elizabeth Hosp. v. Graham*, 883 S.W.2d 433, 438 (Tex. App.—Beaumont 1994). This Court may not act as a jury, pass judgment on the credibility of witnesses or substitute its judgment for that of the jury. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

Richard Wylie provided fact and opinion testimony at trial and the jury was free to disbelieve part or all of what he said. The evidence showed he lied to Simmons about prorated franchise taxes for the Target, had pocketed Simmons's portion of those taxes, and then cheated the State by allowing the corporate charter to be forfeited. RR7.80–89; RR8.41; RR12, Pl. Ex. 27. The evidence also showed that lied to the Texas Board of Public Accounting about the Target, and that he signed a loan extension as president of the Target long after it had ceased practicing public professional accounting. RR6.196–99; RR8.44-46; RR12, Pl. Ex. 12; RR12, Pl. Ex. 147.

He admitted that the covenants not to compete were designed to protect the Target, and that Target had ceased operating as a professional accounting firm in 2009 and its corporate charter had been forfeited in 2010.[11] RR8.41, 42; RR9.42;

[11] Wylie even testified at one point that the Target was divested of clients on the day of closing, and that it did not operate as a professional accounting firm from that forward. RR8.34, 42.

RR12, Pl. Ex. 1, at 8.9 and 8.9.1. He complained his firm lost approximately a third of its clients two years after the closing date of the sale, admitted he had assumed the risk of client attrition, but testified that he was entitled for the loss anyway. RR8.12, 54; RR12, Pl. Ex. 1, at §§ 6.22, 6.23.

He based his lost-profits model on the operation of a firm that was not part of the purchase agreement. RR8.78; RR9.73. He projected lost profits to the year 2021 when the five-year covenant not to compete expired in 2013. RR12, Pl. Ex. 1, at § 8.7. *See Rimes v. Club Corp. of Am.*, 542 S.W.2d 909, 912 (Tex. Civ. App.—Dallas, 1976, writ ref'd n.r.e.) (covenant expires by its own terms). His lost-profits opinion was based on clients he said "Simmons took" from the firm, but admitted that he had no personal knowledge that Simmons had intercepted any of them. RR9.48, 79–81. He provided no evidence that the clients would have continued with his firm absent some type of interference by Simmons.[12] *See Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 861 (Tex. 2017) (observing that Texas courts require that a plaintiff seeking damages based on lost profits from future business opportunities adduce evidence establishing that prospective customers would have done business with the plaintiff absent the defendant's misconduct).

The jury was free to find that Simmons may have breached the five-year covenant not to compete, but also that Richard Wylie (or whoever) failed to prove any lost

[12] The appellants concede that they had no future contracts or arrangements with the clients: "A creditor cannot seize clients, any one of which could instantly leave the firm." Apps.Br. at 30.

profits from that breach[13] *See* RR9.102. It was free to believe nothing Wylie said.

[13] The appellants also introduced the expert testimony of Bryan Rice for damages. *See* RR9.102. The jury apparently didn't believe him either.

Issue No. 7

The final judgment properly imposed joint-and-several liability upon Cheree Bishop.

Standard of Review

This Court must affirm the trial court's judgment if If the pleadings and the evidence support the judgment and the evidence is legally and factually sufficient to support implied findings for any of the causes of action pleaded. Tex. R. Civ. P. 301; *Woford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). In determining whether some evidence supports the judgment and the implied findings of fact, this Court considers only that evidence most favorable to the issue and disregards entirely that which is opposed to it or contradictory in its nature. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950). The judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *In re W.E.R.*, 669 S.W. 716, 717 (Tex. 1984).

Argument and Authorities

The trial court is required to give effect to each jury finding. *See Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 867 (Tex. App.—Austin 2006, n.p.h.). Simmons sued Cheree Bishop, individually, alleging that Richard Wylie and/or KSW transferred assets to her with the actual intent to hinder, delay, or defraud him. CR.24. Simmons submitted a Texas Pattern Jury charge on the is-

sue of fraudulent transfer and Bishop failed to object to it. RR9.231; CR.157, 158. She thus waived the objection she raises here. The jury was asked whether the transfer of clients, goodwill, member interests and assets (tangible and intangible assets) of KSW and HMSW to an insider were fraudulent.[14] Again, there was no objection asserted to the question. RR9.231. There was no requirement that Bishop be identified in the specific questions because there was no dispute of material fact that she was the insider to whom the assets were transferred. *See Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex. 1971) (holding that there is no need to submit issue to the jury when facts are undisputed or conclusively established); *see also* Tex. PJC 105.25, cmt. "Insider."

But even if there was, Texas Rule of Civil Procedure 279 allows for deemed findings. *See Service Corp. v. Guerra*, 348 S.W.3d 221, 228–29 (Tex. 2011); *Chon Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005); *In re J.F.C.*, 96 S.W.3d 256, 262–63 (Tex. 2002). The trial court may make an express finding in support of the judgment when the charge was submitted with an element missing from a claim or defense and (1) the party with the burden of proof on the incomplete claim or defense did not request the missing element, (2) the opposing party did not object to the missing element, (3) the claim or defense consisted of more than one element, (4) the missing element is "necessarily referable" to the claim or defense, and (5) there is

[14] Appellants argue, citing no authority, that intangibles cannot be fraudulently transferred. But see *Airflow Houston, Inc. v. Theriot*, 849 S.W.2d 928 (Tex. App.—Houston [1st Dist.] 1993, no writ) (recognizing intangible assets can be fraudulently transferred). In any case, the charge's definitions of assets included intangibles so any error was waived.

factually sufficient to support a finding on the missing element. Tex. R. Civ. P. 279; *see Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 564 (Tex. 2002); *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997); *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990); *Wal-Mart Stores v. Renteria*, 52 S.W.3d 848, 850 (Tex. App.—San Antonio 2001, pet. denied).

By not objecting, Bishop waived a jury trial on the issue and agreed to submit it to the trial court. *Gulf States*, 79 S.W.3d at 565. This Court will deem a finding on the omitted element that supports the judgment if the trial court did not make an express finding on the omitted element before rendering judgment, provided the finding is supported by legally sufficient evidence. Tex. R. Civ. P. 279; *Service Corp.*, 348 S.W.3d at 228–29; *Chon Tri*, 162 S.W.3d at 557–58; *see, e.g., Ramos*, 784 S.W.2d at 668 (Supreme Court deemed findings in support of trial court's judgment); *Cielo Dorado Dev., Inc. v. Certainteed Corp.*, 744 S.W.2d 10, 11 (Tex. 1988) (same).

The trial court arguably made an express finding by entering a judgment against Bishop as the transferee of the fraudulently transferred assets. Whether its finding was express or implied, it is amply supported by legally sufficient evidence. *See* Issue 5.

The Remedy is a Question of Law

The remedy for a fraudulent transfer is often a question of law for the Court. A creditor affected by a fraudulent transfer can seek equitable remedies or money

damages. Tex. Bus. & Com. Code 24.008, 24.009(b). The equitable remedies allowed under Section 24.008 of the Act include "any other relief the circumstances may require."[15] Tex. Bus. & Com. Code 24.008(a)(3)(C). The section allows the award of monetary damages against the transferee as demonstrated in *Airflow Houston, Inc. v. Theriot*, 849 S.W.2d 928 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also McDill Columbus Corp. v. Univ. Woods Apts., Inc.*, No. 06-99-00138-CV, 2001 Tex. App. LEXIS 2560, at *24 (Tex. App.—Texarkana, Dec. 11, 2000, pet. denied) ("We find that the language of the statute . . . will permit the award of monetary damages, as found in *Airflow Houston*.").[16] The Act also provides permission to "levy execution on the asset transferred or its proceeds" if the creditor has obtained a judgment against the debtor. *Id*. at 24.008(b).[17] Interestingly, the appellants do not argue that the trial court erred, but only that the "appropriate remedy . . . would simply involved avoiding and reversing the transfers altogether under § 24.008(a)(1)." Apps.Br. at 31. While they might have preferred a different remedy, the trial court's choice was not error.[18]

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[15] Simmons raised Tex. Bus. Com. Code 24.008 in a supplemental motion for entry of judgment. CR.212–18. But the issue isn't what he raised or didn't raise, but whether the trial court erred in fashioning the remedy.

[16] Appellants have asserted the same *Airflow* arguments that were rejected in *McDill*.

[17] The appellants concede that Section 24.008 provides for appropriate remedies for fraudulent transfers as found by the jury. *See* Apps.Br. at 3.

[18] A monetary judgment under Section 24.008 can include the principal and interest of a promissory note. *Airflow*, 849 S.W.2d at 934.

Additional Jury Findings Were Not Necessary

While litigants are entitled to a trial by jury when pursuing equitable remedies, the jury may decide only factual questions that predicate the availability of equitable relief and not the ultimate question of whether and what form of equitable relief should be granted. The latter question is reserved for the Court. *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *see also Wagner v. Brown Ltd. v. Sheppard*, 282 S.W.3d 419, 428–29 (Tex. 2008); *DeGiussepe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2008). A jury finding on the value of the fraudulently transferred asset is not required to support relief under Tex. Bus. & Com. Code 24.008 because none of the remedies that section is predicated on such a finding. *Flores v. Robinson Roofing & Construction Co.*, 161 S.W.3d 750, 756–57 (Tex. App.—Fort Worth 2005, pet. denied).

Based upon these authorities, the trial court properly imposed joint-and-several liability upon Cheree Bishop, the transferee of the fraudulently transferred assets.

Issue No. 8

The final judgment properly imposed joint-and-several liability on KSW and HMSW.

Standard of Review

This Court must affirm the trial court's judgment if If the pleadings and the evidence support the judgment and the evidence is legally and factually sufficient to support implied findings for any of the causes of action pleaded. Tex. R. Civ. P. 301; *Woford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). In determining whether some evidence supports the judgment and the implied findings of fact, this Court considers only that evidence most favorable to the issue and disregards entirely that which is opposed to it or contradictory in its nature. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950). The judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *In re W.E.R.*, 669 S.W. 716, 717 (Tex. 1984).

Argument and Authorities

Disregarding the corporate fiction is an equitable doctrine that takes a flexible fact-specific approach focusing on equity. *Castleberry v. Branscum*, 721 S.W.2d 270, 273–76 (Tex. 1986); *see also Stewart v. Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 109 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Alter ego is not an independent cause of action, but is instead a means of imposing liability for

an underlying cause of action. *Wilson v. Davis*, 305 S.W.3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Alter ego applies when there is such unity between the corporation and individual that the separateness of the corporation and the individual has ceased and holding only one of the two liable would result in injustice. *See Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243–44 (5th Cir. 1990) (applying Texas alter-ego law to reverse-piercing situation); *see also American Petroleum Exchange, Inc. v. Lord*, 399 S.W.2d 213, 216–17 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.) (where debtor held majority of stock individually and as trustee for minor daughter and treated corporation as alter ego, court disregarded corporate fiction and held corporation accountable for debtor's liability); *see also Dillingham v. Dillingham*, 434 S.W.2d 459, 462 (Tex. Civ. App.—Fort Worth 1968, writ dism'd).

The trial court submitted alter-ego questions to the jury regarding both KSW and HMSW. The court properly instructed the jury regarding alter ego, and the appellants have not pointed to any objections to the instruction. Apps.Br. at 34. The court's definition included the consideration that the separateness of Richard Wylie and the entities had ceased and holding only the entities responsible would result in injustice.

The trial court is required to give effect to each jury finding. *See Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 867 (Tex. App.—Austin 2006, n.p.h.). Upon a sufficient showing "that the corporation is the alter ego of the

debtor, the corporation is treated as the debtor and its property may be attached." *See Zahra*, 910 F.2d at 244; *see also Cappuccitti v. Gulf Indus. Prods.*, 222 S.W.3d 468, 481 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The jury found that the separateness of Richard Wylie and the entities had ceased. CR.159, 160. These findings was based upon sufficient evidence. *See* Issue 4. Consequently, both KSW and HMSW were properly held to be jointly-and-severally liable for any judgment imposed against Richard Wylie. Thus the trial court did not err by entering a final judgment that conformed to the jury findings.

Issue No. 9

The appellants have failed to show any error or harm from the trial court's discovery rulings.

Standard of Review

Appellant must preserve error by presenting a "timely request, objection, or motion," setting forth its specific basis, and obtaining a ruling from the trial court. Tex. R. App. P. 33.1(a)(1). The standard of review is whether the trial court's order, in light of the entire record and the offending party's conduct, "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." Tex. R. App. P. 44.1.

Argument and Authorities

The appellants complain that the trial court's "erroneous discovery rulings compromised [their] ability to develop the merits of its [sic] case with respect to the scope of Plaintiff's breach of the non-competition provisions of the Purchase Agreement and the damages that arose from it." Apps.Br. at 35. They claim they "repeatedly sought discovery from Plaintiff regarding the precise identities of the clients listed on Exhibit A of the Purchase Agreement for which [Simmons] provided services in violation of the Purchase Agreement." Apps.Br. at 35.

They, however, concede that Simmons produced invoices which identified the clients appellants sought to discover. Apps.Br. at 38. The invoices contained the

clients' identities, contact information, work performed, and monies billed. RR13, Def. Ex. 285; *compare* Apps.Br. at 4 (defendants argue they sought the client's identities which Simmons served). The appellants admitted these invoices at trial. RR13, Def. Ex. 285. Richard Wylie relied on them in calculating his opinion of lost profits to "Defendants." RR9.50–60; RR13, Def. Exs. 276, 277. He did not testify that he could not form an opinion because of the lack of requested information.

The trial court did not err by denying the appellants' discovery requests for invoice registers because Simmons produced similar information via the client invoices. The jury did not believe Richard Wylie's testimony and found that KSW's damages from Simmons's breach was zero even with this evidence. The appellants thus have failed to prove any error, let alone error that probably caused the rendition of an improper judgment.

Issue No. 10

The appellants have waived error, if any, by failing to raise issues on appeal.

Argument and Authorities

Issues not included in appellants' initial brief are considered waived. *See* Tex. R. App. 38.3; *City of El Paso v. Collins*, 440 S.W.3d 879, 888 (Tex. App.—El Paso 2013, no pet.); *Marin Real Estate Partners v. Vogt*, 373 S.W.3d 57, 72 (Tex. App.—San Antonio 2011, no pet.).

The appellants have requested that this Court reverse the trial court's judgment and remand the case for a new trial on all issues. Apps.Br. at 4, 38. But they have waived any error with respect to Financial Worx, Ltd.; Sekure Connect, Ltd.; D.S. Family, L.P.; and Simmons & Associates of North Texas, P.L.L.C. because they failed to raise any appellate issues regarding these parties.[19] CR33.–64, 378–411. The trial court also denied Center Street, Ltd., an intervenor, any relief and the appellants failed to raise any issues for this entity so any error has been waived. Finally, the appellants also failed to raise any appellate issues regarding the trial court's denial of injunctive relief so any error there, too, is waived. CR.379. If this Court reverses on any issue raised in the appellants' initial brief, remand for a new trial or hearing should be limited that issue alone.

[19] The appellants' initial brief cites Dan Simmons as the lone appellee and doesn't identify any of the other trial defendants as appellees. Apps.Br. at cover and *i*.

Prayer

The Court should affirm the trial court's judgment.

Dated: February 10, 2020

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of this document has been transmitted to the following legal counsel on this the 10th of February 2020 in compliance with the Texas Rules of Civil Procedure, to wit:

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Certificate of Compliance

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief does not comply with Texas Rule of Appellate Procedure 9.4(i)(3)because it contains 15,610 words. But the appellees have filed for leave to submit this brief in its entirety. The brief does comply with the typeface requirements of the Court of Appeals because it has been prepared in a proportionally spaced typeface using Pages for the Mac in Arno Pro 14 pt. font (12pt. for footnotes).

/s/ Peter Smythe
Peter Smythe
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Dated: February 10, 2020