Affirmed and Opinion Filed December 28, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00778-CV

D. REGINALD STOVER, JACE HARKEY,
ROBERT H. HOLMES, AND THE HOLMES LAW FIRM, INC., Appellants
V.
ADM MILLING CO., Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-13400

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Lang

This case involves several claims respecting a failed business agreement for the purchase of real property. D. Reginald Stover, Jace Harkey, Robert H. Holmes, and the Holmes Law Firm (Holmes Law) appeal the trial court's judgment in favor of ADM Milling Co. (ADM Milling) awarding it, in part: (1) actual damages in the amount of $1,075,000 from Hesed Enterprises L.L.C. (Hesed Enters.), Stover, and Harkey, jointly and severally; (2) actual damages in the amount of $100,000 from Hesed Enters., Stover, Harkey, Holmes, and Holmes Law, jointly and severally; (3) punitive damages from Hesed Enters., Stover, Holmes, and Holmes Law in the amount of $200,000 each; and (4) attorneys' fees in the amount of $540,501 for which Hesed Enters., Stover, Harkey, Holmes, and Holmes Law are jointly and severally liable. The trial court's judgment is affirmed.

I. PARTIES AND ISSUES ON APPEAL

As a preliminary matter, we identify the parties and the issues those parties raise on appeal. There are a total of five briefs and reply briefs filed in this appeal, which has a substantial trial court record. Stover and Harkey have appealed and filed a joint brief and reply brief. Also, Holmes and Holmes Law have appealed and filed a joint brief and reply brief. Stover and Harkey, and Holmes and Holmes Law did not incorporate or adopt one another's arguments. Hesed Enters. did not file a notice of appeal or a brief in this appeal.

The points on appeal raised by appellants total sixty-one. Stover and Harkey have brought nine issues that raise eleven points. Holmes and Holmes Law have brought five issues, some with sub-issues denoted by decimal points, which raise a total of fifty points. In all, we have identified a total of sixty-one issues on appeal. Many of the points purporting to address jury issues fail to identify the specific jury question and answer being challenged. Also, many of the issues refer to matters of law, but fail to specifically identify how the trial court erred. We have reviewed the record and have attempted to identify the specific jury question and answer being challenged and liberally construe those issues arguing error "as a matter of law" to contend that the trial court erred when it denied Stover, Harkey, Holmes, and Holmes Law's motions for judgment notwithstanding the verdict (JNOV).[1] Throughout our discussion in this opinion we will refer to the appellants' issues by the number and subpart identified in footnote 1.

---

[1] Sixty-one points have been raised by the appellants. We set those points out here. In our discussion in this opinion, we will refer to each point by the number designated below.

In their brief, Stover and Harkey argue these points:

(1) the trial court erred when it:

(a) denied their motion for JNOV because the trial court's instruction in jury question no. 3, which related to the breach of contract damages against Hesed Enters., was erroneous as a matter of law, and

(b) overruled their objection to jury question no. 3, which relates to the breach of contract damages against Hesed Enters., because it instructed the jury on an improper measure of damages;

(2) the trial court erred when it denied their motion for JNOV because the trial court's jury question no. 1(C), which related to the breach of contract claim against Hesed Enters., failed, as a matter of law, because the October 1, 2013 email was a unilateral contract, not an amendment to the purchase agreement;

(3) there was error with respect jury question no. 5 on ADM Milling's fraud claim against Hesed Enters., Holmes, and Holmes Law because:

  (a) the trial court erred when it denied their motion for JNOV because, as a matter of law, the October emails were a unilateral contract which never became enforceable, and

  (b) the evidence is legally and factually insufficient to support the jury's finding that Hesed Enters., Holmes, and Holmes Law committed fraud;

(4) the trial court erred when it denied their motion for JNOV with respect to jury question no. 12 because, as a matter of law, they cannot be held liable for conspiracy;

(5) the evidence is legally and factually insufficient to support the jury's finding in jury question no. 12 that Stover and Harkey conspired with Hesed Enters., Holmes, and Holmes Law;

(6) the evidence is legally and factually insufficient to support the jury's finding in jury question no. 13 as to damages on the conspiracy claim;

(7) the evidence is legally and factually insufficient to support the jury's answer to jury question no. 11, which relates to piercing the corporate veil, finding that Stover and Harkey were responsible for the conduct of Hesed Enters.;

(8) the trial court erred when it denied their motion for JNOV as to jury question no. 19 because, as a matter of law, attorneys' fees for the breach of contract claim could not be assessed against Hesed Enters., which is a limited liability company; and

(9) the evidence is legally and factually insufficient to support the jury's finding in jury question no. 20, assessing attorneys' fees against Hesed Enters. on the statutory fraud claim.

In a separate brief, Holmes and Homes Law argue these points:

(1) the trial court erred when it denied their motions for JNOV with respect to jury question no. 2, which relates to the breach of contract claim against Hesed Enters., because the evidence conclusively established, as a matter of law, that Hesed Enters. was excused from performance under the purchase agreement since: (a) the contingency condition in paragraph 16 of the purchase agreement was an unknown supervening impossibility; or (b) in the alternative, during the feasibility period, Hesed Enters. properly terminated the purchase agreement;

(2) the trial court erred when it denied their motions for JNOV with respect to jury question no. 1(C), which relates to the liability of Hesed Enters. for breach of contract because the evidence conclusively established, as a matter of law, that the October emails, which were not signed by the parties, did not constitute a valid amendment to the purchase agreement;[1]

(3) the trial court erred when it denied their motions for JNOV because, as a matter of law, the evidence did not conclusively establish that they were liable to ADM Milling because:

  (3.1) the trial court erred when it denied their motions for JNOV with respect to jury question no. 14 because Holmes and Holmes Law conclusively established, as a matter of law, their affirmative defense of attorney immunity because: (a) they were Hesed Enters.'s attorneys at all times; (b) they took preapproved directions from Hesed Enters. through Stover at all times; (c) they were paid hourly fees and had no pecuniary interest in the outcome of the transaction; and (d) there was no evidence to support a fraud claim against them;

  (3.2) the evidence is legally and factually insufficient to support the jury's finding of actual damages in jury question no. 9 because: (a) there is no separate claim for post-contract representations; (b) the October emails were not a valid amendment to the purchase agreement; (c) in the alternative, if the October emails were a valid amendment, they were contingent on paragraph 16 of the purchase agreement; and (d) no damages for the October emails were pleaded or proved;

  (3.3) the jury's award of exemplary damages in jury question no. 17 was error because:

    (a) the evidence is legally and factually insufficient to support the jury's award of exemplary damages because: (i) the findings on the threshold jury question nos. 5 and 6 were not certified to be unanimous; and (ii) the damages award was not supported by sufficient evidence; and

    (b) assuming the trial court erred when it denied their motions for JNOV with respect to jury question no. 14 relating to their affirmative defense of attorney immunity, then they are: (i) exempt; or (ii) there was no legal basis to support the claim;

  (3.4) the trial court erred when it denied their motions for JNOV with respect to jury question no. 12 because the conspiracy finding against Holmes and Holmes Law was invalid as a matter of law;

  (3.5) The award of attorneys' fees was error because:

II. FACTUAL AND PROCEDURAL CONTEXT

Archer-Daniels-Midland Company (ADM) is a corporation that purchases crops for food, feed, and fuel, transporting and processing them around the world. ADM Milling is a subsidiary of ADM that processes wheat and sorghum into flour and other food ingredients. ADM Milling owned the Harvest Queen Mill (the Mill) located in Plainview, Texas, which became "idle" because it was unprofitable to operate. The Mill was near the main railroad line with side lines that went onto the Mill property. The railroad tracks were leased by ADM from Burlington Northern Santa Fe Railroad Company (BNSF). There were also private tracks that ran between the buildings of the Mill Property.

In 2012, Stover and Harkey became interested in buying the Mill because it was a potential location for storing frac sand. On September 24, 2012, Stover sent Kris Kappenman, an employee at ADM's idle properties division, a letter of intent to purchase the Mill. Kappenman understood the buyer to be DRS Trucking, which was owned by Stover and his wife. However, Harkey stated that, although the letter of intent listed DRS Trucking as the buyer, it was always their plan to substitute Hesed Enters. as the buyer once the company was created. Stover and Harkey formed

---

(a) the evidence is legally and factually insufficient to support the trial court's judgment awarding ADM Milling attorneys' fees and costs because they failed to segregate their billing;

(b) the evidence is legally and factually insufficient to support the jury's award of attorneys' fees in jury question no. 20 relating to attorneys' fees on the statutory fraud claim;

(c) the trial court erred when it awarded ADM Milling attorneys' fees and costs with respect to jury question no. 19 because they cannot be awarded on a breach of contract claim;

(d) assuming the trial court erred when it denied their motions for JNOV on jury question no. 14 relating to an attorney exemption, the trial court erred when it awarded ADM Milling attorneys' fees and costs because Holmes and Holmes Law are "exempt under immunity";

(e) assuming the trial court erred when it denied their motions for JNOV on jury question no. 6(ii) because the October emails were not a valid amendment to the purchase agreement, the trial court erred when it denied their motions for JNOV because, as a matter of law, attorneys' fees could not be awarded on the statutory fraud finding which was premised on those October emails being a valid amendment;

(4) The award of damages in jury question nos. 3 and 13 was error because:

(a) the trial court erred when it denied their motions for JNOV with respect to jury questions nos. 3 and 13 because, as a matter of law, the evidence conclusively established ADM Milling had no damages;

(b) the evidence was legally and factually insufficient to support the jury's award of damages in jury question nos. 3 and 13 because the evidence shows: (i) ADM Milling suffered no damages; and (ii) the property that was appraised at a value of $2 million remains in ADM Millings possession;

(5)(a)–(r) the trial court erred when it overruled their objections to jury charge question nos. 1–2, and 4–19 for numerous reasons.

Hesed Enters. for the sole purpose of purchasing the Mill. Stover and Harkey were the sole owners of Hesed Enters. and put $50,000 capital into the limited liability corporation. However, Hesed Enters. did not have a bank account and maintained no accounting documents.

Stover and Harkey retained Holmes to represent them in connection with negotiating for the purchase by Hesed Enters. of the Mill from ADM Milling. All legal fees incurred by Hesed Enters. were paid by Stover and Harkey from their personal accounts.

In June 2012, Stover and Harkey met with Ken Bailey, a commerce operations manager for ADM Milling, and toured the Mill. Again in March 2013, Bailey met with Stover for a second site visit, during which Bailey gave Stover a set of keys. On March 21, 2013, Bailey sent Stover an email providing, in part, the contact information for someone at BNSF so Stover could "go[] about securing a lease with BNSF" as well as a recommendation for a company that could do railroad track repair. In May 2013, Bailey met with Stover and his wife for a third site visit.

Meanwhile, on March 8, 2013, Hesed Enters. and ADM Milling signed a real estate purchase agreement where Hesed Enters. agreed to buy the Mill, as is and with all faults, for $1.6 million (the purchase agreement). Hesed Enters. also agreed to $50,000 as earnest money.[2] The earnest money was paid by Stover and Harkey, each contributing $25,000 of their personal funds. ADM Milling and Hesed Enters. also agreed to use their best efforts to close before June 1, 2013. The purchase agreement included a noncompetition clause that restricted Hesed Enters. from engaging in certain activities defined as being competitive with ADM Milling for ten years and a confidentiality agreement.

In May 2013, Robert Homes II (Holmes II) learned of the Mill transaction from Holmes, his father. Holmes introduced Homes II to Stover because Holmes II wanted to invest in the Mill.

[2] Throughout the opinion, the parties use the terms "earnest money," "escrow," and "consideration" interchangeably when referring to these funds.

The parties did not close on June 1, 2013. Several reasons were provided by Holmes to ADM Milling for the delay, including waiting for a bank loan, issues related to the survey and environmental inspection, working with BNSF and "red tape" delays, problems obtaining insurance, and Stover's need to resolve an estate dispute with his sister. However, the record shows that an environmental inspection was not performed and BNSF had no record of any communications with Holmes.

In July 2013, Holmes sent text messages to Holmes II that advised: (1) Holmes II should make Stover an offer for the Mill deal; (2) Stover and Harkey had approximately $100,000 invested in the deal; (3) Stover and Harkey could not get the deal done, which Holmes II understood to mean they could not close with ADM Milling; and (4) Holmes advised that the contract amount with ADM Milling was for $1.5 or $1.6 million. Holmes II testified that he understood that to mean Stover and Harkey were attempting to sell their interest in Hesed Enters. at a $200,000 premium because they were asking $1.8 million. When Holmes II asked Holmes if he should call Stover about the Mill deal, Holmes responded "Yes." In September and October 2013, Stover and Harkey continued negotiating the sale of Hesed Enters. to Holmes II for $1.8 million, which included $100,000 each for Stover and Harkey, and a $50,000 escrow payment. However, these sale negotiations were not relayed to ADM Milling and Stover, Harkey, and Holmes II did not reach an agreement for the sale of Hesed Enters.

Meanwhile, on October 1, 2013, Holmes sent Michael Kaye, ADM Milling's associate general counsel, an email updating him on the Hesed Enters. transaction. Holmes advised that Stover planned to close his transaction with his sister on October 15, 2013, at which time Stover and Harkey would be able to close on the purchase of the Mill. Also, Holmes asked if ADM Milling would be more comfortable with the situation if Hesed Enters. paid an additional non-refundable consideration in the amount of $50,000 for the extension of time ($50,000 extension consideration).[3] Kaye responded that the additional $50,000 extension consideration was acceptable and requested that they schedule a closing date. Holmes responded suggesting a closing date of November 15, 2013, and Kaye agreed. Then, Holmes responded that the funds would be "deposited in a few days" and inquired whether they needed an agreement. Kaye responded, "No need for a separate agreement. The e-mail will suffice." (These emails will be referred to as the "October Amendment" to the purchase agreement.) However, Hesed Enters. did not deposit the additional $50,000 extension consideration as agreed. Instead, on October 30, 2013, Holmes sent Kaye a letter terminating the purchase agreement and demanding a return of the $50,000 already in escrow.

On November 11, 2013, ADM Milling sent a demand letter to Hesed Enters. care of Holmes stating that Hesed Enters.'s termination constituted a breach of the purchase agreement or an anticipatory repudiation and that ADM Milling had suffered substantial damages as a result of multiple misrepresentations by Hesed Enters. However, in the demand letter, ADM Milling stated it was willing to forego litigation in exchange for a release of the $50,000 in escrow and payment of the additional $50,000 extension consideration that Hesed Enters. had agreed to pay in exchange for ADM Milling's agreement to extend the closing date. ADM Milling actually filed its suit against Hesed Enters., Stover, and Harkey on November 11, 2013, the same day it sent the demand letter.

Holmes responded to the demand letter saying, in part, "[T]here was no commitment to pay the additional escrow funds, what are you smoking? You filed the suit so let's tee it up. If your client does not release the 50K before I return from Japan on 11/23, we will file[] a counter suit."

[3] Throughout their briefs, the parties use the terms "escrow" and "consideration" interchangeably when referring to these funds.

On February 7, 2014, ADM Milling filed its first amended petition adding Holmes and Holmes Law as defendants.[4] On March 22, 2014, Holmes and Holmes Law filed their original answer asserting several affirmative defenses, including attorney immunity. On September 12, 2014, Hesed Enters., Stover, and Harkey filed their second amended answer and first amended counterclaims and third-party claims. They alleged the following counterclaims and third-party claims: (1) seeking a declaratory judgment against ADM Milling; (2) restitution, expectation interest, and reliance interest against ADM Milling and ADM; and (3) fraud by nondisclosure, conspiracy, and rescission against ADM Milling, ADM, Kappenman, Kaye, and Bailey. However, Hesed Enters., Stover, and Harkey eventually nonsuited its counterclaims and third-party claims during the course of litigation.

In November 2014, Hesed Enters. filed bankruptcy. However, the bankruptcy proceedings were voluntarily dismissed.

On August 17, 2015, ADM Milling filed its second amended petition alleging claims against Hesed Enters., Stover, Harkey, Holmes, and Holmes Law. In that petition, it alleged the following claims: (1) breach of contract against Hesed Enters.; and (2) fraudulent inducement, fraud, statutory fraud in a real estate transaction, and conspiracy against Hesed Enters., Stover, Harkey, Holmes, and Holmes Law. Also, ADM Milling sought to pierce the corporate veil and impose individual liability on Stover and Harkey for Hesed Enters.'s alleged breach-of-contract, fraud, and statutory-fraud liability. Further, ADM Milling sought its attorneys' fees on its claims for breach of contract and statutory fraud. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001; TEX. BUS. & COM. CODE ANN. § 27.001(e).

[4] ADM Milling's first amended petition is not in the record on appeal. However, other documents in the record refer to that filing, including the filing date and that it added Holmes and Holmes Law as defendants.

The case was tried to a jury from August 1 through 8, 2016. At the conclusion of the trial, the jury found: (1) Hesed Enters. was liable for breach of contract in the amount of (a) $1,075,000 for breach of the purchase agreement, and (b) $100,000 for breach of the October Amendment; (2) Hesed Enters.'s failure to comply with the purchase agreement was not excused; (3) Hesed Enters., Holmes, and Holmes Law were not liable for fraud or statutory fraud with respect to the purchase agreement; (4) Hesed Enters., Holmes, and Holmes Law were liable for fraud and statutory fraud with respect to the October Amendment and that they had actual awareness of the falsity of the representations made and assessed damages at $100,000, apportioning the responsibility of Hesed Enters. at 45%, Holmes at 50%, and Holmes Law at 5%; (5) the corporate veil should be pierced and liability imposed on Stover and Harkey for Hesed Enters.'s breach of contract, fraud, and statutory fraud; (6) Hesed Enters., Stover, Harkey, Holmes, and Holmes Law were liable for conspiracy to commit fraud or statutory fraud and assessed damages in the amount of $1,075,000 with respect to the purchase agreement and $100,000 with respect to the October Amendment; (7) Holmes's and Holmes Law's conduct was outside the scope of Holmes's representation of his clients; (8) there was clear and convincing evidence of the harm to ADM Milling that resulted from the conduct of the defendants and the harm was the result of the defendants' malice; (9) exemplary damages should be assessed against Hesed Enters. in the amount of $425,000, Stover for $250,000, Holmes for $800,000, and Holmes Law for $800,000, but should not be assessed against Harkey; (10) Hesed Enters., Stover, Harkey, Holmes, and Holmes Law secured the execution of the purchase agreement through deception; (11) reasonable and necessary attorneys' fees relating to the breach-of-contract claim in the amount of $540,501; and (12) reasonable and necessary attorneys' fees relating to the statutory-fraud claim in the amount of $540,501 and expert-witness fees in the amount of $18,732.

On October 10, 2016, Hesed Enters., Stover, Harkey, Holmes, and Holmes Law filed a joint motion for JNOV.[5] Also, on October 11, 2016, Holmes and Holmes Law filed a separate, additional motion for JNOV. Further, on April 11, 2017, Stover and Harkey, and Holmes and Holmes Law each filed supplemental motions for JNOV. On June 13, 2017, the trial court signed a final judgment in the case. The final judgment denied the motions for JNOV. Also, the final judgment awarded ADM Milling, in part: (1) actual damages in the amount of $1,075,000 from Hesed Enters., Stover, and Harkey, jointly and severally; (2) actual damages in the amount of $100,000 from Hesed Enters., Stover, Harkey, Holmes, and Holmes Law, jointly and severally; (3) punitive damages from Hesed Enters., Stover, Holmes, and Holmes Law in the amount of $200,000 each; and (4) attorneys' fees in the amount of $540,501 and expert witness fees in the amount of $18,732 for which Hesed Enters., Stover, Harkey, Holmes, and Holmes Law are jointly and severally liable.

III. STANDING TO APPEAL

On appeal, ADM Milling claims that Stover and Harkey, and Holmes and Holmes Law do not have standing to assert their issues on appeal relating to the jury's findings against Hesed Enters. for breach of contract. ADM Milling asserts that Hesed Enters. has not appealed the trial court's judgment and contends that Stover and Harkey, and Holmes and Holmes Law "challenge the breach-of-contract findings in the hope of undermining the [trial court's] [j]udgment as to them." This contention requires us to review whether Stover and Harkey, and Holmes and Holmes Law have standing to appeal some of the issues they have raised on appeal.

[5] Although we refer to the motion as a joint motion for JNOV, it was actually a comprehensive motion for JNOV, motion to disregard certain jury answers, and objections to ADM Milling's motion for entry of judgment.

A. Applicable Law

Generally, only parties of record may appeal a final judgment. Texas courts have long held that an appealing party may not complain of errors that do not injuriously affect it or that merely affect the rights of others. *See, e.g., Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000); *Menetti v. Chavers*, 974 S.W.2d 168, 171 (Tex. App.—San Antonio 1998, no pet.).

Individuals found liable when the corporate veil is pierced do not have standing to appeal the findings of liability against a corporation if the corporation does not appeal. *See Latham v. Burgher*, 320 S.W.3d 602, 611 (Tex. App.—Dallas 2010, no pet.) (where jury found liability against corporation, not individual who jury determined was alter ego, and corporation did not appeal individual has no standing to appeal jury's finding of treble damages); *Menetti*, 974 S.W.2d at 171 (default judgment against corporation does give individuals found liable because corporate veil was pierced standing to complain on appeal); *see generally, Carone v. Retamco Operating, Inc.*, 138 S.W.3d 1, 9 (Tex. App.—San Antonio 2004, pet. denied) (citing *Menetti* for proposition that default judgment against corporation established liability and shareholders did not have standing to assert defenses to liability on appeal or complain on appeal of default judgment even though they could be liable for judgment if corporate veil pierced). A finding of liability against a corporation does not necessarily amount to a finding of liability against the individual shareholders. *See Menetti*, 974 S.W.2d at 171. However, when the corporate veil is pierced, the liability of the shareholders depends on a finding of liability against the corporation because individuals cannot be held responsible for the acts of a corporation if the corporate veil is not pierced. *See Menetti*, 974 S.W.2d at 171. If the corporate veil is pierced, the shareholders are considered the equivalent of the corporation, not separate parties with individual defenses. *See Menetti*, 974 S.W.2d at 171 n.5. The individual shareholders are only injured when the corporate veil is pierced and whether the corporate veil is pierced is the *only* issue about which they have standing to complain with respect to the findings against the corporation. (Emphasis added.) *See Menetti*, 974 S.W.2d at 172.

B. Application of the Law to the Facts

In Stover and Harkey's issues 1, 2, 8, and 9, they argue error with respect to the jury's finding of breach-of-contract liability, damages, and attorneys' fees, and statutory-fraud attorneys' fees against Hesed Enters. The jury found Hesed Enters. liable for breach of contract, not Stover and Harkey. Rather, Stover and Harkey were found liable when the corporate veil was pierced. Hesed Enters. has not appealed the trial court's judgment. Accordingly, Stover and Harkey do not have standing to appeal the breach-of-contract findings and statutory-fraud attorneys' fees against Hesed Enters. *See Latham*, 320 S.W.3d at 611; *Menetti*, 974 S.W.2d at 171–72.

In issue 3, Stover and Harkey argue it was error for the jury to find fraud as to Hesed Enters., Holmes, and Holmes Law. Again, Stover and Harkey do not have standing to appeal the fraud findings against Hesed Enters. *See Latham*, 320 S.W.3d at 611; *Menetti*, 974 S.W.2d at 171–72. Also, Stover and Harkey, and Holmes and Holmes Law have not filed a joint brief or otherwise adopted each other's briefs. Stover and Harkey do not have standing to appeal the fraud findings against Holmes and Holmes Law because they cannot complain of errors that do not injuriously affect them or that merely affect the rights of others. *See, e.g., Torrington Co.*, 46 S.W.3d at 843, *Menetti*, 974 S.W.2d at 171.

In Holmes and Holmes Law's issues 1 and 2, part of issue 4(a) and (b), and issue 5(a) and (r), they argue error as to the jury's findings against and the questions in the jury charge related to Hesed Enters.'s liability and damages for breach of contract and damages for conspiracy. In issue 3.5(c), Holmes and Holmes Law argue the trial court erred when it awarded to ADM Milling attorneys' fees and costs with respect to jury question no. 19, which assessed breach-of-contract attorneys' fees against Hesed Enters., because attorneys' fees cannot be awarded on the breach-of-contract claim. These complained-of findings in jury question no. 19 were against only Hesed Enters. Once again, we point out, Hesed Enters. has not appealed the trial court's judgment. Holmes and Holmes Law do not have standing to appeal or complain of errors that do not injuriously affect them or that merely affect the rights of others. *See e.g., Torrington Co.*, 46 S.W.3d at 843, *Menetti*, 974 S.W.2d at 171.

Accordingly, Stover and Harkey do not have standing to appeal the complaints raised in issues 1, 2, 3, 8, and 9, and Holmes and Holmes Law do not have standing to appeal the complaints raised in issues 1, 2, and 3.5(c), part of issue 4(a) and (b), and issue 5(a) and (r).

IV. LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

In Stover and Harkey's issues 5, 6, and 7, and Holmes and Holmes Law's issues 3.2, 3.3(a), and 4(b) they argue the evidence is legally and factually insufficient to support several of the jury's findings. In Stover and Harkey's issue 4, and Holmes and Holmes Law's issues 3.1, 3.3(b), 3.4, and part of 4(a) they argue the trial court erred when it denied their motion for JNOV because they were entitled to judgment in their favor as a matter of law.

A. Failure to Preserve Factual Sufficiency Complaints

In part of Stover and Harkey's issues 5, 6, and 7, and part of Holmes and Holmes Law's issues 3.2, 3.3(a), and 4(b), they challenge the factual sufficiency of the evidence to support several of the jury's findings. To preserve a factual sufficiency challenge, the party must present the specific complaint to the trial court in a motion for new trial. TEX. R. CIV. P. 324(b)(2), (3); *see, e.g.*, *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991); *Barnett v. Schiro*, No. 05-16-00999-CV, 2018 WL 329772, at *7 (Tex. App.—Dallas Jan. 9, 2018, pet. filed) (mem. op.); *Maya Walnut, L.L.C. v. Lopez-Rodriguez*, No. 05-16-00750-CV, 2017 WL 1684679, at *4 (Tex. App.—Dallas May 3, 2017, no pet.) (mem. op.). Neither Stover, Harkey, Holmes, nor Holmes Law filed a motion for new trial. Accordingly, the portions of Stover and Harkey's issues 5, 6, and 7, and Holmes and

Holmes Law's issues 3.2, 3.3(a), and 4(b) arguing the evidence is factually insufficient were not preserved for appellate review. *See* TEX. R. APP. P. 33.1; TEX. R. CIV. P. 324.

B. Standards of Review

1. Legal Sufficiency

When examining a legal sufficiency challenge, an appellate court reviews the evidence in the light most favorable to the challenged finding and indulges every reasonable inference that would support it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex.2005); *LandAmerica Commonwealth Tit. Co. v. Wido*, No. 05-14-00036-CV, 2015 WL 6545685, at *3 (Tex. App.—Dallas Oct. 29, 2015, no pet.) (mem. op.). An appellant attacking the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, must demonstrate that there is no evidence to support the adverse finding. *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011); *LandAmerica*, 2015 WL 6545685, at *3. The ultimate test for legal sufficiency is whether the evidence would enable a reasonable and fair-minded fact finder to reach the verdict under review. *See City of Keller*, 168 S.W.3d at 827; *LandAmerica*, 2015 WL 6545685, at *3. The fact finder is the sole judge of witness credibility and the weight to give their testimony. *See City of Keller*, 168 S.W.3d at 819; *LandAmerica*, 2015 WL 6545685, at *3.

2. Judgment Notwithstanding the Verdict

A trial court should grant a motion for judgment notwithstanding the verdict when: (1) the evidence is conclusive and one party is entitled to recover as a matter of law; or (2) a legal principle precludes recovery. *See Varel Int'l Indus. L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *4 (Tex. App.—Dallas Aug. 30, 2016, pet. denied) (mem. op.); *Blackstone Med., Inc. v. Phoenix Surgicals L.L.C.*, 470 S.W.3d 636, 645 (Tex. App.—Dallas 2015, no pet.); *Iroh v. Igwe*, 461 S.W.3d 253, 261 (Tex. App.—Dallas 2015, pet. denied); *see also* TEX. R. CIV. P. 301. A party with the burden of proof at trial is entitled to JNOV on a particular issue only if the evidence establishes that issue as a matter of law. *See Murphy v. McDaniel*, No. 05-03-01045-CV, 2004 WL 2404518, at *3 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem. op.); *Cain v. Pruett*, 938 S.W.2d 152, 160 (Tex. App.—Dallas 1996, no pet.).

The standard of review for the denial of a motion for judgment notwithstanding the verdict is the same as for the denial of any motion that would render a judgment as a matter of law. *See Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller*, 168 S.W.3d at 823. A court of appeals reviews an appellant's challenge to a trial court's grant or denial of a motion for JNOV under a legal sufficiency standard. *See City of Keller*, 168 S.W.3d at 823 ("the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review"). When such a ruling is based on a question of law, an appellate court reviews that ruling de novo. *See Wells v. Hoisager*, 553 S.W.3d 515, 521 (Tex. App.—El Paso 2018, no pet.).

C. Piercing the Corporate Veil

In issue 7, Stover and Harkey challenge the legal sufficiency of the evidence to support the jury's finding that imposed on them personal liability for Hesed Enters.'s breach of contract, fraud, and statutory fraud under the alternative theories of sham to perpetrate a fraud and alter ego. They contend that section 21.223(b) of the Texas Business Organizations Code required ADM Milling to prove that: (a) Stover and Harkey used Hesed Enters. for the purpose of perpetrating an actual fraud on ADM Milling; and (b) it was primarily for their direct personal benefit. Stover and Harkey claim that the jury found against Hesed Enters. on ADM Millings's claims for fraud only with respect to the October Amendment to the purchase agreement, there is no evidence Harkey was involved in the October Amendment, and the only evidence as to Stover was his approval of the first email in the chain of emails making up the October Amendment. Also, they contend there was no evidence that any fraud perpetrated by Hesed Enters. was for the direct, personal benefit of Stover and Harkey. ADM Milling responds that: (1) Stover and Harkey challenge only "a narrow aspect" of the veil piercing claims; (2) the record shows conduct that not only reflects a dishonesty of purpose, but an intent to deceive; and (3) in the proposed sale of Hesed Enters. to Holmes II, the $200,000 in excess of the actual sales prices was to be split between Stover and Harkey in their individual capacities and not as equity partners of Hesed Enters.

1. Applicable Law

Corporations are separate legal entities from their shareholders, or owners. *See Khajeie v. Garcia-Martinez,* No. 05-17-01010-CV, 2018 WL 3424365, at *2 (Tex. App.—Dallas July 16, 2018, no pet.) (mem. op.); *Doyle v. Kontemporary Builders, Inc.,* 370 S.W.3d 448, 457 (Tex. App.—Dallas 2012, pet. denied); *Sparks v. Booth*, 232 S.W.3d 853, 868 (Tex. App.—Dallas 2007, no pet.). This separation generally enables the corporate form to shield its shareholders from individual liability for the wrongdoings of the corporation and protect them behind a corporate veil. *See Willis v. Donnelly*, 199 S.W.3d 262, 272 (Tex. 2006) (bedrock principle of corporate law is that individual can incorporate a business and normally shield himself from personal liability for corporation's contractual obligations); *Khajeie*, 2018 WL 3424365, at *2; *Doyle*, 370 S.W.3d at 457. Further, section 21.223(a)(2) of the Texas Business Organizations Code provides a shareholder may not be held liable to the corporation or its obligees with respect to "any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the [shareholder] . . . is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory." TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2); *see Willis*, 199 S.W.3d at 272; *Doyle*, 370 S.W.3d at 457.

However, the corporate veil may be pierced, allowing imposition of individual liability on a shareholder under certain circumstances despite the corporate form. *See Khajeie*, 2018 WL 3424365, at *2. Section 21.223(b) provides that the statutory limitation on a shareholder's liability under subsection (a)(2) "does not prevent or limit the liability of [the shareholder] . . . if the obligee demonstrates the [share]holder . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the [share]holder." BUS. ORGS. § 21.223(b); *see Willis*, 199 S.W.3d at 272.

In the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud. *See Martin v. U.S. Merchants Fin. Grp., Inc.*, No. No. 05-13-00999-CV, 2014 WL 6871392, at *5 (Tex. App.—Dallas Dec. 8, 2014, no pet.) (mem. op.); *Latham*, 320 S.W.3d at 607. In the piercing of the corporate veil, actual fraud involves "dishonesty of purpose or intent to deceive." *See Martin*, 2014 WL 6871392, at *5; *Latham*, 320 S.W.3d at 607.

Section 21.223 does not define the phrase "primarily for the direct benefit." *See* BUS. ORGS. § 21.223; *Hong v. Havey*, 551 S.W.3d 875, 885 (Tex. App.—Houston [14th Dist.] 2018, no pet.). However, courts have concluded that evidence showing that funds derived from the corporation's fraudulent conduct were "pocketed by or diverted to" the individual defendant is sufficient to demonstrate the requirement of a direct personal benefit. *See Hong*, 551 S.W.3d at 885–86 (examining the cases where the direct personal benefit showing was met). On the other hand, evidence showing that the fraudulently procured funds were used for the corporation's financial obligations refutes the notion that the fraud was perpetrated primarily for the direct personal benefit of an individual. *See Hong*, 551 S.W.3d at 886.

2. Application of the Law to the Facts

First, we address Stover and Harkey's argument that there is legally insufficient evidence to prove they used Hesed Enters. for the purpose of perpetrating a fraud. The entirety of their argument on appeal as to this point is as follows:

> First, the only fraud found was as to the "October Amendment." As described above, no fraud occurred with respect to that unilateral contract; there was no evidence as to Harkey's involvement with the "October Amendment," and the only evidence as to Stover was that he approved the sending of the first email in the

> chain which stated that "They are willing to add $50,000 to the escrow and place the entire amount as nonrefundable if they do not close by 11/15." Thus[,] Hesed [Enters.] was not used to perpetrate any fraud.

However, Stover and Harkey did not raise this argument in their joint motion for JNOV. Instead, in their joint motion for JNOV, they argued: (1) the jury's answers to jury question no. 1, which related to Hesed Enters.'s liability for breach of contract should be disregarded based on the defenses of a condition precedent, impossibility, and the October emails did not constitute an amendment to the purchase agreement; (2) the jury's answers to jury question no. 2, which related to Hesed Enters.'s liability for breach of contract should be disregarded because the evidence established it was impossible for Hesed Enters. to obtain the necessary lease agreements with BNSF prior to closing on the purchase of the property; (3) the only evidence of alter ego was their undercapitalization of Hesed Enters. and their failure to follow corporate formalities, which is expressly rejected as a basis for vicarious liability in section 21.223(a)(3) of the Texas Business Organizations Code; and (4) there was no evidence of a direct personal benefit to Stover or Harkey "related to the actual fraud of offering an additional escrow and nonrefundability, related to the asserted October Amendment, which was the only fraud not rejected by the jury."

To preserve a legal sufficiency challenge after a jury trial, an appellant must: (1) move for a directed verdict; (2) move for a judgment notwithstanding the verdict; (3) object to the submission of a jury question; (4) move to disregard the jury finding; or (5) move for a new trial. *See, e.g., DFW Aero Mechanix, Inc. v. Airshares, Inc.*, 366 S.W.3d 204, 206 (Tex. App.—Dallas 2010, no pet.). Complaints on appeal must correspond with the complaint made at the trial court level. *See, e.g., Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 170–71 (Tex. App.—Dallas 2009, no pet.); *see also* TEX. R. APP. P. 33.1. Stover and Harkey's complaint on appeal that the evidence is legally insufficient to support the jury's finding piercing the corporate veil because there is no evidence they used Hesed Enters. for the purpose of perpetrating a fraud was not preserved for appellate review because it does not comport with their complaint to the trial court.[6]

Nevertheless, even if their complaint was preserved for appellate review, Stover and Harkey's brief does not contain a clear and concise argument for their contentions, with appropriate citations to authorities as to this argument. *See* R. APP. P. 38.1(i). An appellant's brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Error may be forfeited through inadequate briefing. *See Fredonia State Bank v. Gen. Am. Life Ins.*, 881 S.W.2d 279, 284–85 (Tex. 1994); *see also Wilburn v. Dacus*, No. 05-16-00522-CV, 2017 WL 2464679, at *1 (Tex. App.—Dallas June 7, 2017, pet. denied) (mem. op.). In their brief, they include only citations to general authority for the proposition that ADM Milling has the burden to show they perpetrated an actual fraud. While they mention the jury's findings against them on the torts of fraud and statutory fraud, they do not analyze those findings in the context of piercing the corporate veil, where actual fraud is not equivalent to the tort of fraud or provide citations to specific authority to establish their position. *See Martin*, 2014 WL 6871392, at *5; *Latham*, 320 S.W.3d at 607 (in piercing of corporate veil, actual fraud involves "dishonesty of purpose or intent to deceive"). Accordingly, Stover and Harkey have not presented anything for us to review on that point.

Second, we address Stover and Harkey's argument that there is legally insufficient evidence to prove that any fraud perpetrated by Hesed Enters. was for the direct, personal benefit of Stover and Harkey. The record shows that in July 2013, Holmes sent text messages to Holmes II that advised Stover and Harkey had approximately $100,000 invested in the deal and the contract

---

[6] We note that courts may not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the court. *Miller v. JSC Lake Highlands Ops., L.P.*, 536 S.W.3d 510, 513 n.5 (Tex. 2017). However, we do not read the Texas Supreme Court's opinion in *Miller* to change the error preservation rules so that Stover and Harkey can challenge a separate element necessary for piercing the corporate veil for the first time on appeal merely because they alleged there was no evidence of another element in their motion for JNOV. *See Tatum v. Hersch*, 559 S.W.3d 581, 586 n.2 (Tex. App.—Dallas 2018, no pet.).

amount with ADM Milling was for $1.5 or $1.6 million. Holmes II testified[7] he understood the text from Holmes to mean Stover and Harkey were attempting to sell the interest in Hesed Enters. at a $200,000 premium because they were asking $1.8 million. Also, the record shows that on August 13, 2013, Stover sent a text to Holmes II that said "[he] got [Harkey] to agree on selling [the deal for the Mill] [and] [they] want 100,000 dollars each if u [sic] are interested [sic] thanks [.]" Stover testified the offer to sell Hesed Enters. to Holmes II for $1.8 million consisted of "the [$]1.6 [million] that was the obligated payment of the contract plus $100,00 for [him] personally and $100,000 for [] Harkey personally." Further, Holmes II testified he received an email from Stover on October 7, 2013, stating, in part:[8]

> You first agreed to become an investment [sic] and put money in the project. Then[,] you wanted to become a managing partner with which [Harkey] and I [Stover] agreed with some limitations put on your authority. . . .
>
> Then[,] you wanted to take our deal over and buy us out. As you know, we were in negotiations with a third party at the time, but you were ready to buy our interests. . . .
>
> More recently, you contacted me [Stover] again to determine the status of the deal and structured a buyout of [Harkey] and my [Stover] interest providing the closing date could be extended to November 15, 2013. So we contacted ADM [Milling] and arranged to extend the closing date, and again you have not performed.

We conclude the evidence is legally sufficient to support the jury's finding that the corporate veil should be pierced and Stover and Harkey should be individually liable for Hesed Enters.'s breach of contract, fraud, and statutory fraud because the evidence shows that $200,000 were not going to be used for Hesed Enters.'s financial obligations, but were to be diverted to Stover and Harkey. *See generally, Hong*, 551 S.W.3d at 885–86 (examining cases where direct personal benefit showing was met when evidence showed funds derived from corporation's

[7] Holmes II did not testify at trial, but his video deposition was played to the jury.

[8] Holmes II testified he suspected that someone other than Stover wrote the email, but he did not know who or elaborate as to why he believed that was the case.

fraudulent conduct were pocketed or diverted to individual defendant). Stover and Harkey's issue 7 is decided against them.

D. Fraud Damages

In part of Holmes and Holmes Law's issue 3.2, they challenge the legal sufficiency of the evidence to support the jury's award of fraud and statutory-fraud damages in jury question no. 9, arguing: (a) there is no separate claim for post-contract representations; (b) the October emails were not a valid amendment to the purchase agreement; (c) in the alternative, if the October emails were a valid amendment, they were contingent on paragraph 16 of the purchase agreement; and (d) no damages for the October emails were pleaded or proved. ADM Milling responds that it pleaded and proved damages related to the $100,000 in nonrefundable escrow funds and these benefit-of-the-bargain damages are recoverable in fraud.

1. Applicable Law

There are two alternative measures of damages for common-law fraud: the out-of-pocket measure and the benefit-of-the-bargain measure. *See Formosa Plastics Corp. USA v. Presidio Eng'rs*, 960 S.W.2d 41, 49 (Tex. 1998); *see also Scott v. Sebree*, 986 S.W.2d 364, 368 (Tex. App.—Austin 1999, pet. denied). The "actual damages" recoverable for statutory fraud under section 27.01(b) of the Texas Business and Commerce Code are those damages available for fraud at common law. *See Scott*, 986 S.W.2d at 368. Out-of-pocket damages are determined by comparing the value paid to the value received, while benefit-of-the-bargain damages compare the value as represented to the value received. *See Formosa Plastics*, 960 S.W.2d at 49; *see also Scott*, 986 S.W.2d at 368.

2. Application of the Law to the Facts

In jury question nos. 5 and 6, the jury found Holmes and Holmes Law committed fraud and statutory fraud with respect to the October Amendment. In jury question no. 9, the jury found

$100,000 in damages would fairly compensate ADM Milling for the fraud or statutory fraud with respect to the October Amendment.

The record shows that on March 8, 2013, Hesed Enters. and ADM Milling signed the purchase agreement where Hesed Enters. agreed to buy the Mill, as is and with all faults, for $1.6 million with Hesed Enters. agreeing to $50,000 as earnest money. Also, on October 1, 2013, Holmes sent Kaye an email proposing the additional $50,000 extension consideration for an extension of time to close. Kaye agreed to the additional, $50,000 extension consideration. Then, Holmes responded that the funds would be "deposited in a few days." However, Hesed Enters. did not deposit the $50,000 extension consideration. Instead, on October 30, 2013, Holmes sent Kaye a letter terminating the purchase agreement and demanding a return of the $50,000 already in escrow.

Holmes and Holmes Law assert there is no evidence of damages relating to the October Amendment. However, they do not address the evidence relating to the $50,000 earnest money or the additional $50,000 extension consideration that was promised. Nor do they provide legal argument and analysis explaining why this evidence constitutes no evidence of ADM Milling's damages.

Nevertheless, with respect to issue 3.2, Holmes and Holmes Law's brief does not contain a clear and concise argument for their contentions, with appropriate citations to authorities. *See* R. APP. P. 38.1(i). In their brief, they include only citations to general authority outlining the elements of a claim for fraud and for proving consequential damages. They do not provide any analysis or citations to specific authority to establish their position and have presented nothing for us to review.

To the extent their issue is not waived for failure to adequately brief it, we conclude the evidence is legally sufficient to support the jury's award of fraud and statutory-fraud damages in jury question no. 9. Part of Holmes and Holmes Law's issue 3.2 is decided against them.

E. Exemplary Damages for Fraud

In part of Holmes and Holmes Law's issue 3.3(a) and (b),[9] they challenge the legal sufficiency of the evidence to support the jury's award of exemplary damages in jury question no. 17 because: (i) the findings on the threshold jury question nos. 5 and 6 were not certified to be unanimous; and (ii) the exemplary damages award was not supported by sufficient evidence. In jury question no. 17, the jury awarded exemplary damages in the amount of $800,000 each from Holmes and Holmes Law for the fraud and statutory fraud. ADM Milling responds that Holmes and Holmes Law argue only that the exemplary damages were not unanimous. Also, ADM Milling argues that with respect to jury unanimity, Holmes and Holmes Law's argument is "based on surmise, not law," and their argument disregards the jury's answers to jury question nos. 15, 16, and 17.

First, we agree with ADM Milling that Holmes and Holmes Law do not argue the exemplary damages award was not supported by sufficient evidence. In the "issues presented" section of their brief, Holmes and Holmes Law state the award of exemplary damages is not supported by legally and factually sufficient evidence. However, in the "argument" section of their brief, they make no argument as to that position. An appellant's brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i).

---

[9] In Holmes and Holmes Law's issue 3.3(b), they argue the jury's award of exemplary damages in jury question no. 17 was error because, assuming the trial court erred when it denied their motions for JNOV with respect to jury question no. 14 relating to their affirmative defense of attorney immunity, they are: (i) exempt; or (ii) there was no legal basis to support the claim. Based on our resolution of Holmes and Holmes Law's issue 3.1, arguing the trial court erred when it denied their motions for JNOV with respect to jury question no. 14 because, as a matter of law, the evidence conclusively established they were entitled to the affirmative defense of attorney immunity later in this opinion, we need not address this issue.

Second, we address Holmes and Holmes Law's argument that the evidence was legally insufficient to support the jury's award of exemplary damages in jury question no. 17 because the findings on the threshold jury question nos. 5 and 6 were not certified to be unanimous. In support of their argument, they point to the verdict certificate where the jury stated, "Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below." However, the record also contains an additional certificate signed by the presiding juror that states, "I certify that the jury was unanimous in answering Question No. 15, 16, 17, and 18. All 12 of us agreed to each of the answers." In jury question nos. 5 and 6, the jury found Holmes and Holmes Law liable for common law fraud and statutory fraud. The instructions for those jury questions did not require a unanimous verdict. However, both jury question nos. 15 (clear and convincing evidence of fraud and statutory fraud) and 16 (malice) instructed the jury to answer those questions "only if [] [they] [] unanimously answered 'Yes' to any part of Question No. 5 [common law fraud] or if [they] unanimously answered 'Yes' to any part of Question No. 6 [statutory fraud] and Question No. 7 [actual awareness]." Further, jury question no. 17 (exemplary damages) instructed the jury that they should only answer the question "if [they] unanimously answered 'Yes' to Question 15 or Question No. 16." The jury is presumed to have followed the trial court's instructions. *See, e.g., Columbia Rio Grande Healthcare L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009).

We conclude the evidence is legally sufficient to support the jury's award of exemplary damages in jury question no. 17. Holmes and Holmes Law's issue 3.3(a) is decided against them.

F. Attorney Immunity

In issue 3.1, Holmes and Holmes Law argue the trial court erred when it denied their motions for JNOV as to jury question no. 14 because, they contend, as a matter of law, Holmes and Holmes Law conclusively established their affirmative defense of attorney immunity. They assert the evidence shows: (1) they were Hesed Enters.'s attorneys at all times; (2) they took preapproved directions from Hesed Enters. through Stover at all times; (3) they were paid hourly fees and had no pecuniary interest in the outcome of the transaction; and (4) there was no evidence to support a fraud claim against them. ADM Milling responds that: (1) the conduct of Holmes and Holmes Law occurred outside the litigation context and attorney immunity does not apply in that situation; and (2) the evidence shows Holmes and Holmes Law were acting outside the scope of their representation and their actions were foreign to the duties of a lawyer.

1. Applicable Law

As a general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation. *See Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Even conduct that is wrongful in the context of the underlying suit is not actionable if it is part of the discharge of a lawyer's duties to his client. *Cantey Hanger*, 467 S.W.3d at 481. Attorney immunity is an affirmative defense. *See Youngkin v. Hines*, 546 S.W.3d 675, 683–84 (Tex. 2018); *Cantey Hanger*, 467 S.W.3d at 481. The purpose of the attorney-immunity defense is to ensure loyal, faithful, and aggressive advocacy to clients. *See Cantey Hanger*, 467 S.W.3d at 481; *see also Bethel v. Quilling, Selander, Lownds, Winslett & Moser P.C.*, No. 05-17-00850-CV, 2018 WL 2434410, at *3 (Tex. App.—Dallas May 30, 2018, pet. filed) (mem. op.). Further, attorney immunity extends to the organizations through which attorneys render legal services. *See Landry's, Inc. v. Animal Legal Defense Fund*, No. 14-17-00207, 2018 WL 5075116, at *11 (Tex. App.—Houston [14th Dist.] Oct. 18, 2018, no pet. h.).

An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his alleged wrongful conduct, regardless of whether it is labeled fraudulent, is part of the discharge of his duties to his client. *See Cantey Hanger*, 467 S.W.3d at 484. "The only facts required to support an attorney-immunity [affirmative] defense are the type of conduct at issue and the existence of an attorney-client relationship at the time." *Youngkin*, 546 S.W.3d at 683; *see also Sheller v. Corral Tran Singh L.L.P.*, 551 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The inquiry focuses on the kind of conduct at issue rather than the alleged wrongfulness of said conduct. *See Youngkin*, 546 S.W.3d at 681; *Cantey Hanger*, 467 S.W.3d at 483. This requires looking beyond the characterizations of the attorney's activity as fraudulent and conspiratorial. *See Youngkin*, 546 S.W.3d at 682; *see also Sheller*, 551 S.W.3d at 363–64. A plaintiff's characterization of an attorney's conduct as fraudulent or otherwise wrong is immaterial to an evaluation of the defense of attorney immunity. *See Youngkin*, 546 S.W.3d at 682; *see also Bethel*, 2018 WL 2434410, at *3.

Once an attorney proves the facts required to support an attorney-immunity affirmative defense, "[a] court [] then decide[s] the legal question of whether said conduct was within the scope of representation." *Youngkin*, 546 S.W.3d at 683; *Sheller*, 551 S.W.3d at 363; *Hesse v. Howell*, No. 07-16-00453-CV, 2018 WL 2750005, at *6 (Tex. App.—Amarillo June 7, 2018, pet. denied) (mem. op.). An attorney may be liable to non-clients only: (1) for conduct outside the scope of his representation of his client; or (2) for conduct foreign to the duties of a lawyer. *See Youngkin*, 546 S.W.3d at 681; *Cantey Hanger*, 467 S.W.3d at 482; *see also Sheller*, 551 S.W.3d at 363–64. Conduct falls within the scope of representation if each of the challenged actions falls within the kind of activity that would be expected as part of the discharge of an attorney's duties in representing his client. *See Sheller*, 551 S.W.3d at 364. However, an attorney who acts in his personal capacity and is not discharging his duties to a client does not have attorney-immunity protection for those personal acts. *See Diogu v. Aporn*, No. 01-17-00392-CV, 2018 WL 3233596, at *5 (Tex. App.—Houston [1st Dist.] July 3, 2018, no pet.) (mem. op.).

Also, an attorney may be liable if the attorney's conduct was foreign to the duties of a lawyer. "If a lawyer participates in independent fraudulent activities, his action is foreign to the duties of an attorney." *See Sheller*, 551 S.W.3d at 364 (quoting *Alpert v. Crain, Caton & James P.C.*, 178 S.W.3d 398, 406 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) and noting the Texas Supreme Court has cited the case with approval). Likewise, an attorney who steals goods or tells lies on a client's behalf may be liable for conversion or fraud in some cases. *See Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008). The Supreme Court of Texas has identified a non-exhaustive list of examples of conduct "foreign to the duties of an attorney." *See Youngkin*, 546 S.W.3d at 682; *Cantey Hanger*, 467 S.W.3d at 482–83. For example, an attorney may be liable for: (1) participating in a fraudulent business scheme with a client outside the litigation context; (2) drafting and filing fraudulent legal documents in a non-litigation context to hide a client's assets and evade a judgment; and (3) committing a physical assault during a trial. *See Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger*, 467 S.W.3d at 482–83; *Sheller*, 551 S.W.3d at 364.

However, the attorney-immunity affirmative defense does not bar the liability of an attorney to his own client for misconduct or reprimand for ethics violations. *See Youngkin*, 546 S.W.3d at 682. Rather, liability to non-clients is a wholly different matter. *See Youngkin*, 546 S.W.3d at 682.

2. Application of the Law to the Facts

The record shows that, in jury question no.14, the jury found that the conduct of Holmes and Holmes Law was outside the scope of Holmes's representation of his clients as to the conduct that constituted fraud, statutory fraud, and conspiracy.[10] In their separate motion for JNOV, Holmes and Holmes Law argued, (1) "As a matter of law, the answers to [Jury] Question No. 14 must be disregarded"; and (2) "there is evidence in [the] record to disregard the jury findings in question no. 14" and "the evidence in the record support a finding that Holmes acted within the

[10] We note that whether Holmes and Holmes Law's conduct was within the scope of their representation or foreign to the duties of a lawyer was a legal question for the trial court to decide. *See Youngkin*, 546 S.W.3d at 863; *Sheller*, 551 S.W.3d at 363; *Hesse*, 2018 WL 2750005, at *6.

scope of his employment." As the parties with the burden of proof on the affirmative defense of attorney immunity, Holmes and Holmes Law were entitled to a JNOV on that issue only if the evidence conclusively established that, as a matter of law, their conduct was within the scope of their representation of Hesed Enters. The record does not contain ADM Milling's response, if any, to the motions for JNOV. The trial court denied Holmes and Holmes Law's motions for JNOV.

The only facts Holmes and Holmes Law were required to prove to support their affirmative defense of attorney-immunity were: (1) the type of conduct at issue; and (2) the existence of an attorney-client relationship at the time. *See Youngkin*, 546 S.W.3d at 683. We note that the parties do not dispute the existence of an attorney-client relationship between Holmes and Holmes Law, and Hesed Enters. and Stover, at the time of the complained-of conduct.

Next, we review whether the alleged conduct by Holmes and Holmes Law was outside the scope of their representation of Hesed Enters. and Stover, or foreign to the duties of an attorney. In the argument portion of their brief, Holmes and Holmes Law make two arguments supporting their contention that, as a matter of law, they conclusively established their affirmative defense of attorney immunity. First, they contend:

> The uncontradicted evidence conclusively established that at all times in the negotiations with ADM [Milling] related to the [p]urchase [a]greement, [Holmes and Holmes Law] acted in their capacity as Hesed [Enters.'s] attorneys and their communications were directed and authorized by Hesed [Enters.'s] managing member [and] ADM [Milling] recognized that [Holmes and Holmes Law] were acting solely in their capacity as Hesed [Enters.'s] attorney.

Second, Holmes and Holmes Law argue:

> In this case, there was absolutely **no evidence** adduced that created or supported any inference that Hesed [Enters.], Harkey[,] or Stover had a capacity to deceive ADM [Milling], much less [Holmes and Holmes Law] had any knowledge of any such capacity. Further, absolutely **no evidence** was adduced that [Holmes and Holmes Law] intended to participate in a purpose of deceptively acquiring the [Mill] from ADM [Milling] and/or share in the gains so desired.

(Emphasis added.) In support of their arguments, Holmes and Holmes Law point to the following: (1) Stover's testimony that he approved Holmes's November 11, 2013 email rejecting ADM Milling's offer to settle their dispute; (2) the comments of counsel for ADM Milling during an offer of proof regarding statements Holmes made to the effect that "when th[e] deal was being negotiated, [Holmes] was his lawyer. Acting in the course and scope of his agency relationship . . ."; (3) the testimony of Kaye that neither he nor Holmes was going to sign or execute the purchase agreement because they were the lawyers and Holmes was not a corporate officer of Hesed Enters.; and (4) Holmes's testimony that he was representing Hesed Enters. and did not step outside his role as an attorney.

In addition to the evidence described by Holmes and Holmes Law, ADM Milling contends other evidence supports the conclusion that Holmes and Holmes Law were acting outside the scope of their representation. Specifically, ADM Milling states in its brief on appeal, "the record reflects that Holmes knew Hesed [Enters.] was not going to close and that within minutes of negotiating the October Amendment he was communicating with Stover about a side deal with Holmes II." Further, ADM Milling contends the record shows: (1) Holmes lied for his clients; and (2) Holmes introduced his son to the transaction so his son could benefit from the deal and a desire to enrich one's family is still a benefit. Also, ADM Milling argues the conduct of Holmes and Holmes Law was foreign to the duties of an attorney because Holmes engaged in "independently fraudulent activities" and points to Holmes's failure to advise ADM Milling that: (1) Hesed Enters. would not perform; and (2) Stover and Harkey were negotiating the sale of Hesed Enters. to Holmes II, who would then take over the purchase agreement with ADM Milling.

As the parties with the burden of proof on the affirmative defense of attorney immunity, Holmes and Holmes Law were entitled to a JNOV on that issue only if the evidence established, as a matter of law, their conduct was within the scope of their representation and not foreign to the duties of an attorney. The record shows that Holmes testified he began representing Stover in 2011 and Hesed Enters. at its creation in February 2013. He stated he did not represent Harkey prior to the filing of this lawsuit. Holmes testified he was acting on behalf of his clients throughout the events that underlie this lawsuit. On behalf of his client, Hesed Enters., Holmes provided ADM Milling with several reasons for the delay in closing, including waiting for a bank loan, issues related to the survey and environmental inspection, working with BNSF and "red tape" delays, problems obtaining insurance, and Stover's need to resolve an estate dispute with his sister. However, the record shows that an environmental inspection was not performed and BNSF had no record of any communications with Holmes.

Also, the record shows that Kaye testified he believed Holmes had stepped outside his role as attorney when he breached the confidentiality agreement between ADM Milling and Hesed Enters. by sharing information concerning "the deal" with Holmes II. The record shows in July 2013, Holmes sent text messages to Holmes II that advised: (1) Holmes II should make Stover an offer for the mill deal; (2) Stover and Harkey had approximately $100,000 invested in the deal; (3) Stover and Harkey could not get the deal done, which Holmes II understood to mean they could not close with ADM Milling; and (4) Holmes advised that the contract amount with ADM Milling was for $1.5 or $1.6 million, which Holmes II testified he understood to mean Stover and Harkey were attempting to sell the interest in Hesed Enters. at a $200,000 premium because they were asking $1.8 million. When Holmes II asked Holmes if he should call Stover, Holmes responded "Yes." Further, an email dated October 1, 2013, from Holmes to Stover forwarded the October Amendment and stated:

> You need to tell [Holmes II] that if he wants the deal, he needs to purchase the membership interests in Hesed [Enters.] for 100k [sic] each and deposit in Countrywide Title in Plainview. Give him a deadline. The purchase price will be credited by the total amount of 100K [sic], so his net cost to you [Stover] and [Harkey] is actually $150K [sic], and the net due at closing will be $1,500,000 not $1,600,000.

In addition, Holmes II testified he received an email from Stover dated October 7, 2013, stating "For several months now, you have lured me into doing a deal with you on the [] Mill facility in Plainview. I trusted you because your dad [Holmes], my attorney, introduced us and I trusted him." On October 17, 2013, Holmes sent Kaye an email after Holmes II contacted ADM Milling directly about the Mill, stating:

> I have discussed the matter with [Stover], and it was his understanding, as it was mine, that [Holmes] II was going to put up the $50,000 [extension consideration] with Countrywide to extend the closing date to November 15, 2013.
>
> The request to obtain a date certain was made to you based wholly on [Holmes] II's commitment to [Stover] that he would put up the funds to extend the closing to November 15, 2013, close the deal with ADM [Milling] and get the benefit of their work, and [Stover] and [Harkey] would receive at least $200,000 or some interest in the project.

All of this evidence shows that ADM Milling was seeking to hold Holmes and Holmes Law liable for doing more than pursuing Hesed Enters.'s and Stover's legal interests. The conduct at issue involved Holmes acting in his personal capacity by providing confidential information to his son, Holmes II, regarding his client's purchase agreement with ADM Milling and helping Hesed Enters. to obtain an extension of time with ADM Milling so that Stover and Harkey could have additional time to negotiate the sale of Hesed Enters. to his son. The jury found this conduct to constitute fraud, statutory fraud, and conspiracy to commit fraud, and an attorney may be liable for the damages caused by his participation in a fraudulent business scheme with his client. *See generally*, *Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger*, 467 S.W.3d at 482–83.

We conclude the trial court did not err when it denied Holmes and Holmes Law's motions for JNOV with respect to their affirmative defense of attorney immunity because Holmes and Holmes Law have not shown the evidence established, as a matter of law, their conduct was within the scope of their representation and not foreign to the duties of an attorney. Holmes and Holmes Law's issue 3.1 is decided against them.

G. Conspiracy

In Stover and Harkey's issue 4, they argue the trial court erred when it denied their motions for JNOV with respect to jury question no. 12 because, as a matter of law, they cannot be held liable for conspiracy. Also, in Stover and Harkey's issues 5 and 6, they challenge the legal sufficiency of the evidence to support the jury's findings in jury question nos. 12 and 13, which found them liable for conspiracy. However, we have already concluded that there was sufficient evidence to support the jury's finding that the corporate veil should be pierced and Hesed Enters.'s liability for breach of contract, fraud, and statutory fraud should be imposed on Stover and Harkey. Accordingly, we need not address Stover and Harkey's issues 4, 5, and 6.

Similarly, in Holmes and Holmes Law's issues 3.4 and part of 4(a) and (b), they argue the trial court erred when it denied their motions for JNOV with respect to jury question nos. 12 and 13 because the conspiracy finding against Holmes and Holmes Law was invalid as a matter of law and the evidence conclusively established that ADM Milling had no damages. However, we have already concluded that the evidence was legally sufficient to support the jury's award of fraud and exemplary damages, and the trial court did not err when it denied their motions for JNOV as to the fraud damages and their affirmative defense of attorney immunity. Accordingly, we need not address Holmes and Holmes Law's issue 3.4 or part of issue 4(a) and (b).

V. JURY CHARGE ERROR

In issue 5(c)–(q), Holmes and Holmes Law argue the trial court erred when it denied their objections to the jury charge.[11] Specifically, Holmes and Holmes Law claim error with respect to jury question nos. 1–2 and 4–19. ADM Milling responds that, in Holmes and Holmes Law's brief, they list forty-nine different objections they made during the charge conference, but those

[11] In issue 1(b), Stover and Harkey argue the trial court erred when it denied their objections to the jury charge question no. 3, which related to the breach of contract damages assessed against Hesed Enters. However, we have already determined that Stover and Harkey do not have standing to appeal of the liability findings against Hesed Enters. Rather, they have standing to appeal only the jury's finding that the corporate veil should be pierced. Accordingly, we do not address Stover and Harkey's issue 1.

arguments do not adequately raise issues for review. First, ADM Milling contends that Holmes and Holmes Law's issues were not preserved for appellate review because they merely adopted other parties' charge objections which is insufficient to preserve error. Second, ADM Milling argues that even if those issues were preserved, they are waived because Holmes and Holmes Law have failed to provide any explanation, analysis, or controlling authority showing how the trial court's denial of their charge objections was error or harmful.

A. Applicable Law

To preserve error for appellate review, the record must show the appellant made a timely request, objection, or motion and that the trial court ruled on the request, objection, or motion either expressly or implicitly. *See* TEX. R. APP. P. 33.1(a). With respect to the jury charge, rule 272 of the Texas Rules of Civil Procedure requires a party to present its objections to the charge: (1) to the trial court, either in writing or by dictating them to the court reporter; (2) in the presence of the trial court and opposing counsel; and (3) before the charge is read to the jury. *See* TEX. R. CIV. P. 272; *see also C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 793 (Tex. App.—Houston [1st Dist.] 2004, np pet.). Objections not presented in this manner are considered waived. *See* R. CIV. P. 272; *see also C.M. Asfahl*, 135 S.W.3d at 793.

Rule 274 provides that "No objection to one part of the charge may be adopted or applied to any other part of the charge by reference." *See* R. CIV. P. 274; *see also C.M. Asfahl*, 135 S.W.3d at 795. Each party is required to present their own objections and does not preserve error premised on the erroneous submission of a jury question by merely joining or adopting another party's objections to the jury charge. *See C.M. Asfahl*, 135 S.W.3d at 796; *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 420–21 (Tex. App.—Corpus Christi–Edinburg 1990, writ denied) (one party failed to preserve all error in charge because it adopted another party's objections by reference when it made its own objections).

B. Application of the Law to the Facts

On August 8, 2016, Holmes and Holmes Law filed written objections to the proposed jury charge. That document contains numerous objections to jury question nos. 1–7 and 9–19. However, Holmes and Holmes Law do not point us to, nor could we find, that the trial court was made aware of or ruled on those objections either in writing or orally. See TEX. R. APP. P. 33.1(a)(2) (record must show trial court ruled on request, objection, or motion). During the charge conference, following the numerous charge objections made by counsel for Hesed Enters., Stover, and Harkey, Holmes and Holmes Law stated, "I adopt those objections to each one of those with my initial objection to some of them" and then made some additional objections to jury question nos. 6, 7, 12, 14, and 15. Holmes and Homes Law's attempt to challenge the jury charge simply by asserting a global adoption of Stover and Harkey's objections was not specific and did not state the grounds for the complaint. *See C.M. Asfahi*, 135 S.W.3d at 796. Accordingly, Holmes and Holmes Law's objections to jury question nos. 1–5, 9–11, 13, 16–19 were not preserved for appellate review.

However, even if Holmes and Holmes Law's objections to jury question nos. 1–5, 9–11, 13, 16–19 were preserved for appellate review, all of their objections, including their separate objections to jury question nos. 6, 7, 12, 14, and 15 were waived. Holmes and Holmes Law's brief does not contain a clear and concise argument for their contentions, with appropriate citations to authorities. *See* R. APP. P. 38.1(i). In their brief, they merely restate their objections to the trial court and include only citations to general authority for the proposition that a trial court must submit proper instructions and definitions to the jury, the burden of proof, and harmful error. They do not provide any analysis or citations to specific authority to establish their position and have presented nothing for us to review.

Holmes and Holmes Law's issues 5(c)–(q) were not preserved for appellate review, are waived, or both.

VI. ATTORNEYS' FEES AND COSTS

In Holmes and Holmes Law's issue 3.5(a)–(b) and (d)–(e), they challenge the award of attorneys' fees and costs, arguing the award of attorneys' fees was error because: (1) the evidence is legally and factually insufficient to support the trial court's judgment awarding ADM Milling attorneys' fees and costs because ADM Milling's counsel failed to segregate their billing; (2) the evidence is legally and factually insufficient to support the jury's award of attorneys' fees in jury question no. 20 relating to attorneys' fees on the statutory fraud claim; (3) assuming the trial court erred when it denied their motion for JNOV on jury question no. 14 relating to an attorney exemption, the trial court erred when it awarded ADM Milling attorneys' fees and costs because Holmes and Holmes Law are "exempt under immunity"; and (4) assuming the trial court erred when it denied their motion for JNOV on jury question no. 6(ii) because the October emails were not a valid amendment to the purchase agreement, the trial court erred when it denied their motion for JNOV because, as a matter of law, attorneys' fees could not be awarded on the statutory fraud finding which was premised on those October emails being a valid amendment.

First, we address the portion of Holmes and Holmes Law's issue 3.5(a)–(b) arguing the evidence is factually insufficient. As we stated earlier in this opinion, to preserve a factual sufficiency challenge, the party must present the specific complaint to the trial court in a motion for new trial. TEX. R. CIV. P. 324(b)(2), (3); *see, e.g.*, *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991); *Barnett v. Schiro*, No. 05-16-00999-CV, 2018 WL 329772, at *7 (Tex. App.—Dallas Jan. 9, 2018, pet. filed) (mem. op.); *Maya Walnut L.L.C. v. Lopez-Rodriguez*, No. 05-16-00750-CV, 2017 SL 1684679, at *4 (Tex. App.—Dallas May 3, 2017, no pet.) (mem. op.). Holmes and Holmes Law did not file a motion for new trial. Accordingly, they have failed to preserve any complaint that the evidence is factually insufficient to support the award of attorneys' fees and costs on appeal.[12] *See* TEX. R. APP. P. 33.1; TEX. R. CIV. P. 324.

Second, we address the portion of Holmes and Holmes Law's issue 3.5(a)–(b) arguing the evidence is legally insufficient to support the award of attorneys' fees. An appellant attacking the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, must demonstrate that there is no evidence to support the adverse finding. *See Exxon Corp.*, 348 S.W.3d at 215; *LandAmerica*, 2015 WL 6545685, at *3. If any attorneys' fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. *See Tony Gullo Motors I. L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). When evidence is presented that does not segregate attorneys' fees by issues, but is rather for the entire case, the record contains some evidence, so an unsegregated award of attorneys' fees requires a remand. *See Chapa*, 212 S.W.3d at 314. In their brief, Holmes and Holmes Law set out the evidence of attorneys' fees, detailing why they believe the attempt of counsel for ADM Milling to segregate their attorneys' fees through documentary and testimonial evidence was insufficient to satisfy the segregation requirement. Also, our review of the record shows the following documentary evidence relating to attorneys' fees was admitted: (1) the affidavit of ADM Milling's legal counsel with invoices dated up to August 2015; (2) the balance of the invoices dated after the date of that affidavit; (3) invoices from the expert witness which were limited to the statutory fraud claim; and (3) a summary of the attorneys' fees to help the jury understand the amount and nature of the fees in the other voluminous exhibits. Further, the record shows counsel for ADM Milling testified as to attorneys' fees. Accordingly, even if we were to agree with Holmes and Holmes Law that ADM

---

[12] We note that the parties raised some of their factual insufficiency arguments in their motion for JNOV. However, a motion for JNOV does not preserve a challenge to the factual sufficiency of the evidence. *See, e.g., Cecil*, 804 S.W.2d at 510–11; *Reule v. M&T Mortg.*, 483 S.W.3d 600, 609 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Griffin v. Carson*, No. 01-08-00340-CV, 2009 WL 1493467, at *3 (Tex. App.—Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.); *Gonzalez v. Cruz*, No. 13-07-00351-CV, 2008 WL 2764565, at *1 (Tex. App.—Corpus Christi-Edinburg July 17, 2008, no pet.) (mem. op.); *Kratz v. Exxon Corp.*, 890 S.W.2d 899, 902 (Tex. App.—El Paso 1994, no writ).

Milling's counsel failed to segregate their attorneys' fees by issues, that unsegregated evidence arguably includes some evidence of what the segregated amount should be. *See Chapa*, 212 S.W.3d at 314 (even unsegregated attorneys' fees for entire case are some evidence of what segregated amount should be).

Third, we address Holmes and Holmes Law's issue 3.5(d)–(e). In issue 3.5(d) they argue that, assuming the trial court erred when it denied their motion for JNOV on jury question no. 14 relating to an attorney exemption, the trial court erred when it awarded ADM Milling attorneys' fees and costs because Holmes and Holmes Law are "exempt under immunity." This argument is premised on our concluding that the trial court erred in Holmes and Holmes Law's issue 3.1. However, we have already resolved issue 3.1 against Holmes and Holmes Law. In issue 3.5(e), their argument the trial court erred when it denied their motion for JNOV because, as a matter of law, attorneys' fees could not be awarded on the statutory fraud finding is premised on the conclusion that the trial court erred when it denied their motion for JNOV on jury question no. 6(ii) because the October emails were not a valid amendment to the purchase agreement. However, on appeal, Holmes and Holmes Law have not argued error with respect to the jury's finding on jury question no. 6(ii).

Fourth, even if Holmes and Holmes Law's issue 3.5(a)–(b) and (d)–(e) was preserved, they waived their arguments. Holmes and Holmes Law's brief does not contain a clear and concise argument for their contentions, with appropriate citations to authorities. *See* R. APP. P. 38.1(i). In their brief, they include only three citations to general authority for the proposition that, when a lawsuit involves multiple claims, the plaintiff must segregate non-recoverable and recoverable fees, and "dailies" of trial transcripts should not be included in a judgment's award of costs. They do not provide citations to specific authority or any analysis of specific authority to establish their position and have presented nothing for us to review.

To the extent their issue was preserved for appellate review and not waived, Holmes and Holmes Law's issue 3.5(a)–(b) and (d)–(e) is decided against them.

VII. CONCLUSION

For the reasons stated in this opinion, the trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

170778F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

D. REGINALD STOVER, JACE HARKEY, ROBERT H. HOLMES, AND THE HOLMES LAW FIRM, INC., Appellants

No. 05-17-00778-CV V.

ADM MILLING CO., Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-13400.
Opinion delivered by Justice Lang. Justices Fillmore and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee ADM MILLING CO. recover its costs of this appeal from appellants D. REGINALD STOVER, JACE HARKEY, ROBERT H. HOLMES, AND THE HOLMES LAW FIRM, INC.

Judgment entered December 28, 2018.