Reversed and Remanded, in part, and Affirmed, in part, and Opinion Filed August 28, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01560-CV

SCOTT PELLEY P.C., THE PELLEY FAMILY LIMITED PARTNERSHIP, AND SCOTT PELLEY, INDIVIDUALLY, Appellants
V.
MICHAEL C. WYNNE, JOHN HUNTER SMITH, AND M&S WYNNE FAMILY LIMITED PARTNERSHIP, Appellees

On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause No. CV 11-1026

MEMORANDUM OPINION

Before Justices Francis, Lang, and Lang-Miers
Opinion by Justice Lang

This case involves a complicated web of claims, counterclaims, and cross-claims respecting the dissolution of the law partnership of Nall, Pelley, Wynne & Smith in Sherman, Texas. Appeals and cross-appeals were perfected with a total of five briefs, reply briefs, and cross-briefs filed in this case as well as a substantial trial court record. The record consists of nineteen volumes of clerk's record[1] and fifteen volumes of reporter's record.[2] There are a total of thirteen issues on appeal and three issues on cross-appeal submitted to us. The appeals and

[1] Ten volumes were filed in this appeal and another nine volumes were transferred to this appeal from appellate cause no. 05-15-01109-CV, which was consolidated with this appeal. Although many of the documents in the clerk's record and the transferred clerk's record are the same, the clerk's record and the transferred clerk's record are not identical.

[2] Fourteen volumes of the reporter's record were filed in this appeal and one volume was filed in appellate cause no. 05-15-01109-CV, which was consolidated with this appeal.

cross-appeals are from a trial court judgment generally in favor of Michael C. Wynne and John Hunter Smith on their counterclaims and cross-claims for breach of contract, an accounting, and attorneys' fees.

As a preliminary matter, we note that, on appeal, the parties generally assert their issues without identifying the particular parties to which each issue and cross-issue pertains. Nor do they distinguish their issues based on the particular parties who asserted or defended against the claims, counterclaims, or cross-claims in the trial court. Accordingly, based on our review of the record, including the parties' claims, counterclaims, and cross-claims, the trial court's findings of fact and conclusions of law, and the trial court's final judgment, we identified below the appropriate parties to each issue and cross-issue on appeal.

First, Scott Pelley P.C. appeals the portion of the trial court's final judgment in favor of Wynne and Smith on its claims for repudiation, breach of contract, conversion, theft, damages under the Texas Theft Liability Act, and breach of fiduciary duty. Scott Pelley P.C. raises four issues on appeal, arguing: (1) as to its claims for repudiation and breach of contract, the trial court erred "in its [c]onclusions of [l]aw" that Wynne and Smith did not (a) repudiate the 2008 Agreement, nor (b) breach the 2008 Agreement; (2) as to its claims for conversion, theft, and damages under the Texas Theft Liability Act, the trial court erred when it concluded that Wynne and Smith did not convert or steal (a) the 2010 bonus in the amount of $52,139.79, or (b) the $50,000 Cobb fee or the $391,722 LJH fee; (3) as to its claim for breach of fiduciary duty, the trial court erred when it concluded that Wynne and Smith did not breach their duties of loyalty and care; and (4) as to its claims for conversion and theft, the trial court erred when it denied its motion to compel the return of misappropriated funds.

Second, The Pelley Family Limited Partnership appeals the portion of the trial court's final judgment in favor of the M&S Wynne Family Limited Partnership on The Pelley Family

L.P.'s claim for partition of the property. In one issue, The Pelley Family L.P. argues the trial court did not have jurisdiction to render any orders in its final judgment related to the partition of the real property.

Third, Scott Pelley, individually,[3] appeals the portion of the trial court's judgment in favor of Wynne and Smith on their cross-claims for breach of contract, seeking specific performance, and voluntary judicial winding up of the partnership. Pelley raises seven issues on appeal arguing: (1) as to Wynne's and Smith's cross-claims for breach of contract, the trial court erred when it concluded that Wynne and Smith were entitled to the equitable remedy of specific performance; (2) as to Wynne's and Smith's cross-claims seeking specific performance, the evidence is legally insufficient to support the trial court's implied finding of fact that Wynne proved he was ready, willing, and able to perform his obligations; (3) as to Wynne's and Smith's cross-claims seeking specific performance, the trial court erred when it concluded against Pelley on his "unclean hands" defense; (4) as to Wynne's and Smith's cross-claims for voluntary judicial winding up of the partnership, the trial court erred when it concluded that the Texas Business Organizations Code did not apply and instead, applied the Texas Family Code; (5) as to Wynne's and Smith's cross-claims for voluntary judicial winding up of the partnership, the trial court erred when it concluded that (a) Wynne did not owe Pelley attorneys' fees for the work Pelley performed on the Gibbs Estate and Shankles Estate cases, and (b) the "reasonable compensation theory" did not apply to the Gibbs Estate and Shankles Estate cases; (6) as to Wynne's and Smith's cross-claims for voluntary judicial winding up of the partnership, the trial court erred when it concluded (a) the "reasonable compensation theory" did not apply for the determination of the law firm's assets, and (b) the challenge of Pelley to the referral fee paid to

[3] Although the case is styled with the name "Scott Pelley," the record shows that he testified his full name is "Michael Scott Pelley." Also, throughout this opinion, Scott Pelley, individually, will be referred to as "Pelley."

John Nix in the Skyberg case was without merit; and (7) as to Wynne's and Smith's cross-claims for voluntary judicial winding up of the partnership, the trial court erred in its determination of the law firm's "wrapping up expenses" because the evidence is legally insufficient to support the trial court's finding of fact that expenses totaled $310,982.

Fourth, Scott Pelley P.C. and Pelley appeal the trial court's alleged, implied order denying their motion for "criminal contempt and [seeking to impose] sanctions." Specifically, Scott Pelley P.C. and Pelley raise one issue, arguing the trial erred when it concluded that a witness did not commit perjury.

Fifth, Scott Pelley P.C., The Pelley Family L.P., and Pelley (collectively "the Pelley parties") appeal the portion of the trial court's judgment imposing joint and severable liability as to Wynne's and Smith's counterclaims against Scott Pelley P.C. and The Pelley Family L.P. In one issue, they argue the trial court erred when it pierced the corporate veil.

Finally, in a cross-appeal, Wynne and Smith appeal the portion of the trial court's final judgment in favor of Pelley on their cross-claims for breach of fiduciary duty and request for appellate attorneys' fees. Wynne and Smith raise three cross-issues arguing: (1) as to their cross-claims for breach of fiduciary duty, the trial court erred when it concluded that Pelley did not breach his fiduciary duties; (2) as to their cross-claims for breach of fiduciary duty, the evidence is factually insufficient to support the trial court's finding of fact that Pelley did not breach his fiduciary duties; and (3) as to their requests for appellate attorneys' fees, the trial court abused its discretion when it failed to include contingent attorneys' fees on appeal in the judgment.

The trial court's final judgment is reversed and remanded, in part, and affirmed, in part.

I. FACTUAL AND PROCEDURAL CONTEXT

We separate our discussions of the factual history from the procedural history and describe each of them, for the most part, in chronological order. The factual background

includes some of the statements and evidence in the extensive record on appeal and the trial court's findings of fact.

A. Factual Context

In 1983, Wynne graduated from law school and began working for the law firm of Nall, Stagner & Pelley. In 1987, he became a partner and the law firm's name became Nall, Pelley & Wynne.

In the 1990s, Pelley and Wynne purchased and renovated the property located at 707 West Washington Street, Sherman, Texas 75092 (the "Washington Street building"). The law firm and its employees moved to that building. On December 1, 1994, a joint venture was created so that Pelley and Wynne each owned 50% of the Washington Street building. On January 1, 2000, Pelley transferred his interest in the joint venture to The Pelley Family L.P. Scott Pelley P.C. was the general partner of The Pelley Family L.P. Similarly, on June 15, 2009, Wynne sold his interest in the Washington Street building to the M&S Wynne Family L.P. Wynne was the president of M&S Wynne Property Management L.L.C., which was the general partner of the M&S Wynne Family L.P.

Smith began working for the law firm in 2003 and became a partner in 2008. The law firm of Nall, Pelley, Wynne & Smith[4] was a general partnership between Pelley, Scott Pelley P.C., Wynne, and Smith.[5] Nall, Pelley, Wynne & Smith rented the Washington Street building from the joint venture, which it occupied as its office.

Pelley, Wynne, and Smith, in their individual capacities, signed a written agreement (the "2008 Agreement"), which was effective as of January 1, 2008 and for all years thereafter. The

[4] At some point Nall left the firm to become a judge, but his name was not removed from the partnership.

[5] At trial and on appeal, Pelley claimed that the law firm was a limited liability partnership and should be referred to as Nall, Pelley, Wynne & Smith L.L.P. However, in its findings of fact and conclusions of law, the trial court found that it was a general partnership. Also, at trial and on appeal, the Pelley parties claimed that Scott Pelley P.C. was the partner in the law firm, not Pelley. However, the trial court found that the partners were Pelley, Scott Pelley P.C., Wynne, and Smith, and that Pelley signed the 2008 Agreement in his individual capacity.

2008 Agreement set out a monthly draw that each partner would receive and how all law firm revenue would be distributed. It also described how distributions were to be made to Pelley and Wynne for the Gibbs Estate and Shankles Estate cases, which were Nall, Pelley & Wynne assets prior to the 2008 Agreement. It also stated that "the Yelderman [m]atters and Highway 59 matter occurred prior to the creation of [] Nall, Pelley, Wynne [&] Smith."

On January 21, 2011, the partners met to consider modifying the 2008 Agreement because the amount of income earned by Pelley was less than his "proposed 2010 end-of-year distribution" (the "2010 bonus") and it was apparent that the same situation was going to occur in 2011. During that meeting, Pelley indicated that he was inclined to "give back" a portion of his 2010 bonus.

In early February 2011, the partners met again. During that meeting, Pelley stated he was going to give Smith a portion of his 2010 bonus, even though they all agreed that Pelley was entitled to it under the terms of the 2008 Agreement. After the meeting, Smith told Wynne that he did not feel right about accepting "all of the monies" Pelley gave him so he was going to give one-third of it to Wynne. On February 12, 2011, the partners met again to discuss adjusting the allocation formula. During that meeting, Smith told Pelley that he gave Wynne a portion of the money he had received from Pelley. Based on Pelley's reaction, Smith believed that Pelley was not pleased.

On February 19, 2011, Wynne sent an e-mail to Pelley and Smith stating that "too much time has passed this year without [them] having a distribution agreement." Wynne reminded Pelley that he and Smith had provided Pelley a proposed 2011 distribution agreement and they were awaiting Pelley's counter-proposal. However, they had not received Pelley's counter-proposal. On February 23, 2011, Pelley responded to the e-mail stating, in part, that there was an agreement in place, the 2008 Agreement, unless Wynne's e-mail was intended to be a

repudiation. On February 25, 2011, Wynne and Smith delivered a response by letter, stating they wanted to continue the partnership, but the 2008 Agreement needed to be modified as to the distributions. However, they stated that any modification they would approve would not affect the agreement relating to the Gibbs Estate and Shankles Estate cases. Pelley did not respond to this letter.

On March 29, 2011, Wynne placed a handwritten note in Pelley's office, stating "Please get with [Smith] or I [sic] tomorrow." On March 31, 2011, Pelley sent Wynne and Smith an e-mail proposing that they enter into an agreement that all oral and written communications relating to a compromise or settlement will not be admissible in any later legal proceeding and that any agreement acknowledge that rule 408 of the Texas Rules of Evidence is applicable. After receiving the e-mail, Wynne and Smith went to Pelley's office and asked Pelley if he was planning to sue them. According to Wynne, Pelley responded "Yes, that is imminent." After the meeting, Smith told Wynne he could not be a law partner with someone who was going to sue him; Wynne said "I agree with you." At that point, Smith orally told Pelley he was "done with the partnership." That same evening of March 31, 2011, Wynne sent Pelley and Smith an e-mail, stating, in part:

> Regretfully, it now appears that the dissolution of the [Nall, Pelley, Wynne & Smith] partnership is inevitable and upon us. I really wish we had been able to work things out and salvage our long[-]standing partnership. It is my sincere hope that we can accomplish the winding up of the partnership in a courteous, respectful, professional[,] and efficient manner.

After the March 31, 2011 discussions and correspondence, Pelley and Scott Pelley P.C. withheld payments from the Gibbs Estate and Shankles Estate cases. Also, Pelley deposited into the Scott Pelley P.C. account monies from the Pilkilton and Miller cases, as well as others. These cases had been contracted with Nall, Pelley, Wynne & Smith before March 31, 2011. Similarly, during the partnership process that took place after the March 31, 2011 discussions

and correspondence, Wynne and Smith deposited monies into an account under their control from the Cobb and LJH cases, which were contracted before March 31, 2011. Also, Wynne and Smith retained some of "the Nall, Pelley, Wynne [&] Smith proceeds belonging to Pelley and/or Scott Pelley P.C." Pelley, Wynne, Smith, and their employees continued to occupy the Washington Street building jointly owned by The Pelley Family L.P. and the M&S Wynne Family L.P after the March 31, 2011 discussions and correspondence. Wynne and Smith continued to pay the upkeep and utilities for the office building. However, the Pelley parties did not contribute to the expenses for maintenance and operation of the building.

B. Procedural Context

After the parties' original and amended petitions, answers, counterclaims, and cross-claims were filed, the claims before the trial court were: (1) Scott Pelley P.C. and The Pelley Family L.P.'s claims against Wynne and Smith for fraudulent inducement, theft, damages under the Texas Theft Liability Act, fraud, conversion, misappropriation of the partnership property, breach of the fiduciary duties of loyalty and care, breach of contract, request for an involuntary judicial winding up of the partnership, request for an accounting, request for the appointment of an auditor, and a claim for rent; (2) The Pelley Family L.P.'s claim against the M&S Wynne Family L.P. for partition of the Washington Street building they owned together; (3) Wynne's cross-claim against Pelley for damages under the Theft Liability Act; (4) Wynne's and Smith's cross-claims against Pelley for breach of fiduciary duty, constructive fraud, breach of contract, money had and received, fraud, disgorgement, the appointment of a receiver, and a voluntary judicial winding up of the partnership; and (5) Wynne's and Smith's counterclaims against Scott Pelley P.C. and The Pelley Family L.P., and cross-claims against Pelley seeking a constructive trust and requesting an accounting and audit. In addition, Pelley asserted that he is not liable in

his individual capacity and there was a defect in parties because he did not practice law with Wynne or Smith.

During the course of the litigation, the trial court signed orders appointing a receiver and an auditor. Scott Pelley P.C. filed a motion to compel the return of misappropriated funds, which the trial court denied. Further, Scott Pelley P.C. and Pelley filed a motion for contempt and the imposition of sanctions, alleging a witness had committed perjury. The trial court carried that motion until the conclusion of the trial.

A bench trial was conducted on May 18–21, 2015. On August 31, 2015, the trial court signed an order directing a sale of the Washington Street building by auction on September 18, 2015. On September 11, 2015, Wynne and Smith filed a notice of appeal of the trial court's order of sale in appellate cause no. 05-15-01109-CV.

On October 7, 2015, the trial court signed a final judgment that: (1) awarded Wynne and Smith actual damages in the amount of $34,948.09 from Pelley and Scott Pelley P.C., jointly and severally, "which represents all [Nall, Pelley, Wynne & Smith] fees withheld by [] Pelley and/or Scott Pelley P[.]C[.] after subtracting a set-off for [Nall, Pelley, Wynne & Smith] fees currently held by Wynne and Smith"; (2) awarded Wynne and Smith reimbursement in the amount of $55,672.80 from Pelley and Scott Pelley P.C. for overhead operation expenses; (3) awarded Wynne and the M&S Wynne Family L.P. damages in the amount of $158,961.76 from the Pelley parties jointly and severally, "which represents . . . Wynne's and the M&S Wynne Family[L.P.'s] 45% share of all proceeds withheld up to May 18, 2015"; and (4) ordered that unless the parties can agree on a method to buy or sell the property, they shall furnish the name of a receiver to sell the Washington Street building within thirty days of the date of the final judgment. On October 23, 2015, in separate pleadings all of the parties requested that the trial

court make written findings of fact and conclusions of law. On November 5, 2015, the Pelley parties filed a motion for new trial, which was overruled.

On December 30, 2015, the Pelley parties filed their notice of appeal of the trial court's final judgment. On January 6, 2016, Wynne, Smith, and the M&S Wynne Family L.P. filed their notice of cross-appeal of the final judgment. On January 27, 2016, this Court consolidated appellate cause no. 05-15-01109-CV, appealing the order of sale, into this appellate cause no. 05-15-01560-CV, appealing the trial court's final judgment.

On January 29, 2016, the trial court signed two separate documents containing its findings of fact and conclusions of law: (1) the January 29, 2016 findings of fact and conclusions of law requested by Wynne and Smith; and (2) the January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties. On February 12, 2016, the Pelley parties filed their request for additional and amended findings of fact and conclusions of law. On March 23, 2016, the trial court signed its additional findings of fact and conclusions of law.

II. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

In issues one through eight, the first and second parts of issue nine, issues ten and eleven, and cross-issues one and two, the parties challenge the trial court's findings of fact and conclusions of law. In order to analyze the issues respecting the findings of fact and conclusions of law in an orderly way, we will address them in three stages. First, we will address the state of the arguments on appeal. Next, we will set out the applicable standard of review. Finally, we divide the parties' issues and arguments according to the nature and type of claim as follows: (1) Scott Pelley P.C.'s claims against Wynne and Smith for repudiation, breach of contract, conversion, theft, damages under the Texas Theft Liability Act, and breach of fiduciary duty; (2) Wynne's and Smith's cross-claims against Pelley for breach of contract, seeking specific performance, voluntary judicial winding up of the partnership, and breach of fiduciary duty; and

(3) Wynne's and Smith's counterclaims against Scott Pelley P.C. and The Pelley Family L.P. for which the trial court imposed joint and several liability.

A. Arguments on Appeal

First, we address the state of the arguments on appeal of the Pelley parties, Wynne, and Smith. In their respective issues on appeal, on only a few occasions do the parties designate, identify, or provide citations to the specific underlying findings of fact or conclusions of law they challenge. In addition, in their prayers for relief and their arguments, the Pelley parties ask only that this Court "render" a judgment in their favor. However, the record on appeal shows the trial court signed three separate documents containing its findings of fact and conclusions of law: (1) the January 29, 2016 findings of fact and conclusions of law requested by Wynne and Smith; (2) the January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties; and (3) the March 23, 2016 additional findings of fact and conclusions of law. These three documents contain a total of eighty-eight findings of fact and conclusions of law.

1. Applicable Law

A party appealing from a nonjury trial in which the trial court made findings of fact should direct its attack on the sufficiency of the evidence to specific findings of fact, rather than to the judgment generally. *See Thompson & Knight L.L.P. v. Patriot Expl. L.L.C.*, 444 S.W.3d 157, 162 (Tex. App.—Dallas 2014, no pet.) (legal malpractice case discussing standard of review for findings of fact and conclusions of law in nonjury trial and generally noting preference for appealing party to direct sufficiency attack at specific findings of fact); *Shaw v. County of Dallas*, 251 S.W.3d 165, 169 (Tex. App.—Dallas 2008, pet. denied) (appeal of judgment denying attorney's fees claim, discussing standard of review for findings of fact and conclusions of law in nonjury trial and generally noting preference for appealing party to direct sufficiency attack at specific findings of fact). However, a challenge to an unidentified finding of fact may

be sufficient if an appellate court can fairly determine from the argument which specific finding of fact the party challenges. *See Copeland v. Cooper*, No. 05-13-00541-CV, 2015 WL 83307, at *3 (Tex. App.—Dallas Jan. 7, 2015, pet. denied) (mem. op.) (appeal of default judgment awarding damages, discussing standard of review for findings of fact and conclusions of law in nonjury trial and noting challenge to unidentified finding of fact may be sufficient if appellate court can fairly determine from argument which specific finding of fact appellant challenges); *Shaw*, 251 S.W.3d at 169 (noting a challenge to an unidentified finding of fact may be sufficient if appellate court can fairly determine from argument specific finding of fact appellant challenges).

Nevertheless, when there are multiple findings of fact, multiple causes of action presented, a variety of legal theories involved, and a substantial record, it may not be possible for an appellate court to fairly determine from the appellate argument the specific findings of fact a party contends are not supported by the evidence. *See generally, In re Estate of Bessire*, 399 S.W.3d 642, 649 (Tex. App.—Amarillo 2013, pet. denied) (noting some authority for proposition that challenge to otherwise unidentified findings of fact may be sufficient if it is included in argument or issue, if after giving consideration to number of findings of fact, nature of case, and underlying elements of applicable legal theories, specific findings of fact which appellant challenges can be fairly determined from argument); *Lujan v. Villa*, No. 07-01-0277-CV, 2002 WL 1131005, at *3 (Tex. App.—Amarillo May 29, 2002, no pet.) (not designated for publication) (in appeal of sufficiency of evidence to support judgment of common law and statutory fraud, appellate court could not fairly determine specific findings of fact challenged because trial court made forty-five findings of fact, and case had multiple causes of action and presented variety of legal theories).

When a party's issue globally attacks the trial court's findings of fact and there is no method to ascertain the appellant's true objection to the sufficiency of the evidence, the findings of fact issued by the trial court are binding on the appellate court. *See In re Estate of Bessire*, 399 S.W.3d at 649 (findings of fact are binding on appellate court because there is no method to ascertain appellant's true objection to sufficiency of evidence). However, the binding nature of the trial court's findings of fact does not prevent an appellate court from reviewing the conclusions drawn from those factual findings. *See id*. (binding nature of trial court's findings of fact does not prevent appellate court from reviewing conclusions of law drawn from those factual findings); *see also Lujan*, 2002 WL 1131005, at *3 (specific findings of fact challenged on appeal could not be determined, but appellate court went on to analyze conclusion of law as to proper measure of damages).

2. Application of the Law to the Facts

As indicated above, for the most part, the parties make global attacks on the trial court's findings of fact. Accordingly, we make these observations and conclusions as a preface to our later determinations. We have attempted to fairly determine the specific findings of fact and conclusions of law the Pelley parties challenge on appeal. *See Copeland*, 2015 WL 83307, at *3 (appeal of default judgment awarding damages, discussing standard of review for findings of fact and conclusions of law in nonjury trial and noting challenge to unidentified finding of fact may be sufficient if appellate court can fairly determine from argument which specific finding of fact appellant challenges); *Shaw*, 251 S.W.3d at 169 (noting a challenge to an unidentified finding of fact may be sufficient if appellate court can fairly determine from argument specific finding of fact appellant challenges). We construe issues three and ten to argue the evidence is insufficient to support the trial court's particular findings of fact addressed in those issues. Because of the generality of the other assertions on appeal, we construe the remaining findings of fact as not

having been challenged on appeal and, as a result, they are binding on this Court. *See In re Estate of Bessire*, 399 S.W.3d at 649 (concluding that because there is no method to ascertain appellant's true objection to sufficiency of evidence, findings of fact are binding on appellate court).

We also note that when an appellant does not clarify whether it has asserted legal or factual sufficiency challenges to the trial court's findings of fact and the arguments of that party consistently seek rendition in its favor on the grounds that it proved its case as a matter of law, an appellate court will construe the appellant's arguments as asserting legal sufficiency, that is, no evidence challenges. *See Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297, 302 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (noting appellant's arguments in principal brief did not clarify whether they asserted legal or factual sufficiency challenges and construing argument as legal sufficiency challenge because appellants consistently sought rendition). Accordingly, as to the findings of fact contested in issues three and ten, we construe the arguments of the Pelley parties to raise only a legal sufficiency argument because the remedy they seek on appeal is rendition. Finally, we construe issues one, two, four, five, six, seven, eight, the first and second parts of issue nine, and issue eleven to argue only that the trial court erred in its conclusions of law.

As to the specific findings of fact challenged by Wynne and Smith on cross-appeal, we construe cross-issue two to challenge the "sufficiency of the evidence" to support the trial court's particular findings of fact addressed in that cross-issue. We note that with respect to cross-issue two, in the "argument and authorities" section of their cross-brief, Wynne and Smith do not clarify whether they are asserting a legal or factual sufficiency challenge. Yet, they provide both standards of review. Also, in the "issues presented" section, they refer to factual sufficiency. Further, they argue the trial court's findings of fact are "against the great weight and

preponderance of the evidence" and seek a "remand." Accordingly, we construe cross-issue two to raise only a factual sufficiency argument. Finally, cross-issue one appears to be a legal sufficiency argument because Wynne and Smith argue the trial court erred "as a matter of law." However, when we look beyond the label they assign to this cross-issue, we conclude the substance of their argument is that the trial court's conclusions of law are not supported by the findings of fact. Accordingly, we construe Wynne and Smith's argument as to cross-issue one to be that the trial court erred when it concluded that Pelley did not breach his fiduciary duties.

B. Standards of Review

In an appeal from a bench trial, findings of fact have the same weight as a jury's verdict. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 233 n.4 (Tex. 1993); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's verdict. *See BMC Software Belgium N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court's findings of fact are binding on the appellate court unless challenged on appeal. *See Ponderosa Pine Energy L.L.C. v. Illinova Generating Co.*, No. 05-15-00339-CV, 2016 WL 3902559, at *3 (Tex. App.—Dallas July 14, 2016, no pet.).

1. Legal Sufficiency of the Trial Court's Findings of Fact

A challenge to the legal sufficiency of the evidence supporting an adverse finding of fact on an issue for which the appellant did not have the burden of proof requires the appellant to show that no evidence supports the adverse finding. *See Graham Central Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). However, when a party attacks the legal sufficiency of an adverse finding on which it had the burden of proof, it must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *See*

Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). When reviewing the record, an appellate court determines whether any evidence supports the challenged finding of fact. *See Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.). If more than a scintilla of evidence exists to support the finding of fact, the legal sufficiency challenge will not prevail. *See Graham Central*, 442 S.W.3d at 263.

2. Review of the Trial Court's Conclusions of Law

An appellate court reviews the trial court's conclusions of law de novo. *See BMC Software*, 83 S.W.3d at 794; *Sheetz*, 503 S.W.3d at 502. An appellant may not challenge the trial court's conclusions of law for factual insufficiency, but it may review the legal conclusions drawn from the facts to determine their correctness. *See BMC Software*, 83 S.W.3d at 794. Further, a trial court's conclusions of law are not reviewable on the basis that there is legally insufficient evidence to support them. *See Farkas v. Aurora Loan Servs. L.L.C.*, No. 05-15-01225-CV, 2017 WL 2334235, at *4 (Tex. App.—Dallas May 30, 2017, no pet. h.) (mem. op.); *see also Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 944 (Tex. App.—Houston [1st Dist.] 2010, no pet.). If an appellate court determines that a conclusion of law is erroneous, but the trial court nevertheless rendered the proper judgment, the error does not require reversal. *See BMC Software*, 83 S.W.3d at 794; *Sheetz*, 503 S.W.3d at 502; *Reisler v. Reisler*, 439 S.W.3d 615, 619–20 (Tex. App.—Dallas 2014, no pet.); *Fulgham v. Fischer*, 349 S.W.3d 153, 157-58 (Tex. App.—Dallas no pet.).

C. Claims of Scott Pelley P.C. Against Wynne and Smith

In issues one, five, and six, Scott Pelley P.C. argues the trial court erred in its findings of fact and conclusions of law as to its claims for repudiation, breach of contract, conversion, theft, damages under the Texas Theft Liability Act, and breach of fiduciary duty.

1. Repudiation of the 2008 Agreement

In the second part of issue one, Scott Pelley P.C. argues the trial court erred "in its [c]onclusion[] of [l]aw that Wynne and Smith did not [] repudiate the 2008 Agreement" as to its claim for anticipatory breach.[6] It claims the evidence establishes that Wynne and Smith first repudiated and then breached the 2008 Agreement. Wynne and Smith respond that Scott Pelley P.C. "cannot show no evidence [sic] to support the trial court's finding and cannot prove . . . repudiation as a matter of law."

a. Applicable Law

Repudiation or anticipatory breach is a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance. *See Markovsky v. Kirby Tower L.P.*, No. 01-13-00516-CV, 2015 WL 8942528, at *3 (Tex. App.—Houston [1st Dist.] Dec. 15, 2015, no pet.) (mem. op.); *Van Polen v. Wisch*, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). The elements of repudiation or anticipatory breach are: (1) the defendant repudiated the obligation, (2) without just excuse, and (3) the plaintiff was damaged from the breach. *See McDonald v. McDonald*, No. 05-15-00338-CV, 2016 WL 2764881, at *5 (Tex. App.—Dallas May 11, 2016, no pet.) (mem. op.); *Poe v. Hutchins*, 737 S.W.2d 574, 578 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); *Taylor Pub. Co. v. Sys. Mktg., Inc.*, 686 S.W.2d 213, 217 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (op. on mot. for reh'g). A repudiation or anticipatory breach occurs when a party's conduct "shows a fixed intention to abandon, renounce, and refuse to perform the contract." *See Hunter v. PriceKubecka P.L.L.C.*, 339 S.W.3d 795, 802 (Tex. App.—Dallas 2011, no pet.); *SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Sci., Inc.*, 128 S.W.3d 304, 315 (Tex. App.—Dallas 2004, no

[6] Scott Pelley P.C., did not assert a claim for repudiation in its fourth amended original petition. However, based on the trial court's findings of fact and conclusions of law, and the final judgment, it appears that this claim was tried by consent.

pet.); *Grp. Life & Health Ins. v. Turner*, 620 S.W.2d 670, 673 (Tex. Civ. App.—Dallas 1981, no writ). The repudiation must be absolute and unconditional. *See Hunter*, 339 S.W.3d at 802.

b. Application of the Law to the Facts

We construe the argument of Scott Pelley P.C. to challenge the following conclusion of law in the trial court's March 23, 2016 additional findings of fact and conclusions of law:

> [II. B.] Wynne and Smith did not repudiate the 2008 Agreement in 2011, prior to their withdrawal from the law firm.

However, as to Scott Pelley P.C.'s claim for repudiation, the trial court made the following express finding of fact in the January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 11. The [trial] [[c]ourt finds that the 2008 Agreement has not been rescinded or repudiated by Wynne or Smith and has not been amended.

Also, the trial court made the following express findings of fact in its March 23, 2016 additional findings of fact and conclusions of law:

> [II.C.] Wynne and Smith, in 2011, prior to their withdrawing from the law firm and without just excuse did not indicate by unconditional words or action, that they would no longer perform their contractual obligations to Scott Pelley under the terms of the 2008 Agreement.
>
> [II.D.] Wynne [sic] and Smith's conduct did not show a fixed intention to abandon, renounce, and refuse to perform under the terms of the 2008 Agreement.

Because Scott Pelley P.C. does not challenge these findings of fact on appeal they are binding. *See Ponderosa*, 2016 WL 3902559, at *3. The above-quoted findings of fact support the trial court's conclusion of law against Scott Pelley P.C. on its claim for repudiation because they find that Wynne and Smith did not absolutely and unconditionally show a fixed intention to abandon, renounce, and refuse to perform the 2008 Agreement. *See Hunter*, 339 S.W.3d at 802; *SAVA*, 128 S.W.3d at 315; *Turner*, 620 S.W.2d at 673. Accordingly, we conclude the trial court did not err when it concluded Wynne and Smith did not repudiate the 2008 Agreement.

The second part of issue one is decided against Scott Pelley P.C.

2. Breach of the 2008 Agreement

In the first part of issue one, Scott Pelley P.C. argues the trial court erred "in its "[c]onclusion[] of [l]aw that Wynne and Smith did not breach [] the 2008 Agreement" as to its claim for breach of contract.[7] It claims the evidence establishes that Wynne and Smith breached the 2008 Agreement. Wynne and Smith respond that it "cannot show no evidence [sic] to support the trial court's finding and cannot prove breach . . . as a matter of law."

a. Applicable Law

To prove a claim for breach of contract, a plaintiff must establish: (1) the existence of a valid contract between the plaintiff and the defendant, (2) the plaintiff's performance or tender of performance, (3) the defendant's breach of the contract, and (4) the plaintiff's damage as a result of the breach. *See Hunter*, 339 S.W.3d at 802; *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 55 (Tex. App.—Dallas 2006, pet. denied).

b. Application of the Law to the Facts

We construe the argument of Scott Pelley P.C. to challenge the following conclusion of law in the trial court's March 23, 2016 additional findings of fact and conclusions of law:

> [I.E.] The Defendants, Wynne and Smith, did not materially breach the 2008 Agreement.

However, as to its breach-of-contract claim, the trial court made the following express findings of fact in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 1. A general partnership existed between [] Pelley and Scott Pelley P.C., [] Wynne and [] Smith, called Nall, Pelley, Wynne and Smith.

[7] This issue does not address Wynne's and Smith's cross-claims for breach of contract against Pelley.

2. [P]elley, [] Wynne[,] and [] Smith entered into a contract, to wit, the 2008 Agreement, which was effective as of January 1, 2008 and for all years thereafter.

12. The [trial] [c]ourt finds that [] Wynne and [] Smith did not materially breach the 2008 Agreement.

Also, the trial court made the following express findings of fact in its March 23, 2016 additional findings of fact and conclusions of law:

[I.A.] The 2008 Agreement was a valid enforceable contract.

[I.D.] The Defendants, Wynne and Smith, performed, tendered performance of, or w[ere] excused from performing their contractual obligations to [] Pelley under the terms of the 2008 Agreement.

Again, Scott Pelley P.C. does not challenge these findings of fact on appeal. As a result, these unchallenged findings of fact are binding. *See Ponderosa*, 2016 WL 3902559, at *3. These findings of fact support the trial court's conclusion of law against Scott Pelley P.C. on its breach of contract claim against Wynne and Smith because they find Wynne and Smith performed, tendered performance, or were excused from performing under the terms of the 2008 Agreement. *See Hunter*, 339 S.W.3d at 802; *Hackberry Creek*, 205 S.W.3d at 55. Accordingly, we conclude the trial court did not err when it concluded Wynne and Smith did not breach the 2008 Agreement.

The first part of issue one is decided against Scott Pelley P.C.

3. Conversion, Theft, and Recovery of Damages Under the Texas Theft Liability Act

In issue five, as to its claims for conversion, theft, and damages under the Texas Theft Liability Act, Scott Pelley P.C., argues the trial court erred when it concluded that Wynne and Smith did not convert or steal (a) the 2010 bonus in the amount of $52,138.79, or (b) the $50,000 Cobb fee or the $391,722 LJH fee.[8] It contends Wynne and Smith wrongfully converted Scott

[8] This issue does not address Wynne's cross-claim for damages under the Texas Theft Liability Act against Pelley.

Pelley P.C.'s interest in the Cobb and LJH funds that have been held in the law firm's trust account. It also maintains that Wynne and Smith continued to conceal the existence of these partnership funds by providing erroneous and misleading information regarding the law firm's financial assets. Wynne and Smith respond that the allegations are addressed in the trial court's findings of fact.

a. Applicable Law

i. Conversion

Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights. *See Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971); *Lawyers Title Co. v. J.G. Cooper Dev., Inc.*, 424 S.W.3d 713, 718 (Tex. App.—Dallas 2014, pet. denied); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 365 (Tex. App.—Dallas 2009, pet. denied). To establish a claim for conversion, a plaintiff must prove that: (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *See Lawyers Title Co.*, 424 S.W.3d at 718; *Tex. Integrated*, 300 S.W.3d at 365–66. The plaintiff also must establish it was injured by the conversion. *See United Mobile Networks L.P. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997) (per curiam); *Lawyers Title Co.*, 424 S.W.3d at 718. An action for conversion of money arises only where the money can be identified as a specific chattel, meaning it is: (1) delivered for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title

claim by the keeper. *See Lawyers Title Co.*, 424 S.W.3d at 718; *see also Edlund v. Bounds*, 842 S.W.2d 719, 727 (Tex. App.—Dallas 1992, writ denied).

ii. Theft and Texas Theft Liability Act

Pursuant to the Texas Theft Liability Act, a person who commits theft is liable for the damages resulting from the theft. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.003(a) (West 2011); *Tex. Integrated*, 300 S.W.3d at 366. Theft is defined as "unlawfully appropriating property or unlawfully obtaining services as described by [s]ection[s] 31.03, 31.04, 31.06 [or 31.11–31.14 of the Texas] Penal Code." CIV. PRAC. & REM. CODE § 134.002(a) (West Supp. 2016); *see Tex. Integrated*, 300 S.W.3d at 366; *see also* TEX. PENAL CODE ANN. §§ 31.03 (theft) (West 2016). Section 31.03(a) of the Texas Penal Code provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." PENAL CODE § 31.03(a); *see Tex. Integrated*, 300 S.W.3d at 366. Appropriation of property is unlawful if it is without the owner's effective consent. PENAL CODE § 31.03(b)(1); *Tex. Integrated*, 300 S.W.3d at 366.

b. Application of the Law to the Facts

First, we address the claims for conversion, theft, and damages under the Texas Theft Liability Act as to the 2010 bonus. We construe Scott Pelley P.C.'s argument to challenge the following conclusions of law in the trial court's March 23, 2016 additional findings of fact and conclusions of law:

> [III.A.] Defendants, Wynne and Smith, did not wrongfully exercise dominion or control over all and/or part of the bonus due to [] Pelley in the amount of $52,139.79 [the 2010 bonus].
>
> [III.B.] The Defendants, Wynne and Smith, did not unlawfully appropriate the bonus due to [] Pelley in the amount of $52,139.79 [the 2010 bonus] with the intent to deprive [] Pelley of the property.

However, Scott Pelley P.C. does not provide any argument as to why the trial court erred, as a matter of law, with respect to the 2010 bonus. Texas Rule of Appellate Procedure 38.1(i)

requires an appellant's brief to "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). Accordingly, because we conclude that Scott Pelley P.C. has failed to adequately brief this argument on appeal, there is nothing for us to review on this point.

Second, we address the claims for conversion, theft, and recovery under the Texas Theft Liability Act as to the Cobb and LJH fees. We construe Scott Pelley P.C.'s argument to challenge the following conclusions of law in the trial court's March 23, 2016 additional findings of fact and conclusions of law:

> [III.D.] Defendants, Wynne and Smith, did not wrongfully exercise dominion or control over all and/or part of the $50,000.00 Cobb fee and the $391,722 LJ[H] fee.
>
> [III.E.] The Defendants, Wynne and Smith, did not appropriate the $50,000.00 Cobb fee and the $391.722 LJH fee, nor did they intend to deprive [] Pelley of the property.

However, as to Scott Pelley P.C.'s claims for conversion, theft, and damages under the Texas Theft Liability Act, the trial court made the following express finding of fact in its March 23, 2016 additional findings of fact and conclusions of law:

> [III.C.] The $50,000.00 Cobb fee and $391.722.00 LJH fee were personal property that belonged to the [Nall, Pelley, Wynne & Smith] firm.

Because Scott Pelley P.C. does not challenge this finding of fact on appeal it is binding. *See Ponderosa*, 2016 WL 3902559, at *3. The finding of fact that the Cobb and LJH fees were the property of the law firm supports the trial court's conclusions of law against Scott Pelley P.C., on its claims for conversion, theft, and under the Texas Theft Liability Act as to the Cobb and LJH fees. *See Lawyers Title Co.*, 424 S.W.3d at 718 (element of conversion is that plaintiff owned or had possession of or entitled to possession of property and action for conversion of money requires it is not subject of title claim by keeper); *Tex. Integrated*, 300 S.W.3d at 366 (appropriation of property unlawful if it is without the owner's effective consent). We conclude

the trial court did not err when it concluded Wynne and Smith did not convert or steal the Cobb or LJH fees.

Issue five is decided against Scott Pelley P.C.

4. Breach of Fiduciary Duty Against Wynne and Smith

In issue six, Scott Pelley P.C. argues the trial court erred when it concluded Wynne and Smith did not breach their fiduciary duties of loyalty and care.[9] It claims Wynne and Smith breached their fiduciary duties by (1) their "failure to pay" the 2010 bonus and (2) their "theft" of the Cobb and LJH fees. Also, Scott Pelley P.C. argues a presumption of unfairness exists because Wynne and Smith profited or benefited "in taking the [2010] bonus of [Scott Pelley P.C.], and the Cobb and LJH fees."

The breach-of-fiduciary-duty arguments of Scott Pelley P.C. are premised on our deciding issue five in its favor by determining that the trial court erred when it concluded that Wynne and Smith did not convert or steal the 2010 bonus, the Cobb and LJH fees, or both. Because we have already determined the trial court did not err in concluding Wynne and Smith did not convert or steal the 2010 bonus, the Cobb and LJH fees, or both we need not address issue six.

Issue six is decided against Scott Pelley P.C.

D. Cross-Claims of Wynne and Smith Against Pelley

In issues two, three, four, eight, the first and second parts of issue nine, and issues ten and eleven, Pelley challenges the trial court's award of the equitable remedy of specific performance on Wynne's and Smith's cross-claims for breach of contract and decision in favor of Wynne's and Smith's cross-claims for voluntary judicial winding up of the partnership. In cross-issues

[9] This issue does not address Wynne's and Smith's cross-claims for breach of fiduciary duty against Pelley.

one and two, Wynne and Smith challenge the trial court's denial of their cross-claims against Pelley for breach of fiduciary duty.

1. Specific Performance

In issues two, three, and four Pelley challenges the trial court's ruling relating to (a) Wynne's and Smith's cross-claims for breach of contract, seeking specific performance, and (b) his defense of unclean hands to the imposition of specific performance.

a. Wynne's and Smith's Request for Equitable Remedy of Specific Performance

In issues two and three, Pelley argues: (1) the trial court erred when it concluded Wynne and Smith were entitled to specific performance; and (2) the evidence is legally insufficient to support the trial court's implied finding of fact that Wynne was ready, willing, and able to perform his obligations. Pelley claims the record shows that Wynne and Smith waived the remedy of specific performance because they failed to include that claim in their pleading, the trial court incorrectly concluded Wynne and Smith were entitled to specific performance because they repudiated or breached the 2008 Agreement, there is no evidence that Wynne was ready, willing, and able to perform his obligations, and the trial court erred in granting Wynne and Smith damages. Wynne and Smith respond that the trial court's findings of fact, relating to the claims of Scott Pelley P.C. for repudiation and breach of contract, support the trial court's conclusion that Wynne and Smith were entitled to specific performance. Also, Wynne argues the evidence shows that he attempted "to work out a modification for the years beginning with 2011 and keeping the partnership together."

i. Applicable Law

Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. *See Goldman v. Olmstead*, 414 S.W.3d 346, 361 (Tex. App.—Dallas 2013, pet. denied); *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas

2007, pet. denied). The equitable remedy of specific performance operates to compel a party violating a duty under a valid contract to comply with its obligations. *See Woody v. J. Black's L.P.*, No. 07-12-00192-CV, 2013 WL 5744359, at *5 (Tex. App.—Amarillo Oct. 18, 2013, pet. denied) (mem. op.). Specific performance is not a separate cause of action, but rather it is an equitable remedy used as a substitute for monetary damages when such damages would not be adequate. *See In re Staley*, 320 S.W.3d 490, 499 (Tex. App.—Dallas 2010, no pet.); *Stafford*, 231 S.W.3d at 535. Specific performance is an equitable remedy committed to the trial court's discretion. *See Stafford*, 231 S.W.3d at 535. A pleading is sufficient to place the defendant on notice that the plaintiff is seeking specific performance when the plaintiff pleads a cause of action for breach of contract and asserts that he does not have an adequate remedy at law. *See id.*

A plaintiff seeking specific performance must plead and prove: (1) compliance with the contract, including tender of performance, unless excused by the defendant's breach or repudiation; and (2) the readiness, willingness, and ability to perform at relevant times. *See DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008); *Smith v. Dass, Inc.*, 283 S.W.3d 537, 545 (Tex. App.—Dallas 2009, no pet.). This means even though a defendant refuses to perform its contractual obligations, a plaintiff must show it could have performed its contractual obligations. *See Woody*, 2013 WL 5744359, at *5 (citing *DiGiuseppe*, 269 S.W.3d at 593). The plaintiff's burden of proving readiness, willingness, and ability is a continuing one that extends to all times relevant to the contract and thereafter. *See DiGiuseppe*, 269 S.W.3d at 593; *Woody*, 2013 WL 5744359, at *5; *Henry S. Miller Co. v. Stephens*, 587 S.W.2d 491, 492 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). Even in the face of repudiation of the contract by the defendant, a plaintiff seeking specific performance must demonstrate his own readiness, willingness, and ability to perform on the date set by the contract before ordering the defendant to perform. *See DiGiuseppe*, 269 S.W.3d at 595; *Woody*, 2013 WL 5744359, at *5.

Recovering economic damages for breach of contract and obtaining specific performance of a contract are inconsistent, alternative theories for relief. *See Goldman*, 414 S.W.3d at 361; *see also Holmes v. Jetall Co.*, No. 01-15-00326-CV, 2016 WL 3662645, at *8 (Tex. App.—Houston [1st Dist.] July 7, 2016, pet. denied) (mem. op.). If a party sues for damages, he has elected to treat the contract as terminated by the breach and to seek compensation for that breach. *See Goldman*, 414 S.W.3d at 361. However, if a party sues for specific performance, he affirms the contract and requests the trial court to effectuate the agreement. *See Goldman*, 414 S.W.3d at 361; *see also Davis v. Luby*, No. 04-09-00662-CV, 2010 WL 3160000, at *3 (Tex. App.—San Antonio Aug. 11, 2010, no pet.) (mem. op.); *Byram v. Scott*, No. 03-07-00741-CV, 2009 WL 1896076, at *3 (Tex. App.—Austin July 1, 2009, pet. denied) (mem. op.). Nevertheless, the relief associated with specific performance may include monetary compensation in narrow circumstances—when it is necessary to place the parties in the same position as if the contract had been performed in full. *See Goldman*, 414 S.W.3d at 361; *Heritage Hous. Corp. v. Ferguson*, 674 S.W.2d 363, 365–66 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). Such compensation is incident to a decree for specific performance and does not amount to legal damages for breach of contract. *See Goldman*, 414 S.W.3d at 361; *Heritage Hous.*, 674 S.W.2d at 366. Further, courts have recognized that a "valid claim" under section 38.001 of the Texas Civil Practices and Remedies Code is not limited to a claim for monetary damages, but also encompasses specific performance of the agreement to avoid actual damages. *See Boyaki v. John M. O'Quinn & Assocs. P.L.L.C.*, No. 01-12-00984-CV, 2014 WL 4855021, at *14 (Tex. App.—Houston [1st Dist.] Sept. 30, 2014, pet. denied) (mem. op.) (specific enforcement of a settlement agreement permitted recovery of Chapter 38 attorneys' fees); *Albataineh v. Eshtehardi*, No. 01-12-00671-CV, 2013 WL 1858864, at *2 (Tex. App.—Houston [1st Dist.] May 2, 2013, no pet.) (mem. op.) (judgment requiring specific performance of material contract

right can support award of attorneys' fees under Chapter 38); *Rasmusson v. LBC PetroUnited, Inc.*, 124 S.W.3d 283, 287 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (concluding that award of specific performance of arbitration agreement permitted recovery of Chapter 38 attorneys' fees and rejecting argument that monetary damages were required).

ii. Application of the Law to the Facts

Initially, we note that Wynne's and Smith's cross-claim for breach of contract against Pelley was the underlying cause of action for which the remedy of specific performance was sought. In their second amended cross-claims, Wynne also alleged that Pelley breached the 2008 Agreement, in part, by failing to pay Wynne amounts due to him under that agreement in the Gibbs Estate and Shankles Estate cases, and by holding and failing to deposit into the firm partnership account the fees collected by Pelley that belong to the partnership.

First, we address the argument of Pelley in issue three, that Wynne failed to plead his request for specific performance, waiving this equitable remedy.[10] In their second amended cross-claims, Wynne and Smith alleged cross-claims for breach of contract and stated they "had to hire counsel to recover damages for the breaches stated herein as well as others committed by Pelley. Wynne and Smith therefore seek to recover attorneys['] fees against [] Pelley as authorized by law and equity." In their prayer for relief, Wynne and Smith also stated that they were requesting a judgment "on their [cross-]claims and for such other and further relief as may be afforded at law and in equity. . . . [and] pray for all further relief in law and equity as they may show themselves justly entitled." Pelley failed to specially except to those allegations, so we construe Wynne and Smith's cross-pleadings liberally. *See Stafford*, 231 S.W.3d at 535.

Construing the cross-pleadings liberally in Wynne's favor, they were sufficient to place Pelley on notice that Wynne was seeking an equitable remedy. Also, at trial, during the opening

[10] Pelley does not assert this argument as to Smith.

statements, counsel for Pelley stated: "They didn't confirm the 2008 agreement and they didn't pay him his bonus. And under the Glass case that—that I know we've cited before, they can no longer enforce specific performance." Also, Pelley testified:

> Well, he repudiated the agreement. He's no longer entitled under the Supreme Court case of—I think it's Glass v. Anderson, to obtain specific performance under the terms of the 2008 agreement after he either repudiated or breached it.
>
> So it wouldn't—and the theory being under the Supreme Court case that if you're a breaching party, you're not entitled to specific performance, he shouldn't be paid any more of the Gibbs/Shankles case because I'm not getting paid any more—I'm not getting paid my 20 percent from any source, so why should he receive any payment—further payments from Gibbs and Shankles.

Further, during the closing argument, counsel for Pelley argued:

> In our posttrial [sic] brief, and we've mentioned during the course of the trial, the Glass versus Anderson case, Texas Supreme Court, and it provides and holds that after that breach and after that repudiation, Wynne and Smith can no longer demand specific performance, including Mr. Wynne's payment of the Gibbs and Shankles fees in the future.

See Stafford, 231 S.W.3d at 537 (noting appellant's counsel raised issue of specific performance in argument before trial court).

The record shows that in their pleading, Wynne and Smith generally sought equitable recovery, that counsel for Pelley raised the issue of specific performance in his opening statement and during closing argument, and Pelley testified regarding specific performance. Accordingly, we conclude that Wynne did not waive his request for the equitable remedy of specific performance.

Second, we address the argument of Pelley, in issue three, that the evidence is legally insufficient to support the trial court's implied finding that Wynne was ready, willing, and able to perform his obligations under the 2008 Agreement.[11] The record shows that Wynne testified

[11] Pelley argues that Wynne waived his request for specific performance when he failed to obtain a written finding of fact on the element requiring proof that he was ready, willing, and able to perform at all relevant times. He does not assert this argument as to Smith. However, the record shows that neither party requested an additional finding of fact on this element of specific performance. When one or more elements have been found by the trial court, omitted unrequested elements of a ground of recovery or defense, when supported by evidence,

he has been practicing law with Pelley since the early 1980s and they entered into a partnership agreement that became effective on January 1, 2008. That 2008 Agreement continued without dispute for two years. Then, in 2010, the following income was produced for the partnership: Wynne produced $650,000; Pelley produced $94,000; and Smith produced $429,000. Nevertheless, Wynne and Smith did not propose varying from the 2008 Agreement with respect to the 2010 distributions. However, in January 2011 there was a partners' meeting to discuss modification of the 2008 Agreement because the distribution levels were no longer equitable now that Pelley was not working full time. In addition, a letter dated February 25, 2011, from Wynne and Smith to Pelley was admitted into evidence. That letter suggested the possible terms of an agreement in order that the partnership could continue and states, in part:

> [W]e would like you to know that it is our desire to continue the partnership if at all possible. . . .
>
> We think the Gibbs/Shankles fees should either not be considered when distributing firm profits (as is the case now pursuant to the 2008 [A]greement); or that all Gibbs and Shankles fees be deposited in the to [sic] law firm account and distributed in accordance with the distribution formula.
>
> We would like [to] put 2010 behind us and work on a fair and equitable distribution agreement/modification . . . for 2011. The agreement concerning Gibbs and Shankles would not be affected.

This evidence shows that even when faced with the dissolution of the partnership, Wynne was ready, willing, and able to perform in accordance with the 2008 Agreement. *See DiGiusseppe*, 269 S.W.3d at 593; *Woody*, 2013 WL 5744359, at * 5; *Henry S. Miller*, 587 S.W.2d at 492. Accordingly, we conclude the evidence is legally sufficient to support the trial court's implied finding of fact that Wynne was ready, willing, and able to perform.

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will be supplied by presumption. *See* TEX. R. CIV. P. 299; *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.—Houston [14th Dist.] 1999, pt. denied) (discussing when omission of finding of fact inadvertent or deliberate). Accordingly, we conclude that Wynne did not waive his request for specific performance.

Third, we address the argument of Pelley, in issue two, that the trial court incorrectly concluded Wynne and Smith were entitled to specific performance because they repudiated or breached the 2008 Agreement. While Pelley made only this general assertion of error, we construe this argument to challenge conclusions of law no. 34 in the trial court's January 29, 2016 findings of fact and conclusions of law that were requested by the Pelley parties and conclusion of law no. II.E in the trial court's January 29, 2016 findings of fact and conclusions of law that were requested by Wynne and Smith. Conclusion of law no. 34 states the following:

> 34. The terms of the 2008 Agreement are to remain in place and shall be used to determine the division of properties, fees[,] and profits for the years 2010 to [the] present with regard to the Gibbs Estate and Shankles Estate cases. Consequently, with regard to the Gibbs Estate case, [] Pelley is entitled to receive 55% of all properties, fees, and profits (including any collected, pre-dissolution "deferred attorneys[']fees") and [] Wynne is entitled to receive 45% of all properties, fees[,] and profits (including any collected, pre-dissolution "deferred attorneys[']fees").

Conclusion of law no. II.E. states the following:

> [II.E.] With Wynne and Smith not having repudiated the 2008 Agreement:
>
> 1. Wynne and Smith continued to be entitled to the equitable remedy of specific performance of the 2008 Agreement, including, but not limited to[,] any claims by Wynne of entitlement to payment of any fees regarding either the Gibbs and/or Shankles cases.
>
> 2. Wynne is entitled to an award of attorney[s'] fees in the amount of $40,000.00, arising out of his pursuit of any claims of either the Gibbs and/or Shankles cases.

The trial court made the following express findings of fact in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 2. [P]elley, [] Wynne[,] and [] Smith entered into [a] contract, to wit, the 2008 Agreement, which was effective as of January 1, 2008 and for all years thereafter.
>
> 5. The 2008 Agreement also controls distributions as between [] Wynne and [] Pelley regarding the Gibbs Estate and Shankles Estate cases.

> 21. The 2008 Agreement requires [] Pelley to pay [] Wynne 45% of all monies received in the Gibbs Estate case and 40% of all monies received in the Shankles Estate case.
>
> 22. This is a valid contract between [] Pelley and [] Wynne. [W]ynne performed or tendered performance under the contract. [W]ynne has never breached or repudiated this contract.
>
> 23. [W]ynne and M&S Wynne Family[, L.P.,] and [] Pelley and [The] Pelley Family[, L.P.,] were partners as pertains to the Gibbs Estate and Shankles Estate cases.
>
> 25. Since December, 2010, [] Pelley has failed to tender to [] Wynne his 40% share from the Shankles Estate case, thus breaching the contract. . .
>
> 27. On or about October 8, 2012, [] Pelley, via e[-]mail, caused Ricky Brantley to stop distributing [] Wynne's 45% of [the] proceeds from sale of Gibbs Estate properties to [] Wynne and, instead, distribute[d] that money to [] Pelley. This was done without [] Wynne's knowledge.
>
> 28. The Court finds that [] Pelley breached the 2008 Agreement as between he and [] Wynne by causing payment to [] Wynne to be withheld in the Gibbs Estate case. . . .

Further, the trial court made the following express findings of fact in its March 23, 2016 additional findings of fact and conclusions of law:

> [I.A. and II.A.] The 2008 [A]greement was a valid[,] enforceable contract.

Finally, Pelley does not challenge these findings of fact on appeal.

The above-listed, unchallenged findings of fact are binding on appeal. *See Ponderosa*, 2016 WL 3902559-CV, at *3. These findings of fact support the trial court's conclusions of law in favor of Wynne and Smith's request for specific performance. Accordingly, we conclude the trial court did not err when it concluded Wynne and Smith were entitled to the equitable remedy of specific performance.

Fourth, we address the argument of Pelley, in issue two, that the trial court erred in granting Wynne and Smith damages. In a heading for issue two, Pelley writes the trial court erred "[i]n awarding to Wynne damages, attorney's fees of $40,000, and prejudgment interest for pursuing the recovery of Gibbs/Shankles fees." Although specific performance is an alternative

remedy to damages, the relief associated with specific performance may include monetary compensation when it is necessary to place the parties in the same position as if the contract had been performed. *See Goldman*, 414 S.W.3d at 361–62. Pelley does not provide any argument other than this heading as to how the amounts awarded constitute damages rather than specific performance in the form of monetary compensation. The parties sought specific performance of the contract as to partnership distributions and the proceeds from the Gibbs Estate and Shankles Estate cases, which would necessarily be monetary. Also, the trial court's award of specific performance on Wynne's and Smith's breach-of-contract cross-claims entitled them to an award of attorneys' fees under Chapter 38 of the Texas Civil Practices and Remedies Code. *See Boyaki*, 2014 WL 4855021, at *14; *Albataineh*, 2013 WL 1858864, at *2 ; *Rasmusson*, 124 S.W.3d at 287.

Issues two and three are decided against Pelley.

b. Doctrine of Unclean Hands

In issue four, Pelley argues the trial court erred when it concluded in favor of Wynne and Smith on his "unclean hands" defense to specific performance. He claims that Wynne and Smith had unclean hands because Scott Pelley P.C. established Wynne and Smith converted Scott Pelley P.C.'s 2010 bonus in the amount of $52,139.79 and "fees belonging to the law firm" by wrongfully withdrawing them from the law firm's trust account. Wynne and Smith respond that Pelley has never offered proof that he was harmed and[,] in fact[,] abundant proof exists that he was not because he received a portion of those fees at the exact time he should have under the 2008 Agreement."

The doctrine of unclean hands operates as a bar to the equitable relief of specific performance. *See Stafford*, 231 S.W.3d at 5356 n.4. The party claiming the plaintiff had unclean

hands has the burden to show it was injured by the plaintiff's unlawful or inequitable conduct. *See Stafford*, 231 S.W.3d at 5356 n.4.

Pelley's "unclean hands" argument is premised on his assertion that Wynne and Smith converted or stole the 2010 bonus or fees. However, we have already concluded the trial court did not err in that respect. Accordingly, we need not address issue four.

Issue four is decided against Pelley.

2. Request for Voluntary Judicial Winding Up of the Partnership

In issue eight, the first and second parts of issue nine, and issues ten and eleven, Pelley argues the trial court erred in its conclusions of law relating to Wynne's and Smith's cross-claims requesting a voluntary judicial winding up of the partnership. He argues the trial court erred when: (1) it concluded that section 152.202 of the Texas Business Organizations Code did not apply and instead applied the Texas Family Code; (2) it concluded the "reasonable compensation theory" did not apply for the determination of the law firm's assets; (3) it concluded that its challenge to the referral fee paid to John Nix in the Skyberg case was without merit, (4) it determined the law firm's "wrapping up expenses" because the evidence is legally insufficient to support the trial court's finding of fact that expenses totaled $310,982; and (5) it concluded that (a) Wynne did not owe Pelley attorneys' fees for the work he performed on the Gibbs Estate and Shankles Estate cases, and (b) the "reasonable compensation theory" did not apply to the Gibbs Estate and Shankles Estate cases.

a. The Texas Family Code was Not Applied to this Case

First, we address Pelley's argument, in issue eight, that the trial court erred when it applied the Texas Family Code rather than the correct statute, section 152.202 of the Texas Business Organizations Code. In support of his argument, Pelley directs us to the following portion of the reporter's record on appeal where the trial court stated: "All right. First of all, let

me tell you, this is in many ways, in my view, like a divorce. After many years, and obviously very successful years, that you all have had as partners, I'm sorry that it came to this situation, but it has[.]" We disagree that this statement demonstrates the trial court misapplied the law. Further, there is nothing in the trial court's findings of fact and conclusions of law to suggest the trial court applied the Texas Family Code to this case. Instead, in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 8. The [trial] [c]ourt [concludes] that the 2008 Agreement will be used to distribute Nall, Pelley, Wynne [&] Smith firm proceeds during the winding up.

Accordingly, we conclude the record does not show the trial court applied the Texas Family Code to this case.

Issue eight is decided against Pelley.

b. Determination of the Law Firm's Assets

Second, we address Pelley's argument, in the first part of issue nine, that the trial court erred when it concluded the "reasonable compensation theory" did not apply in determining the law firm's assets. Pelley claims section 152.203 of the Texas Business Organizations Code requires application of the "reasonable compensation theory" and he offered the only evidence of the amount of reasonable compensation for post-dissolution services. In short, he claims his remuneration should have been based on his hourly rate for the contingency fees cases, including the Pilkilton and Miller cases. Pelley claims the trial court instead inappropriately applied the "passage of time theory." Wynne and Smith respond that Pelley does not attack the trial court's findings of fact. They claim the trial court expressly addressed the Pilkilton and Miller cases in its findings of fact and the remaining contingency fee cases discussed were all settled after March 31, 2011, the date Wynne and Smith notified Peley thet were dissolving the law firm, and were apportioned in the same manner as the Pilkilton and Miller cases.

i. Applicable Law

"[The] [w]inding up of a domestic entity is required on . . . a voluntary decision to wind up the domestic entity." TEX. BUS. ORGS. CODE ANN. § 11.051(2) (West 2012); *see also Gonzales v. Maggio*, 500 S.W.3d 656, 664 n.25 (Tex. App.—Austin 2016, no pet.). "Unless otherwise provided by the partnership agreement or statute, a voluntary decision to wind up a domestic general partnership [not having a specific duration or purpose] requires the express will of a majority-in-interest of the partners who have not assigned their interests." BUS. ORGS. CODE § 11.057(a); *see also Gonzales*, 500 S.W.3d at 664 n.25. Section 152.701(1) provides that "[o]n the occurrence of an event requiring winding up of a partnership business under section 11.051 or 11.057[], the partnership continues until the winding up of its business is completed, at which time the partnership is terminated." BUS. ORGS. CODE § 152.701(1); *CBIF Ltd. P'ship v. TGI Friday's, Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *11 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.). Also, section 152.502 of the Texas Business Organizations Code provides that "[a] partnership continues after an event of withdrawal." BUS. ORGS. CODE § 152.502; *see also Fleming & Assocs. L.L.P. v. Barton*, 425 S.W.3d 560, 572 n.13 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

"[O]n the application of a domestic entity or an owner or member of a domestic entity, a court may: (1) supervise the [voluntary] winding up of the domestic entity; (2) appoint a person to carry out the winding up of the domestic entity; or (3) make any other order, direction, or inquiry that the circumstances may require." BUS. ORGS. CODE § 11.054; *see also Spiritas v. Davidoff*, 459 S.W.3d 224, 233 (Tex. App.—Dallas 2015, no pet.). After the occurrence of an event requiring a winding up of a partnership business, the partnership business may be wound up by: (1) the partners who have not withdrawn; (2) the legal representative of the last surviving partner; or (3) a person appointed by the court to carry out the winding up. *See* BUS. ORGS.

CODE § 152.702; *see also Spiritas*, 459 S.W.3d at 233. In winding up the partnership business, the property of the partnership, including required contributions of the partners, shall be applied to discharge its obligations to creditors and a surplus shall be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under section 152.707. *See* BUS. ORGS. CODE § 152.706(a), (b). Each partner is entitled to a settlement of all partnership accounts on winding up the partnership business. *See* BUS. ORGS. CODE § 152.707(a). The partnership shall make a distribution to a partner in an amount equal to that partner's positive balance in the partner's capital account. *See* BUS. ORGS. CODE § 152.707(d).

In contrast, section 11.314 of the Texas Business Organizations Code is titled "Involuntary Winding Up and Termination of Partnership or Limited Liability Company." BUS. ORGS. CODE § 11.314. That section states that:

> A district court . . . has jurisdiction to order the [involuntary] winding up of a domestic partnership . . . on application by:
>
> (1) a partner in the partnership if the court determines that:
>
> (A) the economic purpose of the entity is likely to be unreasonably frustrated [(the economic purpose basis)]; or
>
> (B) another partner has engaged in conduct relating to the partnership's business that makes it not reasonably practicable to carry on the business in partnership with that partner [(the partner-conduct basis)]; or
>
> (2) an owner of the partnership . . . if the court determines that it is not reasonably practicable to carry on the entity's business in conformity with its governing documents [(governing-documents basis)].

BUS. ORGS. CODE § 11.314; *see also CBIF Ltd.*, 2017 WL 1455407, at *9 & n.9.

ii. Application of the Law to the Facts

Initially, we note that there appears to be some confusion on the part of the parties regarding whether the trial court voluntarily or involuntarily wound up the partnership. On appeal, Pelley appears to refer to the involuntary winding up of a partnership, while Wynne and Smith cite to the portion of the statute addressing a voluntary winding up of a partnership.

The record shows that Scott Pelley P.C. asserted a claim against Wynne and Smith seeking an involuntary judicial winding up of the partnership under section 11.314 of the Texas Business Organizations Code, alleging that:

> Wynne and Smith have engaged in wrongful conduct relating to the partnership business, which included breach of contractual agreements, attempted wrongful withdrawal from the partnership, fraud, conversion, and misappropriation of partnership/fiduciary funds, that makes it not reasonably practicable for [] Scott Pelley P.C.[] to carry on the business of the practice of law in partnership with [] Wynne and Smith..

Also, Wynne and Smith asserted a cross-claim against Pelley requesting the trial court to "judicially wind the partnership up in accordance with [Texas] Business Organizations Code [section] 11.054" and prayed for "a judicially supervised winding up."

In its findings of fact and conclusion of law, the trial court concluded that Wynne and Smith did not breach the contract or their fiduciary duties, and did not convert or steal funds. The trial court also did not make any findings of the existence of exigent circumstances listed in section 11.314 of the Texas Business Organizations Code that would have authorized it to order the involuntary winding up and termination of the partnership. *See* BUS. ORGS. CODE § 11.314; *see also CBIF Ltd.*, 2017 WL 1455407, at *9 & n.9. Also, in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties the trial court found, "[a]ll parties have requested the [trial] [c]ourt to judicially wind up the Nall, Pelley, Wynne [&] Smith partnership." Based on the trial court's findings of fact and conclusions of law, we conclude the trial court supervised a voluntary judicial winding up of the partnership as requested by Wynne and Smith in their cross-claims against Pelley and address the first part of issue nine accordingly.

Pelley argues the trial court should have applied the "reasonable compensation theory," which he claims is "based upon a remuneration to the attorney at his hourly rate." The only authority he provides for this theory is section 152.203(c) of the Texas Business Organizations Code, which states: "A partner is not entitled to receive compensation for services performed for

a partnership other than reasonable compensation for services rendered in winding up the business of the partnership." BUS. ORGS. CODE § 152.203(c); *see also Gonzales*, 500 S.W.3d at 666 n.35. However, Pelley does not explain how this section pertains to the distribution of the firm's assets on dissolution. Further, he does not cite to, nor have we found, any authority describing or discussing the "reasonable compensation theory." Accordingly, we conclude the trial court did not err when it concluded the law firm's assets should be distributed in accordance with the 2008 Agreement.

The first part of issue nine is decided against Pelley.

c. Referral Fee

Third, we address the argument of Pelley, in the second part of issue nine, that the trial court erred when it concluded that his challenge to the referral fee paid to John Nix in the Skyberg case, which was based on the fee allegedly being in violation of the disciplinary rules, was without merit. Wynne and Smith respond that evidence was admitted at trial showing the clients were advised of the referral fee and agreed to it in writing. They also contend there is no private cause of action under the Texas Disciplinary Rules of Professional Conduct.

i. Applicable Law

The Texas Disciplinary Rules of Professional Conduct expressly state that a violation of the rules does not give rise to a private cause of action. Tex. Disciplinary Rules of Prof'l Conduct preamble: scope ¶ 15, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2013) ("These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached."); *see also Douglas-Peters v. Cho, Choe & Holen P.C.*, No. 05-15-01538-CV, 2017 WL 836848, at *20 (Tex. App.—Dallas Mar. 3, 2017, no pet.) (mem. op.); *Blankinship v. Brown* 399 S.W.3d 303, 311

(Tex. App.—Dallas 2013, pet. denied); *McGuire, Craddock, Strother & Hale P.C. v. Transcontinental Realty Inv'rs, Inc.*, 251 S.W.3d 890, 896 (Tex. App.—Dallas 2008, pet. denied). A claim that a lawyer has violated a rule of professional conduct should be raised in a disciplinary proceeding. *See McGuire*, 251 S.W.3d at 896.

ii. Application of the Law to the Facts

We construe Pelley's argument to challenge the following conclusion of law in the trial court's January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 42. The [trial] [c]ourt [concludes] that [] Pelley's and/or Scott Pelley P[.]C[.]'s challenge to the referral fee paid to [] Nix in the Skyberg case is without merit and should be denied.

At trial and on appeal, Pelley claimed "Nix was prohibited by [Texas Disciplinary Rule 104(e)] from collecting a contingent referral fee for representing a defendant in a criminal case" and "Wynne did not comply with [Texas Disciplinary] Rule 104(g) prior to paying Nix." As a result, according to Pelley the trial court erred in failing to require Wynne to account for and return to the partnership the referral fee paid to Nix arising out of the Skyberg litigation. However, Pelley's assertion that Wynne violated a rule of professional conduct should be raised in a disciplinary proceeding. *See McGuire*, 251 S.W.3d at 896. The Texas Disciplinary Rules of Professional Conduct expressly state that a violation of the Code of Professional Responsibility does not give rise to a private cause of action. *See* Tex. Disciplinary Rules of Prof'l Conduct preamble: scope ¶ 15; *Blankinship*, 399 S.W.3d at 311. Accordingly, we are not persuaded by the argument of Pelley that the trial court erred when it concluded his challenge to the referral fee paid to Nix in the Skyberg case was without merit. *See Blankinship*, 399 S.W.3d at 311 (in appellants' challenged reliance element of negligent misrepresentation claim, court of appeals stated Texas Rules of Disciplinary Procedure did not apply under facts of case, and commented it

was not persuaded by appellants' argument and noted those rules do not give rise to a private cause of action).

The second part of issue nine is decided against Pelley.

d. Legal Sufficiency of the Evidence to Support the Amount of Expenses

Fourth, we address the argument of Pelley, in issue ten, that "the [trial court] erred in its determination of the law firm's 'wrapping up' expenses" because the evidence is legally insufficient to support the trial court's finding of fact that expenses totaled $310,982. Wynne and Smith respond that they can locate no such finding of fact that expenses totaled $310,982, the issue is waived for failure to adequately brief,[12] and the trial court made several findings of fact pertaining to the law firm's assets and expenses. We agree with Wynne and Smith.

The trial court's findings of fact and conclusions of law do not contain a finding of fact that expenses totaled $310,982. Instead, the trial court expressly found and concluded in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties the following:

> 39. Wynne and Smith have continued to pay upkeep and utilities at 707 Washington Street and none of the Pelley Parties has contributed to the expenses paid by them.
>
> 40. The [trial] [c]ourt finds that the following is a fair and equitable manner of dividing overhead and operating expenses among the parties for upkeep of the building and businesses: Overhead and operating expenses owed to Wynne [and] Smith shall be determined by accounting documents prepared by Wynne [and] Smith's accountant. The Pelley parties shall pay Wynne [and] Smith a sum equal to fifteen point two [percent] (15.2%) of all overhead and operating expenses incurred by Wynne [and] Smith in the years 2012, 2013, 2014, and 2015. The Pelley parties shall not be responsible for the following expenses incurred by Wynne [and] Smith: postal meter, computer, advertising, shredding Services, magazine subscriptions[,] and expenses relating to the employment of Deborah McCoy.

[12] We note that, although Scott Pelley P.C. provides citations to the record on appeal, it does not cite any legal authority to support its argument with the exception of a citation to section 152.706(a) of the Texas Business Organizations Code in its reply brief.

41. The [trial] [c]ourt finds that from January 1, 2012 through July, 2015, [] Pelley owes Wynne and Smith $55,672.80 for his 15.2% share of upkeep and overhead expenses.

However, Pelley does not challenge these findings of fact and conclusions of law on appeal. The above unchallenged findings of fact are binding on appeal. *See Ponderosa*, 2016 WL 3902559, at *3.

Accordingly, for the reasons stated above, we conclude the trial court did not err "in its determination of the law firm's 'wrapping up' expenses" as asserted by Pelley.

Issue ten is decided against Pelley.

e. Payment of Attorneys' Fees

Finally, we address the argument of Pelley, in issue eleven, where he argues the trial court erred when it concluded that: (1) Wynne did not owe him attorneys' fees for the work that he performed on the Gibbs Estate and Shankles Estate cases; and (2) the "reasonable compensation theory" did not apply to the Gibbs Estate and Shankles Estate cases. He argues that "[i]f the 2008 [A]greement is being specifically enforced, then the provision for payment of [Scott Pelley P.C.,] for work performed after January 1, 2009, should also be enforced rather than granting Wynne this unagreed win[d]fall." Also, he claims that "if the [t]rial [c]ourt was correct in specifically enforcing the 2008 Agreement, then in that event, it nonetheless erred in its failure to correctly apply the "[r]easonable [c]ompensation theory" contained in both the Texas Partnership Act and the 2008 Agreement, to the Gibbs and Shankles cases being handled by [Scott Pelley P.C.]

In his brief on appeal, we note that although Pelley provides citations to the record, he does not provide citations to the authorities he contends support his arguments. We acknowledge that he does provide one general reference to the "Texas Partnership Act," but that reference is to the entire act and does not specify the sections he contends apply. In his reply

brief, he provides two general citations to the parol evidence rule. Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to "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). Accordingly, we conclude that Pelley has failed to adequately brief issue eleven on appeal.[13] There is nothing for us to review.

Issue eleven is decided against Pelley.

3. Breach of Fiduciary Duty Against Pelley

In cross-issues one and two, Wynne and Smith argue as to their cross-claim for breach of fiduciary duty: (1) the trial court erred when it concluded that Pelley did not breach his fiduciary duties; and (2) the evidence is factually insufficient to support the trial court's finding of fact that "Pelley did not breach his fiduciary duty to [] Wynne by diverting proceeds Wynne was supposed to receive as Pelley's partner in connection with the Gibbs Estate and Shankles Estate cases."[14] Even if the trial court erred when it decided against Wynne and Smith as to their breach-of-fiduciary-duty cross-claim against Pelley, Wynne and Smith must show that the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1).

a. Applicable Law

Texas Rule of Appellate Procedure 44.1(a) provides that:

> No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:
>
> (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.

[13] Nevertheless, we note that although Pelley challenges the trial court's conclusions of law as to the compensation owed as a result of specific performance, he does not challenge findings of fact nos. 26, 29, 30–33, and 35 in the trial court's January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties. These unchallenged findings of fact are binding on appeal and preclude the arguments of Pelley. *See Ponderosa*, 2016 WL 3902559, at *3.

[14] In their cross-claims, Wynne and Smith also alleged Pelley breached his fiduciary duties as to the Yelderman and Highway 59 matters. The trial court concluded those matters were barred by the statute of limitations. On cross-appeal, they do not argue the trial erred with respect to those matters.

TEX. R. APP. P. 44.1(a)(1)–(2); *see also G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (applying harmless error rule to trial court error in granting summary judgment). The harmless error rule applies to all errors. *See Magee*, 347 S.W.3d at 297 (citing *Lorusso v. Members Mut. Ins.*, 603 S.W.2d 818, 819–20 (Tex. 1980)). It is the complaining party's burden to show harm on appeal. *See Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009) (apply harm analysis to claim trial court abused its discretion in discovery ruling and noting it is complaining party's burden to show harm).

b. Application of the Law to the Facts

Assuming, without deciding, the trial court erred, as asserted in cross-issues one and two, when it decided against Wynne and Smith on their breach-of-fiduciary-duty cross-claim against Pelley, Wynne and Smith must show they were harmed by that error. *See* TEX. R. APP. P. 44.1. In their brief on cross-appeal, Wynne and Smith argue that the breach of fiduciary duty by Pelley "resulted in both gain to [Pelley] and loss to Wynne." In support of their argument, Wynne and Smith direct us to a numerical range of findings of fact in the trial court's January 29, 2016 findings of fact and conclusions of law submitted by the Pelley parties.

However, those findings of fact address their breach-of-contract cross-claim against Pelley, not their breach-of-fiduciary-duty cross-claim. Wynne and Smith present no argument as to how they were harmed by the trial court's alleged errors as to their cross-claim for breach of fiduciary duty. They merely assert it was error not to conclude Pelley breached his fiduciary duty. Without more explanation as to the impact on the final judgment, we will not speculate as to whether the alleged error was harmful. Accordingly, as stated above, we conclude that, assuming, without deciding, the trial court erred when it decided against Wynne and Smith on their breach-of-fiduciary-duty cross-claim against Pelley, Wynne and Smith have not met their burden to show harm. *See* TEX. R. APP. P. 44.1.

Cross-issues one and two are decided against Wynne and Smith.

E. Wynne's and Smith's Counterclaims Against the Pelley Parties

In issue thirteen, the Pelley parties argue the trial court erred when it concluded the corporate veil should be pierced and imposed joint and severable liability. They contend that Nall, Pelley, Wynne & Smith was a limited liability partnership and that only Scott Pelley P.C., was a limited liability partner in the law firm, not Pelley. They also argue Wynne and Smith abandoned their claim for vicarious liability and disregarding the corporate form. Wynne and Smith do not respond to this issue.

1. Applicable Law

Section 152.051 of the Texas Business Organizations Code defines a general partnership as "an association of two or more persons to carry on a business for profit as owners." BUS. ORGS. CODE § 152.051; *see Phillips v. Boo 2 You L.L.C.*, No. 03-14-00406-CV, 2016 WL 2907971, at *2 (Tex. App.—Houston [14th Dist.] May 13, 2016, no pet.) (mem. op.). All partners are jointly and severally liable for all obligations of the general partnership unless otherwise agreed or provided by law. *See* BUS. ORGS. CODE § 152.304(a); *U.S. Rest. Props. Operating L.P. v. Motel Enters., Inc.*, 104 S.W.3d 284, 293 (Tex. App.—Beaumont 2003, pet. denied); *Pinebrook Props. Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 499 (Tex. App.—Texarkana 2002, pet. denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 151 (Tex. App.—San Antonio 1995, writ denied). Piercing the corporate veil is inapplicable to partnerships. *See Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 474 (Tex. App.—Dallas 2008, pet. denied); *Pinebrook*, 77 S.W.3d at 499. There is no veil that needs piercing because a general partner is always liable for the debts and obligations of the partnership to third parties. *See Asshauer*, 263 S.W.3d at 474; *Pinebrook*, 77 S.W.3d at 500.

2. Application of the Law to the Facts

The trial court's final judgment ordered the Pelley parties jointly and severally liable as to Wynne's and Smith's counterclaims. We construe their argument to challenge several conclusions of law in the trial court's January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties, concluding that the "Pelley parties are jointly and severally liable."

However, the trial court also made the following express findings of fact in its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties:

> 1. A **general partnership** existed between [] Pelley and Scott Pelley[] P[.]C[.], [] Wynne[,] and [] Smith, called Nall Pelley Wynne [&] Smith.
>
> 4. [P]elley signed the 2008 Agreement in his **individual capacity**.
>
> 23. [] Wynne and [the] M&S Wynne Family[L.P.,] and [] Pelley and [The] Pelley Family[L.P.] were **partners** as pertains to the Gibbs Estate and Shankles Estate cases.

(Emphasis added.)

The Pelley parties do not challenge these findings of fact on appeal. As a result, these unchallenged findings of fact are binding on appeal. *See Ponderosa*, 2016 WL 3902559-CV, at *3. These findings of fact support the trial court's conclusion that they are jointly and severally liable. Because the trial court found that the business relationships were that of a general partnership, there was no need to pierce the corporate veil. *See Asshauer*, 263 S.W.3d at 474; *Pinebrook*, 77 S.W.3d at 499–500. Accordingly, we conclude the trial court did not err when it concluded the Pelley parties were jointly and severally liable.

Issue thirteen is decided against the Pelley parties.

III. MOTION TO COMPEL THE RETURN OF MISAPPROPRIATED FUNDS

In the third part of issue nine, Scott Pelley P.C. argues the trial court erred when it denied its pretrial motion to compel the return of misappropriated funds. It contends that the trial court

should have required all of the limited partners to gather and deposit any fees belonging to the law firm into the firm's account as part of the wrapping up and termination of the "limited partnership" in compliance with the Texas Business Organizations Code. Wynne and Smith respond that Scott Pelley P.C. has waived this issue and, even if the issue was not waived, it has failed to show it was harmed by the trial court's denial of the motion to compel.

The record shows that Scott Pelley P.C.'s pretrial motion to compel the return of misappropriated funds is based on its claims for conversion and theft. Specifically, the motion argued:

> After receipt of notice of termination, Pelley discovered that Wynne and Smith had misappropriated trust funds from the [Nall, Pelley, Wynne & Smith] trust account and converted by theft over $441,711.08 in cash. The cash represented fees earned and actually received for services rendered to clients of the [Nall, Pelley, Wynne & Smith] law firm prior to the termination of the firm, the theft of which Wynne and Smith attempted to conceal from Pelley.

Although the motion does not name the clients, it does specify the amounts of $50,000 and $391,722, which correspond to the Cobb and LJH fees.[15] These fees were the subject of Scott Pelley P.C.'s claims for conversion, theft, and damages under the Texas Theft Liability Act. Because we have already determined the trial court did not err when it concluded that Wynne and Smith did not convert or steal the Cobb and LJH fees, we need not address the third part of issue nine.

The third part of issue nine is decided against Scott Pelley P.C.

IV. PARTITION OF PROPERTY

In issue twelve, The Pelley Family L.P. argues the trial court did not have jurisdiction to render any orders related to the partition of the real property. It claims that, although the issue of the sale of the Washington Street building was tried with this case, it was part of a third lawsuit

[15] The record shows that early in the litigation, the parties were hesitant to use their clients' names. However, later, these sums were identified with the clients.

that was not consolidated with this case. Also, The Pelley Family L.P. argues the trial court's judgment was signed after the trial court lost plenary power over the partition of the property, which was thirty days after the trial court's order of sale. The M&S Wynne Family L.P. responds that through this appeal The Pelley Family L.P. has consistently characterized the partition order as an interlocutory order, although the M&S Wynne Family L.P. disagrees with that characterization. The M&S Wynne Family L.P. argues the motion to modify the order of sale extended the trial court's plenary power, allowing the trial court to supersede that partition order with its October 7, 2015 final judgment.

A. Applicable Law

Unlike other proceedings, a suit for partition of real property has two final judgments, both of which are independently appealable. *See Griffin v. Wolfe*, 610 S.W.2d 466, 466 (Tex. 1980); *Carter v. Harvey*, No. 02-16-00153-CV, 2017 WL 2813936, at *2 n.2 (Tex. App.—Fort Worth June 29, 2017, no pet. h.); *Bolinger v. Williams*, No. 07-14-00024-CV, 2015 WL 9473924, at *2 (Tex. App.—Amarillo Dec. 21, 2015, no pet.) (mem. op.). During the first proceeding, the merits of the case are determined and the rights of the parties are concluded. *See Bolinger*, 2015 WL 9473924, at *2; *Campbell v. Tufts*, 3 S.W.3d 256, 259 (Tex. App.—Waco 1999, no pet.).

A trial court retains jurisdiction over a case for thirty days after signing a final judgment. *See* R. CIV. P. 329b(d); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000); *Pipes v. Hemingway*, 358 S.W.3d 438, 445 (Tex. App.—Dallas 2012, no pet.). The period of plenary power may be extended by timely filing an appropriate post-judgment motion. *See Lane Bank*, 10 S.W.3d at 310; *Pipes*, 358 S.W.3d at 445. However, the trial court's plenary power cannot extend beyond 105 days after the trial court signs the judgment. *See* TEX. R. CIV. P. 5 (trial court may not enlarge period for taking any action under rules relating to new trials

except as stated in rules), 329b(c), (e); *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996) (per curiam); *Pipes*, 358 S.W.3d at 445. Orders rendered after the trial court loses its plenary power are void. *See In re Florance*, 377 S.W.3d 837, 839 (Tex. App.—Dallas 2012, orig. proceeding). An exception to this rule is the trial court's inherent power to enforce its judgments. *See* TEX. R. CIV. P. 308; *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982); *In re Florance*, 377 S.W.3d at 839. That power is part of the court's jurisdiction, and the court may employ suitable methods to enforce its judgment. *See Arndt*, 633 S.W.2d at 499; *Hunt Prod. Co. v. Burrage*, 104 S.W.2d 84, 86 (Tex. Civ. App.—Dallas 1937, writ dism'd).

B. Application of the Law to the Facts

First, we address The Pelley Family L.P.'s argument that the trial court did not have jurisdiction to render any orders related to the partition of the real property because it was part of a third lawsuit that was not consolidated with this case. The parties advise us that a separate suit for partition was filed by Wynne in January 2012 and is still pending. However, the record shows that in its fourth amended petition, The Pelley Family L.P. sought partition of the Washington Street building it owned with the M&S Wynne Family L.P., seeking the sale of the Washington Street building and apportionment of the proceeds in accordance with their respective ownership interests.

Second, we address The Pelley Family L.P.'s argument that the trial court did not have jurisdiction to render any orders related to the partition of the real property because the trial court signed its final judgment more than thirty days after it signed the "order regarding sale of real property." As a result, The Pelley Family L.P. argues the trial court did not have plenary power to modify its first judgment in the partition suit. The record shows that on August 31, 2015, the trial court signed an "order regarding sale of real property," appointing James A. Lindsey to conduct the sale of the Washington Street building by auction on September 18, 2015. It states

that the "agreed" rules and procedures for the sale are made a part of the order. Unlike other proceedings, this first judgment in a partition suit is independently appealable. *See Griffin*, 610 S.W.2d at 466; *Carter*, 2017 WL 2813936, at *2 n.2; *Bolinger*, 2015 WL 9473924, at *2. The trial court retained jurisdiction over the partition judgment for thirty days after signing it. *See* R. CIV. P. 329b(d); *Lane Bank*, 10 S.W.3d at 310; *Pipes*, 358 S.W.3d at 445.

On September 1, 2015, Wynne and Smith filed a motion for the trial court to render an amended judgment on the partition of the sale, stating that they had not consented to the "agreed" rules and procedures. Although the trial court's plenary power may be extended by a motion to modify or reform a judgment, the M&S Wynne Family L.P. did not join that motion. *See Lane Bank*, 10 S.W.3d at 310; *Pipes*, 358 S.W.3d at 445. On September 11, 2015, Wynne, Smith, and the M&S Wynne Family, L.P., filed a notice of appeal of the trial court's order of sale in appellate cause no. 05-15-01109-CV. While that appeal was pending, the trial court signed its final judgment on October 7, 2015, ordering, in part, that unless the parties can agree on a method to buy or sell the Washington Street building, they shall furnish the name of a receiver to sell the Washington Street building within thirty days of the date of the final judgment. The trial court's October 7, 2015 final judgment was signed more than thirty days after the trial court signed its order regarding the sale of the Washington Street building. After the parties appealed the final judgment, the appeal of the partition judgment was consolidated with the appeal of the trial court's final judgment.

Based on the trial court's findings of fact and conclusions of law, the final judgment, and the parties' arguments, it appears that the auction of the property did not take place on September 18, 2015 as required by the August 31, 2015 judgment of partition. As a result, we conclude the trial court had jurisdiction to enforce its August 31, 2015 judgment of partition in its October 7, 2015 final judgment. *See* TEX. R. CIV. P. 308; *Arndt*, 633 S.W.2d at 499 (noting general rule that

every court having jurisdiction to render a judgment has inherent power to enforce its judgment); *In re Florance*, 377 S.W.3d at 839 (noting trial court's inherent power to enforce its judgment is exception to rule that orders rendered after trial court loses plenary power are void); *Hunt Prod.*, 104 S.W.2d at 86 (noting that court is charged with duty and clothed with power and exclusive jurisdiction to enforce its judgments is axiomatic, and it may issue all necessary process and employ suitable methods, legal or equitable, to accomplish that end). We express no opinion as to the merits of the partition judgment.

Issue twelve is decided against The Pelley Family L.P.

V. MOTION FOR CRIMINAL CONTEMPT AND TO IMPOSE SANCTIONS

In issue seven, Scott Pelley P.C. and Pelley argue, with respect to their motion for "criminal contempt and for [the imposition of] sanctions," the trial erred when it concluded that a witness did not commit perjury. On March 23, 2012, Scott Pelley P.C. and Pelley filed a motion for "criminal contempt and for [the imposition of] sanctions." The motion for "criminal contempt and for [the imposition of] sanctions" was both (1) a motion for contempt, and (2) a motion seeking the imposition of sanctions. As a result, we must address issue seven in two parts, reviewing the motion for contempt and the motion for the imposition of sanctions separately.

A. Motion for Criminal Contempt

In the first part of issue seven, Scott Pelley P.C. and Pelley argue, with respect to their motion for criminal contempt, that the trial erred when it concluded that the witness did not commit perjury. Wynne responds that Scott Pelley P.C. and Pelley failed to preserve this argument for appellate review and waived this issue.

1. Applicable Law

An appellate court is obligated to review *sua sponte* issues affecting jurisdiction. *See In re City of Dallas*, 501 S.W.3d 71, 73 (Tex. 2016) (orig. proceeding) (per curiam); *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam). A court of appeals lacks jurisdiction to review a contempt order on direct appeal. *See Tex. Animal Health Comm'n v. Nunley*, 647 S.W.2d 951, 952 (Tex. 1983); *Tracy v. Tracy*, 219 S.W.3d 527, 530 (Tex. App.—Dallas 2007, no pet.). A ruling denying a motion for contempt can be challenged only by an original proceeding. *See Hooper v. Hooper*, No. 14-09-01024-CV, 2011 WL 334198, at * 1 (Tex. App.—Houston [14th Dist.] Feb. 3, 2011, no pet.) (mem. op.). This rule applies even when the contempt order is appealed along with a judgment that is appealable. *See Salas v. Chris Christensen Sys., Inc.*, No. 10-11-00107-CV, 2011 WL 4089999, at *17 (Tex. App.—Waco Sept. 14, 2011, no pet.) (mem. op.); *In re Office of Attorney Gen.*, 215 S.W.3d 913, 915 (Tex. App.—Fort Worth 2007, orig. proceeding).

2. Application of the Law to the Facts

The record does not contain a written order denying the motion for contempt. To the extent Scott Pelley P.C. and Pelley appeal the trial court's implied denial of their motion for contempt and the trial court's failure to conclude the witness committed perjury as to their motion for contempt, we do not have jurisdiction to consider their issue. *See Tex. Animal Health*, 647 S.W.2d at, 952; *Tracy*, 219 S.W.3d at 530. The trial court's implied ruling denying the motion for contempt can be challenged only by an original proceeding. *See Hooper*, 2011 WL 334198, at *1.

The first part of issue seven is dismissed for lack of jurisdiction.

B. Motion for the Imposition of Sanctions

In the second part of issue seven, Scott Pelley P.C. and Pelley argue, with respect to their motion for the imposition of sanctions, the trial erred when it concluded that [the witness] did not commit perjury. It contends that:

> The [trial] court indicated at the time of the hearing that [it] would defer [its] decision regarding [the witness's] perjury until [the] time of trial, but failed to address [the witness's] perjury in its [March 23, 2016 additional findings of fact and conclusions of law], protecting [the witness].

Wynne responds that Scott Pelley P.C. and Pelley failed to preserve this argument for appellate review and waived this issue.

1. Preservation of Error

First, we must address Wynne's response to the second part of issue seven, claiming that Scott Pelley P.C. and Pelley failed to obtain a ruling on their motion so this issue is not preserved for appellate review. In their reply brief, Scott Pelley P.C. and Pelley argue that they brought the matter to the trial court's attention in their request for additional and amended findings of fact and conclusions of law.

a. Applicable Law

An appellate court may not address the merits of an issue that has not been preserved for appeal. To preserve error for appellate review, the complaining party must make a timely, specific objection and obtain a ruling on the objection. *See* TEX. R. APP. P. 33.1. As a result, a party must take proper action to make the trial court aware of the complaint and obtain a ruling, either express or implied. See TEX. R. APP. P. 33.1(a); *In re S.H.V.*, 434 S.W.3d 792, 801 (Tex. App.—Dallas 2014, no pet.).

Texas courts have long recognized a presumption of finality for judgments rendered after a full trial on the merits. *See Moritz v. Preiss*, 121 S.W.3d 715, 718–19 (Tex. 2003). A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the

record. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). When there has been a full trial on the merits, either to the bench or before a jury, the inclusion of a "Mother Hubbard" clause, e.g., "all relief not granted is denied," indicates the trial court's intention to dispose of the entire matter and thus signifies finality. *See Lehmann*, 39 S.W.3d at 195; *In re A.B.P.*, No. 05-11-00066-CV, 2013 WL 4568012, at *5 (Tex. App.—Dallas Aug. 26, 2013, pet. denied) (mem. op.); *Memphis, Inc. v. Coggswell*, No. 05-02-01876-CV, 2005 WL 1774973, at *2 (Tex. App.—Dallas July 28, 2005, pet. denied) (mem. op.).

b. Application of the Law to the Facts

The record shows that on March 23, 2012, Scott Pelley P.C. and Pelley filed a motion to impose sanctions. On June 4, 2012, at the conclusion of a pretrial hearing on several motions, the trial court carried the motion for the imposition of sanctions, stating:

> [The] [m]otion [for] [c]ontempt and for [s]anctions is to be carried along and heard at the time of trial, so that will be part of the evidence at that time, so I'll hear it and then make a ruling on that if I can't talk you guys into resolving this thing.

However, the record does not contain an order denying the motion for the imposition of sanctions. The record shows that after a trial on the merits, the trial court signed a final judgment stating that "[a]ll other relief not expressly granted is denied." Then, in their request for additional and amended findings of fact and conclusions of law, Scott Pelley P.C. and Pelley stated that the trial court's judgment did not mention or address [the witness's] alleged perjury, so they believed it was "effectively denied." Accordingly, they requested the following additional finding of fact:

> At the February [14], 2012 hearing, [the witness] testified that the $50,000 Cobb Fee and $391,722 LJH Fee were deposited into Wynne and Smith's Secret Account because the Cobb Fee was not "earned" until April 1, 2011, and the LJH settlement proceeds were not "received" until April 1, 2011, the day *after* Wynne and Smith terminated the [Nall, Pelley, Wynne & Smith] partnership. [The witness's] testimony was neither false and/or perjurious. [Exhibit citation omitted.]

[Emphasis in orig.] However, the trial court did not make this additional finding of fact in its March 23, 2016 additional findings of fact and conclusions of law.

The trial court's judgment was a final judgment that had the effect of denying the motion for the imposition of sanctions. *See Lehmann*, 39 S.W.3d at 195; *In re A.B.P.*, 2013 WL 4568012, at *5; *Memphis, Inc.*, 2005 WL 1774973, at *2. Accordingly, we conclude Scott Pelley P.C. and Pelley obtained a ruling on their motion for the imposition of sanctions preserving the second part of issue seven for appellate review.

2. Waiver

Second, we must address Wynne's response to the second part of issue seven, claiming that Scott Pelley P.C. and Pelley have waived this issue because they fail to provide citations to authorities in support of their argument.

a. Applicable Law

Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and the record." TEX. R. APP. P. 38.1(i). However, the Supreme Court of Texas has repeatedly made clear that "[d]isposing of appeals for harmless procedural defects is disfavored." *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 162 (Tex. 2012) (citing *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam)); *see also In Interest of L.T.H.*, 502 S.W.3d 338, 343 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Instead, appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver. *Weeks Marine*, 371 S.W.3d at 162; *see also In Interest of L.T.H.*, 502 S.W.3d at 343.

b. Application of the Law to the Facts

Wynne complains that Scott Pelley P.C. and Pelley have failed "to include a single citation to authority in this point of error." We acknowledge that Scott Pelley P.C., and Pelley

have not provided citations to authority in their brief on appeal as to this issue. However, they do provide argument and citations to the record. Further, in response to Wynne's complaint, they filed a reply brief with citations to legal authorities to support their argument.[16] Keeping in mind that we should construe briefs reasonably, yet liberally, so that the right to appellate review is not lost by waiver, we decline to conclude, on this record, that Scott Pelley P.C., and Pelley have waived this appellate issue by inadequate briefing. *See In Interest of L.T.H.*, 502 S.W.3d at 342–43 (declining to waive issue where brief had legal citations, identified order appealed, documents discussed in brief were easily identifiable, and general legal authorities, and reply brief included citations to record and additional authorities).

3. Error in Concluding the Witness Did Not Commit Perjury

Finally, we address the merits of the second part of issue seven, where Scott Pelley P.C. and Pelley argue, with respect to their motion for the imposition of sanctions, that the trial court erred when it concluded the witness did not commit perjury. Wynne does not respond to the merits of this argument.

a. Standard of Review

An appellate court reviews a trial court's order denying a motion for the imposition of sanctions for an abuse of discretion. *See In re K.N.R.*, No. 05-03-00214-CV, 2004 WL 878273, at *2 (Tex. App.—Dallas Apr. 26, 2004, no pet.) (mem. op.); *Vickery v. Gordon*, No. 14-11-00812-CV, 2012 WL 3089409, at *4 (Tex. App.—Houston [14th Dist.] July 31, 2012, no pet.) (mem. op.); *Shelton v. Univ. of Tex. Med. Branch at Galveston*, No. 14-07-00994-CV, 2009 WL 997480, at *7 (Tex. App.—Houston [14th Dist.] Apr. 14, 2009, pet. denied) (mem. op.). When reviewing sanctions orders, appellate courts are not bound by the trial court's findings of fact and

[16] The briefing pertaining to the second part of issue seven differs from the briefing for issue eleven. For issue eleven, the brief provided a general citation to the entire "Texas Partnership Act" and the reply brief provided only two general citations to the parol evidence rule.

conclusions of law. *See Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam); *Elliot v. Dauterman*, No. 05-15-00516-CV, 2016 WL 6835710, at *3 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.). Rather, appellate courts must independently review the entire record to determine whether the trial court abused its discretion. *See Am. Flood Research*, 192 S.W.3d at 583; *Elliot*, 2016 WL 6835710, at *3. A trial court abuses its discretion if it acted without reference to any guiding rules and principles to the extent the act was arbitrary or unreasonable. *See Am. Flood Research*, 192 S.W.3d at 583; *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004).

b. Applicable Law

A court has the inherent power to impose sanctions for the abuse of the judicial process, which may not be covered by rule or statute. *See In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (court has inherent power to impose sanctions on own motion in appropriate cases); *Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ) (trial courts have power to impose sanctions on parties for bad faith abuse of judicial process not covered by rule or statute); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509–10 (Tex. App.—Corpus Christi 1992, no writ) (same). A court has weapons in its arsenal to discourage perjury without restraining a person's liberty in a contempt proceeding. *See In re Reece*, 341 S.W.3d 360, 368 (Tex. 2011) (orig. proceeding). As such, our rules make available the possibility of a range of sanctions. *See In re Reece*, 341 S.W.3d at 368. At a sanctions hearing, the court is entitled to judge the credibility of the witnesses and the weight of their testimony, since it has the opportunity to observe the demeanor of the witnesses. *See City of Dallas v. Cox*, 793 S.W.2d 701, 724 (Tex. App.—Dallas 1990, no writ) (discussing discovery sanctions); *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230, 232–33 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (en banc) (discussing discovery sanctions). Also, there is no requirement that a person be guilty of a

crime under the Texas Penal Code in order for a trial court to impose sanctions for presenting false evidence. *See Vaughn v. Texas Emp't Comm'n*, 792 S.W.2d 139, 143 n.3 (Tex. App.—Houston [1st Dist.] 1990, no writ) (discussing discovery sanction under Texas Rule of Civil Procedure 215).

c. Application of the Law to the Facts

Scott Pelley P.C. and Pelley sought the imposition of sanctions under the trial court's inherent authority for a witness's alleged perjury. The trial court carried the motion until after a bench trial. The motion for imposition of sanctions was impliedly denied when the trial court signed its final judgment. In their request for additional and amended findings of fact and conclusions of law, Scott Pelley P.C. and Pelley requested an additional finding of fact that the witness did not commit perjury. However, the trial court did not make this additional written finding of fact.

In arguing for a reversal of the trial court's implied order denying the imposition of sanctions, Scott Pelley P.C. and Pelley rely on two cases for the proposition that sanctions may be imposed under the trial court's inherent authority and "Texas courts have specifically held that the court may impose sanctions when a party gives false testimony." *See Kutch*, 831 S.W.2d at 510 (trial courts have power to impose sanctions on parties for bad faith abuse of judicial process not covered by rule or statute); *Schaver v. British Am. Ins.*, 795 S.W.2d 875, 877–78 (Tex. App.—Beaumont 1990, no writ) (discussing imposition of sanctions for false evidence under rule 215). However, they do not provide any authority where an appellate court has reversed a trial court's decision not to impose sanctions for alleged perjury, nor have we found any. *See Allstate Ins. v. Garcia*, No. 13-02-00092-CV, 2003 WL 21674766, at *2 (Tex. App.—Corpus Christi July 18, 2003, no pet.) (mem. op.) (noting appellant does not cite authority in which appellate court reversed trial court's decision not to impose sanctions under rule 13 or

chapter 10, nor did appellate court find any). With regard to the alleged perjury, the trial court was entitled to judge the credibility of the witnesses and the weight of their testimony, since it had the opportunity to observe the demeanor of the witnesses. *See Cox*, 793 S.W.2d at 724; *Daniel*, 981 S.W.2d at 232–33. Accordingly, we are not persuaded that Scott Pelley P.C. and Pelley met their heavy burden of showing that the trial court's refusal to impose sanctions for the alleged perjury of a witness was an abuse of discretion. *See Allstate*, 2003 WL 21674766, at *2.

The second part of issue seven is decided against Scott Pelley P.C., and Pelley.

VI. APPELLATE ATTORNEYS' FEES

In cross-issue three, Wynne and Smith argue, as to their request for appellate attorneys' fees, the trial court abused its discretion when it failed to include contingent attorneys' fees on appeal in the final judgment. They contend that, with the consent of the Pelley parties' counsel, they proved their appellate attorneys' fees via affidavit. The Pelley parties respond that Wynne and Smith waived their right to recover appellate attorneys' fees and failed to show their entitlement to appellate attorneys' fees under Chapter 38 because: (1) they did not include any language regarding appellate attorneys' fees in their proposed judgment; (2) they did not plead or request findings of fact on appellate attorneys' fees; (3) they did not present their claim for payment; (4) there was no proof of the reasonableness of the amount of appellate attorneys' fees; and (5) they argue for the first time on appeal that they are entitled to appellate attorneys' fees.

A. Standard of Review

An appellate court generally reviews a trial court's decision to award appellate attorneys' fees for an abuse of discretion. *See Ventling v. Johnson*, 466 S.W.3d 143, 155 (Tex. 2015) (discussing attorneys' fees in terms of the trial court's discretion); *Blackstone Med., Inc. v. Phoenix Surgicals L.L.C.*, 470 S.W.3d 636, 657 (Tex. App.—Dallas 2015, no pet.); *Stovall & Assocs. P.C. v. Hibbs Fin.Ctr. Ltd.*, 409 S.W.3d 790, 803 (Tex. App.—Dallas 2013, no pet.). A

trial court has discretion to fix the amount of attorneys' fees, but it does not have discretion to deny attorneys' fees entirely if an award of fees is required under the terms of the parties' agreement or by statute. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009); *Blackstone*, 470 S.W.3d at 657; *Stovall*, 409 S.W.3d at 803; *Texas Ear Nose & Throat Consultants P.L.L.C. v. Jones*, 470 S.W.3d 67, 93 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

B. Applicable Law

Chapter 38 of the Texas Civil Practice and Remedies Code allows a reasonable attorneys' fees recovery in breach-of-contract cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015). To recover attorneys' fees under section 38.001 of the Texas Civil Practice and Remedies Code, a party must prevail on the underlying claim and recover damages. *See Ventling*, 466 S.W.3d at 154; *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). If an award of trial attorneys' fees is mandatory under Texas Civil Practice and Remedies Code section 38.001, an award of appellate attorneys' fees is likewise mandatory. *See Ventling*, 466 S.W.3d at 154; *Karam v. Brown*, 407 S.W.3d 464, 475 (Tex. App.—El Paso 2013, no pet.). Except where reasonableness is presumed, there must be evidence of the reasonableness of fees for appellate work to support the award of appellate attorneys' fees. *See Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied).

C. Application of the Law to the Facts

In their second amended original petition, Wynne and Smith requested attorneys' fees. Specifically, they stated "Wynne and Smith generally request attorneys[']fees to the extent allowed by law and equity." Also, in their prayer for relief, they asked for attorneys' fees. At the conclusion of the trial, the trial court stated:

> The Court awards attorney's fees to Mr. Wynne for time spent in the award for the recovery of fees on Gibbs and Shankles matter. That will be submitted by affidavit and then both counsel on appeal, for appeal purposes, if you'll submit an affidavit concerning what you anticipate the fees would be in the event that it's unsuccessfully appealed, then I will consider that and flesh that out in my final judgment.

On June 24, 2015, Wynne and Smith filed their motion for entry of judgment, attaching the affidavit of Wynne's and Smith's trial counsel. That affidavit states, in part, that trial counsel had twenty years of experience and provided his hourly rate, which he stated was within the zone of reasonableness for a trial attorney of his experience. It also states that in trial counsel's opinion, appellate attorneys' fees in the amount of $50,000 would be reasonable and necessary. On July 20, 2015, the Pelley parties filed a response and objection to the motion for judgment. Although they objected to attorneys' fees associated with the trial, they did not object to an award of appellate attorneys' fees. On August 3, 2015, Wynne and Smith filed a response to the Pelley parties' objections, attaching a revised attorneys' fees affidavit that lowered the appellate attorneys' fees requested to $30,000.

In its January 29, 2016 findings of fact and conclusions of law requested by the Pelley parties the trial court found:

> 44. The [trial] [c]ourt finds that [] Wynne and [] Smith retained the services of Dick Bufkin to represent them in connection with this case. The [trial] [c]ourt finds that Mr. Bufkin's charges were both reasonable and necessary.
>
> 45. The [trial] [c]ourt finds that [] Wynne and [] Smith retained the services of Greg Westfall to represent them in connection with this case. The [trial] [c]ourt finds that Mr. Westfall's charges were both reasonable and necessary.
>
> 46. The [trial] [c]ourt finds that a reasonable allocation of attorneys['] fees attributable to the Gibbs Estate and Shankles Estate matters is $40,000.00

In its January 29, 2016 findings of fact and conclusions of law requested by Wynne and Smith, the trial court concluded:

> [II.E.2.] Wynne is entitled to an award of attorney[s'] fees in the amount of $40,000.00, arising out of his pursuit of any claims of either the Gibbs and/or Shankles cases.

Also, in its final judgment, the trial court ordered that "the Wynne Parties are entitled to recover from the Pelley parties, jointly and severally, the sum of Forty Thousand Dollars ($40,000.00), representing attorneys' fees incurred in connection with the Gibbs Estate and Shankles Estate cases." However, the trial court did not award Wynne and Smith conditional appellate attorneys' fees.

As stated above, the record shows that the trial court found that Wynne and Smith were entitled to trial attorneys' fees under section 38.001 and awarded them $40,000 in attorneys' fees for the trial of the case. Also, the record shows that Wynne and Smith presented some evidence of their appellate attorneys' fees. We conclude that the trial court erred when it failed to award Wynne and Smith conditional appellate attorneys' fees because the trial court found that Wynne and Smith were entitled to trial attorneys' fees under section 38.001. *See Ventling*, 466 S.W.3d at 154; *Karam*, 407 S.W.3d at 475.

Cross-issue three is decided in favor of Wynne and Smith. We remand the case to the trial court for a determination of the reasonable amount of appellate attorneys' fees to be awarded to Wynne and Smith in view of the fact that Wynne and Smith successfully defended this appeal and were partially successful in their cross-appeal, and to make a determination of appellate attorneys' fees should the Pelley parties unsuccessfully appeal to the Texas Supreme Court.

VII. CONCLUSION

With respect to Scott Pelley P.C.'s claims for repudiation, breach of contract, conversion, theft, recovery under the Texas Theft Liability Act, and breach of fiduciary duty, the evidence is legally sufficient to support the trial court's findings of fact and the trial court did not err in its

conclusions of law. Also, with respect to Wynne's and Smith's cross-claims for breach of contract, seeking specific performance, and voluntary judicial winding up of the partnership, the evidence is legally sufficient to support the trial court's findings of fact and the trial court did not err in its conclusions of law. Also, assuming without deciding the trial court erred in its conclusions of law relating to Wynne's and Smith's cross-issues for breach of fiduciary duty, Wynne and Smith have not shown that they were harmed by that error. Further, with respect to the imposition of joint and several liability on Wynne's and Smith's counterclaims, the trial court did not err in its conclusions of law.

This Court does not have jurisdiction to review the trial court's implied denial of the motion for criminal contempt filed by Scott Pelley P.C. and Pelley. That issue is dismissed for want of jurisdiction. However, the trial court did have jurisdiction with regard to the partition of property.

Further, the trial court did not err when it denied Scott Pelley P.C.'s pretrial motion to compel return of misappropriated funds and the motion for the imposition of sanctions filed by Scott Pelley P.C. and Pelley. Nevertheless, the trial court erred when it failed to include contingent attorneys' fees on appeal in the final judgment.

The trial court's final judgment is reversed as to Wynne's and Smith's request for contingent appellate attorneys' fees and remanded for further proceedings consistent with this opinion. The remainder of the trial court's judgment is affirmed.

151560F.P05

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SCOTT PELLEY P.C., THE PELLEY FAMILY LIMITED PARTNERSHIP, AND SCOTT PELLEY, INDIVIDUALLY, Appellants

No. 05-15-01560-CV V.

MICHAEL C. WYNNE, JOHN HUNTER SMITH, AND M&S WYNNE FAMILY LIMITED PARTNERSHIP, Appellees

On Appeal from the 15th Judicial District Court, Grayson County, Texas
Trial Court Cause No. CV 11-1026.
Opinion delivered by Justice Lang. Justices Francis and Lang-Miers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED,** in part, and **REVERSED,** in part. We **REVERSE** that portion of the trial court's judgment as to appellees' MICHAEL C. WYNNE and JOHN HUNTER SMITH request for appellate attorneys' fees. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellees MICHAEL C. WYNNE, JOHN HUNTER SMITH, and M&S WYNNE FAMILY LIMITED PARTNERSHIP recover their costs of this appeal and the full amount of the trial court's judgment from appellants SCOTT PELLEY P.C., THE PELLEY FAMILY LIMITED PARTNERSHIP, and SCOTT PELLEY, INDIVIDUALLY and from the cash deposit in lieu of cost bond. After all costs have been paid, the clerk of the District court is directed to release the balance, if any, of the cash deposit to appellants SCOTT PELLEY P.C., THE PELLEY FAMILY LIMITED PARTNERSHIP, and SCOTT PELLEY, INDIVIDUALLY.

Judgment entered this 28th day of August, 2017.