IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2022 Session

JEFFREY ROBINSON, ET AL. v. CITY OF CLARKSVILLE, TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. CC-16-CV-1410 Joseph P. Binkley, Jr., Judge

No. M2019-02053-COA-R3-CV

The owners of a restaurant in downtown Clarksville sued the City of Clarksville for breach of contract, promissory estoppel, interference with business relationship, diminution of value of land, and a takings claim under 42 U.S.C. § 1983 for the City's failure to construct an alleyway on property Plaintiffs sold the City. Plaintiffs also filed a claim for inverse condemnation alleging that the City's construction of a sewer line encroached on their land. The trial court dismissed Plaintiffs' claims for breach of contract, interference with business relationship, diminution of value of land, and section 1983 claim for failure to state a claim under Tenn. R. Civ. P. 12.02(6) and dismissed Plaintiffs' promissory estoppel claim on summary judgment. After a jury trial on the inverse condemnation claim, the jury awarded Plaintiffs $8,335 for the value of land on which the sewer was built, and the trial court awarded Plaintiffs $30,000 in attorneys' and paralegals' fees. Plaintiffs appeal each of the dismissals, the measure of damages from the jury trial, and the award of attorneys' and paralegals' fees, among other things. We affirm the decisions of the trial court and decline to award Plaintiffs their attorneys' fees on appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which KRISTI M. DAVIS and JEFFREY USMAN, JJ., joined.

Mark Robert Olson, Clarksville, Tennessee, for the appellants, Jeffrey Robinson, Sherri Robinson, and Franklin Street Corporation.

Edmund Scott Sauer, James L. Murphy, III, and Michael Jacob Stephens, Nashville, Tennessee, for the appellee, City of Clarksville, Tennessee.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Franklin Street Corporation ("FSC") is owned by Jeffrey and Sherri Robinson ("the Robinsons"), who are residents of Clarksville, Tennessee. FSC owns Blackhorse Pub and Brewery ("Blackhorse Pub"), a restaurant in downtown Clarksville. In August 2002, FSC purchased two vacant lots behind Blackhorse Pub. FSC alleges that it purchased the lots because then-mayor of Clarksville, John Piper (the "former mayor"), proposed that if FSC purchased the property and sold a portion to the City, the City would install utilities and construct a public alley on the conveyed parcel. Meeting Minutes from the Clarksville City Council Meeting on August 1, 2002 show that the Council voted to authorize the "purchase of property on North Second Street from [FSC[1]] for public alley[,]" and a motion was made to approve the purchase "not to exceed $60,000."

FSC sold the City a portion of the two vacant lots behind Blackhorse Pub on August 30, 2002 (hereinafter referred to as "City Property") for $55,000 and retained the remainder of the vacant lots (hereinafter referred to as "FSC Property"). FSC executed a General Warranty Deed conveying the property to the City which stated, in relevant part:

> [FSC], a Tennessee business corporation (herein referred to as the ["]Grantor"), has bargained and sold, and by these presents does transfer and convey unto [the City], a Tennessee municipal corporation (herein referred to as the "Grantee"), to be held by the Grantee, Grantee's heirs, successors, and assigns, all of the Grantor's right, title, and interest in and to certain land in the Twelfth Civil District to Montgomery County, Tennessee, being more particularly described as follows:
>
> [legal description of the property omitted]
>
> This is unimproved property known as the Blackhorse Alley and located on South Second Street, Clarksville, Tennessee 37040.
>
> TO HAVE AND TO HOLD the said tract of land, with its appurtenances, estate, title and interest thereto, belonging to the Grantee, their successors and assigns, forever; and Grantor does covenant with said Grantee that Grantor is lawfully seized and possessed of said land in fee simply, has a

[1] The Meeting Minutes refer to the property at issue as being owned by Peter Martin, who was apparently the person from whom FSC purchased the property before selling it to the City. We also note that the Meeting Minutes refer to the property on "North Second Street," but the general warranty deed, quoted *infra*, states the property conveyed was "located on South Second Street." Nevertheless, there appears to be no dispute that the property discussed in the Meeting Minutes is the same property conveyed by FSC to the City.

> good right to convey it, and the same is unencumbered, except for (1) 2002 taxes associated with this property which have been prorated; and (2) existing restrictive covenants, recorded plats, and/or zoning ordinances. Grantor does further covenant and bind itself, its successors and assigns, to warrant and forever defend the title to said land to said Grantee, its heirs, successors and assigns, against the lawful claims of all persons whomsoever.

Over twelve years later, the Robinsons decided to construct a brewery on the FSC Property and submitted a site plan to the City for the proposed brewery in December 2015. The City determined that a downtown sewer improvement project was required before construction of the brewery could begin, and the City requested the Robinsons to delay construction of the brewery so the sewer line could be installed on City Property. The Robinsons then requested the City to perform on the former mayor's alleged 2002 oral promise to build an alley on the City Property. The City declined to construct an alley, and while constructing the sewer line, the City inadvertently built a portion of the sewer on FSC Property.

On July 14, 2016, the Robinsons and FSC (collectively "Plaintiffs") filed this action against the City based upon the City's refusal to build the alley, as it had allegedly promised to do. Plaintiffs advanced the following theories of recovery: promissory estoppel, breach of contract, diminution of value of land, and interference with business relationship. Plaintiffs also filed claims for violation of 42 U.S.C. § 1983 and inverse condemnation, based on allegations that the placement of the sewer line across a portion of the FSC property constituted a taking without due process which diminished the value of the remainder of the FSC Property. By order entered December 1, 2016, the trial court dismissed Plaintiffs' claims for breach of contract, interference with business relationship, diminution of value of land, promissory estoppel, and violation of section 1983 claim for failure to state a claim under Tenn. R. Civ. P. 12.02(6). The court denied the City's motion to dismiss the inverse condemnation claim. On July 27, 2017, the court *sua sponte* reinstated Plaintiffs' previously dismissed claim for promissory estoppel, finding that promissory estoppel had been adequately pled as an alternative to the contract claim. Plaintiffs were permitted to file an Amended Complaint asserting claims of promissory estoppel/detrimental reliance and inverse condemnation. Both parties assert that the other side then engaged in abusive discovery practices and obstructionist behavior throughout the litigation.

The parties eventually filed cross motions for summary judgment on the promissory estoppel and inverse condemnation claims. The trial court granted summary judgment to the City on the promissory estoppel claim finding that the claim was barred by the six-year statute of limitations and ten-year statute of repose, both of which began to run no later than January 1, 2003 when the former mayor's term ended. The court held that those statutes of limitation expired, respectively, on December 31, 2008 and December 31, 2012, well before the case was filed in July 2016. The court held that the doctrine of laches also

applied to bar the claim and that the former mayor no longer had the authority to bind the City to build an alley when his term ended on December 31, 2002, if he ever had the authority to begin with.

The inverse condemnation claim regarding the sewer-line extension proceeded to a jury trial in October 2019. The proof at trial showed that the City of Clarksville installed a sewer pipe 1 foot and 9 inches within the boundary of Plaintiffs' property. The jury awarded Plaintiffs $8,335 for the City's encroachment onto the FSC property. Plaintiffs then moved the court to award them attorneys' fees incurred on the inverse condemnation claim. In its order on Plaintiffs' motion for attorneys' fees, the court stated:

> the documentation of Plaintiff s attorneys' fees first of all is not sufficiently detailed for the Court to determine the attorney time which addresses counsel's work on the inverse condemnation claim as opposed to counsel's work on the promissory estoppel claim and/or Plaintiff's other claims for relief. Secondly, most all of the Plaintiff's time entries are not sufficiently detailed for the Court to determine even the general bases for the attorney time requests.

Nevertheless, the court awarded Plaintiffs $30,000 in attorneys' fees and determined that "a reasonable hourly rate for Mr. Olson's attorney time is $350; a reasonable hourly rate for Ms. Dahl's attorney time is $200, and a reasonable hourly rate for their paralegals' time is $75" and "a reasonable amount of time to prepare and to try this inverse condemnation case to a jury verdict is approximately 100 hours." Plaintiffs appeal, raising thirteen issues which we will address in turn below.

ANALYSIS

I. Motion to Dismiss

A. Standard of Review

Plaintiffs challenge the trial court's order dismissing five of their claims pursuant to Tenn. R. Civ. P. 12.02(6). As an initial matter, we note that the trial court considered matters outside the complaint in ruling on the motion to dismiss. Specifically, the court relied upon the general warranty deed, the official minutes from the Clarksville City Council, and pertinent provisions of the Clarksville City Charter. Generally, "[i]f matters outside the pleadings are presented in conjunction . . . with a [Rule 12 motion] . . . and the trial court does not exclude those matters, the court must treat such motions as motions for summary judgment . . . ." *Patton v. Est. of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007). However, under certain circumstances, materials other than the pleadings may be reviewed by the trial court without converting the motion to one for summary judgment. In *Indiana State District Council of Laborers v. Brukardt*, this Court noted:

> Numerous cases . . . have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered . . . without converting the motion into one for summary judgment.

Ind. State Dist. Council of Laborers v. Brukardt, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009) (quoting Wright and Miller, *Federal Practice and Procedure*, Civil § 1357, p. 376 (3d ed. 2004)); *see also* Tenn. R. Civ. P. 10.03 ("Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit. . . ."). The trial court determined that each of the documents it considered in rendering its decision were "certified" and "authentic copies" of documents referenced in the complaint, and neither party disputes this finding on appeal. Therefore, we proceed with our appellate review under the standard for review of a Tenn. R. Civ. P. 12.02(6) motion to dismiss.

A Tenn. R. Civ. P. 12.02(6) motion to dismiss "seeks only to determine whether the pleadings state a claim upon which relief can be granted." *Edwards v. Allen*, 216 S.W.3d 278, 284 (Tenn. 2007). The motion "tests the legal sufficiency of the complaint" rather than "the strength of plaintiff's proof." *Smith v. Benihana Nat'l Corp.*, 592 S.W.3d 864, 870 (Tenn. Ct. App. 2019) (citations omitted). A trial court's decision to grant a Tenn. R. Civ. P. 12.02(6) motion to dismiss is a question of law that we review de novo with no presumption of correctness. *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). We uphold a trial court's decision to dismiss under Tenn. R. Civ. P. 12.02(6) "only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).

B. Alleged Failure to Comply with Tenn. R. Civ. P. 7.02

We begin with Plaintiffs' procedural argument that "[t]his Court may reverse the dismissal of all claims dismissed for failure to state a claim because the City's motion to dismiss failed to set forth the grounds for the relief sought." Plaintiffs cite Tenn. R. Civ. P. 7.02 in support of their position, which states:

> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

> (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

The City asserts that Plaintiffs' argument should fail for two reasons: 1) the City failed to timely raise this issue in the court below, and 2) even if preserved, any deficiency in the City's motion does not constitute reversible error. We agree with the City that this issue was not preserved for appellate review because it was not timely raised in the court below.

We have reviewed the City's motion to dismiss and lengthy memorandum of law filed in support of the motion. We have also reviewed the Plaintiffs' response to the motion wherein they make no argument that the motion failed to meet the requisites of Tenn. R. Civ. P. 7.02. The trial court held a hearing and entertained the parties' substantive arguments before entering its order on the City's motion. It was not until four years after the dismissal order, on January 19, 2021, that Plaintiffs raised the Tenn. R. Civ. P. 7.02 argument in their 132-page post-judgment motion seeking relief from "any and every final order entered in this action." As this Court has explained, post-judgment motions "should not be used to raise or present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) (citing *Local Union 760 of Intern. Broth. of Elec. Workers v. City of Harriman*, No. E2000-00367-COA-R3-CV, 2000 WL 1801856, at *4 (Tenn. Ct. App. Dec. 8, 2000)); *see also City of Memphis v. Pritchard*, No. W2019-01557-COA-R3-CV, 2020 WL 4354911, at *3 (Tenn. Ct. App. July 29, 2020) ("Typically, when a party raises an argument for the first time in a motion to alter or amend, we will deem the argument waived[.]"); *Cent. Parking Sys. of Tenn., Inc. v. Nashville Downtown Platinum, LLC*, No. M2010-01990-COA-R3-CV, 2011 WL 1344633, at *5 (Tenn. Ct. App. Apr. 7, 2011) ("'A Rule 59 motion should not be used to raise or present new, previously untried or unasserted legal theories or legal arguments.'") (quoting *In re M.L.D.*, 182 S.W.3d at 895).

Here, Plaintiffs advanced a new legal theory in their "Motion for Relief from Judgments or Orders and Motion to Revise Judgments and Orders and Motion for Recusal" despite the fact that the Tenn. R. Civ. P. 7.02 theory could have been asserted four years earlier in its response to the City's motion to dismiss. Thus, we deem it waived.

C. Dismissal of Breach of Contract Claim

Plaintiffs argue that the trial court erred by concluding that Tennessee's Statute of Frauds ("Statute of Frauds") prevents enforcement of the former mayor's alleged oral promise to build an alley. Alternatively, they argue that 1) even if the Statute of Frauds applies, several other documents combine to satisfy the Statute of Frauds, or 2) the City's part performance of the contract renders the Statute of Frauds inapplicable.

"To be enforceable, a 'contract must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from

fraud or undue influence, not against public policy and sufficiently definite to be enforced.'" *Est. of Elrod v. Petty*, No. M2015-00568-COA-R3-CV, 2016 WL 3574963, at *4 (Tenn. Ct. App. June 23, 2016) (quoting *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005)). Enforceable contracts can take different forms, including "express, implied, written, or oral." *Thompson v. Hensley*, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003). However, the Statute of Frauds—Tenn. Code Ann. § 29-2-101—"precludes actions to enforce certain types of parol contracts unless the action is supported by written evidence of the parties' agreement." *Waddle v. Elrod*, 367 S.W.3d 217, 222 (Tenn. 2012). With respect to the conveyance of real property, the Statute of Frauds provides:

> No action[2] shall be brought: . . . [u]pon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year . . . unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party. In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.

Tenn. Code Ann. § 29-2-101(a)(4). The Statute of Frauds is designed to eliminate "concerns about the reliability of oral evidence" *Gen. Dynamics Corp. v. U.S.*, 563 U.S. 478, 488 (2011), and "fosters certainty in transactions by ensuring that contract formation is not 'based upon loose statements or innuendoes long after witnesses have become unavailable or when memories of the precise agreement have been dimmed by the passage of time.'" *Waddle*, 367 S.W.3d at 223 (quoting *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 932 (Tenn. Ct. App. 1984)). It functions to protect against "hasty or inconsiderate agreements concerning a valuable species of property" and "misunderstandings as to the nature and extent of such agreements." *Brandel v. Moore Mortg. & Inv. Co.*, 774 S.W.2d 600, 604 (Tenn. Ct. App. 1989) (citing *Johnson v. Haynes*,

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[2] The Statute of Frauds "prohibits an 'action' from being brought on a land sale contract without a writing." *Davidson v. Wilson*, No. M2009-01933-COA-R3-CV, 2010 WL 2482332, at *7 n.1 (Tenn. Ct. App. June 28, 2010). As this Court has explained,

> "The statute of frauds, however, does not render oral contracts for the sale of land void *ab initio*. Instead, such contracts are merely voidable at the election of either party. If one of the parties to the contract fails to raise the statute of frauds as a defense, or if the parties consent, the court is required to enforce an oral contract for the sale of land."

Id. (quoting *Anderson v. Hacks Crossing Partners*, 3 S.W.3d 482, 486 (Tenn. Ct. App. 1999)). Here, Plaintiffs have brought an action to enforce an oral contract, and Defendants have raised the Statute of Frauds as a defense. Therefore, the Statute of Frauds has been implicated, and we must proceed to determine whether it applies to the contract at issue in this case.

532 S.W.2d 561, 565 (Tenn. Ct. App. 1975)). In other words, the Statute of Frauds "'ensures that transactions involving . . . realty interests are commemorated with sufficient solemnity . . . that the parties and the public can reasonably know when such a transaction occurs." *Curtis v. Rice*, No. 01A-01-9605-CH-00211, 1996 WL 694156, at *3 (Tenn. Ct. App. Dec. 5, 1996) (quoting *D & S Coal Co. v. USX Corp.,* 678 F. Supp. 1318, 1322 (E. D. Tenn. 1988)).

Plaintiffs argue that the former mayor's oral promise to build an alley on the City property falls outside the Statute of Frauds because his promise was an independent agreement collateral to the parties' real estate transaction and was, therefore, not required to be in writing. Plaintiffs' complaint stands in contrast to the assertion that the agreements were independent. In paragraphs 6 and 24 of their complaint, Plaintiffs aver that the promise to build an alley was the "purpose" of the sale:

> 6. At the time the City purchased this property from FSC, this transaction was undertaken at the request of the Mayor at the time, for the purpose and with the understanding that the City was to install, upgrade, and maintain underground utilities. . . . .
> 24. The City, at the time it purchased the portion of land from FSC, did so with the understanding and for the purpose of building and maintaining an alley. The City, in refusing to complete the alley, has breached its contract[3] with FSC.

In view of these statements in the complaint, we find the alleged promise to build the alley was integral to the "sale of land[]" at the heart of this dispute. Tenn. Code Ann. § 29-2-101(a)(4). Our Supreme Court has explained that "[i]n order to satisfy the statute of frauds, the entire agreement must be in writing. It cannot be partly in writing and partly in parol." *Eslick v. Friedman*, 235 S.W.2d 808, 812 (Tenn. 1951). Because Plaintiffs alleged that the former mayor's promise was an essential component of the real estate transaction, and that promise placed affirmative duties on the City with respect to the land, the Statute of Frauds applies and requires the former mayor's alleged promise to build an alley to be in writing

[3] In their brief, Plaintiffs cite *Jackson v. Smith*, 387 S.W.3d 486, 491-92 (Tenn. 2012) and argue that the City cannot rely on the Statute of Frauds because the City "cannot meet its burden of showing that [the Statute of Frauds defense] appear[s] clearly and unequivocally on the face of the complaint" because "[n]othing on the face of the complaint establishes that there is *not* a writing that could satisfy the statute of frauds." (emphasis in original). We note that, pursuant to Tenn. R. Civ. P. 10.03, Plaintiffs were required to attach a written contract to their complaint if one existed. Tennessee Rule of Civil Procedure 10.03 states, in pertinent part, "[w]henever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit . . . ." No such instrument was attached to Plaintiffs' complaint in this case; therefore, the absence of a written agreement attached to the complaint serves to implicate the Statute of Frauds defense. We note that the City attached additional documents to its motion to dismiss, and the trial court relied upon those documents and deemed them "authentic."

in order to be enforceable. *See, e.g.*, *Est. of Elrod*, 2016 WL 3574963, at *5 (holding that the Statute of Frauds barred an oral agreement to pay rental income as additional consideration for conveyance of real property); RESTATEMENT (FIRST) OF PROPERTY § 522(1) ("[A] promise that certain land will be used in a particular way is subject to the provisions of the Statute of Frauds.").[4] Our holding squares with the purpose of the Statute of Frauds which is to prevent "hasty or inconsiderate agreements concerning a valuable species of property" and "misunderstandings as to the nature and extent of such agreements." *Brandel*, 774 S.W.2d at 604; *see also McGannon v. Farrell*, 214 S.W. 432, 434-35 (Tenn. 1919) (finding that a buyer's alleged oral promise to erect a "handsome residence" on property could not be proven by parol evidence). Furthermore, a signed writing would have been particularly apropos in this case as Plaintiffs chose not to pursue an action to enforce the alleged oral agreement until over fourteen years after the former mayor made the promise.

Now that we have determined that the Statute of Frauds applies to the alleged oral promise, we must determine whether there is merit to Plaintiffs' assertion that the City Council's Meeting Minutes, the Clarksville Gas & Water Committee Minutes ("Gas & Water Minutes"), and the General Warranty Deed combine to satisfy the writing requirement of the Statute of Frauds. Tennessee courts have previously examined what type of writing is required to satisfy the Statute of Frauds and have determined it "does not require a written contract, only a written memorandum or note evidencing the parties' agreement." *Waddle*, 367 S.W.3d at 226 (citing *Huffine v. McCampbell*, 257 S.W. 80, 89 (Tenn. 1923)). Moreover, "while the writing required by the Statute of Frauds must contain the essential terms of the contract, it need not be in a single document." *Id.* As our Supreme Court has explained:

> The general rule is that the memorandum, in order to satisfy the statute, must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence. A memorandum disclosing merely that a contract had been made, without showing what the contract is, is not sufficient to satisfy the requirement of the Statute of Frauds that there be a memorandum in writing of the contract.

[4] Comment (a) to the Restatement (First) of Property § 522, lends further support to our holding and explains:

> A promise that land of the promisor will be used in a particular way operates to create an interest in the land respecting which the promise was made. Not only does it create an interest but it creates an interest of significance in connection with the future use of the land. This interest is of such significance as to come within those provisions of the Statute of Frauds requiring interests in land to be created by an instrument in writing.

Id. (quoting *Lambert v. Home Fed. Sav. & Loan Ass'n*, 481 S.W.2d 770, 773 (Tenn. 1972)). Finally, to satisfy the Statute of Frauds, the writing must be signed by the "party to be charged" or, the "party against whom enforcement of the contract is sought." Tenn. Code Ann. § 29-2-101(a)(4). Here, the City is the party to be charged.[5]

A review of the relevant documents that Plaintiffs allege combine to satisfy the Statute of Frauds shows that they are not "expressed with such certainty" that there is no need for further parol evidence. While the City Council's Meeting Minutes authorize purchase of property "for public alley" there is nothing more to explain the City's duty with respect to the property. On the topic of the property, the Meeting Minutes state as follows:

> Authorizing purchase of property on North Second Street from Peter Martin for public alley.
>
> Councilwoman Clark made a motion to approve this purchase, not to exceed $60,000. The motion was seconded by Councilwoman Dozier. The vote was recorded as follows: AYE: Barbara Johnson, Staton Shelby, Marshall Ross, Mark Holleman, Mary Jo [D]ozier, Margie Clark, Curtis Johnson, Morrell Boyd
>
> NAY: Gabriel Segovia, Phil Drew, Joe Couch, Wayne Harrison
>
> The motion to approve the purchase passed.

While Plaintiff's argument presents a creative attempt to satisfy the Statute of Frauds, the City Council's Meeting Minutes contain a barebone authorization to purchase property "for public alley" "not to exceed $60,000." The meeting minutes do not contain "essential terms" of any obligation of the City to build, construct, pave, or improve the property at issue. There is no way to determine what further steps the City allegedly agreed to complete by looking at the City Council's Meeting Minutes or the General Warranty Deed. In view of these deficiencies, we find Plaintiffs' argument that the additional documents satisfy the Statute of Frauds unavailing.

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[5] In this particular case, another layer of signature requirements exists, as the City Charter requires the mayor to "execute all deeds, bonds and contracts made in the name of the city, and his signature shall be attested by the city clerk or by the person acting for the city clerk . . . ." *Charter of the City of Clarksville, Tenn.*, Ch. No. 292, Article IV, § 2. We note that the City Council's Meeting Minutes are signed by the mayor and attested by the city clerk; therefore, we will consider them in determining whether they satisfy the Statute of Frauds. In contrast, the Gas & Water Minutes are not signed by the mayor or "attested" by the city clerk; thus, we will not include those minutes in our review.

Finally, we dispense with Plaintiff's argument that "part performance" renders the Statute of Frauds inapplicable because, as this Court has explained, "it has long been the rule in this state that partial performance will not prevent the application of the Statute of Frauds to an agreement involving interests in real estate." *Owen v. Martin*, No. M1999-02305-COA-R3-CV, 2000 WL 1817278, at *4 (Tenn. Ct. App. Dec. 13, 2000) (citing *Knight v. Knight*, 436 S.W.2d 289 (Tenn. 1962); *Eslick v. Friedman*, 235 S.W.2d 808 (Tenn. 1951); *Goodloe v. Goodloe*, 92 S.W. 767 (Tenn. 1905)); *see also Smith v. Hi-Speed, Inc.*, 536 S.W.3d 458, 477-80 (Tenn. Ct. App. 2016) (stating "the partial performance doctrine is unavailable to remove agreements regarding realty from the Statute of Frauds"). The alleged promise at issue in this case concerns real estate; thus, the partial performance defense does not extract the former mayor's alleged oral agreement from the requisites of the Statute of Frauds.

In sum, the trial court's ruling that the Statute of Frauds prevents enforcement of the alleged oral agreement is affirmed.[6]

D. Dismissal of "Diminution of Value of Land" Claim

Plaintiffs next contend that the trial court erred by dismissing their "claim" for "diminution of value of land." The trial court ruled that Plaintiffs' claim for diminution of value of land was "part[] and/or extension[]" of Plaintiffs' breach of contract claim and dismissed the claim on the basis. We agree with the trial court. Diminution in value of land is a "measure of damages" to be used in cases where a party incurs "damages for injury to real property." *Durkin v. MTown Constr., LLC*, No. W2017-01269-COA-R3-CV, 2018 WL 1304922, at *2 (Tenn. Ct. App. Mar. 13, 2018); *see, e.g.*, *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005) (discussing cost of repair and diminution in value as measures of damages in breach of construction contract cases). Diminution of value of land is not a stand-alone cause of action with its own elements to

[6] As their final issue on appeal, Plaintiffs assert the trial court erred in failing to revise its order on their breach of contract claim. The entirety of Plaintiffs argument is restated below:

> The Robinsons moved the Trial Court to revise its order dismissing breach of contract (T.R.Vol.3, 351), and this Court should reverse the Trial Court's denial of that motion. It concluded that "a Rule 54.02 motion to revise doesn't apply to any judgment except … summary judgment …" (T.R.Vol.9, 1,196:17–21.) Tenn. R. Civ. Pro. 54.02(1) provides, however, that "any order … that adjudicates fewer than all the claims … is subject to revision at any time before the entry of the [final] judgment …" (emphasis added).

This Court has held that "[a] skeletal argument that is really nothing more than an assertion will not properly preserve a claim." *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006). Plaintiffs set forth this perfunctory argument without development or explanation of how revising the order, if appropriate, would affect the outcome of the case. It is not our role to "research or construct a litigant's case or arguments for him or her." *Sneed v. Bd. Pro. Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010). Therefore, we deem this "issue" waived.

be satisfied. Therefore, we affirm the trial court's dismissal of the invented claim "diminution of value of land."

E. Dismissal of Intentional Interference with Business Relationship Claim

Plaintiffs argue that the trial court erred in determining that the Governmental Tort Liability Act ("GTLA") bars their claim for intentional interference with business relationships. The GTLA "codifies the common law rule that governmental entities are immune from suit for any injury resulting from the activities of the governmental entities." *Moreno v. City of Clarksville*, 479 S.W.3d 795, 809 (Tenn. 2015) (citing *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 79 (Tenn. 2001)). The GTLA begins as follows:

> Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

Tenn. Code Ann. § 29-20-201(a). The GTLA goes on to remove "governmental immunity in limited circumstances for certain enumerated injuries." *Sneed v. City of Red Bank, Tenn.*, 459 S.W.3d 17, 24-25 (Tenn. 2014); *Halliburton v. Town of Halls*, 295 S.W.3d 636, 638 (Tenn. Ct. App. 2008) (summarizing the causes of action for which immunity is removed); *see, e.g.*, Tenn. Code Ann. §§ 29-20-202 through -205. As is relevant here, Tenn. Code Ann. § 29-20-205 provides that:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:
> . . .
> (2) False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, *interference with contract rights*, infliction of mental anguish, invasion of right of privacy, or civil rights; . . .

(emphasis added). We are mindful that "the GTLA's limited waiver of governmental immunity is in derogation of the common law" and thus "is to be strictly construed and confined to its express terms." *Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005) (citing *Doyle v. Frost*, 49 S.W.3d 853, 858 (Tenn. 2001)).

When examining intentional torts under the purview of the GTLA, our Supreme Court has instructed that "'the GTLA does not allow plaintiffs to hold governmental entities vicariously liable for intentional torts not exempted under section 29-20-205(2), but rather requires a direct showing [of] negligence on the part of the governmental

entity.'" *Hughes v. Metro. Gov't of Nashville & Davidson Cty.*, 340 S.W.3d 352, 368 (Tenn. 2011) (quoting *Pendleton Metro. Gov't of Nashville & Davidson Cty.*, No. M2004-01910-COA-R3-CV, 2005 WL 2138240, at *3 (Tenn. Ct. App. Sept. 1, 2005)). In other words, "where an intentional tort is not specifically enumerated in section 29-20-205(2), the governmental entity may still be liable for its negligent failure to prevent its employees from committing the intentional tort." *Fitzgerald v. Hickman Cty. Gov't*, No. M2017-00565-COA-R3-CV, 2018 WL 1634111, at *6 (Tenn. Ct. App. Apr. 4, 2018) (citing *Hughes*, 340 S.W.3d at 368-69; *Limbaugh*, 59 S.W.3d at 84).

The trial court held that interference with business relationships is an "extension" of a claim for interference with contract rights and determined the City is immune from suit pursuant to Tenn. Code Ann. § 29-20-205(2). Thus, we will consider whether the claim of "interference with business relationships" "arises out of" a claim for "interference with contract rights" and whether it can be used interchangeably with that claim under the GTLA. The trial court followed the reasoning from a United States federal district court case that held the GTLA provides immunity for claims of interference with business relationships. In *Abu-Hatab v. Blount Memorial Hospital, Inc.*, No. 3:06-CV-436, 2008 WL 2713992, at *2 (E.D. Tenn. July 9, 2008), the federal district court discussed intentional interference with business relationship in the context of the GTLA and held:

> In *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002), the Tennessee Supreme Court stated that the cause of action for intentional interference with a business relationship is merely "an extension of the well-known [tort of] interference with contractual relations.["] *Id.* at 699. The court further explained that the business relationships protected by the tort of intentional interference with business relationships "include any prospective contractual relations . . . if the potential contract would be of pecuniary value," including a "continuous business or other customary relationship" which is non-contractual. *Id.* at 701 (emphasis provided). As this tort is an extension of the tort of interference with contractual relations, the court finds that it is also subject to the GTLA's retention of immunity for claims of interference with contract rights. *See Martinek v. United States*, 254 F.Supp.2d 777, 790 (S.D. Ohio 2003) (determining that claims for interference with business relationships fall within the exclusion for claims arising out of interference with contract rights). Accordingly, plaintiff's fifth claim for relief for interference with business relations will be DISMISSED . . . .

See also Noyes v. City of Memphis, No. 11-2775-STA, 2012 WL 3060100, at *3 (W.D. Tenn. 2012) (dismissing "interference with business relationships" claim pursuant to the

GTLA). Plaintiffs urge us to find that the reasoning employed by the federal district courts and the trial court was incorrect.[7]

Our Supreme Court expressly adopted the tort of intentional interference with a business relationship in *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002) and articulated the elements of the tort as follows:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference.

Trau-Med, 71 S.W.3d at 701 (footnotes, emphasis, and citation omitted). The *Trau-Med* Court specifically noted that the business relationships protected may include "a continuing business or other customary relationship *not amounting to a formal contract*." *Id.* at 701 n.4 (emphasis added). In contrast, the elements of the cause of action for interference with contract rights[8] are:

> (1) a legal contract existed; (2) the defendants knew the contract existed; (3) the defendants intended to induce a breach of that contract; (4) the defendants acted with malice; (5) the contract was breached; (6) the defendants' actions were the proximate cause of the breach; and (7) the plaintiff suffered damages.

Dowlen v. Weathers, No. E2004-00857-COA-R3-CV, 2005 WL 1160627, at *7 (Tenn. Ct. App. May 17, 2005) (citing *TSC Indus., Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987)); *see also* Tenn. Code Ann. § 47-50-109. Although they are similar in some ways, the two causes of action are separate and distinct, with the chief distinction being that a cause of action for interference with business relationship does not require an existing contract. We do not find that the claim of interference with business relationship

[7] We note that federal opinions interpreting Tennessee law are not binding on this Court. *See Townes v. Sunbeam Oster Co., Inc.*, 50 S.W.3d 446, 452 (Tenn. Ct. App. 2001) ("When a federal court undertakes to decide a state law question . . . the state courts are not bound to follow the federal court's decision.").

[8] Various cases denominate a claim for "interference with contract rights" in different ways, including "procurement of breach of contract" and "inducement of breach of contract." *See, e.g.*, *Apollo Hair Sys. of Nashville v. First Lady Int'l Corp.*, No. M2003-02322-COA-R3-CV, 2005 WL 735032, at *3 (Tenn. Ct. App. Mar. 29, 2005); *Int'l Mktg. Grp., Inc. v. Speegle*, No. M1999-00468-COA-R3-CV, 2000 WL 329375, at *5 (Tenn. Ct. App. Mar. 30, 2000).

necessarily "arises out of" a claim for interference with contract rights because no contract is required in order to pursue the claim of interference with business relationship. Our Supreme Court has cautioned that we must construe the GTLA "strictly" and confine the statute "to its express terms," *Sallee*, 171 S.W.3d at 828, therefore, we find that the trial court erred in conflating the torts of interference with contract rights and interference with business relations under Tenn. Code Ann. § 29-20-205(2).

However, our analysis under the GTLA is not complete, because the City cannot be held liable for an intentional tort "absent proof of its negligent supervision." *Hughes*, 340 S.W.3d at 368; *see also Lemon v. Williamson Cty. Schs.*, 618 S.W.3d 1, 23 (Tenn. 2021). So, we must review the complaint to ensure there are no allegations that the City's negligent supervision caused the intentional act complained of in this case. To be sure, interference with business relationship is an intentional tort (not arising from a negligent act) because it requires a finding of "the defendant's intent to cause the breach or termination of the business relationship." *Trau-Med*, 71 S.W.3d at 701. The Plaintiffs' allegations with respect to the tort are as follows:

> COUNT 4: INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS
>
> 27. At the time the City breached its contract with FSC, and at the time [the] City placed the sewer line on FSC's building site, the City, by its agents, knew that FSC had an existing business relationship with a specific identifiable class of third persons, specifically, purchasers of beer brewed by FSC.
>
> 28. At the time the City breached its contract with FSC, and at the time [the] City placed the sewer line of FSC's building site, the City, by its agents, knew of FSC's business dealings with others and knew specifically of the intent to place a Brewhouse on the building site, in an effort to meet growing demand.

Construing the allegations in the complaint liberally, we find no allegations of negligent supervision or any other negligent conduct on the part of the City that caused the intentional conduct at issue. *Lemon*, 618 S.W.3d at 23 (quoting *Lemon v. Williamson Cty. Schs.*, No. M2018-01878-COA-R3-CV, 2019 WL 4598201, at *6 (Tenn. Ct. App. June 5, 2019) (quoting *Hughes*, 340 S.W.3d at 368))) ("'[A] governmental entity cannot be held liable for an intentional tort "absent proof of its negligent supervision."'"). Therefore, we find that the City retains immunity for the claim of intentional interference with business relationships, and we affirm the trial court's dismissal of the claim. *See White v. Johnson*, 522 S.W.3d 417, 425 n.3 (Tenn. Ct. App. 2016) ("This court may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result.").

F. Dismissal of 42 U.S.C. § 1983 Claim

Plaintiffs next contend the trial court erred in dismissing their Section 1983 claim.[9] With respect to this claim, Plaintiffs' complaint alleges:

> COUNT 5: § 1983 TAKING
>
> 29. This placement of the sewer on FSC's property constitutes a taking of FSC's real property, by the City, without compensation.
>
> 30. This taking has been done without compensation in violation of the Fifth Amendment of the Constitution of the United States of America, made applicable by the Fourteenth Amendment, and in violation of the Constitution of the State of Tennessee.
>
> 31. FSC, as a result of this sewer line being placed on its property, has suffered a significant loss in the value of its property.

A claim may arise under Section 1983 for individuals who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of "any statute, ordinance, regulation, [or] custom." 42 U.S.C. § 1983. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating . . . rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). In the present case, Plaintiffs allege the City violated their Fifth Amendment rights, made binding on the states via the Fourteenth Amendment. "The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'" *Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2167 (2019).

Municipalities may be liable under Section 1983 in particular circumstances. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). In *Monell*, the

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[9] Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983.

Supreme Court determined that in order to establish Section 1983 liability against a municipality, a plaintiff must show that the protected right was violated by the execution of the municipality's "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy[.]" *Monell*, 436 U.S. at 694. Moreover, a municipal governmental entity cannot be held liable for an injury caused by its agents or employees under § 1983 based on a theory of respondeat superior. *Id.* Instead, a municipal governmental entity may only be liable for a constitutional tort where the action occurred pursuant to a municipal policy, practice, or custom. *Id.* at 690-91. In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Supreme Court clarified *Monell* adding that "a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." The edicts of *Monell* and its progeny have been summarized as follows: "a plaintiff 'must (1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy.'" *Davidson v. Arlington Cmty. Sch. Bd. of Educ.*, No. 2:19-cv-02101-TLP-cgc, 2020 WL 4194528, at *10 (W.D. Tenn. July 21, 2020) (quoting *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003)); *see also Hill v. City of Memphis*, No. W2013-02307-COA-R3-CV, 2014 WL 7426636, at *7 (Tenn. Ct. App. Dec. 30, 2014) (underscoring the fact that "the plaintiff must prove that a city policy or policy of inaction was the moving force behind the violation").

Here, Plaintiffs have not alleged any specific "policy or custom" through which the City caused harm; therefore, Plaintiff failed to state a 42 U.S.C. § 1983 claim upon which relief can be granted. The trial court's dismissal of Plaintiffs' Section 1983 claim is affirmed.[10]

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[10] Plaintiffs assert that the trial court erred in failing to dismiss this case without prejudice. In support of this argument, Plaintiffs point to dictum from a memorandum opinion entered in a parallel federal court case initiated by Plaintiffs. The federal court was presented with much of the record from this case, including the trial court's order at the center of this dispute. Regarding the trial court's order, the federal court stated, in relevant part:

> Based on an apparent misreading of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the State Court dismissed *with prejudice* the § 1983 taking claim on the grounds that the initial Complaint "fail[ed] to allege that a 'policy' or 'custom' of the City deprived the Plaintiffs of the federal constitutional or statutory rights."

(Emphasis in original). The federal court then included a footnote stating as follows:

> At the time the State Court issued this opinion, the governing law would have required dismissal of the § 1983 claim without prejudice, based on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), pursuant to which a § 1983 claim premised upon an unconstitutional taking in violation of the Fifth Amendment could not be brought until after the plaintiff had sought, and been denied, just compensation by a state court through the available state inverse condemnation procedure.

G. Denial of Plaintiffs' Motion to Amend the Complaint

Plaintiffs assert the trial court applied an incorrect standard when it denied Plaintiffs' motion to amend their complaint to add a claim of interference with business relationship against Mayor Kim McMillan. Essentially, the trial court determined that the claim was "futile" because the proposed complaint "does not contain any allegations of fact setting forth the second, third and fourth[] elements of a claim for intentional interference with business relationships . . . ."

> *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002) (quoting *Williamson Cty. Reg'l Plan. Comm'n*, 473 U.S. at 186, 194)).
>
> The Supreme Court overruled, in part, *Williamson County Regional Planning Commission* in 2019, in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). There, the Court held that a property owner has an actionable Fifth Amendment taking claim when the government takes his property without paying for it and that he may bring his claim in federal court under § 1983 at that time, without being required to exhaust his claim in the state court by bringing an inverse condemnation claim. The federal Complaint, filed less than a year after its issuance, is governed by *Knick*.

We have considered the federal court's intimation of error and have pondered the applicability of *Williamson* and *Knick* to the present situation. In our view, neither *Williamson* nor *Knick* necessitate a different outcome in this case. We are persuaded to reach this result through our review of the following analysis from the Michigan Court of Appeals:

> *Williamson*, therefore, stands for the proposition that a party cannot bring a federal Taking Clause claim in federal court until its state claims are resolved. *However, Williamson does not serve to preclude a party from bringing its state and federal claims at the same time in a state court.* [Emphasis added.]
>
> In other words, plaintiffs were always permitted to raise their federal claim in the *state* court, and the *Knick* decision did not change that; rather, plaintiffs were not permitted, prior to *Knick*, to raise such a claim *in federal court* without having tried and failed to obtain compensation in state court.

Gottleber v. Cty. of Saginaw, No. 354965, 2022 WL 1195288, at *5 (Mich. Ct. App. Apr. 21, 2022) (quoting *Bruley v. City of Birmingham*, 675 N.W.2d 910 (Mich. Ct. App. 2003)). We also note that *Monell* was not at issue in *Knick*, likely because the petitioner in that case sought declaratory and injunctive relief on the ground that the Township's "ordinance" effected a taking of her property; thus there was clearly a municipal policy implicated in *Knick*. *Knick*, 139 S.Ct. 2168. There is nothing in *Williamson* or *Knick* that persuades us that *Monell* is not applicable to this case. Therefore, we dismiss Plaintiffs' Section 1983 claim with prejudice pursuant to *Monell*. *See Jackson v. Thomas*, No. M2010-01242-COA-R3-CV, 2011 WL 1049804, 2011 WL 1049804, at *5 (Tenn. Ct. App. Mar. 23, 2011) (dismissing Section 1983 claim with prejudice where the complaint "did not allege or identify a policy or custom" of the County that resulted in deprivation of any rights).

Our Supreme Court has explained that "[a] trial court's decision to grant or deny a motion to amend [a pleading] is reviewed under an abuse of discretion standard." *Bidwell ex rel. Bidwell v. Strait*, 618 S.W.3d 309, 318 (Tenn. 2021) (citing *Runions v. Jackson-Madison Cty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 84 (Tenn. 2018)). "A court abuses its discretion when it applies an incorrect legal standard or its decision is illogical or unreasonable, is based on a clearly erroneous assessment of the evidence, or utilizes reasoning that results in an injustice to the complaining party." *Id.* (quoting *Runions*, 549 S.W.3d at 84). Tennessee Rule of Civil Procedure 15.01 provides, in pertinent part:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires. . . .

When deciding whether to allow an amendment to the complaint, courts should consider the following factors: "'[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by pervious amendments, undue prejudice to the opposing party, and *futility of amendment.*'" *Cumulus Broad., Inc., v. Shim*, 226 S.W.3d 366, 374 (Tenn. 2007) (emphasis added) (quoting *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979)). In particular, "courts are not required to grant a motion to amend if the amendment would be futile." *Runions*, 549 S.W.3d at 84-85.

In this case, we must consider whether the trial court's finding that Plaintiffs' complaint did not "contain any allegations of fact setting forth the second, third and fourth[] elements of a claim for intentional interference" constitutes "futility" for purposes of denying a motion to amend. Plaintiffs correctly note that this court observed in *Conley v. Life Care Centers of America, Inc.*, 236 S.W.3d 713, 724 (Tenn. Ct. App. 2007) that a plaintiff's Tenn. R. Civ. P. 15 motion to amend should not be denied "based on an examination of whether it states a claim on which relief can be granted." The *Conley* court also stated that where "the legal sufficiency of the proposed Complaint is at issue . . . the better protocol is to grant the motion to amend the pleading, which will afford the adversary the opportunity to test the legal sufficiency of the amended pleading by way of a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss." *Id.* However, the *Conley* court concluded that any error "was harmless because Plaintiff failed to state a claim upon which relief can be granted." *Id.* at 723. In other words, the *Conley* court ultimately concluded that the trial court was correct in its assessment that no legally adequate claim was stated in the proposed amendment; therefore, the trial court committed no reversible error in denying a motion to amend on that basis.

Confronting a similar circumstance in *Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 657 n.10 (Tenn. Ct. App. 2017), this court noted the above referenced language from *Conley* but then, as in *Conley* itself, proceeded to assess the correctness of the trial court's conclusion regarding whether the plaintiff had stated a claim in considering the denial of the motion to amend. In employing this approach, the *Blackwell* court observed that "[i]f we were to remand to the trial court with directions to grant the amendment, it is likely that the trial court would later grant a motion to dismiss this claim on the same basis that it denied the motion to amend. Consequently, we cannot discern how judicial economy would be furthered by requiring the above procedure." *Id*.

That this ultimate approach—considering whether a legally adequate claim was stated in the proposed amendments to the complaint—was employed in *Conley* and *Blackwell* is unsurprising. A broad consensus exists in federal and state courts that, where an amended claim cannot withstand a motion to dismiss for failure to state a claim, allowing such an amendment would be futile and thus the motion to amend is properly subject to denial on this basis.[11] When trial courts elect to deny the motion to amend on the basis of failure to state a claim, rather than granting the motion to amend and reserving the legal adequacy of the claim for a subsequent motion for dismiss, appellate courts consistently apply the less deferential standard of review generally applicable to reviewing a grant of a

[11] See, e.g., *Klotz v. Celentano Stadtmauer & Walentowicz LLP*, 991 F.3d 458, 462 (3d Cir. 2021) ("A proposed amendment to a complaint is futile if the amended complaint would fail to state a claim for relief under Rule 12(b)(6)."); *In re Triangle Capital Corp. Sec. Litig.*, 988 F.3d 743, 750 (4th Cir. 2021) ("[W]e have made clear that district courts are free to deny leave to amend as futile if the complaint fails to withstand Rule 12(b)(6) scrutiny."); *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 229 (5th Cir. 2022) ("If the complaint, as amended, would be subject to dismissal, then amendment is futile and the district court was within its discretion to deny leave to amend."); *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 737 (6th Cir. 2022) ("An amendment is futile when, after including the proposed changes, the complaint still 'could not withstand a Rule 12(b)(6) motion to dismiss.'"); *Cornelia I. Crowell GST Trust v. Possis Med., Inc*., 519 F.3d 778, 782 (8th Cir. 2008) ("[W]hen the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure."); *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 972 (10th Cir. 2021) ("A proposed amendment is futile if the complaint, as amended, would be subject to dismissal. . . . .The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim.") (citations omitted); *Houser v. CenturyLink, Inc.*, 513 P.3d 395, 406-07 (Colo. App. 2022) ("An amendment would be futile if it is legally insufficient or fails to cure defects in the previous pleadings.") (citations omitted); *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 811-12 (Del. 2016) ("A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim."); *Chang v. Winklevoss*, 123 N.E.3d 204, 213 (2019) ("Although leave to amend should be 'freely given when justice so requires,' such leave may be denied where amending the complaint would be futile. An amended complaint is futile if the amended claims would not survive a motion to dismiss for failure to state a claim.") (citations omitted); *Spiers v. Oak Grove Credit, LLC*, 328 So. 3d 645, 651 (Miss. 2021) ("To be futile, the amendment must fail to state a claim."); *Johnson v. Pinson*, 854 S.E.2d 225, 235 (W. Va. 2020) ("An amendment is also futile if, for example, it . . . fails to state a legal theory, or could not withstand a motion to dismiss.").

motion to dismiss rather than the more deferential standard typically applicable to a trial court's ruling on motions to amend a complaint.[12] That is precisely what the *Conley* court did in considering the trial court's decision to deny the motion to amend in that case. *Conley*, 236 S.W.3d at 723-24. Rather than applying the more deferential standard of review generally applicable to trial court decisions upon motions to amend a complaint, the *Conley* court applied the heightened standard of review applicable to rulings upon motions to dismiss. *Id*.

Here, the trial court examined whether the proposed amendment to the complaint to add a claim of tortious interference with business relations actually set forth a legally adequate claim. In other words, the trial court engaged in what is more conventionally motion to dismiss analysis in the context of considering a motion to amend. As observed by the *Blackwell* court, judicial economy would not be furthered by remanding the case for entry of the same decision in response to a separate motion to dismiss rather than addressing on appeal the merits of the trial court's ruling in determining whether the proposed amendment stated a claim. Despite having labeled as error the trial court's action of denying the motion to amend rather than granting the motion to amend and awaiting a motion to dismiss, the *Conley* court, nevertheless, engaged in the same analysis as state and federal courts that do not regard such action as error. Accordingly, whether labeled as error that is subject to harmless error analysis as performed by the *Conley* court or viewed as a proper approach by trial courts—the view held by federal and state courts generally—Tennessee courts and other courts functionally end up at the same place. Therefore, we will proceed to consider whether the trial court correctly determined that the proposed amended complaint fails to contain factual allegations setting forth the elements of a claim for intentional interference with business relationship. In doing so, we apply the heightened standards of review applicable to motions to dismiss.

As we explained above, a claim for interference with business relationships requires:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference.

[12] *See*, *e.g.*, *In re Triangle Capital Corp. Sec. Litig.*, 988 F.3d at 750; *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 125-26 (5th Cir. 2019); *Doe v. Michigan State Univ.*, 989 F.3d 418, 424-25 (6th Cir. 2021); *Kap Holdings, LLC v. Mar-Cone Appliance Parts Co.*, 55 F.4th 517, 529 (7th Cir. 2022); *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 588 (8th Cir. 2018).

Trau-Med, 71 S.W.3d at 701 (footnotes and citation omitted). Plaintiffs assert they pleaded facts sufficient to establish each element. The proposed complaint alleges in Paragraph 27 that "at the time City placed the sewer line on FSC's building site, the city, by its agents, knew that FSC had an existing business relationship with a specific identifiable class of third persons, specifically purchasers of beer brewed by FSC." In Paragraph 28, the proposed complaint states, "the City by its agents knew of FSC's business dealings with others and knew specifically of the intent to place a Brewhouse on the building site, in an effort to meet growing demand." Paragraph 15 of the proposed complaint states:

> Upon completion of the sewer repair, the City Mayor, Ms. Kim McMillan, called a meeting with the owners of the Franklin Street buildings, at which time it was announced that the City did not intend to complete the alley. FSCs offer to complete the alley at its own expense was not accepted. This was a change instituted by Mayor McMillan individually. It is believed it results from political disagreements with Jeff Robinson.

Applying the elements from *Trau-Med* to this proposed complaint, we have determined that Plaintiffs failed to sufficiently plead the fourth element of the cause of action, "the defendant's improper motive or improper means." Plaintiffs were required to demonstrate that Mayor McMillan's "predominant purpose" was to injure Plaintiffs through improper purpose or improper means. *TIG Ins. Co. & Fairmont Specialty Grp. v. Titan Underwriting Managers, LLC*, No. M2007-01977-COA-R3-CV, 2008 WL 4853081, at *4 (Tenn. Ct. App. Nov. 7, 2008). We have previously found that the City was under no obligation to construct the alley because the alleged promise by the former mayor did not comport with the Statute of Frauds and was unenforceable. Thus, Mayor McMillan's announcement that the alleyway would not be constructed was not in any way improper. We agree with the trial court that the proposed amended complaint does not include allegations setting forth a claim for intentional interference with business relationship, and we uphold the trial court's decision denying Plaintiffs' request to amend the complaint to add Mayor McMillan as a party.

II. Summary Judgment

A. Standard of Review

We review a trial court's summary judgment determination de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). This means that "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* We "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *see also Acute Care Holdings, LLC v. Houston Cty.*, No. M2018-01534-COA-R3-CV, 2019 WL 2337434, at *4 (Tenn. Ct. App. June 3, 2019).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. A disputed fact is material if it is determinative of the claim or defense at issue in the motion. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). When a party moves for summary judgment but does not have the burden of proof at trial, the moving party must submit evidence either "affirmatively negating an essential element of the nonmoving party's claim" or "demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. Once the moving party has satisfied this requirement, the nonmoving party "'may not rest upon the mere allegations or denials of [its] pleading.'" *Id.* at 265 (quoting TENN. R. CIV. P. 56.06). Rather, the nonmoving party must respond and produce affidavits, depositions, responses to interrogatories, or other evidence that "set forth specific facts showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.06; *see also Rye*, 477 S.W.3d at 265. If the nonmoving party fails to respond in this way, "summary judgment, if appropriate, shall be entered against the [nonmoving] party." TENN. R. CIV. P. 56.06. If the moving party fails to show he or she is entitled to summary judgment, however, "'the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.'" *Martin*, 271 S.W.3d at 83 (quoting *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

B. Dismissal of Promissory Estoppel Claim

We next consider whether the trial court properly granted summary judgment to the City on Plaintiffs' promissory estoppel claim. Promissory estoppel "is an equitable doctrine, and its limits are defined by equity and reason." *Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007). In order to prevail on a claim of promissory estoppel, plaintiffs must establish the following elements: "'(1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment.'" *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *9 (Tenn. Ct. App. July 12, 2017) (quoting *Chavez*, 245 S.W.3d at 404). "The key element, of course, is the promise." *Id.* (citing *Chavez*, 245 S.W.3d at 405). Tennessee courts have cautioned that "the doctrine of promissory estoppel is not liberally applied." *Kinard v. Nationstar Mortg. LLC*, 572 S.W.3d 197, 210 (Tenn. Ct. App. 2018); *see also Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 645 (Tenn. Ct. App. 2006).

We also acknowledge there is some uncertainty in Tennessee law regarding a claim for promissory estoppel and the application of the Statute of Frauds. *See e.g.*, *Carbon Processing & Reclamation, LLC v. Valero Mktg. & Supply Co.*, 823 F. Supp. 2d 786, 821

(W.D. Tenn. 2011) (noting that "the Tennessee Supreme Court has not defined the limits for applying promissory estoppel to promises that are unenforceable under the statute of frauds"). Indeed, this Court has stated both that promissory estoppel "has not been recognized as an exception to the statute of frauds", (*Seramur v. Life Care Centers of Am., Inc.*, No. E2008-01364-COA-R3-CV, 2009 WL 890885, at *5 (Tenn. Ct. App. Apr. 2, 2009), and also that the application of promissory estoppel to overcome the bar of the Statute of Frauds is limited to "'exceptional cases where to enforce the statute of frauds would make it an instrument of hardship or oppression, verging on actual fraud.'" *Shedd v. Gaylord Entm't Co.*, 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003) (quoting *Baliles v. Cities Serv.*, 578 S.W.2d 621 (Tenn. 1979)); *see also Chavez*, 245 S.W.3d at 407 (reversing award of damages for promissory estoppel where "there was no proof presented that [the defendant] was guilty of any conduct that verged on actual fraud, that it acted from improper motive, or that it gained an unconscionable advantage from its actions"). In instances where this Court has considered a claim of promissory estoppel as an exception to the Statute of Frauds, we have cautioned that it "should not be applied too liberally lest the exception swallow the rule." *Johnson v. Allison*, No. M2003-00428-COA-R3CV, 2004 WL 2266796, at *8 (Tenn. Ct. App. Oct. 7, 2004) (citing *Shedd*, 118 S.W.3d at 698).

Assuming that a claim for promissory estoppel is an exception to the Statute of Frauds, per *Chavez* and *Shedd*, we will proceed to analyze whether Plaintiffs' claim for promissory estoppel withstands summary judgment in this case. *See Chavez*, 245 S.W.3d at 407; *Shedd*, 118 S.W.3d at 699-700. We have previously held that the former mayor's oral promise was subject to the Statute of Frauds and that none of the documents produced by Plaintiffs (including the General Warranty Deed and the City Council's Meeting Minutes) satisfy the Statute of Frauds. Using the reasoning from *Shedd* and *Chavez*, we must determine whether conduct "verging on actual fraud" exists such that the Statute of Frauds should not bar the claim in this case. *See Shedd*, 118 S.W.3d at 699-700. When defining "fraud," this Court has explained:

> The essence of fraud is deception. *Lopez v. Taylor*, 195 S.W.3d 627, 634 (Tenn. Ct. App. 2005). "In its most general sense, fraud is a trick or artifice or other use of false information that induces a person to act in a way that he or she would not otherwise have acted." *Id.* (citing *Rawlings v. John Hancock Mut. Life Ins. Co*., 78 S.W.3d 291, 301 (Tenn. Ct. App. 2001)).

Deal v. Tatum, No. M2015-01078-COA-R3-CV, 2016 WL 373265, at *7 (Tenn. Ct. App. Jan. 29, 2016). The former mayor testified in his deposition that he never intended to deceive the Robinsons:

> Q. What I said was, what happened in August of 2002, the city purchased the property, correct?
> A. Yes.

Q. And that purchase was funded by money from three different city departments, correct?
A. That's right.
Q. And that money was to buy the property from Mr. Robinson, correct?
A. Yes.
Q. It was not to -- there was no money to build and pave the property –
A. In that allocation, there was not.
Q. When you made that commitment, as you call it, to Mr. Robinson, were you being truthful?
A. Truthful?
Q. Yeah.
A. Yes.
Q. Okay. You weren't trying to deceive Mr. Robinson?
A. No.
. . .
BY MR. ECKERT:
Q. Actually, when do you -- when the city purchased the property back in August of 2002, do you remember whether it was your intent at the time that the city would build and pave it prior to your leaving office?
A. It was my intent at the time to purchase and construct an alleyway to access people's property from the rear, give them accessibility from the rear. And then an election occurred, and everything changes after the election.
Q. But you didn't run for mayor, did you, or did you?
A. I did. I got beat.
Q. You did? Sorry.
A. Yes, sir.
Q. So you intended to be mayor from '03 to -- through '06?
A. I did.
Q. And Mr. Trotter, Don Trotter, won?
A. Yes, sir, he beat me.
Q. So was the fact that you did not get elected mayor in 2002, effective 2003, did that play a role with regard to you not completing this project –
A. Yes.
Q. -- building and paving it?
A. Yes.

Joel, what happens – I'm sure you're familiar with this. But what happens when a campaign is over and the victor then -- everything -- everything begins to shift to the new person who is the decision-maker for the next four years.

So you become a lame duck, and you're kind of ready for it to get through. So most of these things, you're not – it's not even brought to your attention at that -- at that point.

Q. Most of -- most of what things?
A. Most of the city business is kind of -- everybody then kind of shifts to the new person that is going to be in charge. And so Mayor Trotter was -- was in charge effectively after the November election, and rightfully so, and I was very accommodating to him for that. I'm – I'm not a -- pol- -- politics is not my career.
Q. So as you sit here today, you're not aware of any action by the city council or anyone from the city, any other mayor, to set aside funding to pay for the building and paving of the alley from the time the property was purchased until -- until today?
A. No, sir.

(emphasis added). Here, Plaintiffs have not alleged fraud[13] nor have they shown conduct "verging on actual fraud" because there is no proof that the City acted from an improper motive or gained an unconscionable advantage from its decision not to construct an alley. Rather, the former mayor explained that the change in municipal administration caused the derailment of the alley project and, furthermore, that no funds had ever been set aside to build or pay for the alley. In our view, this does not rise to the level of conduct verging on actual fraud. Therefore, the Statute of Frauds trumps and continues to bar Plaintiffs' promissory estoppel claim.

As an alternate ground to dismiss the claim, we find that the promise at the heart of the promissory estoppel claim is ambiguous and unenforceably vague. As we explained when discussing the application of the Statute of Frauds, the former mayor's "promise" does not contain the essential terms of the bargain with any certainty and does not set forth any obligation of the City to build, construct, pave, or improve the property at issue. Indeed, the former mayor testified that funds had been assigned to purchase the land, but no funds had been appropriated to complete any construction on the alley. Because there was no showing of conduct "verging on actual fraud," and the promise at the center of the claim was unenforceably vague, we affirm the trial court's dismissal of the promissory estoppel claim (albeit on different grounds).

III. Claims Related to Inverse Condemnation Trial

A. Jury of Inquest

Plaintiffs assert this Court should "vacate the jury verdict and remand for a new trial on the inverse condemnation claim, instructing that [Plaintiffs] are entitled to convene a

[13] Tennessee Rule of Civil Procedure 9.02 requires, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The word fraud does not appear in Plaintiffs' First Amended Complaint, and Plaintiffs have not explained what conduct on the part of the City constituted fraud.

jury of inquest." The trial court denied the Plaintiffs' request for a jury of inquest for the following reasons:

> the Plaintiffs have waived their right to convene a jury of inquest for the following reasons: 1) By including in their complaint a request for a jury of inquiry as well as an action for damages in the ordinary way, Plaintiffs have failed to make an election of their remedies as required by TCA § 29-16-123(a); 2) Plaintiffs, in their original complaint and their amended complaints, waived their right to a jury of inquest by seeking to recover the value of the land as well as an action for damages in the ordinary way; 3) Plaintiffs by agreed order set the case for jury trial in the ordinary way; 4) Plaintiffs have been extremely dilatory in pursuing their right to a jury of inquest including making it clear to the Court that Plaintiffs fully intended to move forward with a jury in the ordinary way; and 5) waiting until six and a half months before the trial date to file Plaintiffs' formal notice of intent to convene a jury of inquest. For the above stated reasons, this Court finds by a preponderance of the evidence that Plaintiffs have waived their right to a jury of inquest. The action shall proceed in the ordinary way upon a twelve person jury scheduled to begin on October 28, 2019 in Clarksville, Tennessee.

Plaintiffs cite Tenn. Code Ann. § 29-16-123(a) in support of their assertion that they are unequivocally entitled to a jury of inquest, which states:

> (a) If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or the owner may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

Our Supreme Court had the occasion to interpret and explain the operation of this statute in *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 640-41 (Tenn. 1996):

> We uphold the long-standing law of this jurisdiction that a property owner whose property is taken by an authority exercising the power of eminent domain has two alternative causes of action. The property owner may petition for a jury of inquest as provided by statute. Tenn. Code Ann. § 29–16–123(a) (1980 Repl.). This alternative, properly designated as an inverse condemnation action, must be instituted in accordance with the statutory provisions applicable to condemnation actions initiated by the taking authority. *Johnson v. Roane Cty.*, 370 S.W.2d at 498. Alternatively, the property owner may sue for damages in a trespass action. If the owner

> proceeds on a trespass cause of action, the proceeding is by jury "in the usual way." Tenn. Code Ann. § 29-16-123(a) (1980 Repl.) ("in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest"); *id.* at -118(a) ("[e]ither party may also appeal from the finding of the jury, and, . . . have a trial anew, before a jury in the usual way").

Here, Plaintiffs have tried the inverse condemnation action before a jury, and the jury reached a verdict in favor of Plaintiffs. This Court has explained that, "'[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.'" *Johnson-Murray v. Burns*, No. M2016-00431-COA-R3-CV, 2017 WL 991891, at *11 (Tenn. Ct. App. March 14, 2017) (quoting TENN. R. APP. P. 36(b)). Plaintiffs have not pointed out how proceeding before an ordinary jury "more probably than not affected the judgment" or resulted in "prejudice to the judicial process." TENN. R. APP. P. 36(b). Thus, assuming arguendo, that the trial court abused its discretion in failing to proceed with a jury of inquest, Plaintiffs have not explained how proceeding to trial and winning before a twelve-person jury affected the judgment and resulted in any prejudice. Therefore, we decline to set aside the jury's verdict.

B. Exclusion of Evidence Related to Plaintiffs' Requested Damages on Inverse Condemnation Claim

Plaintiffs next assert that the trial court erred in excluding evidence from experts related to "special and incidental"[14] damages they incurred as a result of the City's encroaching sewer line. We first consider whether the trial court applied the appropriate measure of damages in this inverse condemnation case.

The Tennessee Constitution requires that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." TENN. CONST. art. 1, § 21. Our Supreme Court has recognized that article one, section twenty-one "recognizes the governmental right of eminent domain, which is the power to take private property

[14] In their brief, Plaintiffs assert they should have been able to proffer evidence related to:

> (1) 5 additional feet of land adjacent to the sewer upon which the Robinsons cannot utilize the Building Site;[] (2) the special attributes of the Building Site, being adjacent to the Robinsons' existing business and constituting the only adjacent vacant land upon which they can expand the business; (3) the loss of profits from the Robinsons' inability to construct a brewery on the Building Site; (4) Jeff Robinson's testimony regarding the value of the Building Site, the loss of profits from the inability to use it, and the loss of value of the remaining property adjacent to the sewer constructed by the City.

without the consent of the owner, but it limits that right by entirely prohibiting the taking of private property for private purposes, and by requiring just compensation when private property is taken for public use." *Jackson v. Metro. Knoxville Airport Auth.*, 922 S.W.2d 860, 861 (Tenn. 1996) (citing *S. Ry. Co. v. City of Memphis*, 148 S.W. 662 (Tenn. 1912); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 (1980)). An inverse condemnation proceeding is "the manner in which a landowner recovers just compensation for a taking of property when condemnation proceedings have not been instituted." *Id.* at 861-62 (citing *Johnson v. City of Greenville*, 435 S.W.2d 476, 478 (Tenn. 1968)); *see also Edwards v. Hallsdale-Powell Util. Dist. Knox Cty., Tenn.*, 115 S.W.3d 461, 464-65 (Tenn. 2003). Here, there is no dispute that the City's sewer project encroached nearly two feet onto FSC Property and therefore constituted a taking. Thus, the issue at hand is what measure of damages constitutes "just compensation" in this context?

Our Legislature has directed that "the jury shall give the value of the land or rights taken without deduction, but incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages." Tenn. Code Ann. § 29-16-203(a)(1). In addition, our Supreme Court has held that "[t]he 'just compensation' constitutionally required is the fair cash market value on the date of taking of the property for public use." *Nashville Hous. Auth. v. Cohen*, 541 S.W.2d 947, 950 (Tenn. 1976) (citing *Alloway v. Nashville*, 13 S.W. 123 (Tenn. 1889)). In determining what constitutes fair market value, courts consider "the price that a reasonable buyer would give if he were willing to, but did not have to, purchase and that a willing seller would take if he were willing to, but did not have to, sell." *Id.* (citing *Davidson Cty. Bd. of Educ. v. First. Am. Nat'l Bank*, 301 S.W.2d 905 (Tenn. 1957)). In addition, our Supreme Court has observed that "the rule in Tennessee has long been stated to be that the [factfinder] must consider all capabilities of the property and all the legitimate uses for which it is available and reasonably adapted." *Id.* at 950 (citations omitted). With respect to "incidental damages," in the context of inverse condemnation cases, we have explained:

> [I]n an eminent domain proceeding, the court is required to "ascertain and award 'just compensation' to the landowner, an amount consisting of the value of the land or rights taken and any incidental damages less any benefits resulting from any improvement." *Water Auth. of Dickson Cnty. v. Hooper*, No. M2009-01548-COA-R3-CV, 2010 WL 1712968, at *4 (Tenn. Ct. App. Apr. 29, 2010) (citing *Love v. Smith*, 566 S.W.2d 876, 878 (Tenn.1978)). Incidental damages include where the State's taking has adversely affected the remainder of the property. *Shelby Cty. v. Kingsway Greens of Am, Inc.*, 706 S.W.2d 634, 638 (Tenn. Ct. App. 1985). The proper measure of incidental damages in an eminent domain action is "the decline in the fair market value of the property by virtue of the taking." *Id.*

> Incidental damages are appropriate in cases "where access to and utility of the remaining property has been impaired by the taking of part of the property, which has caused a loss of fair market value in the remainder." *Pun Wun Chan v. State,* No. E2005-01391-COA-R3-CV, 2006 WL 1233053, at *3 (Tenn. Ct. App. May 9, 2006). Factors that may be considered in determining whether it is appropriate to award incidental damages in an eminent domain proceeding include "the loss of use of the property for any lawful purpose, any unsightliness of the property or inconvenience in its use, any impairment to the owner's access to nearby streets and highways and any other consideration that could reduce the fair market value of the remaining property." *Water Auth. of Dickson Cty.*, 2010 WL 1712968, at *4 (citing 26 AM.JUR. 2d *Eminent Domain* § 284 (2010); 8 Tenn. Prac. Pattern Jury Instr.-CIVIL § 11.04 (2013)). In cases involving a partial taking, such as the case here, the resulting damage should be measured in relation to the entire tract of property. *Mills v. Solomon*, 43 S.W.3d 503, 509 (Tenn. Ct. App. 2000).

State on Rel. of Comm'r of Dep't of Transp. v. Richardson Lumber Co., No. M2012-02092-COA-R3-CV, 2014 WL 1516478, at *2-3 (Tenn. Ct. App. Apr. 16, 2014); *see also City of Rogersville v. Nelms*, 1985 WL 4126, at *1 (Tenn. Ct. App. Dec. 6, 1985) ("[T]he owner may, in the course of the condemnation suit, recover for damages to property not taken which has suffered incidental damages by virtue of the taking.").

Plaintiffs rely on *Southern Railway Co. v. City of Memphis*, 148 S.W. 662, 669-70 (Tenn. 1912), for the proposition that the trial court erred in failing to allow them to introduce "special damages" regarding their anticipated use of the FSC Property as a brewhouse or an event center. In *Southern Railway*, the City of Memphis sought to acquire land, including land on which the railway was currently operating terminals and switchyards, for a public park. *S. Ry. Co. v. City of Memphis*, 148 S.W. at 663-64. In that case, our Supreme Court held, "if the property is in actual use by the owner in such way that it possesses a peculiar value to him, which would be sacrificed if placed upon the general market, he is entitled to this value, and just compensation requires that he shall be paid for it." *Id.* at 669-70. The company's railway terminals and switchyards were "in actual use by the owner" at the time of the taking, and the taking caused damage to the rail system which was currently in operation. *Id.* In contrast, the property at issue in this case is not in "actual use" as a brewery; thus, the trial court correctly held that the exception allowing evidence of "special damages" in *Southern Railway* does not apply in this particular inverse condemnation action.

In light of the precedent quoted above, we believe incidental damages were a proper component of the measure of damages, and "special damages," as defined in *Southern Railway*, were not a proper component because Defendants' property was not in actual use as a brewhouse or event center at the time of the taking. We note that, "[t]he trial court has

broad discretion with regard to admitting valuation evidence in condemnation proceedings." *Giles Cty. v. Wakefield*, No. 01A01-9307-CV-00335, 1994 WL 312897, at *3 (Tenn. Ct. App. July 1, 1994) (citing *State v. Rascoe*, 178 S.W. 2d 392, 394 (Tenn. 1944) (further citation omitted)). The trial court allowed evidence of "the decline in the fair market value of the property by virtue of the taking" through the testimony of Jimmy Lamb, Plaintiffs' own expert in the field of commercial appraisal. *See Shelby Cty.*, 706 S.W.2d at 638. We have reviewed Mr. Lamb's testimony and find his testimony appropriately factored in the "loss of fair market value" to the remainder of the property in his valuation of the property. He testified as follows:

> Q Sir, have you had an opportunity to visit the real property at issue in this case?
> A Yes, sir, I have.
> Q And, in fact, sir, have you formulated an appraisal with regards to the amount that is related just to the property that is at issue in this civil action?
> A Yes, sir, I have.
> Q I'm going to ask that value in a moment, but what I would like you to do is tell the Court, or actually the jury, the method by which you reached an appraisal amount. How do you determine what the value of this property involving the sewer is? Go ahead and tell them.
> A Well, in a case such as this, we initially value the property as a whole, meaning that as the property was. The[n] we utilize the typical appraisal processes for land appraisals, and that process is one in which we inspect the property. *We look at the property and determine different factors about it, its size and physical characteristics and economic characteristics around it.* Then we go out and look for comparable sales. We, in this case, got four comparable sales that were used to analyze and compare to the subject property, make adjustments where needed, and then through that adjustment process come up with what we call a dollar per square foot value. That dollar per square foot value is then applied to the size of the subject, the total square footage of it. And from that process we yield what we estimate the market value would be.
> Q And is that what you did in this case?
> A That is what we did in this case.
> Q And with regards to the comparable sales, did you -- I know sometimes appraisers have to go far afield. Did you find things that you felt were comparable sales?
> A Yes, sir, we did.
> Q And did you come up with a number that would be the value of the property before the sewer pipe was installed?
> A Yes, sir.
> Q And what was that number?
> A $145,000.

Q And did you come up with a value of the real property that was related to the property value after the sewer pipe was installed?
A Yes, sir.
Q And what was that value?
A That value is slightly more precise, just for calculation purposes of this particular process, but it was $136,665.
Q Did you come up with a figure, a dollar figure that is utilized by you -- that you feel is a fair reflection of the value of just the property which is taken -- is associated with the sewer?
A That's not actually how the process works.
Q Okay. Then you explain it to me. Tell me how it is.
A *You don't come up with a value for that particular strip of land that's being taken. In condemnation appraisals, the process is a little different than you normally do if you're dealing with a normal five-acre size tract of land, for instance, or a two-acre tract. It's so small, the sliver being taken, that the concept of condemnation through State guidelines, through court rulings in the past, it's called a partial taking of the whole. So you first value the whole, which the value I provided for you was 145,000. Then you appraise it after. It's called before and after concept for condemnation appraisals. So once you do the before and once you do the after, that derives the value owed to the property owner by deducting the after value from the before value.*
Q And just so we're clear, what is the value that you found is owed to these property owners based upon that equation?
A It's $8,335.
Q Do you feel that that is an accurate amount, based upon the manner in which the law requires this be appraised?
A Yes, sir, I do.

(Emphasis added). Mr. Lamb testified that he considered how the taking affected the fair market value of the remaining property by examining many different factors, including the economic characteristics of the property around it. The jury accepted his valuation and awarded the exact amount he suggested—$8,335—for the value of the one foot and nine inch encroachment of the sewer line.

In sum, the jury was presented with appropriate evidence in this inverse condemnation case, and the trial court did not abuse its discretion in excluding evidence of "special damages," which were not available in this matter.

C. Attorneys' Fees at Trial

Plaintiffs assert the trial court erred in determining the amount of attorneys' fees that should be awarded to them following their success in the inverse condemnation trial. Plaintiffs claimed $778,153 in fees and are aggrieved that the court awarded $30,000 in

fees. The City does not dispute that Plaintiffs are entitled to an award of reasonable attorneys' fees in this case; thus, the dispute is solely regarding what amount constitutes "reasonable" fee should be under the circumstances.

Tennessee Code Annotated section 29-16-123(b) provides the basis for the award of attorneys' fees in this case and states that "the court rendering a judgment for the plaintiff" in an inverse condemnation proceeding "*shall* determine and award . . . *reasonable* costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding." (Emphasis added). The non-exhaustive list of factors in the Tennessee Rules of Professional Conduct guide a court in determining what constitutes a "reasonable" award of attorneys' fees:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent;
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) whether the fee agreement is in writing.

TENN. R. SUP. CT. 8, RPC § 1.5. These "may not be relevant in all cases," but "[an] attorney's time and labor will always be relevant in cases where the court is asked to determine a reasonable fee." *Smith v. All Nations Church of God*, No. W2021-00846-COA-R3-CV, 2022 WL 4492199, at *4 (Tenn. Ct. App. Sept. 28, 2022) (quoting *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 181 (Tenn. 2011)). When a trial court follows the appropriate procedure in determining a reasonable fee, appellate review of the court's determination is limited:

> The trial court's determination of a reasonable attorney's fee is "subjective judgment based on evidence and the experience of the trier of facts," *United Med. Corp. of Tenn., Inc. v. Hohenwald Bank & Tr. Co.*, 703 S.W.2d 133, 137 (Tenn. 1986), and Tennessee has "no fixed mathematical rule" for determining what a reasonable fee is. *Killingsworth v. Ted Russell Ford, Inc.*,

> 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002). Accordingly, a determination of attorney's fees is within the discretion of the trial court and will be upheld unless the trial court abuses its discretion. *Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002); *Shamblin v. Sylvester*, 304 S.W.3d 320, 331 (Tenn. Ct. App. 2009). We presume that the trial court's discretionary decision is correct, and we consider the evidence in the light most favorable to the decision. *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010); *Keisling v. Keisling*, 196 S.W.3d 703, 726 (Tenn. Ct. App. 2005).

Id. (quoting *Wright*, 337 S.W.3d at 176); *see also 817 P'ship v. James Goins & Carpenter, P.C.*, No. E2014-01521-COA-R3-CV, 2015 WL 5609993, at *10 (Tenn. Ct. App. Sept. 24, 2015) (recognizing that "[a] trial court's calculation of a reasonable attorney's fee is a subjective judgment based on evidence and the experience of the trier of facts" and "appellate court[s] will normally defer to a trial court's award of attorney's fees unless there is a showing of an abuse of the trial court's discretion") (quotations omitted).[15]

The trial court reviewed the time entries provided by Plaintiffs' counsel and found them "not sufficiently detailed for the Court to determine the attorney time which addresses counsel's work on the inverse condemnation claim as opposed to counsel's work on the promissory estoppel claim." Nevertheless, the court went on to review the factors from Tenn. Sup. Ct. R. 8, RPC § 1.5 in detail. Specifically, regarding Plaintiffs' attorneys' "time and labor," the trial court recounted the history of the case and the nature of the different causes of action alleged. The court noted that the majority of the claims were dismissed under Tenn. R. Civ. P. 12.02(6), and the promissory estoppel claim proceeded until summary judgment was entered in October 2019. The trial court believed "most all of the time and labor which was spent on the litigation of this case" from July 27, 2017 through October 10, 2019 "involved the claim for promissory estoppel and only a much smaller amount of time was spent on the inverse condemnation cause of action." The court noted that Plaintiffs' attorney "had previously prepared and tried several inverse condemnation cases" thus an inverse condemnation case was "neither novel nor difficult" for him. The court examined the affidavits of several Clarksville attorneys who had practiced law in the area for many years. The court credited the opinion of one Clarksville attorney who believed "it is not possible to determine how many hours Plaintiff[s'] counsel actually spent on the inverse condemnation claim" because Plaintiffs' attorneys' affidavits "lack sufficient specificity" but that "his best estimate" of the amount of a fee for the requisite

[15] Following oral argument, the parties filed motions with competing arguments as to the applicable standard of review to employ in reviewing the trial court's decision on the reasonable amount of attorneys' fees. We have reviewed the arguments and have set forth the applicable standard of review in this Opinion. Our Supreme Court has explained that, depending on the authority granting the award of fees, the decision whether to grant attorney's fees may be reviewed "de novo because the issue is a question of law." *Eberbach v. Eberbach*, 535 S.W.3d 467, 479 n.7 (Tenn. 2017). However, the proper standard for reviewing the *amount* of the fee awarded is under an abuse of discretion standard. *Id.* In this case, we are reviewing the amount of the award, not whether the award was proper in the first instance.

work would be in the range of "$25,000 to $35,000 for all attorneys' fees and paralegal costs." Another Clarksville attorney stated, in his affidavit: "Many of the billings do not offer a clear explanation of how time is divided between the inverse condemnation action and the promissory estoppel action. It appears that this was arbitrarily designated." After considering each factor in RPC § 1.5, the court determined a "reasonable" amount of attorneys' fees to be awarded for the successful prosecution of the inverse condemnation claim was as follows:

> For all of the reasons above-stated, the Court finds that a reasonable hourly rate for Mr. Olson's attorney time is $350; a reasonable hourly rate for Ms. Dahl's attorney time is $200, and a reasonable hourly rate for their paralegals' time is $75. The Court also finds that a reasonable amount of time to prepare and to try this inverse condemnation case to a jury verdict is approximately 100 hours. The Court further finds that because the attorneys' explanations of their attorney time entries do not provide the required sufficient detail and probative value for the Court to determine that the stated hours were actually and reasonably spent in the prosecution of the inverse condemnation claim, the result is that the hourly charges are of no benefit to the Court. The Court has concluded that the most appropriate and fair method to assess the attorney fees for this inverse condemnation case is to determine the range that comparable attorneys would charge to try an inverse condemnation case in Clarksville, Montgomery County, Tennessee. In making this determination, the Court has relied heavily on the affidavits of Clarksville attorneys Dan L. Nolan, Roger A. Maness, Mark A. Rassas and M. Joel Wallace. The Court, therefore, concludes that a reasonable attorney fee award for Attorneys Mark. R. Olson and Taylor R. Dahl which includes the time expended by both attorneys and their paralegals is $30,000.

In determining the reasonableness of attorneys' fees, the opinion testimony of other lawyers is "advisory only." *Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988). While the court stated it "relied heavily" on the affidavits of the local attorneys, it did so because the attorney time entries proffered by Plaintiffs lacked sufficient detail to assign each entry to a specific cause of action. Here, the only time entries that were compensable as an award of attorneys' fees were those entries related to the inverse condemnation action. Based on the particular circumstances before the court, we find the court appropriately considered the affidavits and ultimately rendered its own opinion as the final arbiter of the issue. We emphasize that our standard of review is limited in cases involving an inquiry into the reasonableness of an award of attorneys' fees, especially where the trial court has gone through the factors at RPC § 1.5 and has undergone the proper procedure to determine a reasonable fee. In light of our limited standard of review, and after a review of the documents before the court, we find that the trial court did not abuse its discretion in awarding Plaintiffs $30,000 in attorneys' fees. The award of attorneys' fees is affirmed.

D. Recusal of the Trial Court

After the jury entered a verdict in favor of Plaintiffs, and after the trial court entered its order awarding Plaintiffs attorneys' fees for their work on the inverse condemnation claim, Plaintiffs filed a motion requesting the trial court to recuse itself and to "set aside the previous jury verdict in this matter and all previous orders entered by this court." As grounds for their motion, Plaintiffs asserted that the trial court judge exhibited "an unintentional bias" that continued through the end of the case and that "the best evidence of bias of the court in this matter is demonstrated by the repeated rulings of the Court favoring the Defendant, causing disability to the Plaintiff[s'] cause of action . . . ."

In its order denying Plaintiffs request for recusal, the trial court noted that it "accepted the transfer of this case" after all judges and the chancellor of the 19th Judicial District recused themselves from presiding over the case. The court pointed out that it had entered "approximately 113" orders in the case. The court went on to deny the motion for three reasons, 1) Plaintiffs initially failed to conform to Supreme Court Rule 10B by failing to support their motion by an affidavit under oath, 2) Plaintiffs failed to state the factual and legal grounds supporting the motion with specificity, and 3) Plaintiffs failed to file the motion in a timely manner. In addition, the court concluded that Plaintiffs' motion was filed "for the improper purposes of harassing both the Court as well as Defendant's counsel, to cause an unnecessary delay in the appeals of this case and to cause increase in the costs of Defendant's litigation."

Tennessee Supreme Court Rule 10B requires appellate courts to review a trial court's ruling on a motion for recusal under a de novo standard with no presumption of correctness. TENN. SUP. CT. R. 10B, § 2.01. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." *Bean v. Bailey*, 280 S.W.3d 798, 805 (Tenn. 2009). Thus, "a recusal motion should be granted when 'the judge has any doubt as to his or her ability to preside impartially in the case' or 'when a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.'" *Id.* (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564-65 (Tenn. 2001)). "The party seeking recusal bears the burden of proof, and 'any alleged bias must arise from extrajudicial sources and not from events or observations during litigation of a case.'" *Adkins v. Adkins*, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491, at *4 (Tenn. Ct. App. July 9, 2021) (quoting *Williams by & through Rezba v. Healthsouth Rehab. Hosp. N.*, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *5 (Tenn. Ct. App. May 8, 2015)). This Court has repeatedly held that even "[c]ontinuous adverse rulings against a party may provide the impetus for the maligned party to wish for another trial judge. They do not, however, provide a basis for requiring the trial judge's recusal from the case." *Runyon v. Runyon*, No. W2013-02651-COA-T10B, 2014 WL 1285729, at *10 (Tenn. Ct. App. Mar. 31, 2014); *see also Duke v. Duke*, 398 S.W.3d 665, 671 (Tenn. Ct. App. 2012).

Plaintiffs do not point to any "extrajudicial sources" of the trial court's alleged bias, rather, Plaintiffs simply disagree with the trial court's rulings and claim they evince "repeated errors" which have allegedly deprived Plaintiffs of a fair trial. Plaintiffs assert no facts supporting personal bias on the part of the trial judge and have failed to proffer any facts suggesting animus resulting from extrajudicial sources. In our view, the trial court thoughtfully presided over Plaintiffs' case for over four years, rendering over 100 orders throughout the course of the contentious litigation on difficult questions of law and evidence. The orders did not demonstrate "repeated errors." To the contrary, we have upheld every order challenged in this appeal. Therefore, Plaintiffs' eleventh-hour attempt to disqualify the trial judge after the jury ruled in their favor and after the trial judge awarded them attorneys' fees on their successful claim is not well taken and is dismissed. *See Eldridge v. Eldridge*, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002) (quoting *Gotwald v. Gotwald*, 768 S.W.2d 689, 694 (Tenn. Ct. App. 1998) (noting that a party may not "silently preserve" an alleged prejudicial event as an "'ace in the hole' to be used in the event of an adverse decision").

E. Attorneys' Fees on Appeal

Plaintiffs expend one sentence in their appellate brief requesting this Court to award attorneys' fees on appeal. Tennessee Code Annotated section 29-16-123(b) governs the award of attorneys' fees in this case and permits "the court rendering a judgment for the plaintiff" to award reasonable attorneys' fees. Plaintiffs have received an award of attorneys' fees from the trial court, and we have affirmed the award. Although Tenn. Code Ann. § 29-16-123(b) does not expressly provide for attorneys' fees incurred at the appellate level, our Supreme Court has explained that "legislative provisions for an award of reasonable attorney's fees need not make a specific reference to *appellate* work to support such an award where the legislation has broad remedial aims." *Killingsworth*, 205 S.W.3d 406, 409 (Tenn. 2006) (emphasis in original) (citing *Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417 (Tenn. 1998)); *see also Beacon4, LLC v. I&L Invests., LLC*, 514 S.W.3d 153, 211 (Tenn. Ct. App. 2016), overruled on other grounds by *In re Mattie L.*, 618 S.W.3d 335 (Tenn. 2021), (applying *Killingsworth* and concluding that the statute at issue allowed for an award of reasonable attorney's fees incurred on appeal). We find that in appropriate cases, Tenn. Code Ann. § 29-16-123 provides for an award of attorneys' fees on appeal. However, we do not believe this is such a case.

Although we have affirmed the jury's verdict in favor of Plaintiffs and have affirmed the award of attorneys' fees to Plaintiffs, it was the Plaintiffs, not the City, who appealed the jury's verdict and award of attorneys' fees. Thus, the Plaintiffs have not prevailed on any issue they brought forward as error in this appeal. As such, we decline to award any attorneys' fees on appeal because we have not "rendered a judgment" for Plaintiffs on any issues raised. *See* Tenn. Code Ann. § 29-16-123(b).

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellants, Franklin Street Corporation and the Robinsons, for which execution may issue if necessary.

_/s/ Andy D. Bennett_____
ANDY D. BENNETT, JUDGE