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Reforming Tennessee's Rules of Appellate Procedure: Separate Notices of Appeal...Or Not?

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REFORMING TENNESSEE'S RULES OF APPELLATE PROCEDURE: SEPARATE NOTICES OF APPEAL . . . OR NOT?

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INTRODUCTION

When it comes to the filing of separate notices of appeal, Tennessee's Rules of Appellate Procedure contain an internal inconsistency. This inconsistency, which has yielded two conflicting and incompatible lines of judicial interpretation, undermines the coherence of Tennessee appellate procedure and poses unfairly contradictory outcomes for similarly situated appellants. To resolve this inconsistency, Tennessee's Rules of Appellate Procedure should be reformed.

Under Tennessee Rules of Appellate Procedure 3(e), 3(f), and 4(a), to perfect an appeal as of right in a civil action, every appellant must file either independently or jointly a timely notice of appeal. Under these rules, for example, each of three plaintiffs against whom a judgment was entered would have to file a notice of appeal to invoke appellate jurisdiction and to pursue an appeal. Yet at the same time, out of a policy in favor of simplifying the appellate process, Tennessee Rule of Appellate Procedure 13(a) provides that "separate appeals" are unnecessary. Rule 13(a) thus indicates that, in separate-appeal scenarios, a timely notice of appeal need *not* be filed by every appellant so long as one party has filed an original notice of appeal. Accordingly, so long as one of three plaintiffs against whom a judgment was entered files a notice of appeal, the other two

plaintiffs may invoke appellate jurisdiction and pursue an appeal without filing or joining any notice of appeal.

These rules not only conflict, but are fundamentally irreconcilable, and they have unsurprisingly yielded two conflicting lines of judicial authority regarding the failure to file a separate notice of appeal. One line of authority, relying solely on Rules 3(e), 3(f), and 4(a), dismisses a separate appeal for lack of appellate jurisdiction when a separate notice of appeal has not been filed. By contrast, another line of authority, relying solely on Rule 13(a), does not dismiss a separate appeal when a separate notice of appeal has not been filed and goes on to exercise appellate jurisdiction. This split of authority yields two dramatically opposing results—dismissal with prejudice versus non-dismissal—arising from a single procedural circumstance. This inconsistency, which arises from Rule 13(a) itself, complicates rather than simplifies Tennessee appellate procedure.

This Article focuses on appeals as of right in civil actions, articulating the need for reform and proposing solutions.[1] Because a notice of appeal functions as a jurisdictional-transfer mechanism, Part I of this Article sets the stage for evaluating Rule 13(a) by examining the jurisdictional function of notices of appeal. Part II then addresses the conflict between Rule 13(a) and Rules 3(e), 3(f), and 4(a), exploring the adoption of Tennessee's Rules of Appellate Procedure, relevant Advisory Commission Comments, and the related split of judicial authority. Finally, Part III proposes potential solutions for correcting the problem. The simplest solution is to amend Rule 13(a) by deleting the phrase "separate appeals," thus eliminating the conflict and rendering Tennessee's handling of separate appeals consistent with Rules 3 and 4. A more complex but perhaps preferable solution would involve overhauling Tennessee's notice-of-appeal structure to mirror the systems employed by federal courts and the majority of states, which require the filing of notices of cross-appeal and notices of separate appeal. Either of these two solutions is viable. Although there are other potential solutions, each of them involves expected difficulties that would render it problematic.

PART I. THE JURISDICTIONAL FUNCTION OF THE NOTICE OF APPEAL

Appeals involve the transition from a trial court's exercise of original jurisdiction to an appellate court's exercise of appellate jurisdiction. As a general rule in Tennessee, the triggering event for an appeal as of right is either the trial court's entry of a final judgment or its

1. Although this Article focuses on civil appeals, it must be recognized that any of the amendments of Rule 13(a) discussed here would equally affect criminal appeals. Because the thirty-day period for filing notices of appeal in criminal actions is non-jurisdictional, the failure to timely file a separate notice of appeal may be excused. *See infra* notes 50–51. But consideration must be given from a criminal-law standpoint regarding any proposed amendment.

entry of an order certifying a less-than-final judgment as immediately appealable.[2] In either event, a party wishing to ask an appellate court to alter or to enlarge the judgment in a civil action must perfect its appeal by filing (either individually or jointly) a notice of appeal within the time period set by rule.[3] The proper and timely filing of a notice of appeal serves as the procedural mechanism for transferring jurisdiction from the trial court to the appellate court. And in Tennessee, the failure to take this step when required in a civil action has the reverse consequence: the appellate court is precluded from exercising appellate jurisdiction, and the trial court's judgment is rendered permanent. This jurisdictional function of the notice of appeal in civil actions is crucial to understanding the significance of Tennessee Rule of Appellate Procedure 13(a), which provides that "separate appeals" are not required.

A. Appellate Jurisdiction

An appeal involves transferring jurisdiction over an action from the trial court to the appellate court. This transfer of jurisdiction is required because trial and appellate courts play differing roles, each of which relates to a specific kind of subject matter. "Subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it."[4] Tennessee trial courts, such as Circuit and Chancery,[5] have original jurisdiction over actions; that is to say, they are empowered to decide civil actions in the first instance, dynamically receiving and evaluating live testimony and other evidence.[6] By contrast, courts of review are typically

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2. An appeal "as of right" is an appeal that does not require permission from the appellate court for it to proceed. TENN. R. APP. P. 3(d); 2 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 30:3 (2012–2013 ed.).

3. "Perfecting" an appeal means taking the actions required by law to render an appeal effective. *See* 4 C.J.S. *Appeal and Error* § 389 (2007); PIVNICK, *supra* note 2.

4. Chapman v. DaVita, Inc., 380 S.W.3d 710, 712 (Tenn. 2012); *see* Estate of Brown, 402 S.W.3d 193, 198 (Tenn. 2013).

5. The Tennessee Constitution establishes the judicial branch:

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in corporation courts as may be deemed necessary.

TENN. CONST. art. VI, § 1. In Tennessee, the Circuit court is a court of general civil jurisdiction. TENN. CODE ANN. § 16-10-101 (2013). Generally speaking, Chancery court has concurrent jurisdiction with Circuit court over civil matters, with the exception of personal-injury and defamation actions and actions for unliquidated property damages not arising from a breach of contract. *See* TENN. CODE ANN. § 16-11-102(a) (2013); PIVNICK, *supra* note 2, § 3:4; Henry R. Gibson, GIBSON'S SUITS IN CHANCERY § 1.08 (8th ed. 2004).

6. "Original jurisdiction" is "[a] court's power to hear and decide a matter before any other court can review the matter." BLACK'S LAW DICTIONARY 1210 (9th ed. 2009). The

limited to the exercise of appellate jurisdiction, by which they correct errors based on a fixed, cold, impersonal record.[7] Under the Tennessee Constitution, the jurisdiction of the Tennessee Supreme Court is exclusively appellate.[8] The jurisdiction of the intermediate Tennessee Court of Appeals is similarly, by statute, appellate only.[9]

Although American appellate courts have the power to correct the actions of trial courts, appellate jurisdiction, unlike original jurisdiction, is fundamentally derivative.[10] An appeal may occur only after and in response

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Tennessee Court of Appeals has contrasted the exercise of original jurisdiction with the exercise of appellate jurisdiction by focusing on witness credibility:

> One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary. The most often cited reason for this principle can be traced to the fact that trial judges, unlike appellate judges, have an opportunity to observe the manner and demeanor of the witnesses while they are testifying.

Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998) (citations omitted).

7. *See* DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 1–2 (1994) (discussing difference between original and appellate jurisdiction).

8. TENN. CONST. art. VI, § 2; Duncan v. Duncan, 672 S.W.2d 765, 767 (Tenn. 1984); Pierce v. Tharp, 461 S.W.2d 950, 954 (Tenn. 1970). While the intermediate Court of Appeals performs an error-correction function (though not without a concurrent responsibility to develop the law), the Tennessee Supreme Court primarily exercises appellate jurisdiction as a matter of discretion, focusing on developing and clarifying Tennessee law. *See* TENN. R. APP. P. 11(a) (discussing the factors for determining whether the Tennessee Supreme Court will grant an application for permission to appeal); TENN. R. APP. P. 11 advisory comm'n cmt. ("[D]iscretionary review by the Supreme Court is rarely granted solely for error-correction purposes."); Fletcher v. State, 951 S.W.2d 378, 382 (Tenn. 1997) ("[O]btaining permission to appeal pursuant to Rule 11 is not, by any means, automatic. Instead, this Court must be convinced that an important consideration justifies granting review."); State v. West, 844 S.W.2d 144, 146 (Tenn. 1992) (observing that the Tennessee Supreme Court functions "primarily as a law-development court, rather than as an error-correction court").

9. TENN. CODE ANN. § 16-4-108(a)(1) (2013). "The jurisdiction of this Court is appellate only; we cannot hear proof and decide the merits of the parties' allegations in the first instance." Reid v. Reid, 388 S.W.3d 292, 294 (Tenn. Ct. App. 2012), *perm. app. denied* (Nov. 20, 2012). Because the Tennessee Court of Appeals' jurisdiction is set by statute, however, it is not impossible for the Tennessee General Assembly to provide for original jurisdiction in that court. *See, e.g.*, State *ex rel.* Gerbitz v. Curriden, 738 S.W.2d 192, 193 (Tenn. 1987) (determining that the Tennessee General Assembly had chosen to vest the Court of Appeals with original jurisdiction over a particular matter).

10. *See generally* Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 932 (1997) (discussing the historical development of appellate process in America).

to matters previously adjudicated by a trial court.[11] "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a case already instituted."[12] For this reason, Tennessee appellate courts generally limit their factual review to matters contained within the appellate record, which comprises facts that were first established and vetted in the trial court.[13] And for this same reason, as well as in consideration of fairness and efficiency, appellate courts typically refuse to entertain legal issues raised for the very first time on appeal.[14]

B. Transferring Jurisdiction from the Trial Court to the Appellate Court

Central to the process of transferring jurisdiction from the trial court to the appellate court is the question of appealability.[15] As a general rule, the event that triggers appealability as of right is the trial court's entry

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11. "Appellate jurisdiction necessarily implies that the issue has been formulated and passed upon by the trial court." Houston v. Scott, E2010-01660-COA-R3-CV, 2012 WL 121104, at *5 (Tenn. Ct. App. Jan. 17, 2012), *perm. app. denied* (May 23, 2012); see also *In re* Estate of Boykin, 295 S.W.3d 632, 636 (Tenn. Ct. App. 2008) ("At the appellate level, 'we are limited in authority to the adjudication of issues that are presented and decided in the trial courts . . . .'") (citation omitted)). "[T]he appellate courts cannot exercise original jurisdiction." Peck v. Tanner, 181 S.W.3d 262, 265 (Tenn. 2005). "It is axiomatic that the appellate jurisdiction of a court in any given case is dependent upon the existence of jurisdiction, either original or appellate, in the court from which the appeal comes." Morgan v. Betterton, 69 S.W. 969, 970 (Tenn. 1902).

12. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 35 (1983) (Rehnquist, J., dissenting) (quoting Marbury v. Madison, 1 Cranch 137, 174–76 (1803)).

13. "The Supreme Court, Court of Appeals, and Court of Criminal Appeals may consider those facts established by the evidence in the trial court and set forth in the record and any additional facts that may be judicially noticed or are considered pursuant to rule 14." TENN. R. APP. P. 13(c). "Only rarely is it proper for an appellate court to consider facts in addition to those established by the evidence in the trial court." TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (c); *see also* TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (e) ("[U]nder Rule 13(c) the appellate court is generally limited in its review to those facts set forth in the record."); TENN. R. APP. P. 14 advisory comm'n cmt. (stating that the rule permitting consideration of post-judgment facts on appeal "is not intended to permit a retrial in the appellate court."); TENN. R. APP. P. 24(e) ("Absent extraordinary circumstances, the determination of the trial court [as to the contents of the record] is conclusive."); TENN. R. APP. P. 36(a) ("[R]elief may not be granted [on appeal] in contravention of the province of the trier of fact."). An appellate court "must not act on matter outside of the record, which would be the exercise of original not appellate jurisdiction." McKinley v. Sherry, 70 Tenn. 200, 203 (1879).

14. "It is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court." Powell v. Cmty. Health Sys., Inc., 312 S.W.3d 496, 511 (Tenn. 2010). "One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal." Waters v. Farr, 291 S.W.3d 873, 918 (Tenn. 2009).

15. Appealability has to do with when a party may properly seek appellate review. *See* MEADOR & BERNSTEIN, *supra* note 7, at 45.

of a final judgment.[16] Under Tennessee law, a "final judgment" is defined as one that resolves all issues in an action, disposing of its entire merits and "leaving nothing else for the trial court to do."[17] Any judgment that accomplishes less than this is classified as partial and merely "interlocutory," leaving it subject to revision by the trial court.[18] In the vast majority of cases, then, the entire merits of the action must be decided for the judgment to be appealable as of right under Tennessee Rule of Appellate Procedure 3.[19] Part of the rationale for this rule is to avoid multiple, piecemeal appeals in a single action, which can result in an inefficient use of judicial and litigant resources.[20]

This general rule is not without its exceptions and ambiguities. Under Tennessee Rule of Civil Procedure 54.02, a trial court may certify a less-than-final judgment for appeal as of right where: (1) the judgment fully resolves a particular claim or the rights and liabilities of a particular party, notwithstanding the fact that other claims or other parties remain before the

16. *See* TENN. R. APP. P. 3(a) ("In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right."). "An appeal as of right is an appeal that does not require permission of the trial or appellate court as a prerequisite to taking an appeal. There shall be one method of appeal as of right to be known as an 'appeal as of right.'" TENN. R. APP. P. 3(d); *see also* TENN. R. APP. P. 3 advisory comm'n cmt. on Subdivision (d) (contrasting appeals as of right with appeals by permission).

17. *In re* Estate of Schorn, 359 S.W.3d 192, 195 (Tenn. Ct. App. 2011) (citation omitted), *perm. app. denied* (July 15, 2011); *see* Creech v. Addington, 281 S.W.3d 363, 377 (Tenn. 2009); *In re* Estate of Ridley, 270 S.W.3d 37, 40 (Tenn. 2008); *see also* Discover Bank v. Morgan, 363 S.W.3d 479, 488 n.17 (Tenn. 2012) (explaining that for purposes of Tennessee Rules of Civil Procedure 54.02 and 59, a final judgment "refers to a trial court's decision adjudicating all the claims, rights, and liabilities of all the parties," while for purposes of Tennessee Rule of Civil Procedure 60, a final judgment "refers both to a decision adjudicating all the claims, rights, and liabilities of all the parties and to the fact that more than thirty days have passed since the final judgment was entered.").

18. *See* TENN. R. APP. P. 3(a) ("Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties."); Stidham v. Fickle Heirs, 643 S.W.2d 324, 325 (Tenn. 1982); *see also* In re *Estate of Ridley*, 270 S.W.3d at 40 ("By definition, an 'interlocutory order' cannot be a 'final judgment.'") (citations omitted); *In re* Estate of Henderson, 121 S.W.3d 643, 645 (Tenn. 2003) ("A final judgment is one that resolves all the issues in the case, 'leaving nothing else for the trial court to do.' In contrast, an order that adjudicates fewer than all of the claims, rights, or liabilities of all the parties is not final, but is subject to revision any time before the entry of a final judgment. Such an order is interlocutory or interim in nature and generally cannot be appealed as of right.") (citations omitted).

19. "Under [Tennessee] Rule [of Appellate Procedure] 3(a), only a 'final judgment' in a civil action is 'appealable as of right.'" In re *Estate of Ridley*, 270 S.W.3d at 40.

20. *See* Harris v. Chern, 33 S.W.3d 741, 745 n.3 (Tenn. 2000) (stating that "[p]iecemeal appellate review is not favored" and noting "the inconvenience and costs of piecemeal review" (quoting Breakstone v. Home Fed. Sav. & Loan Ass'n, 539 S.W.2d 45, 45 (Tenn. Ct. App. 1976)).

trial court; and (2) the trial court expressly determines that "there is no just reason for delay" of an appeal.[21] The propriety of such a certification, however, requires complete resolution with respect to a particular claim or a particular party and thus is not assured.[22] Further, the entry of a final judgment does not preclude a trial court from retaining jurisdiction to decide matters merely "ancillary" to the merits; the potential rub here is drawing the line between what is "merits" and what is "ancillary."[23] In any event, determining whether a judgment is final requires the inexact science of comparing the scope of the judgment both with the scope of the operative pleadings and with the issues advanced by the parties by motion and, if applicable, at trial.

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21. "When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." TENN. R. CIV. P. 54.02; *see* TENN. R. APP. P. 3(a) ("*Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure*, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.") (emphasis added); In re *Estate of Henderson*, 121 S.W.3d at 646; Bayberry Assocs. v. Jones, 783 S.W.2d 553, 557 (Tenn. 1990) ("An appeal as of right pursuant to Tenn. R. App. P. 3 lies from the trial court's entry of final judgment on orders adjudicating fewer than all claims or parties pursuant to Tenn. R. Civ. P. 54.02.").

22. *See, e.g.*, Williams v. Tenn. Farmers Life Reassurance Co., M2010-01689-COA-R3-CV, 2011 WL 1842893, at *3, & n.1 (Tenn. Ct. App. May 12, 2011) ("An order is not properly made final pursuant to Rule 54.02 unless it disposes of an entire claim or is dispositive with respect to a party."); *see also, e.g.*, *Bayberry Assocs*., 783 S.W.2d at 558–59 (holding that trial court's certification under Tennessee Rule of Civil Procedure 54.02 was improper); Christus Gardens, Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., M2007-01104-COA-R3-CV, 2008 WL 3833613, at *4–5 (Tenn. Ct. App. Aug. 15, 2008) (vacating trial court's certification under Tennessee Rule of Civil Procedure 54.02, designating appeal as improvident, and remanding action to the trial court).

23. It is not always clear where the line will be drawn. *Compare, e.g.*, TENN. R. APP. P. 4 advisory comm'n cmt. to 1995 Amendment ("A motion for discretionary costs does not toll the time for filing a notice of appeal."), Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Sys. of the Midsouth, Inc., 266 S.W.3d 421, 425 (Tenn. Ct. App. 2007) (stating that perfection of an appeal does not prevent trial court from acting with regard to ancillary matters relating to judgment enforcement), First Am. Trust Co. v. Franklin-Murray Dev. Co., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (same), *and* Roberts v. Roberts, E2009-02350-COA-R3-CV, 2010 WL 4865441, at *8 (Tenn. Ct. App. Nov. 29, 2010) (stating that award of discretionary costs is an ancillary matter) *with* City of Jackson v. Hersh, W2008-02360-COA-R3-CV, 2009 WL 2601380, at *3–4 (Tenn. Ct. App. Aug. 25, 2009) (dismissing appeal as premature for lack of a final judgment because motions for attorneys' fees and discretionary costs as well as disbursement of escrow funds remained undecided by trial court), *and* Grand Valley Lakes Prop. Owners' Ass'n v. Gunn, W2008-01116-COA-R3-CV, 2009 WL 981697, at *3–4 (Tenn. Ct. App. Apr. 13, 2009) (remanding action to trial court for lack of a final, appealable judgment because trial court had not adjudicated a request for attorneys' fees).

Because determining whether a judgment is properly classified as final is not automatic (even labeling an order as "final" does not necessarily render it properly appealable), counsel who harbor doubt about the finality of a judgment often file a protective notice of appeal, which may subsequently become effective upon the entry of a truly final judgment.[24] This practice, though understandable, has the unfortunate collateral effect of shifting the determination of whether a judgment is final to the Tennessee Court of Appeals and its staff, who must docket the appeal and go to the trouble of reviewing and analyzing the record only (frequently) to conclude that the appeal is premature. The Tennessee Court of Appeals routinely dismisses appeals as premature on the ground that a final judgment is lacking.[25] Such a dismissal does not, however, necessarily prejudice the appellant's right to renew an appeal once a final judgment has actually been entered below.[26]

Unless the trial court has entered a judgment properly classified or certified as final, Tennessee appellate courts typically refuse to exercise appellate jurisdiction over the action. Tennessee courts have sometimes justified this refusal on the ground that the appellate court simply lacks

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24. "A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof." TENN. R. APP. P. 4(d); *see* Gaskill v. Gaskill, 936 S.W.2d 626, 630 n.4 (Tenn. Ct. App. 1996) (deeming premature notice of appeal timely where final judgment was subsequently entered); Swafford v. Memphis Individual Practice Ass'n, 02A01-9612-CV-00311, 1998 WL 281935, at *3 (Tenn. Ct. App. June 2, 1998) (same); *see also* 5 AM. JUR. 2D *Appellate Review* § 267 (2007) (discussing premature appeals).

25. *See, e.g.*, Miljenovic v. Miljenovic, E2013-00172-COA-R3-CV, 2013 WL 1776930 (Tenn. Ct. App. Apr. 24, 2013) (nonprecedential memorandum opinion under Rule 10 of the Rules of the Court of Appeals of Tennessee dismissing appeal as premature for lack of a final judgment); Milam v. Titlemax of Memphis, LLC, W2012-02209-COA-R3-CV, 2013 WL 1739177 (Tenn. Ct. App. Apr. 23, 2013) (same); *In re* Anna C.T., W2012-01999-COA-R3-JV, 2013 WL 749339 (Tenn. Ct. App. Feb. 26, 2013) (same); Eslami v. Derrick, E2012-01200-COA-R3-CV, 2012 WL 6017937 (Tenn. Ct. App. Dec. 3, 2012) (same); Summer Bay Mgmt., L.C. v. Gatlinburg Town Square Members' Ass'n, E2012-01276-COA-R3-CV, 2012 WL 4501700 (Tenn. Ct. App. Oct. 1, 2012) (same); Torres v. Torres, E2011-00057-COA-R3-CV, 2012 WL 3834054 (Tenn. Ct. App. Sept. 5, 2012) (same); Griffith Servs., LLC v. Arrow Gas & Oil, Inc., E2012-00507-COA-R3-CV, 2012 WL 3017020 (Tenn. Ct. App. July 24, 2012) (same); Parigin v. Mills, E2012-00418-COA-R3-CV, 2012 WL 2873370 (Tenn. Ct. App. July 13, 2012) (same). One may ask why the Court of Appeals routinely classifies such opinions as non-precedential when the Court of Appeals is deciding a question of law and when the opinions inevitably become available to the public through the Tennessee Administrative Office of the Courts' website, Westlaw, and other electronic databases.

26. "A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof." TENN. R. APP. P. 4(d); *see* TENN. R. APP. P. 4 advisory comm'n cmt. ("Subdivision (d) establishes the general rule that the right to appeal is not lost by filing a notice of appeal before entry of the judgment appealed from."); Smith Cnty. Planning Comm'n v. Carver Trucking, Inc., M2011-00146-COA-R3-CV, 2012 WL 2859931, at *3 (Tenn. Ct. App. July 11, 2012) (considering appeal of action that was previously remanded to the trial court because previous appeal had been premature).

subject-matter jurisdiction (i.e., appellate jurisdiction) over the action and therefore must dismiss the appeal.[27] It is more accurate, however, to say that Tennessee appellate courts choose as a matter of policy not to exercise jurisdiction over non-final judgments despite their power to do so.

It is well established that Tennessee appellate courts have the discretionary power to entertain appeals of judgments that are less than final. Interlocutory orders may ascend on appeal by means of several procedural avenues. As discussed above, under Tennessee Rule of Civil Procedure 54.02 a trial court may (so long as certain finality-related criteria are met) certify an interlocutory order for immediate appeal as of right. Under Tennessee Rule of Appellate Procedure 9, an interlocutory order may be appealed where both the trial court and the Court of Appeals exercise their discretion to permit it.[28] And under Tennessee Rule of Appellate Procedure 10, the appellate court alone has discretion to permit an interlocutory appeal when extraordinary circumstances justify it.[29] Moreover, the Tennessee Supreme Court has held that appellate courts have the discretion simply to suspend the final-judgment requirement of Tennessee Rule of Appellate Procedure 3(a), although it cautions that such suspension should be exercised only rarely.[30] These authorities demonstrate

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27. *See, e.g.*, Davis v. Davis, 224 S.W.3d 165, 168 (Tenn. Ct. App. 2006); *see also* Ingram v. Wasson, 379 S.W.3d 227, 237 (Tenn. Ct. App. 2011) ("Lack of appellate jurisdiction cannot be waived."), *reh'g denied* (Feb. 13, 2012), *perm. app. denied* (June 25, 2012). The cases cited above that dismissed appeals as premature for lack of a final judgment, *see supra* note 25, frequently recite the unqualified proposition that the Tennessee Court of Appeals lacks "subject matter jurisdiction to adjudicate a Tenn. R. App. P. 3 appeal as of right if there is no final judgment." *Miljenovic*, 2013 WL 1776930, at *1 (memorandum opinion under Rule 10 of the Rules of the Court of Appeals of Tennessee); *see also, e.g.*, *Eslami*, 2012 WL 6017937 at *1 ("This Court does not have subject matter jurisdiction to adjudicate an appeal if there is no final judgment."); *Torres*, 2012 WL 3834054 at *1 ("This court does not have subject matter jurisdiction to adjudicate an appeal if there is no final judgment.") (memorandum opinion). Insofar as these and other similar opinions have been designated as "memorandum opinions" under Rule 10 of the Rules of the Court of Appeals of Tennessee, they are binding only upon the parties to the action and carry no precedential value; nonetheless, the reasoning contained in them shows how the Tennessee Court of Appeals understands its own appellate jurisdiction.

28. Appeals by permission, as opposed to appeals as of right, "require that either the trial court or the appellate court expressly authorize the taking of an appeal." TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (d). "An interlocutory appeal is an exception to the general rule that requires a final judgment before a party may appeal as of right." State v. Gilley, 173 S.W.3d 1, 5 (Tenn. 2005); *cf. In re* Estate of Boykin, 295 S.W.3d 632, 636 (Tenn. Ct. App. 2008) ("Because all of the claims have not been adjudicated, this Court would have jurisdiction to hear this appeal only if permission to file an interlocutory appeal had been granted pursuant to Rules 9 or 10 of the Tennessee Rules of Appellate Procedure, or if the order appealed had been made final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.").

29. TENN. R. APP. P. 10.

30. *See* Bayberry Assocs. v. Jones, 783 S.W.2d 553, 559 (Tenn. 1990) (holding that Tennessee Rule of Appellate Procedure 2 empowers appellate courts to suspend the final-judgment requirement of Tennessee Rule of Appellate Procedure 3(a)); *see also* TENN. R. APP. P. 2 (providing that, with certain express exceptions, "[f]or good cause, including the

that the existence of appellate jurisdiction is not, strictly speaking, contingent upon the entry of a final judgment that resolves "everything," leaving the trial court with "nothing" left to do.

Rather, when it comes to drawing a bright line, Tennessee appellate courts lack appellate jurisdiction only when the issue to be reviewed on appeal has not first been adjudicated by a trial court. The material distinction, then, is between appellate jurisdiction and original jurisdiction, and the sources of this distinction are the Tennessee Constitution[31] and the Tennessee Code,[32] which circumscribe the powers of Tennessee appellate courts. Jurisdiction is thus properly transferred from the trial court to the appellate court once the trial court has completed its exercise of original jurisdiction over the matter to be reviewed (whether a particular issue, the rights and liabilities of a particular party, or the merits of the action as a whole), and appellate jurisdiction is lacking only when the trial court has yet to do so.

C. The Notice of Appeal as Jurisdictional-Transfer Mechanism

In the context of an appeal as of right, the procedural mechanism for transferring jurisdiction from the trial court to the appellate court is the notice of appeal. The filing of a notice of appeal has accordingly been described as "an event of jurisdictional significance."[33] In Tennessee, "[a]n appeal as of right . . . shall be taken by timely filing a notice of appeal with the clerk of the trial court as provided in rule 4 and by service of the notice of appeal as provided in rule 5."[34] The notice of appeal performs two important functions: it "advises the court and opposing counsel that an appeal has been taken" and, by designating the judgment appealed from and the court appealed to, it "clearly describes the matter on appeal."[35]

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interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion."); Williams v. Tenn. Farmers Life Reassurance Co., M2010-01689-COA-R3-CV, 2011 WL 1842893, at *4–6 (Tenn. Ct. App. May 12, 2011).

31. TENN. CONST. art. VI, § 2 ("The jurisdiction of this [Supreme] Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law.").

32. TENN. CODE ANN. § 16-4-108(a)(1) (2013) ("The jurisdiction of the court of appeals is appellate only.").

33. *See* Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

34. TENN. R. APP. P. 3(e); *see* Cruse v. City of Columbia, 922 S.W.2d 492, 493 (Tenn. 1996) ("Rule 3 of the Tennessee Rules of Appellate Procedure sets forth the method for filing an appeal as of right."). Noncompliance with the service requirements of Tennessee Rule of Appellate Procedure 5(a) is not considered a jurisdictional defect. *See* TENN. R. APP. P. 5 advisory comm'n cmt. to 1997 amend.; Cobb v. Beier, 944 S.W.2d 343, 345–46, & n.7 (Tenn. 1997); G. F. Plunk Constr. Co. v. Barrett Props., Inc., 640 S.W.2d 215, 216–17 (Tenn. 1982); Keith v. Regas Real Estate Co., E2011-00337-COA-R3-CV, 2011 WL 6009625, at *2–3 (Tenn. Ct. App. Dec. 2, 2011).

35. *Cruse*, 922 S.W.2d at 493.

When a notice of appeal is filed, it has the effect of transferring jurisdiction from the trial court to the appellate court. "[U]pon the filing of a notice of appeal, jurisdiction over the case attaches to the appellate court, and the trial court loses jurisdiction over the matter that is the subject of the appeal."[36] In other words, the filing of a notice of appeal ends the exercise of original jurisdiction and begins the exercise of appellate jurisdiction. Once the appellate court obtains jurisdiction over a matter, it retains exclusive jurisdiction until it issues its mandate, which returns the matter to the trial court.[37] The notice of appeal thus performs the important administrative function of preventing more than one court (one trial, the other appellate) from simultaneously exercising jurisdiction over a single matter. The Tennessee Supreme Court has "decline[d] to adopt a rule that would allow a case to be pending in more than one court at a time."[38] Of course, as discussed above, "cases" can and regularly do pend in more than one court (trial and appellate) at the same time insofar as core merits issues may be decided on appeal while "ancillary" issues (such as judgment enforcement) may remain pending in the trial court.[39] Further, for example,

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36. *In re* E.J.M., 259 S.W.3d 124, 135 (Tenn. Ct. App. 2007); *see* First Am. Trust Co. v. Franklin-Murray Dev. Co., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) ("Perfecting an appeal vests jurisdiction over the case in the appropriate appellate court."); Spann v. Abraham, 36 S.W.3d 452, 461 (Tenn. Ct. App. 1999) ("The legal effect of perfecting an appeal is to divest the trial court of further authority to act without leave of the appellate court and to vest jurisdiction in the court of appeals."); Reed v. Alamo Rent-A-Car, Inc., 4 S.W.3d 677, 691 n.8 (Tenn. Ct. App. 1999) ("As a general rule, a trial court loses jurisdiction to enter orders in a case after one of the parties files a notice of appeal."); Dunlap v. Dunlap, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1998) ("This court's jurisdiction attaches upon the filing of the notice of appeal."); PIVNICK, *supra* note 2; *cf. Griggs*, 459 U.S. at 58 (the filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").

37. *First Am. Trust Co.*, 59 S.W.3d at 141 ("An appellate court retains jurisdiction over a case until its mandate returns the case to the trial court."); *see* TENN. R. APP. P. 42–43 (regarding mandate); TENN. CODE ANN. § 21-1-810 (2013).

38. Spence v. Allstate Ins. Co., 883 S.W.2d 586, 596 (Tenn. 1994); *see First Am. Trust Co.*, 59 S.W.3d at 141 (discussing the "undesirable consequences of permitting a case to be pending in more than one court at the same time."); *cf. Griggs*, 459 U.S. at 58 (observing that it has been "generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.").

39. *See supra* note 23 & accompanying text. Tennessee Rule of Appellate Procedure 4(e), which permits the trial court to retain jurisdiction to decide certain motions (such as a motion to alter or amend a judgment under Tennessee Rule of Civil Procedure 59.04) notwithstanding the filing of a premature notice of appeal, implies that the trial court will decide such a motion promptly or, in the event that the trial court does not act promptly, that the Court of Appeals will remand or stay the appeal until the trial court has issued its decision. The Advisory Commission Comments clarify this very point:

> Subdivisions (b) and (c) specify certain post-trial motions that, if timely filed, terminate the running of the time for filing notice of appeal. These tolling provisions may unduly lengthen litigation if such motions are not ruled on promptly by the trial court. However, unless these motions are abolished, it would be undesirable to proceed with the appeal while the

trial court proceedings are not necessarily stayed pending the outcome of an interlocutory appeal.[40] The concern really is to prevent a single *issue* from pending simultaneously before both the trial court and an appellate court.

D. The Jurisdictional Effect of Failing to Properly File a Notice of Appeal

Although some flexibility is afforded regarding the form and contents of a notice of appeal,[41] a party's failure to perfect its appeal as of right by timely filing a notice of appeal will deprive the Tennessee Court of Appeals of jurisdiction over the appeal. In Tennessee, it is well established that the notice-of-appeal requirement in civil cases is mandatory and jurisdictional.[42] Under Tennessee Rule of Appellate Procedure 3(e), a party wishing to appeal as of right must do so "by timely filing a notice of appeal."[43] Under Rule 4(a), the time limit for doing so is "within 30 days after the entry of the judgment appealed from."[44] By rule, this time limit is non-waivable and jurisdictional in civil actions; the grant of discretion to suspend the Tennessee Rules of Appellate Procedure "shall not permit the

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> trial court has before it a motion the granting of which would vacate or alter the judgment appealed from, and which might affect either the availability of or the decision whether to seek appellate review.

TENN. R. APP. P. 4 advisory comm'n cmt. to Subdivisions (b), (c), and (d).

40. See Tenn. R. App. P. 9(f) ("The application for permission to appeal or the grant thereof shall not stay proceedings in the trial court unless the trial court or the appellate court or a judge thereof shall so order."). The trial court does, however, lose jurisdiction to decide the matters that have been specifically certified for interlocutory appeal. "In Rule 9 appeals, the norm is for the trial court to retain jurisdiction of the case, except for the issues being appealed." *In re* Conservatorship for Allen, E2010-01625-COA-R10-CV, 2010 WL 5549037, at *6 (Tenn. Ct. App. Dec. 29, 2010).

41. *See* TENN. R. APP. P. 3(f) (listing required contents of notice of appeal and stating that "[a]n appeal shall not be dismissed for informality of form or title of notice of appeal."); TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (f) ("This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect."). A comprehensive analysis of which defects in content may not be excused lies outside the scope of this Article.

42. *See, e.g.*, Albert v. Frye, 145 S.W.3d 526, 528 (Tenn. 2004) ("The thirty-day time limit for filing a notice of appeal is mandatory and jurisdictional in civil cases."); Jefferson v. Pneumo Servs. Corp., 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985) (the notice-of-appeal "time limit is mandatory and jurisdictional in civil cases"); Howse v. Campbell, M1999-01580-COA-R3-CV, 2001 WL 459106, at *3 (Tenn. Ct. App. May 2, 2001) ("[C]ompliance with Tenn. R. App. P. 4(a) is mandatory and jurisdictional in civil cases."); 2 TENNESSEE JURISPRUDENCE *Appeal and Error* § 57 (Paul Ernest ed., 2009 & Supp. 2012).

43. TENN. R. APP. P. 3(e).

44. Rules 3(e) and 4(a) together "require that a notice of appeal be filed with the clerk of the trial court within the time prescribed for taking an appeal . . . ." TENN. R. APP. P. 3 advisory comm'n cmt. on Subdivision (e). "The 30-day period . . . in which to file a notice of appeal is to be uniformly applied." TENN. R. APP. P. 4 advisory comm'n cmt. on Subdivision (a).

extension of time for filing a notice of appeal prescribed in Rule 4."[45] Accordingly, Tennessee appellate courts have repeatedly held in civil actions that they lack appellate jurisdiction when the appellant has failed to timely file a notice of appeal.[46] Seeking relief from a judgment under Tennessee Rule of Civil Procedure 60 does not affect this jurisdictional requirement.[47]

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45. TENN. R. APP. P. 2; *see* TENN. R. APP. P. 2 advisory comm'n cmt. ("The exceptions to this rule [of exercising discretion to suspend the Rules of Appellate Procedure] prohibit the appellate courts from extending the time for taking an appeal as of right . . . . Since filing a notice of appeal is an essential step necessary to a valid appeal of right, this step should not be waivable . . . ."); TENN. R. APP. P. 2 advisory comm'n cmt. to 2003 amend. (stating that the time period for filing a notice of appeal as set forth in Tennessee Rule of Appellate Procedure 4 is "jurisdictional"); TENN. R. APP. P. 3(e) ("An appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals shall be taken by *timely* filing a notice of appeal with the clerk of the trial court as provided in Rule 4 and by service of the notice of appeal as provided in Rule 5 . . . . Failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.") (emphasis added); TENN. R. APP. P. 4 advisory comm'n cmt. to Subdivision (a) ("Nothing in this Rule or any other Rule permits the time for filing a notice of appeal to be extended beyond the specified 30 days . . . ."); TENN. R. APP. P. 21(b) ("[T]he court may not enlarge the time for filing a notice of appeal prescribed in Rule 4."); *see also In re*: Amendments to the Tennessee Rules of Procedure & Evidence, No. ADM2013-02056, at *2 (Tenn. Sept. 11, 2013) (proposing 2014 Advisory Commission Comment on Tennessee Rule of Appellate Procedure 2 stating that "Rule 2 bars an appellate court from extending the time for filing a notice of appeal pursuant to Rule 4(a) . . . ."); Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996) ("*[O]nce a timely notice of appeal is filed*, the rules should not erect unjustified technical barriers which prevent consideration of the merits of the appeal.") (emphasis added). By expressly providing that the filing of a timely notice of appeal in a criminal action is "not jurisdictional," Rule 4(a) implies that it is jurisdictional in civil actions. *See* TENN. R. APP. P. 4(a).

46. *See, e.g.*, Ball v. McDowell, 288 S.W.3d 833, 836 (Tenn. 2009) ("[I]f the notice of appeal is untimely, the Court of Appeals lacks subject matter jurisdiction over the appeal."); Binkley v. Medling, 117 S.W.3d 252, 255 (Tenn. 2003) ("The thirty-day time limit set out in Rule 4 is jurisdictional in civil cases."); Arfken & Assocs., P.A. v. Simpson Bridge Co., Inc., 85 S.W.3d 789, 791 (Tenn. Ct. App. 2002) ("In civil cases, the failure to timely file a notice of appeal deprives the appellate court of jurisdiction to hear the appeal."). Tolling of the thirty-day period based on the filing of post-trial motions in the trial court, *see* TENN. R. APP. P. 4(b), lies outside the scope of this Article.

47. Seeking relief from a final judgment by means of Tennessee Rule of Civil Procedure 60.02 poses a different question (a trial court's revision of a final judgment) that does not directly implicate the jurisdictional aspect of the notice-of-appeal requirement. Although the Advisory Commission Comment to Tennessee Rule of Appellate Procedure 4(a) observes that, "in appropriate circumstances an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02," Rule 60.02 is not intended to function as a substitute for a timely notice of appeal. *See* Henderson v. Wilson, M2009-01591-COA-R3CV, 2011 WL 683905, at *4 (Tenn. Ct. App. Feb. 25, 2011); *In re* Estate of Williams, M2000-02434-COA-R3CV, 2003 WL 1961805, at *12 (Tenn. Ct. App. Apr. 28, 2003); City Bank & Trust Co. v. St. John, 1993 WL 414827, at *3 (Tenn. Ct. App. Oct. 20, 1993) (memorandum opinion under Rule 10 of the Rules of the Court of Appeals of Tennessee).

Characterizing this jurisdictional effect under the auspice of subject-matter jurisdiction results from a judicial choice, not from the lack of a constitutional or statutory power to act.[48] So long as the trial court has already exercised original jurisdiction over the matter, neither the Tennessee Constitution nor the Tennessee Code forbids an appellate court from addressing an appeal notwithstanding the appellant's failure to file a timely notice of appeal.[49] In criminal actions, for example, the timely-notice-of-appeal requirement is treated as non-jurisdictional and waivable "to ensure due process in criminal actions because fundamental interests such as life and liberty must be protected."[50] In civil actions, which typically do not involve such fundamental constitutional rights, notices of appeal are handled less delicately.[51] The decision to invest the notice of

48. *See supra* notes 4–9, 46.

49. *See supra* Section II(B).

50. State v. Williams, M2011-01169-CCA-R3-CD, 2012 WL 2061599, at *5 (Tenn. Crim. App. June 8, 2012); *see also* TENN. R. APP. P. 4(a) ("[I]n all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice."); Mills v. Wong, 155 S.W.3d 916, 925 (Tenn. 2005) ("In criminal litigation, where an alleged infringement of a constitutional right often affects life or liberty, conventional notions of finality associated with civil litigation have less importance.") (citation omitted).

51. In Tennessee, the timely-notice-of-appeal requirement is treated as non-jurisdictional and waivable in criminal actions on the ground that criminal actions involve fundamental constitutional rights affecting life and liberty. *See supra* note 50 & accompanying text. Although most civil actions involve non-fundamental property rights, some civil actions—child-custody disputes, for example—can involve governmental action regarding fundamental constitutional rights. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993) ("[T]he right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution."); C.J.H. v. A.K.G., M2001-01234-COA-R3-JV, 2002 WL 1827660, at *2 (Tenn. Ct. App. Aug. 9, 2002) ("Under the Tennessee and the United States Constitutions, a parent has a fundamental right to the 'custody and upbringing of his or her child.'" (quoting *In re* Swanson, 2 S.W.3d 180, 187 (Tenn. 1999)). Yet untimely appeals in such civil actions have been dismissed without consideration of an exception. *See, e.g.*, *In re* Taurian L C-G, M2013-02183-COA-R3-PT, 2013 WL 5874764, at *1 (Tenn. Ct. App. Oct. 30, 2013) (dismissing untimely appeal for lack of appellate jurisdiction in action involving termination of parental rights) (memorandum opinion under Rule 10 of the Rules of the Court of Appeals of Tennessee); *In re* Jayden B.-H., E2013-00873-COA-R3-PT, 2013 WL 4505389, at *1 (Tenn. Ct. App. Aug. 21, 2013) ("This time limitation is jurisdictional and mandatory in civil cases, including cases dealing with termination of parental rights. This Court has no authority to expand or waive the thirty-day time limitation.") (citations omitted). Although there are special, expedited appellate procedures for cases involving the termination of parental rights, *see* TENN. R. APP. P. 8A, the thirty-day period for filing a notice of appeal remains mandatory and jurisdictional under those procedures. To the extent that civil actions involve governmental action regarding fundamental constitutional rights, the constitutional rationale for treating notices of appeal as non-jurisdictional and waivable in criminal actions but not in civil actions arguably breaks down. The point here is neither to endorse a constitutional-based exception in civil actions nor to suggest that there is or should be a constitutional right of appeal where fundamental rights are at stake, but rather simply to identify a hole in the

appeal with a jurisdictional effect in civil actions akin to the lack of subject-matter jurisdiction arises from administrative policies favoring fair notice, judicial efficiency, convenience, and repose, not from any inherent limit on the appellate court's power of review.[52]

By choosing to impose a mandatory and jurisdictional time limit on initiating a civil appeal as of right, Tennessee is consistent with the majority of American jurisdictions. Most jurisdictions impose a time limit on filing a notice of appeal as of right that authorities characterize not only as mandatory, but also as jurisdictional, with the consequence that the failure to satisfy the time limit absolutely precludes the exercise of appellate jurisdiction over a matter.[53] Although some jurisdictions instead treat this

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rationale for treating appellate jurisdiction in criminal appeals differently from appellate jurisdiction in all civil appeals.

52. The Comments to Rule 4(a), for example, point out that a thirty-day limit for filing a notice of appeal "is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve the notice of appeal." TENN. R. APP. P. 4 advisory comm'n cmt. to Subdivision (a). The Comments to Rule 2 also indicate that making compliance with this jurisdictional deadline prevents litigants from having to wait too long for certainty about the trial court's judgment: "[T]his step should not be waivable inasmuch as the rights of parties remain uncertain during the time available for filing a notice of appeal." TENN. R. APP. P. 2 advisory comm'n cmt. The United States Supreme Court has offered a similar rationale for federal notice-of-appeal deadlines. *See* Greenlaw v. United States, 554 U.S. 237, 252 (2008) ("The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality."); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 481–82 (1999) (stating that the "cross-appeal requirement . . . is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not.").

53. *See, e.g.* 28 U.S.C. § 2107(a) (2014) (imposing mandatory thirty-day period for filing a notice of appeal in federal civil cases); FED. R. APP. P. 3 General Note ("Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' compliance with the provisions of those rules is of the utmost importance.") (citation omitted); Wis. Stat. Ann. § 809.10(1)(e) (2014) ("The notice of appeal must be filed within the time specified by law. The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal."); Bowles v. Russell, 551 U.S. 205, 209 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'") (citation omitted); MPQ, Inc. v. Birmingham Realty Co., 78 So. 3d 391, 394 (Ala. 2011) ("A court must dismiss an appeal for lack of jurisdiction if a party does not appeal within the time prescribed by statute.") (citation omitted); Edwards v. Young, 486 P.2d 181, 182 (Ariz. 1971) ("It is settled in Arizona that the perfecting of an appeal within the time prescribed is jurisdictional; and, hence, where the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal."); Stacks v. Marks, 127 S.W.3d 483, 485 (Ark. 2003) ("Timely filing of a notice of appeal is jurisdictional, and we are required to raise the issue of subject-matter jurisdiction on our own motion."); Starpoint Props., LLC v. Namvar, 201 Cal. App. 4th 1101, 1107, 134 Cal. Rptr. 3d 58, 63 (2011) ("'Compliance with the requirements for filing a notice of appeal is mandatory and jurisdictional,' and an appellate court therefore must dismiss an appeal that is untimely.") (citation omitted); Peltz v. Dist. Court of Appeal, Third Dist., 605 So. 2d 865, 866 (Fla. 1992) ("The untimely filing of a notice of appeal precludes the appellate court from exercising jurisdiction."); Perlman v. Perlman, 734 S.E.2d 560, 566 (Ga. Ct. App. 2012) ("[T]he proper and timely filing of a

timeliness requirement as prudential, and thus subject to exception,[54] several of these jurisdictions provide that exceptions will be granted only rarely, when justified by good cause or extraordinary circumstances.[55]

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notice of appeal is an absolute requirement to confer jurisdiction upon an appellate court.") (citation omitted); Ditto v. McCurdy, 80 P.3d 974, 978 (Haw. 2003) ("As a general rule, compliance with the requirement of the timely filing of a notice of appeal is jurisdictional, and we must dismiss an appeal on our motion if we lack jurisdiction.") (citation omitted); Walton, Inc. v. Jensen, 979 P.2d 118, 121 (Id. Ct. App. 1999) ("It is well-settled that the failure to timely file a notice of appeal is jurisdictional and shall cause automatic dismissal of such appeal."); Secura Ins. Co. v. Illinois Farmers Ins. Co., 902 N.E.2d 662, 664 (Ill. 2009) ("The timely filing of a notice of appeal is both jurisdictional and mandatory."); Bohlander v. Bohlander, 875 N.E.2d 299, 301 (Ind. Ct. App. 2007) ("In Indiana, timeliness of filing a notice of appeal is of the utmost importance . . . . 'The timely filing of a notice of appeal is a jurisdictional prerequisite, and failure to conform to the applicable time limits results in forfeiture of an appeal.'") (citation omitted); Robco Transp., Inc. v. Ritter, 356 N.W.2d 497, 498 (Iowa 1984) ("A timely appeal is jurisdictional, and cannot be conferred by consent, much less the silence of the appellee."); Bd. of Cnty. Comm'rs of Sedgwick Cnty. v. City of Park City, 260 P.3d 387, 390 (Kan. 2011) ("Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner prescribed by the applicable statutes.") (citation omitted) (internal quotation marks omitted); Rice v. Amerling, 433 A.2d 388, 391 (Me. 1981) ("All statutory requirements for perfecting an appeal are jurisdictional and require strict compliance."); Calvert v. Griggs, 992 So. 2d 627, 631 (Miss. 2008) ("A timely-filed notice of appeal is a jurisdictional prerequisite to invoking this Court's review."); *In re* Marriage of Short, 847 S.W.2d 158, 161 (Mo. Ct. App. 1993) ("If a notice of appeal is untimely, the appellate court is without jurisdiction and must dismiss the appeal."); Manske v. Manske, 518 N.W.2d 144, 146 (Neb. 1994) ("Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte."); Sonntag v. Creekside Apartments, 281 P.3d 1220, at *1 (Nev. 2009) ("Since appellant's notice of appeal was untimely filed, we lack jurisdiction to consider this appeal.") (table); Schulz v. New York State Dep't of Envtl. Conservation, 589 N.Y.S.2d 370, 371 n.1 (Supreme Ct. App. Div. 1992) ("It is well settled that a party's failure to timely file a notice of appeal effectively deprives this court of jurisdiction to entertain his or her appeal."); *In re* H.F., 900 N.E.2d 607, 613 (Ohio 2008) ("[F]ailure to file a timely notice of appeal . . . is a jurisdictional defect."); *In re* Estate of Allen, 960 A.2d 470, 471 (Pa. Super. Ct. 2008) ("[I]f the appeal is late, we have no jurisdiction to entertain it."); Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984) ("The timely filing of a notice of appeal as prescribed by Rule 3 of our rules is mandatory and jurisdictional."); Smith v. Rustic Home Builders, LLC, 826 N.W.2d 357, 359 (S.D. 2013) ("We have no jurisdiction over an untimely appeal."); Wells v. Shenandoah Valley Dep't of Soc. Servs., 692 S.E.2d 286, 288 (Va. Ct. App. 2010) ("Timely filing of the notice of appeal at the appellate level is mandatory and jurisdictional."); Casella Constr., Inc. v. Dep't of Taxes, 869 A.2d 157, 158 (Vt. 2005) ("The timely filing of a notice of appeal is a jurisdictional requirement."); Yeager v. Forbes, 78 P.3d 241, 247 (Wyo. 2003) ("[F]ailure to timely file a notice of appeal deprives this Court of jurisdiction to hear the appeal."); *see generally* 5 AM. JUR. 2D *Appellate Review* § 258 (2007); 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE *Jurisdiction* § 3950.1 (4th ed. 2013); MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION & PRACTICE § 6:03 (3d ed. 2013).

54. *See, e.g.*, Richard v. Boggs, 162 P.3d 629, 633 (Alaska 2007); Conn. Commercial Lenders, LLC v. Teague, 940 A.2d 831, 833 n.5 (Conn. Ct. App. 2008).

55. *See, e.g.*, MONT. R. APP. P. 4(6); Giordano v. Marta, 723 A.2d 833, 837–38 (Del. 1998); Troy Indus., Inc. v. Samson Mfg. Corp., 924 N.E.2d 325, 331 (Mass. App. Ct. 2010); *In re* Welfare of J.R., Jr., 655 N.W.2d 1, 3 (Minn. 2003); Lyman v. Kern, 995 P.2d 504, 506

Implicit in the timeliness requirement is the requirement that an appellant be named in a notice of appeal.[56] Rule 3(f) provides that "[t]he notice of appeal *shall specify the party or parties taking the appeal* . . . ."[57] And for joint notices of appeal by multiple appellants represented by the same counsel, the Rules now permit such collective designations as "all plaintiffs," "the plaintiffs A, B, et al.," and similar conventions.[58] Rule 3(f) thus contemplates that where an action involves multiple rights of appeal, each appealing party possessing an independent right of appeal must file a notice of appeal.

For a party to be properly classified as an appellant, the notice of appeal must somehow expressly identify that party. Notices of appeal filed on behalf of a non-party or the wrong party are insufficient to perfect an appeal.[59] Consequently, in actions involving the entry of a judgment against

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(N.M. Ct. App. 2000); Holbrook v. Poole Assocs., Inc., 400 S.E.2d 863, 866 n.3 (W. Va. 1990).

56. "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal." TENN. R. APP. P. 3(e). Identifying the party taking an appeal may be construed as part of "the timely filing of a notice of appeal."

57. TENN. R. APP. P. 3(f) (emphasis added).

58. *See* TENN. R. APP. P. 3(f); TENN. R. APP. P. 16(a). Formerly, the use of "et al." was deemed insufficient to satisfy the requirement that each appellant be identified in the notice of appeal, with the result that any party not specifically listed in the notice was deemed not to be an appellant. *See, e.g.*, Arnett v. Domino's Pizza I, L.L.C., 124 S.W.3d 529, 533 (Tenn. Ct. App. 2003). Following federal precedent in a manner inconsistent with the ostensible meaning of Rule 13(a), Tennessee Rule of Appellate Procedure 3(f) was amended in 2004 to permit the use of "et al." and similar conventions in a notice of appeal to refer to multiple appellants represented by the same counsel. *See* TENN. R. APP. P. 3 advisory comm'n cmt. to 2004 amend. If Rule 13(a) means that only the original appellant needs to file a notice of appeal, then a rule governing how to identify multiple parties in a notice of appeal would be superfluous. Even as originally adopted, Rule 3(f) contemplated that a single appeal might involve multiple appellants, each of which was required to comply with Rule 3: "The notice of appeal shall specify the party or parties taking the appeal . . . ." TENN. R. APP. P. 3(f), TENN. DECISIONS 577–581 S.W.2d (1979), at XXXIV. The joinder of separate parties in a single notice of appeal is also governed in part by Tennessee Rule of Appellate Procedure 16(a), which provides that "[i]f two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may proceed on appeal jointly." "Under Rule 16, two or more persons may proceed on appeal jointly. Thus, it is entirely proper for parties to file a joint notice of appeal; however, a joint notice of appeal must comply with subparagraph (f) of this rule." TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (e).

59. *See, e.g.*, Bank of Am., N.A. v. Darocha, 241 S.W.3d 510, 513 (Tenn. Ct. App. 2007) (dismissing appeal where only named appellant was not a party to the lawsuit); Legens v. Marshall, W2003-00005-COA-R3CV, 2004 WL 442903, at *2–3 (Tenn. Ct. App. Mar. 9, 2004) (dismissing appeal where judgment was rendered against a corporation but only timely named appellant was the corporation's individual principal). Both Tennessee and federal appellate courts have held that the failure to name a party in a notice of appeal constitutes that party's failure to appeal. *See, e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 (1988) ("The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal."), *superseded on other*

multiple parties, courts will not presume that all of those parties are appellants when only one of them files a notice of appeal, even when they all are represented by the same counsel.[60] In our party-driven system, as a general rule, a party wishing to appeal must take timely action to initiate the appellate process by filing (independently or jointly) a notice of appeal.[61] A party's failure to be named in a notice of appeal is tantamount to not filing a notice at all, and it has the same jurisdictional consequence as an untimely filing.

In Tennessee, the notice of appeal thus plays a crucial role in civil actions that is jurisdictional in the strictest sense. Once a trial court's exercise of original jurisdiction has concluded with a judgment that triggers appealability as of right, a party wishing to obtain appellate review of that judgment as an appellant has a limited time to initiate such review by filing a notice of appeal expressly identifying that party. Thus, a timely notice of appeal that adequately identifies the appealing party or parties is the required procedural mechanism for transferring jurisdiction from the trial court to the appellate court. Absent a party's fundamentally proper filing of a notice of appeal, the appellate court may not exercise appellate jurisdiction over a judgment entered against that party, and that judgment

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grounds by FED. R. APP. P. 3(c)(1)(A); M.E.S., Inc. v. Snell, 712 F.3d 666, 668 (2d Cir. 2013) (dismissing appeal by party that was not identified as an appellant in the notice of appeal); Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271, 1274–78 (10th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 779 (U.S. 2011); Holloman v. Mail-Well Corp., 443 F.3d 832, 844–45 (11th Cir. 2006) (same); Maerki v. Wilson, 128 F.3d 1005, 1007–08 (6th Cir. 1997) (same); Billino v. Citibank, N.A., 123 F.3d 723, 726 (2d Cir. 1997) ("[A] complete *failure* to name the party taking the appeal creates a fatal defect . . . . To hold otherwise would render the requirements of Rule 3 meaningless. Naming the appealing party is a fundamental purpose of requiring a formal notice of appeal, as it 'serves both the interests of finality, in that courts of appeal may not exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed, and of fairness, because the purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants.'") (citations omitted); Mairose v. Fed. Exp. Corp., 86 S.W.3d 502, 509 (Tenn. Ct. App. 2001) (citing *Torres*, 487 U.S. at 314), *superseded on other grounds by* TENNESSEE RULE OF APPELLATE PROCEDURE 3(f); *see also* 20 MOORE'S FEDERAL PRACTICE–CIVIL § 304.11[3][b] (3d ed. 1997) (even after the 1993 amendment of Federal Rule of Appellate Procedure 3(c)(1)(A) to permit the use of "et al." and similar conventions, and despite the requirement that Federal Rule of Appellate Procedure 3 must be construed liberally, "a complete failure to identify the party taking the appeal deprives the appellate court of jurisdiction . . . . [A] notice of appeal that does not indicate, in any way, the clear intention of a party to appeal, still will not confer jurisdiction on the appellate court."); TIGAR & TIGAR, *supra* note 53, § 6:02.

60. *See, e.g.*, Town of Carthage, Tenn. v. Smith Cnty., 01-A-01-9308-CH00391, 1995 WL 92266, at *4 (Tenn. Ct. App. Mar. 8, 1995) ("To be considered an appellant, a party must file a timely notice of appeal in its own name, or it must be named as an appellant in a timely joint notice of appeal filed in accordance with Tenn. R. App. P. 16(a). Parties who do neither are simply not before the court as appellants.").

61. *See* TENN. R. APP. P. 3(f); TENN. R. APP. P. 16(a); *see also* MEADOR & BERNSTEIN, *supra* note 7, at 69 (discussing party-driven aspect of American appellate system); *see infra* note 175 & accompanying text.

will become permanent under the doctrine of res judicata.[62] When it comes to the vitality of a civil lawsuit, the difference between filing and not filing a proper notice of appeal is a matter of life or death.

PART II. THE PROBLEM OF SEPARATE NOTICES OF APPEAL IN TENNESSEE

In Tennessee, the jurisdictional function of notices of appeal must be viewed in the larger context of Tennessee's overall structure for transferring an appeal from the trial court to the appellate court. In adopting the Tennessee Rules of Appellate Procedure, Tennessee endorsed policies of judicial efficiency and procedural simplicity that favor minimizing not only the number of serial appeals in an action, but also the number of notices of appeal that need to be filed in relation to the appeal of an action.

Based on these policies, Tennessee is one of a minority of American jurisdictions that do not require the filing of notices of cross-appeal.[63] Once a party has timely filed a notice of appeal, an appellee that seeks to alter or to enlarge the trial court's judgment may do so without filing its own notice of appeal but rather simply by asserting those additional issues in its responsive brief.

Unlike other jurisdictions, however, Tennessee has taken this approach a step further: Tennessee Rule of Appellate Procedure 13(a) expressly provides that "separate appeals" are unnecessary.[64] Setting aside cross-appeals, which are by definition derivative, a separate-appeal scenario typically arises when multiple parties occupying the same posture in the trial court respectively possess independent rights of appeal. A separate-appeal scenario comes about, for example, when a final judgment is entered in favor of a plaintiff against two separate defendants, each of which is thus confronted with a limited time period for perfecting its appeal by filing (independently or jointly) a notice of appeal.

Although, as discussed above, Tennessee Rules of Appellate Procedure 3(e), 3(f), and 4(a) make the timely filing of a notice of appeal both mandatory and jurisdictional for all putative appellants, Rule 13(a)'s

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62. *See* Jackson v. Smith, 387 S.W.3d 486, 491 (Tenn. 2012) (stating that res judicata is a "rule of rest" that "promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits") (citations omitted); *see also* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398–402 (1981) (discussing res judicata in relation to a party's failure to assert a separate appeal).

63. *See, e.g.*, IND. R. APP. P. 9(D); NEB. CT. R. § 2-101(E); Key Risk Ins. Co. v. Crews, 727 S.E.2d 436, 442 (Va. Ct. App. 2012).

64. Rule 13(a) states in full: "**(a) Questions of Law that May Be Urged Upon Appeal.** Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required. Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court." TENN. R. APP. P. 13(a).

exception for separate appeals other than cross-appeals directly contradicts this general jurisdictional requirement. This discrepancy, which is imbedded within Tennessee's Rules of Appellate Procedure, has yielded two conflicting lines of judicial authority regarding the failure to file a separate notice of appeal: one line of authority, relying solely on Rules 3(e), 3(f), and 4(a), dismisses a separate appeal for lack of appellate jurisdiction when a separate notice of appeal has not been filed; by contrast, another line of authority, relying solely on Rule 13(a), exercises appellate jurisdiction and does not dismiss a separate appeal when a separate notice of appeal has not been filed. This split of authority yields two opposing results arising from a single procedural circumstance. Such a result is unfair, is inconsistent with the simplicity and coherence that Tennessee's Rules of Appellate Procedure are intended to embody, and fails to provide reliable guidance to litigants.

A. Tennessee's Singular Structure for Filing Notices of Appeal

Tennessee has adopted an appellate procedural structure that is designed to minimize not only serial appeals in a single action, but also the overall number of notices that must be filed in relation to a particular appeal. In line with this emphasis on procedural simplicity, Tennessee not only has chosen not to require the filing of notices of cross-appeal, but also has provided that separate notices of appeal need not be filed.

1. Tennessee Does Not Require Notices of Cross-Appeal

Unlike most jurisdictions, Tennessee does not require the filing of notices of cross-appeal.[65] A "cross-appeal" arises when an appellee, in response to an appeal previously filed by another party, asserts its own right to seek alteration or enlargement of the judgment relating to that appellant.[66] In Tennessee an appellee may advance its own issues on

65. *See* TENN. R. APP. P. 13(a) ("*Cross-appeals*, separate appeals, and separate applications for permission to appeal are not required.") (emphasis added); Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006) ("When a party to a lawsuit properly perfects an appeal, the appellee need not file a separate notice of appeal [i.e., a cross-appeal] to obtain review of additional issues and may raise additional issues in its responsive brief."); Flautt & Mann v. Council of City of Memphis, 285 S.W.3d 856, 867 (Tenn. Ct. App. 2008) (holding that notice of cross-appeal need not be filed by appellant for appellant to raise appellate issues of its own); Jahn v. Jahn, 932 S.W.2d 939, 941 n.1 (Tenn. Ct. App. 1996) ("The appellant argues that we cannot consider the appellee's issues because he did not file a notice of appeal. The appellant's position is incorrect. Once a case is properly appealed by one party, the other party or parties are at liberty to raise issues."); Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992) ("It is the intention of [Tennessee Rule of Appellate Procedure 13(a)] that only one notice of appeal be filed and that the right of cross-appeal shall exist without notice of cross-appeal.") (citation omitted).

66. "Cross-appeal" is defined as "[a]n appeal by the appellee, usu[ally] heard at the same time as the appellant's appeal." BLACK'S LAW DICTIONARY 113 (9th ed. 2009); *see*

appeal—including seeking to alter or enlarge the judgment entered below—simply by asserting those issues in its responsive brief.[67]

By contrast, federal courts require an appellee that wishes to alter or to enlarge (rather than merely to affirm) the judgment below to file its own notice of cross-appeal after an original notice of appeal has been filed.[68] Through this requirement, as well as by requiring the filing of separate notices of appeal based on multiple, independent rights of appeal, federal appellate courts ensure that from the inception of an appeal the appellate court, the appellate court clerk's office, and the litigants have

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also 4 C.J.S. *Appeal and Error* § 21 (2007) ("A 'cross appeal' is an appeal by an appellee who seeks something more than was received in the trial court."); 20 MOORE'S FEDERAL PRACTICE–CIVIL § 304.11[3][b] (3d ed. 1997) ("A party against whom an appeal is taken may file a notice of appeal to challenge the order or judgment, which is commonly referred to as a notice of cross-appeal."); TIGAR & TIGAR, *supra* note 53, § 6:10 ("The cross-appeal is not a device to confer jurisdiction where it does not already exist."); *see also infra* notes 79–84 & accompanying text.

67. *See* TENN. R. APP. P. 27(b) ("If appellee is also requesting relief from the judgment, the brief of the appellee shall contain the issues and arguments involved in his request for relief as well as the answer to the brief of appellant."); *see also* TENN. R. APP. P. 13(a) (stating that "[c]ross appeals . . . are not required."); *Cantrell*, 193 S.W.3d at 471; *Flautt & Mann*, 285 S.W.3d at 867; Quebecor Printing Corp. v. L & B Mfg. Co., 209 S.W.3d 565, 582–83 (Tenn. Ct. App. 2006); *Henderson*, 838 S.W.2d at 541; PIVNICK, *supra* note 2, § 30:7. The Rules indicate that a cross-appellant, despite not having filed a notice of cross-appeal, may advance its cross-appeal notwithstanding dismissal of the appellant's appeal. *See* TENN. R. APP. P. 13(a) ("Dismissal of the original appeal shall not preclude [the appeal of] another party from being considered by an appellate court."); *see also* Edwards v. Hunt, 635 S.W.2d 696, 698 (Tenn. Ct. App. 1982) ("The first question for decision is whether the party filing a notice of appeal is able to later terminate all counter appeals by dismissing his notice of appeal. We hold that he cannot."); *see infra* notes 133–134 & accompanying text.

68. *See* FED. R. APP. P. 4(a)(3) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."); FED. R. APP. P. 28.1 (describing the procedure concerning cross-appeals); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'") (citation omitted); *see also* WRIGHT, *supra* note 53, § 3950.7; 2A FED. PROC., L. ED. § 3:611 (2013); TIGAR & TIGAR, *supra* note 53, § 6:10; 5 AM. JUR. 2D *Appellate Review* § 295 (2007). Federal circuits are split over the question whether the failure to file a notice of cross-appeal is a jurisdictional defect. *See* Greenlaw v. United States, 554 U.S. 237, 245 (2008); WRIGHT, *supra* note 53, § 3950.7; DAVID G. KNIBB, FED. CT. APP. MANUAL §§ 11:2, 11:4 (6th ed. 2013). Although the United States Supreme Court has declined to decide this question, labeling it merely "theoretical," *Greenlaw*, 554 U.S. at 245, the Court has reinforced the characterization of the cross-appeal requirement as mandatory. The cross-appeal rule is described as "inveterate and certain," *id.* (citation omitted), and "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Supreme Court's] holdings has ever recognized an exception to the rule." *El Paso Natural Gas*, 526 U.S. at 480. Consequently, practitioners might as well treat the rule as if it were jurisdictional. *See* WRIGHT, *supra* note 53, § 3950.7.

notice of all rights of appeal being asserted within an action.[69] Most states fall in line with this federal appellate procedure, requiring or at least providing for the filing of notices of cross-appeal when an appellee wants to alter or to enlarge the judgment entered below.[70] Only a handful of jurisdictions in addition to Tennessee do not require or contemplate the filing of notices of cross-appeal.[71]

Not requiring the filing of a notice of cross-appeal—which by definition is a derivative appeal that is dependent on and responsive to an appeal previously asserted by an opposing party—is an understandable exception to the general requirement that each party wishing to appeal must file its own notice of appeal.[72] A party that is largely satisfied with the trial court's judgment may choose not to file an original or separate appeal, but that party may seek to alter or to enlarge some portion of the judgment should it be drawn into an appeal as an appellee. A cross-appeal is thus asserted by a party, and regarding a judgment, over which the appellate court necessarily already exercises appellate jurisdiction; the appellate court already has the power to reverse or to modify the judgment in favor of the appellee, and thus the appellee's raising of its own issues arguably does not fall outside the appellate jurisdiction already being exercised. "The cross-

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69. *See Greenlaw*, 554 U.S. at 252–53 ("[I]f the Government files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence."); *El Paso Natural Gas*, 526 U.S. at 481–82 ("[The] cross-appeal requirement . . . is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not.").

70. *See, e.g.*, ALASKA R. APP. P. 204(a)(2); COLO. APP. R. 4(a); FLA. R. APP. P. 9.110(g); GA. CODE ANN. § 5-6-38 (2013); HAW. R. APP. P. 4.1; IOWA R. APP. P. 6.101(2); KAN. STAT. ANN. § 60-2103(h) (2013); KY. R. CIV. P. 72.06(2); MASS. R. APP. P. 4(a); MINN. R. APP. P. 103.02(2); MISS. R. APP. P. 4(c); MO. SUP. CT. R. 81.04(c); NEV. R. APP. P. 4(a)(2); N.D. R. APP. P. 4(a)(2); PA. R. APP. P. 903(b); VT. R. APP. P. 4(a); WISC. STAT. ANN. § 809.10(2)(b); WYO. R. APP. P. 2.01(a)(2); Beaty v. Head Springs Cemetery Ass'n, 413 So. 2d 1126, 1128 (Ala. 1982); Tempe Corporate Office Bldg. v. Ariz. Funding Servs., Inc., 807 P.2d 1130, 1133 (Ariz. Ct. App. 1991); Hasha v. City of Fayetteville, 845 S.W.2d 500, 504 (Ark. 1993); Gulf Ins. Co. v. TIG Ins. Co., 86 Cal. App. 4th 422, 437, 103 Cal. Rptr. 2d 305 (2001); 190 Elm St. Realty, LLC v. Beaudoin, 855 A.2d 546, 548 (N.H. 2004); Powers v. Miller, 984 P.2d 177, 183–84 (N.M. Ct. App. 1999); Kaplysh v. Takieddine, 519 N.E.2d 382, 386–87 (Ohio 1988); Glezos v. Frontier Investments, 896 P.2d 1230, 1233 (Utah Ct. App. 1995). *See generally* 4 C.J.S. *Appeal and Error* § 21 (2007). The question whether states treat the failure to file a notice of cross-appeal as a jurisdictional defect lies outside the scope of this Article.

71. *See, e.g.*, IND. R. APP. P. 9(D); NEB. CT. R. § 2-101(E); Key Risk Ins. Co. v. Crews, 727 S.E.2d 436, 442 (Va. Ct. App. 2012).

72. *See, e.g.*, Town of Carthage, Tenn. v. Smith Cnty., 01-A-01-9308-CH00391, 1995 WL 92266, at *4 (Tenn. Ct. App. Mar. 8, 1995) ("To be considered an appellant, a party must file a timely notice of appeal in its own name, or it must be named as an appellant in a timely joint notice of appeal filed in accordance with Tenn. R. App. P. 16(a). Parties who do neither are simply not before the court as appellants.").

appeal is not a device to confer jurisdiction where it does not already exist."[73]

Although not requiring the filing of notices of cross-appeal departs from and is technically inconsistent with the general notice-of-appeal requirements mandated by Tennessee Rules of Appellate Procedure 3 and 4, that departure has not engendered the kind of judicial split of authority caused by Rule 13(a) with respect to separate appeals other than cross-appeals. Though the better and more consistent practice both in jurisdictional and administrative terms may be to require the filing of notices of cross-appeal, as is done in federal courts, Tennessee's practice of not requiring it works reasonably well.[74]

Tennessee's rationale for not requiring notices of cross-appeal primarily has to do with simplifying the appellate process. With respect to Tennessee Rule of Appellate Procedure 3(e), the Advisory Commission has emphasized this policy in favor of simplicity: "The intent of this subdivision is to provide a uniform and simplified method of taking an appeal as of right."[75] In line with this attempt at simplification, Tennessee has, for the most part, rejected the use of the notice of appeal as a means for limiting the scope of the issues that may be raised on appeal.[76]

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73. TIGAR & TIGAR, *supra* note 53, § 6:10; *see supra* note 66.

74. Under federal appellate procedure, multiple appeals (both cross-appeals and separate appeals in a narrower sense) within an action are handled by requiring each party asserting a right of appeal (whether derivative or independent) to file a timely notice of appeal: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." FED. R. APP. P. 4(a)(3). This rule not only ensures that, from the inception of an appeal, the appellate court, the appellate court clerk's office, and the litigants receive notice of every right of appeal (whether derivative or independent) being asserted within an action, but it also permits putative cross-appellants and separate appellants to wait until another party has filed an original appeal before determining whether to assert their cross-appeals or other separate appeals. *See* WRIGHT, *supra* note 53, § 3950.7; MOORE'S FEDERAL PRACTICE, *supra* note 59, § 304.11[3][a]. The federal procedure thus does an arguably better job than Tennessee in clarifying from the outset the contours of the respective rights of appeal being asserted by multiple parties, which may make it easier to set briefing schedules and the sequence of oral argument for appeals involving the assertion of multiple rights of appeal. *See infra* Section IV(B).

75. TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (e); *see* Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996) ("Prior to July 1, 1979, practice and procedure in Tennessee appellate courts were governed by scattered statutory provisions and by the rules and decisions of the appellate courts."); John L. Sobieski, Jr., *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161, 166–70, 183–87 (1978) [hereinafter Sobieski, *Theoretical Foundations*] (stating that a "primary purpose of the [Tennessee Rules of Appellate Procedure] is simplification of the law," which included compiling the formerly scattered statutes and judicial rulings on appellate procedure and transforming and revising them into a single, coherent set of rules).

76. TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (a) ("[T]his subdivision rejects use of the notice of appeal as a review-limiting device."); Cox v. Tenn. Farmers Mut. Ins. Co., 297 S.W.3d 237, 243 (Tenn. Ct. App. 2009); *In re* NHC–Nashville Fire Litig., 293 S.W.3d 547, 559–60 (Tenn. Ct. App. 2008); *see infra* Section IV(A).

2. Under Tennessee Rule of Appellate Procedure 13(a), Tennessee Does Not Require Notices of Separate Appeal

Tennessee has gone a step further. In addition to not requiring the filing of notices of cross-appeal, Tennessee's Rules of Appellate Procedure manifest an even deeper attempt at simplification: As a general rule, with respect to appeals within a single action, Tennessee Rule of Appellate Procedure 13(a) ostensibly provides that only a single notice of appeal ever needs to be filed.[77] Rule 13(a) states that "[c]ross-appeals, *separate appeals*, and separate applications for permission to appeal are not required."[78]

Because the Rules do not define "separate appeals," we must do so here. Defined most broadly, "separate appeals" are appeals asserted by two or more parties, each of which possesses a right of appeal. Appeals asserted in separate lawsuits constitute separate appeals.[79]

When limited to a single lawsuit, "separate appeal" means the right of appeal that may be asserted by any party other than the original appellant. Cross-appeals fall under this definition. Even a lawsuit involving, for example, only a single appellant and a single appellee potentially involves a separate appeal, for an appellee with something to complain about potentially possesses a right of cross-appeal that is "separate" from the appellant's appeal.[80] Should the appellant dismiss its appeal, the

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77. *See* Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992) ("It is the intention of this rule [Tennessee Rule of Appellate Procedure 13(a)] that only one notice of appeal be filed and that the right of cross-appeal shall exist without notice of cross-appeal."); Edwards v. Hunt, 635 S.W.2d 696, 698 (Tenn. Ct. App. 1982) ("It was the intention of Rule 13 TRAP that only one notice of appeal be filed and that the right of cross appeal shall exist without a notice of cross appeal."); *see also* State v. Jefferson, 938 S.W.2d 1, 3 n.1 (Tenn. Crim. App. 1996) ("The Tennessee Rules of Appellate Procedure contemplate the filing of only one notice of appeal."); John L. Sobieski, Jr., *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1, 13–14 (1978) [hereinafter Sobieski, *Procedural Details*] ("[P]arties other than the initial appellant do not need to file their own notices of appeal to obtain appellate review and relief.").

78. TENN. R. APP. P. 13(a) (emphasis added). Comments to Rule 3(f) state that "[t]his subdivision read in conjunction with Rule 13(a) permits any question of law to be brought up for review [except as otherwise provided by Rule 3(a)] as long as any party formally declares an intention to appeal in a timely fashion." TENN. R. APP. P. 3 advisory comm'n cmt. to Subdivision (f). This Comment does not, however, expressly address the question of separate appeals, and it has not been interpreted as addressing the conflict addressed by this Article. Comments to Rule 5(c) similarly state that, "once one party files a notice of appeal, other parties are not required to file a separate notice of appeal in order to raise any issue(s) in the appeal." TENN. R. APP. P. 3 advisory comm'n cmt. to 2012 amend. This Comment also does not address the conflict at issue. *See infra* Section III(B).

79. Tennessee Rule of Appellate Procedure 16(b) uses this meaning when it provides that "[w]hen separate appeals involving a common question of law or common facts are pending before the appellate court, the appeals may be consolidated by order of the appellate court on its own motion or on motion of a party."

80. *See supra* notes 66 (defining cross-appeal), 74 & accompanying text; *see also* Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006) (referring to a cross-appeal as a "separate appeal"); State v. Russell, 800 S.W.2d 169, 171 (Tenn. 1990) (same); Harrell v.

appellee would retain the right to go forward with its cross-appeal: "Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court."[81] Nevertheless, as discussed above, cross-appeals remain a derivative category of appeal because they are, by definition, necessarily responsive to and dependent on an opposing party's prior appeal. Cross-appeals are also necessarily asserted by parties, and regarding judgments, over which the appellate court already exercises appellate jurisdiction by virtue of the prior appeal.

When cross-appeals are excluded from the definition of "separate appeals," as Rule 13(a) does by expressly referring additionally to "cross-appeals," a separate appeal within a single lawsuit means an appeal asserted by any party, other than the original appellant, that possesses an independent (as opposed to derivative) right of appeal.[82] In other words, separate rights of appeal arise in an action when two or more parties each possess a right of appeal other than a right of cross-appeal. In this sense, a separate appeal is something other than an original appeal or a cross-appeal. Insofar as a cross-appeal is defined as an appeal asserted derivatively by an appellee against an appellant, an appeal asserted by an appellee against a party that never appealed involves an independent right of separate appeal. Unlike cross-appeals, separate appeals in this narrower sense can involve putative appellants over whom the appellate court does not necessarily already exercise appellate jurisdiction by virtue of an original appeal.[83]

This narrowed definition of separate appeals applies to multi-party actions involving more than just a single appellant and a single appellee.[84] "[I]f numerous parties aligned together in the lower court file individual appeals, all but the first are known as separate appeals. Once one party has filed a notice of appeal, other parties who have not joined in that initial notice of appeal must file their own notices of appeal if they wish to attack all or a portion of the judgment below and to be relieved of the

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Harrell, 321 S.W.3d 508 (Tenn. Ct. App. 2010) (referring to a notice of cross-appeal as a "separate notice of appeal").

81. TENN. R. APP. P. 13(a). The Rules thus indicate that a cross-appellant, despite not having filed a notice of cross-appeal, may advance its cross-appeal notwithstanding dismissal of the appellant's appeal. *See Edwards*, 635 S.W.2d at 698 ("The first question for decision is whether the party filing a notice of appeal is able to later terminate all counter appeals by dismissing his notice of appeal. We hold that he cannot."); *see also Russell*, 800 S.W.2d at 171; *infra* note 128 & accompanying text. To permit an original appellant to cancel a cross-appeal by dismissing its appeal would unfairly permit a party to gain an unfair procedural advantage by being the first to file a notice of appeal. Such a consequence would undermine the viability of not requiring the filing of notices of cross-appeal.

82. *See* WRIGHT, *supra* note 53, § 3950.7; *see also supra* note 66 (defining cross-appeal).

83. *See* WRIGHT, *supra* note 53, § 3950.7.

84. 4 C.J.S. *Appeal and Error* § 243 (2007) ("In multiparty actions, each party may be required to appeal to protect one's separate interest. . . . A party may not appeal the claim of another party. Parties who are separately aggrieved may separately appeal."); *see also* WRIGHT, *supra* note 53, § 3950.7.

consequences thereof. The fact that one party has taken a timely appeal does not permit the appellee or any other party (even though aligned in the district court with the first appellant) to seek to have the judgment below overturned or modified in some respect."[85] Although separate appeals arise most often where multiple parties occupy the same procedural posture in the trial court (e.g., five plaintiffs), they are not limited to such circumstances. Separate appeals can arise even where the separate appellants do not all occupy the same posture in the trial court (e.g., a plaintiff and a third-party defendant may have separate, independent rights of appeal that do not implicate cross-appeals between the plaintiff and third-party defendant or otherwise).

Some examples and diagrams illustrate the definition. For instance, consider an action in which three separate plaintiffs seek to appeal from a judgment in favor of a single defendant.

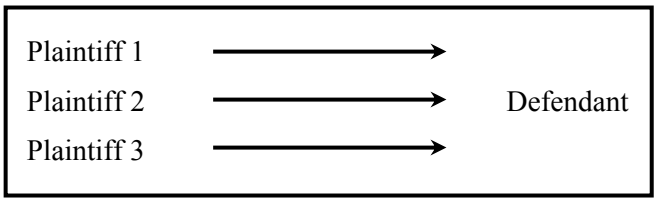

Figure 1

In Figure 1, the arrows represent the rights of appeal possessed respectively by each of the three plaintiffs. It may not be presumed that all three of the plaintiffs are represented by the same counsel or have shared interests in the lawsuit.[86] Under Tennessee Rules of Appellate Procedure 3 and 4 alone, for each of these three plaintiffs to perfect an appeal each must file its own separate notice of appeal or must expressly join in a notice of appeal filed by one of the other two plaintiffs.[87] Under Rules 3 and 4, and under the appellate procedures of all jurisdictions other than Tennessee, a plaintiff in such a situation that does neither is, as a general rule, simply not an appellant and may not seek appellate review of the trial court's judgment.[88]

Another, more complex example involves third-party practice. Suppose that a single plaintiff obtains a final judgment against a single

85. *See* WRIGHT, *supra* note 53, § 3950.7.

86. Whether these three parties are all represented by the same counsel does not affect the requirement under Tennessee Rules of Appellate Procedure 3 and 4 that each appellant must file a notice of appeal. By permitting "an attorney representing more than one party" to describe them in a notice of appeal by using "all plaintiffs," "et al.," and similar conventions, Tennessee Rule of Appellate Procedure 3(f) does not restrict the existence of separate appeals to instances where the separate appellants are represented by separate counsel. In other words, the use of "et al." and other conventions is simply a means for encompassing separate appeals within a single notice of appeal where multiple appellants happen to be represented by the same counsel. *See supra* note 58.

87. TENN. R. APP. P. 3; TENN. R. APP. P. 4.

88. *See* 4 C.J.S. *Appeal and Error* § 243 (2007); WRIGHT, *supra* note 53.

defendant, and suppose that the single defendant, in its capacity as a third-party plaintiff, obtains a final judgment against a third-party defendant, which is a separate party from the plaintiff.

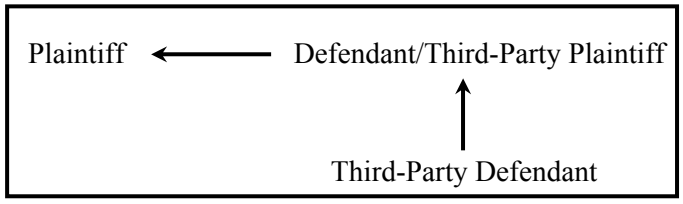

Figure 2

In this example, represented by Figure 2, the defendant/third-party plaintiff has a right of appeal (represented by an arrow) from the judgment against it in favor of the plaintiff, and the third-party defendant has a right of appeal (represented by an arrow) from the judgment against it in favor of the defendant/third-party plaintiff. Neither of these two rights of appeal qualifies as a cross-appeal, and the two rights of appeal are separate from and independent of each other. Accordingly, under Rules 3 and 4 alone, to perfect an appeal, the defendant/third-party plaintiff and the third-party defendant would each have to file (either independently or jointly) a notice of appeal. Given the adversity between those parties, the filing of a joint notice would be unlikely and perhaps even prohibited.

But as discussed above, Tennessee Rule of Appellate Procedure 13(a) expressly provides that "separate appeals" are unnecessary: "Cross-appeals, separate appeals, and separate applications for permission to appeal are not required." This sentence has been part of Rule 13(a) since Tennessee's Rules of Appellate Procedure were first adopted effective July 1, 1979.[89] According to the language of Rule 13(a), in the examples represented graphically above, only the original appellant (i.e., the first of the appellants to appeal) would be required to file a notice of appeal. The remaining appellants could assert separate appeals (i.e., appeals other than an original appeal or a cross-appeal) without filing either independently or jointly any notice of appeal. The remaining appellants could instead rely implicitly on the original appellant's notice of appeal to perfect their own separate appeals and thus avail themselves of appellate jurisdiction.[90]

89. *See* TENN. R. APP. P. 13(a), TENN. DECISIONS 577–581 S.W.2d (1979), at LV (providing text of proposed Rule 13 in context of proposed Tennessee Rules of Appellate Procedure); *see also* TENN. R. SUP. CT. 1 (stating that the Tennessee Rules of Appellate Procedure took effect on July 1, 1979); TENN. R. APP. P. 49 (stating that effective date of Rules is July 1, 1979). For background regarding the drafting and original adoption of Tennessee's Rules of Appellate Procedure, see Sobieski, *Theoretical Foundations*, *supra* note 75; Sobieski, *Procedural Details*, *supra* note 77.

90. TENN. R. APP. P. 13(a); *see infra* Section IV(A).

3. Historical Background to the Adoption of Tennessee Rule of Appellate Procedure 13(a)

Historical background to the adoption of Tennessee's Rules of Appellate Procedure in 1979 illuminates the two main reasons for adopting Rule 13(a). First, as explained by the Reporter to the Tennessee Supreme Court Advisory Commission on Civil Rules in 1978–79, Rule 13(a) represented Tennessee's "rejection of the use of the notice of appeal as a review-limiting device" as provided under Federal Rule of Appellate Procedure 3(c), which requires that a notice of appeal specify the "judgment, order, or part thereof" being appealed.[91] This rationale supports primarily the first sentence of Rule 13(a), which provides that "[e]xcept as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party."[92] Second, Tennessee expressly rejected as unnecessary and unduly complex the federal requirement that appellees must file notices of cross-appeal to be eligible to alter or to enlarge the judgment on appeal.[93] This rationale supports Rule 13(a)'s provision that "[c]ross-appeals . . . are not required."[94] As the Reporter explained, "The proposed Tennessee Rules reject both of the review-limiting aspects of the notice of appeal that have arisen in the federal system."[95]

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91. Sobieski, *Theoretical Foundations*, *supra* note 75, at 188; *see* TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (a) ("[T]his subdivision rejects use of the notice of appeal as a review-limiting device. In federal practice the notice of appeal has limited review in two principal ways. Some courts have limited the questions an appellant may urge on review to those affecting the portion of the judgment specified in the notice of appeal. However, since the principal utility of the notice of appeal is simply to indicate a party's intention to take an appeal, this limitation seems undesirable. The federal courts have also limited the issues an appellee may raise on appeal in the absence of the appellee's own notice of appeal. Here again, since neither the issues presented for review nor the arguments in support of those issues are set forth in the notice of appeal, there seems to be no good reason for so limiting the questions an appellee may urge on review. The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole.").

92. TENN. R. APP. P. 13(a).

93. Sobieski, *Theoretical Foundations*, *supra* note 75, at 189–92; *see* TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (a), quoted in full, *supra* note 91. Federal Rule of Appellate Procedure 4(a)(3) regarding "Multiple Appeals" provides that "[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." This provision has, in substance, been part of the Federal Rules of Appellate Procedure since they were first adopted in 1968. *See* Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, 43 F.R.D. 61, 69, 127 (1968); WRIGHT, *supra* note 53.

94. TENN. R. APP. P. 13(a).

95. Sobieski, *Theoretical Foundations*, *supra* note 75, at 190. "The proposed rules differ significantly from the Federal Rules of Appellate Procedure, although some rules are modeled after the federal rules." *Id.* at 181.

The justification for not requiring notices of *separate* appeal, however, is harder to discern. In discussing the reasons for adopting Rule 13(a), the Reporter focuses on simple cross-appeal scenarios both without explaining the intended effect of Rule 13(a) on separate-appeal scenarios involving multiple, independent rights of appeal and without explaining how Rule 13(a) may be reconciled with Rules 3 and 4.[96] Although the Reporter later takes the position that "[f]or reasons explored at length elsewhere, parties *other than the initial appellant do not need to file their own notices of appeal to obtain appellate review and relief*,"[97] the Reporter still neither explains the intended effect of Rule 13(a) on separate-appeal scenarios other than cross-appeals nor addresses how Rule 13(a) may be reconciled with Rules 3 and 4.[98] The Reporter acknowledges the occasional need for the filing of multiple notices of appeal, stating that "[i]n cases involving more than a single plaintiff and a single defendant, proposed Rule 16(a) permits two or more persons to proceed as a single appellant and file a joint notice of appeal, a joint brief, and the like, if their interests make joinder practicable."[99] But the relationship of Rules 13(a) and 16(a) with the mandatory and jurisdictional notice-of-appeal requirements of Rules 3 and 4 remains unexplained for separate appellants whose adverse interests make joinder impracticable.[100] Insofar as it is suggested that parties with adverse interests "may take separate appeals," thus indicating that multiple notices of appeal may need to be filed within a single action, the relationship between Rule 13(a) and Rules 3 and 4 with respect to separate appeals is not clarified.[101] Moreover, the Reporter approvingly cites commentators recommending that an appellate court be given the power to modify a "judgment in favor of any nonappealing party even if that party has not participated at all in the appeal." Yet this principle also is not reconciled with the jurisdictional mandate of Rules 3 and 4.[102]

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96. *See id.* at 187–94.

97. Sobieski, *Procedural Details, supra* note 77, at 13–14 (emphasis added).

98. *Id.* (cross-referencing Sobieski, *Theoretical Foundations*, *supra* note 75 at 187–92); *cf.* TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (a) ("The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole.").

99. Sobieski, *Procedural Details*, *supra* note 77, at 14.

100. *Id.*

101. *Id.*

102. *See id.* (citing commentators). One of these authorities, Wright and Miller's treatise on federal procedure, continues to take the position, contrary to federal judicial authority, that "[i]t is better to recognize power to modify a judgment in favor of a nonappealing party" and criticizes both the jurisdictionality of notices of appeal and the requirement of filing notices of cross-appeal. *See* WRIGHT, *supra* note 53, § 3904. *But see* Greenlaw v. United States, 554 U.S. 237, 254 (2008) ("The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal."); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479–81 (1999).

The resulting Advisory Commission Comment to Rule 13(a) states that "[t]he result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole," thus indicating that notices of cross-appeal asserted by appellees are unnecessary, but it does not expressly address the issue of separate appeals. In sum, the rationale for not requiring notices of separate appeal has been murky since Tennessee's Rules of Appellate Procedure were first adopted in 1979.

4. The Uniqueness of Tennessee Rule of Appellate Procedure 13(a)

Comparison of Rule 13(a) with rules of appellate procedure in other jurisdictions throughout the country indicates that Tennessee is the only jurisdiction in the United States that has expressly provided by rule that "separate appeals" (that is to say, separate notices of appeal) are not required.[103] As discussed below, Tennessee's judicial split of authority regarding the effect of Rule 13(a) probably arises in part from its sheer eccentricity.

B. Tennessee's Judicial Split of Authority Regarding Whether Separate Notices of Appeal Are Required

When it comes to handling the failure to file a notice of appeal in separate-appeal scenarios, Tennessee appellate courts have sometimes—but not always—read Rule 13(a) as providing an exception to Rules 3(e), 3(f), and 4(a). Consequently, two inconsistent lines of authority have arisen: one line follows Rules 3(e), 3(f), and 4(a), dismissing attempted separate appeals where no separate notice of appeal has been filed or joined; and the other line follows Rule 13(a), permitting separate appeals despite the fact that no separate notice of appeal has been filed or joined. It is instructive to contrast these two lines of cases.

On the one hand, a leading example of cases following Rules 3 and 4 that reject separate appeals where no separate notice of appeal has been filed is *Spectra Plastics, Inc. v. Nashoba Bank*.[104] In *Spectra*, a lender-liability action, two separate plaintiffs—Spectra Plastics and J. Goodman

103. *See* TENN. R. APP. P. 13(a). The only other jurisdiction with a similar rule is Georgia, which provides by statute that "[a]ll parties to the proceedings in the lower court shall be parties on appeal and shall be served with a copy of the notice of appeal in the manner prescribed by Code Section 5-6-32." GA. CODE ANN. § 5-6-37 (2013). This statute, which does not expressly address the question of separate appeals and which could potentially be read narrowly as merely providing that the appellate court may render a judgment affecting any party to the action below, nonetheless has been construed by a few courts as obviating the need for a separate notice of appeal. *See, e.g.*, Marsden v. Se. Sash & Door Co., 388 S.E.2d 730, 731 (Ga. Ct. App. 1989).

104. 15 S.W.3d 832 (Tenn. Ct. App. 1999).

Associates—sought to appeal from a grant of summary judgment in favor of the sole defendant, Nashoba Bank.[105] In Figure 3, which depicts the separate-appeal scenario in *Spectra*, each arrow represents a separate, independent right of appeal.

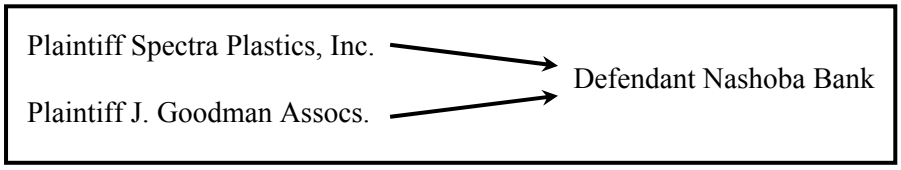

Figure 3

The two plaintiffs filed a joint appellants' brief.[106] The Court of Appeals determined, however, that only Spectra Plastics was properly before the Court of Appeals because "the only notice of appeal that was filed in this case . . . expressly identified Spectra as an appealing party, and did not declare [J. Goodman Associates'] intention to appeal in any manner."[107] Relying on Rule 3(f), the Court of Appeals concluded that J. Goodman Associates had simply failed to perfect an appeal, and the appellate court declined to address any matters relating to J. Goodman Associates, effectively rendering permanent the trial court's judgment as to that party.[108] In so holding, the Court of Appeals never addressed Rule 13(a). Other cases, often similarly focusing on Rules 3(f) and 4(a) to the exclusion of Rule 13(a), have reached conclusions consistent with *Spectra*.[109]

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105. *Id.* at 840.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g.*, McGaugh v. Galbreath, 996 S.W.2d 186, 189–90 (Tenn. Ct. App. 1998) (the Court of Appeals, citing Tennessee Rules of Appellate Procedure 3(f) and 4(a), in case involving two defendants/counter-plaintiffs/cross-plaintiffs who sought to appeal, held that the failure of one of them to be named in a notice of appeal was fatal to that party's appeal); Barbee v. Wal-Mart Stores, Inc., W2003-00017-COA-R3-CV, 2004 WL 239763 (Tenn. Ct. App. Feb. 9, 2004) (in case involving appeal by three plaintiffs, the Court of Appeals dismissed the appeal by one plaintiff (named Dillard) because he "did not file a notice of appeal. Accordingly, Dillard is dismissed as an appellant in this case. Tenn. R. App. P. 3(f), 4(a)."); Town of Carthage, Tenn. v. Smith Cnty., 01-A-01-9308-CH00391, 1995 WL 92266, at *3–4 (Tenn. Ct. App. Mar. 8, 1995) (in case involving six plaintiffs/appellants, only two of which were named in the notice of appeal, the Court of Appeals held that the four who were not named in the notice of appeal were not before the Court of Appeals as appellants); State v. City of Murfreesboro, 01-A-01-9404-CH00195, 1994 WL 585678, at *2 (Tenn. Ct. App. Oct. 26, 1994) (in case involving three plaintiffs/appellants, the Court of Appeals dismissed the appeals of two of them for failure to be named in a notice of appeal, reasoning that "there is no provision [in the Tennessee Rules of Appellate Procedure] permitting one of two plaintiffs who join their separate suits in a single action to appeal the dismissal of both suits without the joinder of both plaintiffs in the notice of appeal and appeal bond"); *see also* Mairose v. Fed. Exp. Corp., 86 S.W.3d 502, 508–09 (Tenn. Ct. App. 2001) (dismissing appeal of eight appellants based on Tennessee Rules of Appellate Procedure 3(f) and 4(a)

On the other hand, a leading example of cases following Rule 13(a) by permitting a separate appeal notwithstanding the separate appellant's failure to file its own notice of appeal is *Bryant v. Gill*.[110] In *Bryant*, a three-car auto-accident case, two plaintiffs, Felicia Bryant and Robert Giden, sued three defendants: John Gill, the driver of a truck, and Pravien Patel and Pramudhbhai Patel, respectively the driver and passenger of a jeep.[111] The Patels cross-claimed against co-defendant Gill.[112] The trial court granted summary judgment, denying the plaintiffs' claims against all three defendants and also denying the Patels' cross-claims against Gill.[113] In Figure 4, the arrows originating with plaintiffs Bryant and Giden represent their respective separate rights of appeal against all three defendants, and the arrows originating with the Patels represent their respective separate rights of appeal (arising from their cross-claims) against defendant/cross-defendant Gill.

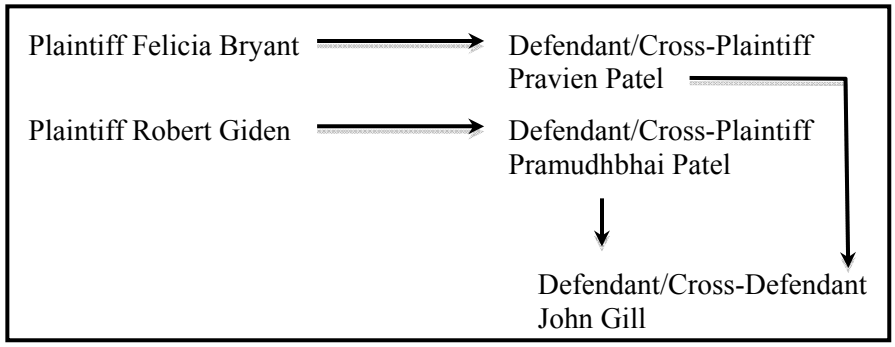

Figure 4

On appeal, both the plaintiffs (Bryant and Giden) and the Patels made arguments for reversal, but only the plaintiffs had filed a notice of appeal.[114] Though the Patels' appeals with respect to Gill arose from their cross-claims against him as co-defendant, the appeals by the Patels against Gill involved independent rights of appeal, not cross-appeals. Defendant/cross-defendant Gill argued that the Patels' "failure to file a notice of appeal bars their appeal from the judgment on their Cross-claim."[115] The Court of Appeals, quoting Tennessee Rule of Appellate

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because they had not been specifically named in the notice of appeal (before amendment of Tennessee Rule of Appellate Procedure 3(f) to permit use of "et al.")); Croslin v. Croslin, 01A01-9607-CV-00297, 1997 WL 44394, at *6 n.7 (Tenn. Ct. App. Feb. 5, 1997) (holding that although there were two respondents in the trial court, only one of them appealed, and therefore the other respondent was "not before this Court [of Appeals] and this Court has no jurisdiction insofar as she is concerned.").

110. 02A01-9311-CV-00259, 1994 WL 709021 (Tenn. Ct. App. Dec. 22, 1994).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *2.

114. *Id.*

115. *Id.*

Procedure 13(a) and its Comments, disagreed, holding that the Patels were properly appellants despite their failure to file a notice of appeal:

> Cross-appeals, separate appeals, and separate applications for permission to appeal are not required. The Advisory Commission Comments note that this rule rejects use of the notice of appeal as a review-limiting device. Further, once any party files a notice of appeal the appellate court may consider the case as a whole. Because Plaintiffs filed a timely notice of appeal, we may consider the Patels' Cross-claim as a part of the case as a whole.[116]

The Court of Appeals in *Bryant*, making no reference to Rules 3(f) or 4(a), thus permitted separate appellants possessing independent rights of appeal to seek and to obtain reversal of a judgment below without their having filed (either independently or jointly) any notice of appeal.[117] In effect, the Court of Appeals permitted these parties to assert a separate appeal other than a cross-appeal—and to obtain appellate jurisdiction—by relying on a notice of appeal filed by another party and counsel with adverse interests. Other cases, focusing on Rule 13(a) to the exclusion of Rules 3(f) and 4(a), have reached conclusions consistent with *Bryant*.[118]

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116. *Id.* (quoting TENN. R. APP. P. 13(a) & advisory comm'n cmt. to Subdivision (a)) (internal quotation marks omitted).

117. *Id.* at *3.

118. *See, e.g.*, Gray v. Boyle Inv. Co., 803 S.W.2d 678 (Tenn. Ct. App. 1990) (permitting two plaintiffs/appellees to raise issues on appeal against four defendants who never appealed (and thus never became appellants) because a separate fifth defendant had filed a notice of appeal, holding that Tennessee Rule of Appellate Procedure 13(a) permitted the Court of Appeals to consider the case as a whole so long as any party files a notice of appeal); Studsvik, Inc. v. Bull Run Metal Fabricators & Eng'rs, Inc., E2010-01696-COA-R3-CV (order entered Nov. 17, 2011) (denying motion to dismiss appeal by Bull Run Metal Fabricators and Engineers, Inc., one of two separate appellants, despite the fact that Bull Run filed no notice of appeal, holding that Tennessee Rule of Appellate Procedure 13(a) did not require the filing of a separate notice of appeal); *In re* Adoption of D.P.E., E2005-02865-COA-R3PT, 2006 WL 2417578, at *32 (Tenn. Ct. App. Aug. 22, 2006) (permitting, based on Tennessee Rule of Appellate Procedure 13(a), a defendant (DCS) that filed appellate brief but no notice of appeal to attack the trial court's judgment on appeal because a separate defendant (Mother) had filed a notice of appeal); Hughes v. Memphis Light, Gas & Water, W2000-01056-WC-R3-CV, 2001 WL 468581, at *43 (Tenn. Workers Comp. Panel May 3, 2001) (memorandum opinion) (in this workers' compensation case involving two separate defendants—the employer and the Second Injury Fund—the court, relying on Tennessee Rule of Appellate Procedure 13(a), permitted the Second Injury Fund to appeal despite the fact that it had filed no notice of appeal, holding that "separate appeals are not required. Any question of law may be brought up for review by any party once a party has appealed. Thus, the Second Injury Fund is not without standing to participate in the appeal."); *see also* Morgan Keegan & Co., Inc. v. Smythe, 401 S.W.3d 595, 608 (Tenn. 2013) (stating, as dicta, that under Tennessee Rule of Appellate Procedure 13(a) "[o]nce one party has perfected an appeal or has filed an application for permission to appeal, the other party or parties in the case are not required to file cross-appeals, separate appeals, or separate applications for

These two lines of cases—which never cross-reference each other—are fundamentally incompatible. The first line of cases, consistent with *Spectra*, adheres to the well-established authority discussed above[119] that the notice of appeal is the procedural mechanism by which jurisdiction is transferred from the trial court to the appellate court and that, absent the timely filing of a notice of appeal, the appellate court lacks appellate jurisdiction and the putative appellant is forever bound by the trial court's judgment. By contrast, the second line of cases, consistent with *Bryant*, follows Tennessee Rule of Appellate Procedure 13(a) and its Advisory Commission Comments, holding that so long as one party timely files an original notice of appeal, any other party—even multiple, separate parties occupying the same procedural posture as the original appellant—need not file a timely notice of appeal to invoke appellate jurisdiction and to seek alteration or enlargement of the trial court's judgment. Although some courts have obviously been confronted with the discord between these two lines of authority,[120] no court has attempted to reconcile them. This reticence is understandable, however, because the problem arises from the Tennessee Rules of Appellate Procedure themselves, rendering the problem effectively insoluble from a judicial perspective.

C. The Rules' Inconsistency Regarding Separate Notices of Appeal

Tennessee's Rules of Appellate Procedure neither acknowledge nor resolve the inconsistency between Rules 3(e), 3(f), and 4(a), which require every putative appellant possessing an independent right of appeal to file a timely notice of appeal, and Rule 13(a), which provides that "separate appeals" are "not required." In various places the Rules and their Comments contemplate that a single action may involve more than one appellant[121] and that more than one notice of appeal may be filed within a

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permission to appeal."); Torrence v. Higgins Family Ltd. P'ship, E2005-1549-COA-R3-CV, 2006 WL 1132080, at *86 (Tenn. Ct. App. Apr. 28, 2006) (holding that, under Tennessee Rule of Appellate Procedure 13(a), "[t]he timely filing of a notice of appeal, by *any* party involved in the trial court litigation, vests the Court of Appeals with jurisdiction to hear and resolve all issues thereafter raised, not only the issues raised by the party filing the notice of appeal but also the issues raised by any other party aggrieved by some action of the trial court."); Scott v. Noland Co., Aqua Glass Corp., 03A01-9502-CV-00072, 1995 WL 440375, at *2 n.1 (Tenn. Ct. App. July 26, 1995) (noting in case involving two separate appellants that, under Tennessee Rule of Appellate Procedure 13(a), "[m]ultiple appeals were not necessary. A party who does not file a notice of appeal can still raise issues in its brief.").

119. *See supra* Section II.

120. *See, e.g.*, *Studsvik, Inc.*, E2010-01696-COA-R3-CV (order entered Nov. 17, 2011) (appellee opposed appeal by defendant that failed to file a separate notice of appeal); *Hughes*, 2001 WL 468581, at *43 (employee opposed appeal by Second Injury Fund on ground that it had failed to file a separate notice of appeal); *Bryant*, 1994 WL 709021 at *2 (cross-defendant opposed appeals by appellees/cross-plaintiffs that failed to file separate notices of appeal).

121. *See, e.g.*, TENN. R. APP. P. 3(f) ("The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice . . . .");

single action, thus acknowledging the actual practice of filing separate notices of appeal.[122] But other parts of the Rules tend to treat appeals as if they can involve only a single appellant and a single appellee, contemplating cross-appeal scenarios while not explicitly addressing the possibility of separate-appeal scenarios not involving cross-appeals.[123] Even the Comments on Rule 13(a) tend to focus on simple cross-appeal scenarios to the exclusion of narrower separate-appeal scenarios.[124] Background to the original adoption of Rule 13(a) indicates that the effect of Rule 13(a) on separate appeals other than cross-appeals, as well as the relationship between Rule 13(a) and Rules 3 and 4, were not fully contemplated or

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TENN. R. APP. P. 29(a) ("If separate briefs are filed on behalf of multiple appellants or multiple appellees, the time for filing and serving a responsive brief shall not commence to run until all briefs on behalf of all appellants or appellees have been filed."); TENN. R. APP. P. 29(a) advisory comm'n cmt. to 1980 amend. ("The sentence added to Rule 29(a) deals with situations in which there are multiple appellants or multiple appellees. It allows a party to wait to respond until all of the briefs have been served by all adverse parties."); TENN. R. APP. P. 35 advisory comm'n cmt. ("'[I]f multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it.'") (citation omitted) (addressing the sequencing of oral argument on appeal).

122. *See, e.g.*, TENN. R. APP. P. 5(c) ("If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court."); TENN. R. APP. P. 5 advisory comm'n cmt. (2012) ("As a practical matter, however, it is not uncommon for more than one party to file a notice of appeal . . . . A second (or later) party filing a notice of appeal may file a reply brief pursuant to Tenn. R. App. P. 27(c) . . . ."); TENN. R. APP. P. 16(a) ("If two or more persons file separate notices of appeal from one judgment or order, the case shall be docketed in the appellate court as a single appeal."); TENN. R. APP. P. 16(a) advisory comm'n cmt. to 2005 amend. ("Under paragraph (a) parties either may file a joint notice of appeal in compliance with Rule 3(f) or they may file separate notices of appeal. In either situation, when parties are seeking to appeal from a single judgment or order, the case will be docketed as a single appeal.").

123. *See, e.g.*, TENN. R. APP. P. 3 1999 advisory commission cmt. ("It is the policy of the appellate court clerk's office in cases involving cross appeals to consider the appellant to be the party who first files a notice of appeal; in the event that the notices are filed on the same day, the plaintiff in the proceeding below is considered to be the appellant unless the parties otherwise agree or the court otherwise directs."); TENN. R. APP. P. 5(c) ("If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court."); *see also, e.g.*, Edwards v. Hunt, 635 S.W.2d 696, 698 (Tenn. Ct. App. 1982) (discussing Rule 13(a) with respect to cross-appeals without contemplating its effect on separate appeals). Rule 3(f) addresses the required contents of a notice of appeal where a single attorney represents more than one party occupying the same posture in the trial court, but it does not and need not expressly address the situation where multiple parties occupying the same posture in the trial court are represented by separate counsel; in such event, Rule 3 simply requires that each separate notice of appeal individually satisfy its requirements. *See supra* note 58.

124. "The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole." TENN. R. APP. P. 13 advisory comm'n cmt. to Subdivision (a).

addressed in the context of the drafting and adoption of Tennessee's Rules of Appellate Procedure.[125]

Certain aspects of the Rules and Comments deserve particular attention. Tennessee Rule of Appellate Procedure 15(a) implicitly acknowledges separate appeals without addressing or resolving Rule 13(a)'s conflict with Rules 3(e), 3(f), and 4(a). Rule 15(a) provides that a party other than the original appellant that wishes to pursue its own right of appeal notwithstanding the original appellant's dismissal of its appeal must notify the appellate court: "Any party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss."[126] The Comment to this rule explains that it "provides a procedure for keeping some appellate issues viable despite the original appellant's dismissal."[127] The notice required by Rule 15(a) thus operates as a substitute for the original appellant's notice of appeal, which is effectively withdrawn upon dismissal of its appeal; in other words, notice under Rule 15(a) takes over the jurisdictional-transfer function of the original notice of appeal. For example, were a plaintiff/appellant to voluntarily dismiss its appeal, a defendant/appellee that filed no notice of appeal but wishes to assert a cross-appeal notwithstanding dismissal of the original appeal may do so by filing notice under Rule 15(a). In the context of cross-appeals, which are by nature derivative of an original appeal giving the appellate court jurisdiction over the judgment in favor of the appellee, this notice requirement is consistent with the rule that dismissal of the original appeal cannot deprive a cross-appellant of its right to continue pursuing its own appeal.[128]

Rule 15(a) does not, however, solve the jurisdictional problem relating to separate appeals other than cross-appeals. Under Rules 3(e), 3(f), and 4(a), an appellate court lacks appellate jurisdiction over a separate appeal where the appellant does not file (either independently or jointly) a notice of appeal within thirty days of the judgment appealed from.[129] Notice under Rule 15(a) could come far too late to establish appellate jurisdiction over a separate appeal, which—unlike a cross-appeal—has an independent

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125. *See supra* notes 96–103 & accompanying text.

126. TENN. R. APP. P. 15(a).

127. TENN. R. APP. P. 15 advisory commission cmt. to 2002 amend.; *see also* TENN. R. APP. P. 13(a) ("Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court.").

128. *See* TENN. R. APP. P. 13(a) ("Dismissal of the original appeal shall not preclude [the appeal of] another party from being considered by an appellate court."); *see also Edwards*, 635 S.W.2d at 698 ("The first question for decision is whether the party filing a notice of appeal is able to later terminate all counter appeals by dismissing his notice of appeal. We hold that he cannot."); *supra* notes 67, 81 & accompanying text. To permit an original appellant to cancel a cross-appeal by dismissing its appeal would permit a party to gain an unfair procedural advantage by being the first to file a notice of appeal. Such a consequence would undermine the viability of not requiring the filing of notices of cross-appeal.

129. *See* TENN. R. APP. P. 3(e); *see also* TENN. R. APP. P. 3(f); TENN. R. APP. P. 4(a).

notice-of-appeal obligation under Rules 3 and 4.[130] Rule 15(a) and its Comment simply do not address the jurisdictional mandate of Rules 3(e), 3(f), and 4(a).

Advisory Commission Comments to the Rules that expressly reference Rule 13(a) also do not resolve its conflict with Rules 3(e), 3(f), and 4(a). A 2012 Advisory Commission Comment on Tennessee Rule of Appellate Procedure 5, which addresses the docketing of appeals, mirrors the conflict.[131] This Comment, having quoted Rule 13(a)'s pronouncement that "separate appeals . . . are not required," reiterates Rule 13(a)'s position: "[O]nce one party files a notice of appeal, other parties are not required to file a separate notice of appeal in order to raise any issue(s) in the appeal."[132] This Comment, however, does not explicitly address Rule 13(a)'s inconsistency with Rules 3(e), 3(f), and 4(a). Further, Rule 5 and its Comments presume that, in a doctrinal sense, there is only one "appellant" per appeal.[133] This presumption is consistent with Rule 13(a)'s simplicity-oriented "intention . . . that only one notice of appeal be filed" in an action.[134] Yet this presumption is inconsistent with the mandate of Rules 3(f) and 4(a) that each party having an independent right of appeal must timely file its own notice of appeal, which means that there may be multiple appellants per action. Rule 5(c) and its Comments thus manifest—without resolving—the conceptual and procedural inconsistency between Rule 13(a) and Rules 3(e), 3(f), and 4(a). Rule 5(c) wants to take the position that only a single notice of appeal ever needs to be filed, and thus there is only one "appellant" per appeal, while at the same time it acknowledges that multiple parties (i.e., multiple appellants) may each possess and exercise independent rights of separate appeal. So long as Rule 3(e), 3(f), and 4(a) impose a mandatory and jurisdictional notice-of-appeal requirement on all parties wishing to assert independent rights of appeal, these rules ostensibly require the filing of multiple, separate notices of appeal in separate-appeal situations.

Although an Advisory Commission Comment on Rule 3(f) references Rule 13(a), it also does not explicitly address the issue of separate appeals, and courts have not interpreted this Comment as bearing

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130. *See* TENN. R. APP. P. 15(a); TENN. R. APP. P. 3; TENN. R. APP. P. 4. For example, were Rule 15(a) used to advance a separate appeal after the original appeal had been voluntarily dismissed, the notice under Rule 15(a) would almost certainly be filed more than 30 days after the entry of the judgment appealed from.

131. *See* TENN. R. APP. P. 5 advisory comm'n cmt. (2012).

132. *See id.*

133. Rule 5(c) and its comments, while conceding that "as a practical matter . . . it is not uncommon for more than one party to file a notice of appeal," provide that "[i]f more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court." *See* TENN. R. APP. P. 5(c) & advisory comm'n cmt. (2012). When viewed from the perspective of Rules 3(e), 3(f), and 4(a), the filing of separate notices of appeal is a legal matter, not merely a "practical" one.

134. Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992).

on the conflict between the two rules. This Comment instead focuses on the scope of an appeal after a timely notice of appeal has been filed:

> Scope of review is treated in Rule 13. This subdivision [Rule 3(f)] read in conjunction with Rule 13(a) permits any question of law to be brought up for review [(except as otherwise provided in Rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion.[135]

The reference here to Rule 13(a) aligns with its first sentence: "Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party."[136] The point of both this first sentence of Rule 13(a) and the Comment to Rule 3(f) is to reinforce Tennessee's simplicity-oriented position that a notice of appeal is not designed to operate as a "review-limiting device."[137] In other words, once a timely notice of appeal has been filed, the appellant may, as a general rule, raise legal issues on appeal with respect to the action as a whole[138] (provided, of course, that the issues were properly preserved below[139]).

Courts citing the Comment to Rule 3(f)—that "Rule 13(a) permits any question of law to be brought up for review . . . as long as any party formally declares an intention to appeal in a timely fashion"—have typically not viewed it as permitting separate appeals without the filing of separate notices of appeal. Rather, these courts have cited the Comment in support of a liberal and forgiving interpretation of Rule 3(f)'s requirement that a notice of appeal "shall designate the judgment from which relief is sought."[140] Despite the reference to Rule 13(a), the Advisory Commission

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135. TENN. R. APP. P. 3 advisory comm'n cmt. to subdivision (f).

136. TENN. R. APP. P. 13(a).

137. TENN. R. APP. P. 13 advisory comm'n cmt. to subdivision (a).

138. *See id.*

139. The well-settled general doctrine of waiver, though not referenced in Rule 3(e) or Rule 13(a), has qualified Rule 13(a)'s statement that "any question of law" may be raised on appeal. *See, e.g.*, Powell v. Cmty. Health Sys. Inc., 312 S.W.3d 496, 511 (Tenn. 2010) ("It is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court."); Waters v. Farr, 291 S.W.3d 873, 918 (Tenn. 2009) ("One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal.").

140. *See, e.g.*, Cox v. Tenn. Farmers Mut. Ins. Co., 297 S.W.3d 237, 242–43 (Tenn. Ct. App. 2009) (citing advisory commission comment to Rule 3(f) to support a liberal view of the requirement that a notice of appeal designate the judgment from which relief is sought and holding that designating final judgment but not a prior order from which relief was sought did not preclude appellate review of that order); *In re* NHC–Nashville Fire Litigation, 293 S.W.3d 547, 556–60 (Tenn. Ct. App. 2008) (same); Consolidated Waste Sys., LLC v. Thompson v. Logan, M2005-02379-COA-R3-CV, 2007 WL 2405130, at *14–21 (Tenn. Ct. App. Aug. 23, 2007) (citing advisory commission comment to Rule 3(f) in context of holding that an un-amended premature notice of appeal that failed to designate subsequently entered order was nonetheless sufficient to bring up the case as a whole, including the order

Comment on Rule 3(f) does not resolve or even address the conflict between the *Spectra* and *Bryant* lines of cases.

By providing in Rule 13(a) that "separate appeals" are not required, the Tennessee Rules of Appellate Procedure take a position that simply cannot be reconciled with the stringent notice-of-appeal requirements imposed by Rules 3(e), 3(f), and 4(a). The irreconcilability of these rules, each of which strikes fundamentally at the very basis for appellate jurisdiction, has engendered the judicial split of authority. This inconsistency departs from the policies underlying Tennessee's Rules of Appellate Procedure that favor simplicity, coherence, and justice: "A principal purpose of these rules is to bring together in one place a simplified, coherent, and modern body of law."[141]

PART III. SOLVING THE PROBLEM OF SEPARATE NOTICES OF APPEAL IN TENNESSEE

The problem, as explained above, is that Tennessee Rule of Appellate Procedure 13(a), which provides that "separate appeals" are unnecessary, directly conflicts with Tennessee Rules of Appellate Procedure Rules 3(e), 3(f), and 4(a), which require as a jurisdictional prerequisite the timely filing of "separate" notices of appeal. Although the drafting and adoption of Tennessee's Rules of Appellate Procedure represented a tremendous step forward for Tennessee law, and the work of the Tennessee Supreme Court Advisory Commission on Civil Rules and the Reporter in the 1970s should be applauded, Rule 13(a) has proved to be an anomaly. Because this anomaly is imbedded within Tennessee's Rules of

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in question, for appellate review); Metro Gov't of Nashville & Davidson Cnty., Tenn., M2002-02582-COA-R3-CV, 2005 WL 1541860, at *48–52 (Tenn. Ct. App. June 30, 2005) (citing advisory commission comment to Rule 3(f) in support of holding that failure to designate order awarding attorneys' fees entered after final judgment did not preclude review of that award); Oakley *ex rel.* Oakley v. State, W2002-00095-COA-R3-CV, 2003 WL 103215, at *8 (Tenn. Ct. App. Jan. 8, 2003) (citing advisory commission comment to Rule 3(f) in support of holding that failure to designate judgment from which relief was sought did not preclude appellate review of it); Dunlap v. Dunlap, 996 S.W.3d 803, 810–11 (Tenn. Ct. App. 1998) (citing advisory commission comment to Rule 3(f) in support of holding that failure to designate judgment from which relief was sought did not preclude appellate review of it).

141. TENN. R. APP. P. 1 advisory comm'n cmt.; *see also* TENN. R. APP. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits."); TENN. R. APP. P. 2 ("For good cause, including the interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion, except that this rule shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4 . . . ."); Overnite Transp. Co. v. Teamsters Local Union No. 480, 172 S.W.3d 507, 510 (Tenn. 2005) (citing TENN. R. APP. P. 1 advisory comm'n cmt.); Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996); PIVNICK, *supra* note 2, § 30:1.

Appellate Procedure itself, it properly deserves a rule-based solution. As suggested when these Rules were first proposed, "experience [has] . . . help[ed] illuminate" the effectiveness of the proposed rules, and "[t]he need for ongoing procedural reform . . . seems evident."[142]

A. First Proposal: Deleting "Separate Appeals" from Tennessee Rule of Appellate Procedure 13(a)

The simplest solution to the problem of separate appeals would be to amend Rule 13(a) by deleting from the second sentence of the rule the phrase "separate appeals" and its preceding and following commas: "Cross-appeals~~, separate appeals,~~ and separate applications for permission to appeal are not required." Rule 13(a) could also be clarified by stating that "notices" of cross-appeal are not required.[143] The second sentence of Rule 13(a) would thus be revised to state as follows: "Notices of cross-appeal and separate applications for permission to appeal are not required."

Under this proposal, no other changes to the text of the Rules would be required, though one other textual change would be strongly recommended. The first sentence of Rule 13(a)—"Except as otherwise provided in Rule 3(e), any question of law may be brought up for review by any party."—should be deleted. As discussed above, when Tennessee's Rules of Appellate Procedure were first adopted, Rule 13(a) had two intended purposes: rejecting federal courts' use of the notice of appeal as a means for limiting the scope of an appeal to a particular order, and rejecting the federal courts' requirement that an appellee file a notice of cross-appeal to be eligible to raise its own issues on appeal.[144]

Most courts applying the first sentence of Rule 13(a) have interpreted it consistently with one of these two purposes. Some Tennessee appellate courts have cited the first sentence of Rule 13(a) in support of the proposition that an appellee need not file a notice of cross-appeal to have standing on appeal to alter or to enlarge the judgment at issue.[145] And some

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142. *See* Sobieski, *Theoretical Foundations*, *supra* note 75, at 179.

143. From a grammatical and stylistic viewpoint, stating that "cross-appeals are not required" means that persons who possess rights of cross-appeal need not assert them; but the apparent intent is that *notices* of cross-appeal need not be filed for rights of cross-appeal to be perfected, which reading is bolstered by Rule 13(a)'s explicit reference to "separate *applications* for permission to appeal" (emphasis added). This aspect of Rule 13(a) should be revised to more clearly express its apparent intent. Applications for permission to appeal to the Tennessee Supreme Court are governed by Tennessee Rule of Appellate Procedure 11, which gives the Tennessee Supreme Court discretion to determine which appeals to accept.

144. *See supra* notes 91, 93 & accompanying text.

145. *See, e.g.*, Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006); State v. Russell, 800 S.W.2d 169, 170–71 (Tenn. 1990); *see also* Rodgers v. GCA Servs. Grp., Inc., W2012-01173-COA-R3-CV, 2013 WL 543828, at *2–3 nn.3–4 (Tenn. Ct. App. Feb. 13, 2013), *reh'g denied* (Feb. 28, 2013); Skaan v. Fed. Exp. Corp., W2011-01807-COA-R3-CV, 2012 WL 6212891, at *4 n.3 (Tenn. Ct. App. Dec. 13, 2012); Harrell v. Harrell, 321 S.W.3d 508, 513 (Tenn. Ct. App. 2010); Dillard Smith Constr. Co. v. Comm'r of Labor &

courts have cited the first sentence of Rule 13(a) to support a liberal interpretation of Rule 3(f)'s requirement that the notice of appeal "shall designate the judgment from which relief is sought," holding that pre-judgment, interlocutory orders may be addressed on appeal notwithstanding their not being specifically identified in the notice of appeal.[146]

But other courts have cited the first sentence of Rule 13(a) to support the proposition that a separate appeal may be advanced despite the failure to file a separate notice of appeal.[147] To the extent that the first sentence of Rule 13(a) supports this last interpretation, retaining that sentence in Rule 13(a) could undercut the reform effected by deleting "separate appeals" from the second sentence of Rule 13(a).

The first sentence of Rule 13(a) is unnecessary to Tennessee's Rules of Appellate Procedure. To the extent that it means that an appellee need not file its own notice of appeal to seek to alter or enlarge the judgment on appeal, it is duplicative of the second sentence of Rule 13(a), which already provides that "[c]ross-appeals . . . are not required." And to the extent that the first sentence of Rule 13(a) means that a notice of appeal need not specifically identify interlocutory orders for issues relating to them

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Workforce Dev., M2008-00735-COA-R3-CV, 2009 WL 4841073, at *7 n.6 (Tenn. Ct. App. Dec. 15, 2009); Flautt & Mann v. Council of City of Memphis, 285 S.W.3d 856, 867 (Tenn. Ct. App. 2008); Quebecor Printing Corp. v. L & B Mfg. Co., 209 S.W.3d 565, 582–83 (Tenn. Ct. App. 2006); Flautt & Mann v. Council of City of Memphis, W2004-01188-COA-R3-CV, 2005 WL 940568, at *9 n.7 (Tenn. Ct. App. Apr. 22, 2005); Heatherly v. Campbell Cnty. Bd. of Educ., E2004-02004-COA-R3-CV, 2005 WL 562752, at *5 (Tenn. Ct. App. Mar. 10, 2005); Glover v. Hardeman Cnty., 713 S.W.2d 73, 78 (Tenn. Ct. App. 1985); Eller Bros., Inc. v. Home Fed. Sav. & Loan Ass'n of Nashville, 623 S.W.2d 624, 625 (Tenn. Ct. App. 1981), *overruled on other grounds by* Guiliano v. Cleo, Inc., 995 S.W.2d 88 (Tenn. 1999).

146. *See, e.g.*, Bell v. Eller Media Co., W2010-01241-COA-R3-CV, 2011 WL 255115, at *2 n.3 (Tenn. Ct. App. Jan. 20, 2011), *perm. app. denied* (May 25, 2011); Cox v. Tenn. Farmers Mut. Ins. Co., 297 S.W.3d 237, 242–43 (Tenn. Ct. App. 2009); *In re* NHC–Nashville Fire Litig., 293 S.W.3d 547, 556–60 (Tenn. Ct. App. 2008); Thompson v. Logan, M2005-02379-COA-R3-CV, 2007 WL 2405130, at *11–18 (Tenn. Ct. App. Aug. 23, 2007); Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cnty., M2002-02582-COA-R3-CV, 2005 WL 1541860, at *42–45 (Tenn. Ct. App. June 30, 2005); J.W.G. v. T.L.H.G., M2002-02656-COA-R3-JV, 2003 WL 22794537, at *2–3 (Tenn. Ct. App. Nov. 25, 2003); Glidden v. Glidden, 86-320-II, 1987 WL 9452, at *1 (Tenn. Ct. App. Apr. 16, 1987); *see also* Oakley *ex rel.* Oakley v. State, W2002-00095-COA-R3-CV, 2003 WL 103215, at *6 (Tenn. Ct. App. Jan. 8, 2003) (holding that failure to identify any judgment in notice of appeal is not fatal to the appeal); Dunlap v. Dunlap, 996 S.W.2d 803, 807–11 (Tenn. Ct. App. 1998) (same).

147. *See, e.g.*, Hughes v. Memphis Light, Gas & Water, W2000-01056-WC-R3-CV, 2001 WL 468581, at *3 (Tenn. Workers Comp. Panel May 3, 2001) (memorandum opinion); Bryant v. Gill, 02A01-9311-CV-00259, 1994 WL 709021, at *2 (Tenn. Ct. App. Dec. 22, 1994); *see also* Torrence v. Higgins Family Ltd. P'ship, E2005-1549-COA-R3-CV, 2006 WL 1132080, at *6–7 (Tenn. Ct. App. Apr. 28, 2006) (citing the first sentence of Rule 13(a) and holding that once any party files a notice of appeal, "[a]ll parties are allowed to raise such issues as they see fit."); *cf. In re* Adoption of D.P.E., E2005-02865-COA-R3-PT, 2006 WL 2417578, at *2 (Tenn. Ct. App. Aug. 22, 2006) (permitting separate appeal without the filing of a separate notice of appeal and citing *Torrence*).

to be advanced on appeal, it addresses the matter so vaguely and obliquely that it has not definitively decided the question.[148] If Rule 3(f) is to mean that once a notice of appeal identifies "the judgment from which relief is sought," any interlocutory order may be addressed on appeal, it would be better for Rule 3(f) simply to say so plainly and directly.

The first sentence of Rule 13(a) has also yielded other interpretive questions: May any question of fact as well as "any question of law" be raised on appeal?[149] By beginning with the specific proviso "[e]xcept as otherwise provided in Rule 3(e)," which provides that the appeal of certain issues can be waived by failing to take action in the trial court, does the first sentence of Rule 13(a) impliedly override unreferenced, general common-law requirements regarding preserving issues for appeal?[150] And, as discussed above, the first sentence of Rule 13(a) is so broad that it could arguably support alteration or enlargement on appeal of a judgment over which the appellate court does not properly exercise appellate jurisdiction based on Rules 3 and 4.[151]

Retaining the current first sentence of Rule 13(a) could perpetuate the separate-appeal problem. Were the first sentence of Rule 13(a) deleted, the title of this subsection should be revised as well to correspond with the change. If revised as proposed, Rule 13(a) would state in full as follows: "(a) Cross-Appeals and Separate Applications for Permission to Appeal. Notices of cross-appeal and separate applications for permission to appeal are not required. Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court."

Because courts often cite Advisory Commission Comments to the Rules, according them deference,[152] corresponding additions to certain

148. In re *NHC–Nashville Fire Litig.*, 293 S.W.3d at 556–60 (discussing split of authority regarding whether orders not specifically identified in a notice of appeal may be addressed on appeal and citing cases); *Thompson*, 2007 WL 2405130, at *11–18 (same); *Consol. Waste Sys.*, 2005 WL 1541860, at *42–45 (same).

149. Courts addressing this question have answered yes. *See, e.g.*, *Glover*, 713 S.W.2d at 78; *Eller Bros.*, 623 S.W.2d at 625.

150. The answer appears to be no. *See, e.g.*, Waters v. Farr, 291 S.W.3d 873, 918 (Tenn. 2009) ("One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal."); State Dept. of Children's Servs. v. Owens, 129 S.W.3d 50, 56 (Tenn. 2004) ("This Court 'is a court of appeals and errors, and we are limited in authority to the adjudication of issues that are presented and decided in the trial courts, and a record thereof preserved as prescribed in the statutes and Rules of this Court.'") (citations omitted). At least one court has explicitly held that the first sentence of Rule 13(a) does not override such general waiver principles. Wellington v. Ledford, 01-A-01-9807-CH00363, 1999 WL 499776, at *6 (Tenn. Ct. App. July 16, 1999).

151. *See, e.g.*, *Torrence*, 2006 WL 1132080, at *6 ("The timely filing of a notice of appeal, by any party involved in the trial court litigation, vests the Court of Appeals with jurisdiction to hear and resolve all issues thereafter raised, not only the issues raised by the party filing the notice of appeal but also the issues raised by any other party aggrieved by some action of the trial court." (citing TENN. R. APP. P. 13(a)).

152. *See* In re *NHC–Nashville Fire Litig.*, 293 S.W.3d at 560.

Advisory Commission Comments to the Rules of Appellate Procedure would also be warranted.[153] The following Comment to Rule 13(a)—or something like it—should be inserted:

> Rule 13(a) has been amended to clarify that the assertion of a separate appeal (other than a cross-appeal) requires the filing of a notice of appeal and bond in compliance with Rules 3, 4, 5, and 6. Separate rights of appeal arise in an action when two or more parties each possess a right of appeal other than a right of cross-appeal. This amendment is intended to correct the discrepancy that formerly existed between Rule 13(a), which stated that "separate appeals" were not required, with Rules 3 and 4, which require each party seeking to initiate an appeal as of right to properly file (independently or jointly) a notice of appeal. This amendment does not, however, affect cross-appeals (which arise only when an appellee asserts its own right of appeal relating to a judgment from which another party has already appealed). This amendment also does not affect applications for permission to appeal.

This proposed Comment states the purpose of the amendment, defines and contrasts separate appeals and cross-appeals, and explains that separate appeals must meet the same requirements under Rules 3, 4, 5, and 6 that govern an original appeal. Because cross-appeals and separate appeals in the narrower sense would be treated differently, clearly defining the difference between a cross-appeal (as derivative) and a separate appeal is crucial to the proposed Comment's practicability.

The proposed Comment should also provide that the following statement contained in the original Advisory Commission Comment on Subdivision (a) of Rule 13 is to be deleted or is no longer to be followed: "The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole." This original Advisory Commission Comment on Subdivision (a) would be unnecessary in light of the amendment and would be inconsistent with the position that appellees must file notices of separate appeal when they seek to alter or enlarge a judgment relating to a non-appealing party, and its retention could cause unwarranted confusion regarding the scope of appellate review where some but not all eligible parties perfect an appeal. This Comment is also inconsistent with Rule 3(f). If a "case as a whole" may be addressed on appeal once any party has filed an original notice of appeal, as ostensibly indicated by the Advisory Commission Comment on Subdivision (a) of

153. *See, e.g.*, TENN. R. APP. P. 3 advisory comm'n cmt. to subsection (f); TENN. R. APP. P. 5 advisory comm'n cmt. (2012).

Rule 13, then Rule 3(f)'s requirement that the notice of appeal identify "the judgment from which relief is sought" would be superfluous. If the "case as a whole" were brought up for review simply based on the filing of an original notice of appeal, then identifying the judgment in the notice of appeal would have no meaning apart perhaps from determining the timeliness of the appeal.

The following Comment to Rule 5 should also be inserted: "Rule 13(a) has been amended to clarify that the assertion of a separate appeal (other than a cross-appeal) requires the filing of a notice of appeal and bond in compliance with Rules 3, 4, 5, and 6." This Comment would be necessary in response to the 2012 Advisory Commission Comment to Rule 5, which reiterates the position taken by Rule 13(a) that separate notices of appeal are unnecessary.[154]

These changes to the text and comments are supported by four reasons. First, these changes would clarify that Rule 13(a) is not intended to abrogate any of the notice-of-appeal requirements set forth by Rules 3(e), 3(f), and 4(a) with respect to separate appeals other than cross-appeals. The efficiency interest involved in imposing a jurisdictional effect on the timely filing of a notice of appeal would remain supported. To invoke appellate jurisdiction, multiple putative appellants possessing independent rights of appeal would each either have to expressly join in a single, timely notice of appeal or have to file separate, timely notices of appeal. The conflict between Rule 13(a), on the one hand, and Rules 3(e), 3(f), and 4(a), on the other, would thus be eliminated, and the long-chosen jurisdictional effect of filing a notice of appeal would be reaffirmed, free from the ambiguity currently stemming from Tennessee's Rules of Appellate Procedure.

Second, the remainder of Tennessee's appellate structure would remain unaffected. Tennessee could continue not to require the filing of notices of cross-appeal. Because cross-appeals are by definition derivative and dependent on the prior filing of a notice of appeal, and because the appellate court thus already necessarily exercises appellate jurisdiction over the judgment at issue, Rule 13(a)'s technical discrepancy with Rules 3 and 4 by not requiring the filing of notices of cross-appeal does not pose the same jurisdictional and procedural problems as with separate appeals defined more narrowly, which are based on independent rights of appeal.[155] And because applications for permission to appeal to the Tennessee Supreme Court under Tennessee Rule of Appellate Procedure 11 are permissive and discretionary, as opposed to appeals as of right, the Supreme Court has the power to accept cases as a whole even when only a single Rule 11 application has been submitted.[156]

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154. *See supra* notes 131–132 & accompanying text.

155. *See supra* Section III(A).

156. *See* TENN. R. APP. P. 11. A comment should also be added to Tennessee Rule of Appellate Procedure 11. The 1999 Advisory Commission comment states, "Concerning the scope of an answer under Rule 11(d), consult Rule 13(a), which permits the appellee to raise

Third, the Rules and their application would become fairer. As illustrated by contrasting the two conflicting lines of authority, in a separate-appeal scenario a party's failure to file a separate notice of appeal from a truly final judgment has two potential consequences, depending on which line of authority happens to be applied: advancement of the appeal, with a corresponding possibility of relief for the appellant, or dismissal of the appeal with prejudice. These two inconsistent results—which arise from a single procedural circumstance—differ in the most extreme and ultimate of ways, amounting, in a legal sense, to the difference between life and death. And based on the current language of the rules, each of these irreconcilable outcomes is arguably correct.[157] "It will not do to decide the same question one way between one set of litigants and the opposite way between another."[158] Amending Rule 13(a) by deleting "separate appeals" would promote uniform outcomes regarding failures to file separate appeals, thereby reinforcing the simplicity and rationality of the Rules and promoting their equal application to similarly situated litigants.

Fourth, Tennessee would lose the "simplicity" of requiring only one notice of appeal per appeal, but this is no real loss; even under the current structure of the Rules this degree of simplicity is not, and never has been, consistently attainable, as is already tacitly acknowledged by Tennessee Rules of Appellate Procedure 5(c) and 16(a).[159] Even in light of a liberal reading of Rule 13(a), under Rules 3 and 4 multi-party litigation involving more than a single plaintiff and a single defendant has inevitably

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issues allegedly decided erroneously by the intermediate appellate court." TENN. R. APP. P. 11, 1999 advisory comm'n cmt. This comment suggests, without explicitly stating, that an answer in opposition to an application for permission to appeal to the Tennessee Supreme Court under Rule 11 is an appropriate vehicle for Rule 11 respondents to raise their own issues for cross-appeal before the Tennessee Supreme Court. The Tennessee Supreme Court has held that "parties who have not perfected an appeal or filed a Tenn. R. App. P. 11 application may raise additional issues and seek relief on their own" by addressing those issues in their responsive brief on the merits, as provided under Tennessee Rule of Appellate Procedure 27(b). Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 608 (Tenn. 2013). But on this point the Court has also cited the 1999 advisory commission comment. *See* Hodge v. Craig, 382 S.W.3d 325, 335 n.10 (Tenn. 2012). Because this comment appears to reference the first sentence of Rule 13(a), were the first sentence of Rule 13(a) deleted as proposed, the 1999 advisory commission comment would lose its referent. To compensate for this deletion, a comment should be added to Rule 11 expressly stating whether a respondent to a Rule 11 application must state its cross-appeal issues in its answer in opposition in order to preserve them for appeal before the Tennessee Supreme Court in the event that the application were granted.

157. The 2012 advisory commission comment to Rule 5(c), which reiterates the position taken by Rule 13(a), does not resolve the conflict. *See supra* notes 131–132 & accompanying text.

158. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921).

159. "If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court." TENN. R. APP. P. 5(c). "If two or more persons file separate notices of appeal from one judgment or order, the case shall be docketed in the appellate court as a single appeal." TENN. R. APP. P. 16(a).

given rise to separate-appeal scenarios (other than cross-appeals) in which multiple parties have been faced with the potential necessity of filing an original notice of appeal. Consequently, the filing of multiple notices of appeal within a single action has often occurred.[160]

Notwithstanding, the proposed changes would mean that, in multi-party scenarios in Tennessee involving more than just a single appellant and single appellee, some parties possessing rights of appeal might have to protectively assert those rights because they lack the opportunity to wait and see if an opposing party appeals first.[161] In Tennessee, a single thirty-day period applies to all parties desiring to assert independent rights of appeal.[162] This differs, for example, from federal appellate procedure providing that once a timely original notice of appeal has been filed, any other party may file a notice of appeal (either cross-appeal or separate appeal) within fourteen days.[163] The civil appellate procedures of many other states correspond with this federal procedure.[164] Unless Tennessee

160. In addition, Tennessee could and should consider whether not requiring the filing of notices of cross-appeal remains preferable to and more rational and efficient than its current structure for appeals. *See supra* Section III(A); *see infra* Section IV(B). Fully addressing this point, however, lies outside the scope of this Article.

161. For example, a defendant that obtains a favorable trial-court judgment against two separate plaintiffs may, in the event that only one of the plaintiffs appeals during the first 29 days of the 30-day period for filing a notice of appeal, have to file a protective notice of appeal to preserve its right of appeal against the second, non-appealing plaintiff. What would be a right of cross-appeal by the defendant against the second plaintiff in the event that it appealed becomes an independent right of appeal in the event that the second plaintiff does not appeal, but the defendant is limited to the same 30-day period as the second plaintiff to assert its right of appeal.

162. *See* TENN. R. APP. P. 4(a) ("In an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from . . . .").

163. *See* FED. R. APP. P. 4(a)(3) ("**Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."); *see also, e.g.*, Janiga v. Questar Capital Corp., 615 F.3d 735, 739–40 (7th Cir. 2010) (applying Federal Rule of Appellate Procedure 4(a)(3) to separate appeal); Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 62 (2d Cir. 2010) (same); Sands v. Wagner, 314 F. App'x 506, 507 (3d Cir. 2009) (same); Woodruff v. Covington, 389 F.3d 1117, 1120–21 (10th Cir. 2004) (same); Ark. Right to Life State Political Action Comm. v. Butler, 146 F.3d 558, 559–60 (8th Cir. 1998) (same); *In re* Julien Co., 146 F.3d 420, 422–23 (6th Cir. 1998) (same); N. Am. Sav. Ass'n v. Metroplex Dev. P'ship, 931 F.2d 1073, 1077 (5th Cir. 1991) (same); *In re* Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1364 (9th Cir. 1987) (same); WRIGHT, *supra* note 53, § 3950.7 ("The 14-day provision is not limited to cross-appeals, and plainly encompasses appeals by other parties such as co-parties or third-party defendants."); KNIBB, *supra* note 68, § 11:1; TIGAR & TIGAR, *supra* note 53, § 6:3.

164. *See, e.g.*, CAL. R. CT. 8.108 ("If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk serves notification of the first appeal."); COLO. APP. R. 4(a) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed, or

were also to amend its appellate procedure to provide that the filing of an original appeal triggers a subsequent period for the filing of separate appeals, which might be preferable but which would entail a broader revision of current Tennessee appellate procedure, the occasional filing of protective notices of separate appeal may be required.[165]

The potential need for the filing of protective notices of appeal highlights the significant degree to which the proposed change would affect current appellate procedure. If cross-appeals were defined as appeals asserted against another party that has already filed a notice of appeal, appeals by appellees against parties that have not appealed would not fall

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within the time otherwise prescribed by this section (a), whichever period last expires."); DE. R. SUP. CT. 6(b) ("In any civil action in which a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 15 days after the date on which the first notice of appeal was filed, or within 30 days after the entry of the judgment or order from which the appeal is taken, whichever is later."); HAW. R. APP. P. 4.1(a)(1)–(2) ("(1) If a timely notice of appeal is filed by a party, any other party may, if allowed by law, file a cross-appeal. (2) In civil cases involving multiple-party plaintiffs or defendants, if one party files a timely notice of appeal, any other party, whether on the same or opposite side as the party first appealing, may file a notice of cross-appeal."); ILL. R. SUP. CT. 303(a)(3) ("If a timely notice of appeal is filed and served by a party, any other party, within 10 days after service upon him or her, or within 30 days from the entry of the judgment or order being appealed, or within 30 days of the entry of the order disposing of the last pending postjudgment motion, whichever is later, may join in the appeal, appeal separately, or cross-appeal by filing a notice of appeal, indicating which type of appeal is being taken."); ME. R. APP. P. 2(b)(3) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal (accompanied, when required, by the filing fee or a request to have the fee waived pursuant to ME. R. Civ. P. 91) within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise herein prescribed, whichever period last expires."); MD. R. CIR. CT. 7-104(d) ("If one party files a timely notice of appeal, any other party may file a notice of appeal within ten days after the date on which the first notice of appeal was filed or within any longer time otherwise allowed by this Rule."); MASS. R. APP. P. 4(a) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."); NEV. R. APP. P. 4(a)(2) ("If one party timely files a notice of appeal, any other party may file and serve a notice of appeal within 14 days after the date when the first notice was served, or within the time otherwise prescribed by Rule 4(a), whichever period last expires."); N.D. R. APP. P. 4(a)(2) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later."); OHIO APP. R. 4(B)(1) ("If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal."); R.I. Sup. Ct. R. 4(a) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within twenty (20) days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires."); VT. R. APP. P. 4(a)(6) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this rule, whichever period ends later."); WYO. R. APP. P. 2.01(a)(2) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 15 days of the date on which the first notice of appeal was filed.").

165. *See supra* notes 24–26 & accompanying text.

under the definition of cross-appeal but rather would be characterized as separate appeals.

For example, assume that a plaintiff timely appeals from an adverse judgment in favor of a defendant, and the defendant subsequently wishes to alter or to enlarge a judgment that adjudicated rights and obligations between the defendant and a second plaintiff that did not file a notice of appeal. Figure 5 represents this scenario graphically.

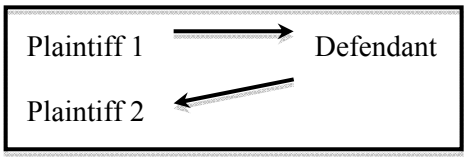

Figure 5

In Figure 5, the arrow pointing from Plaintiff 1 toward Defendant represents Plaintiff 1's right of appeal, which has been perfected by the timely filing of Plaintiff 1's notice of appeal. The arrow pointing from Defendant toward Plaintiff 2 represents Defendant's right of appeal against Plaintiff 2. In this scenario, under the proposed amendment of Rule 13(a), including its proposed definition of a cross-appeal as derivative, Defendant's attempted appeal with respect to Plaintiff 2 would be unperfected because Defendant possesses an independent right of separate appeal. This is so because the judgment that adjudicated the rights and obligations between Defendant and Plaintiff 1 is severable and separate from the judgment that adjudicated the rights and obligations between Defendant and Plaintiff 2. The proposed amendment of Rule 13(a) employs a narrow definition of cross-appeals (as derivative) that would require Defendant to file a notice of appeal (whether protective or otherwise) to perfect its right of appeal relative to Plaintiff 2.

The proposed amendment of Rule 13(a) thus unavoidably departs from the Advisory Commission's apparent intent, when adopting the Tennessee Rules of Appellate Procedure, to permit appeals by an appellee without the need for the appellee ever to file a notice of appeal. Such a divergence would be necessary, however, so long as the jurisdictional mandate of Rules 3 and 4 is to apply to rights of appeal other than the original appeal within an action (i.e., the first notice of appeal filed) and so long as cross-appeals are defined as derivative.

Were cross-appeals defined more expansively to include an appeal asserted by an appellee against a non-appealing party (thus defining cross-appeals to include non-derivative appeals so long as the party asserting the appeal may be characterized as an appellee), the need for an appellee to file its own notice of appeal would be reduced. But expanding the definition of cross-appeals in this manner would create some of the very same problems identified in relation to the Rule's current structure. For example, an appellee could, without filing a notice of appeal, seek relief on appeal

against a non-appealing party and related judgment; appellate jurisdiction over the non-appealing party and the judgment relating to it would thus arise vicariously based on the filing of an original notice of appeal by an unrelated, potentially adverse party. As discussed below, such a method of attaining appellate jurisdiction is atypical.[166] Further, the line between cross-appeals and separate appeals would become awfully thin and difficult for courts to draw. Tennessee's attempt, for the sake of simplicity, to reduce the number of notices of appeal that must be filed in relation to a single action has yielded unanticipated complications.

These concerns raise the question whether, ultimately, the most practicable and conceptually sound solution is simply requiring all parties that wish to pursue a right of appeal to file a notice indicating the exercise of that right, as is provided for by the Federal Rules of Appellate Procedure and the rules of appellate procedure for most states.[167]

B. Second Proposal: Overhauling Tennessee's Structure for Notices of Appeal

The Federal Rules of Appellate Procedure require each party wishing to pursue an appeal—whether an original appeal, a cross-appeal, or a separate appeal—to file its own notice of appeal.[168] Under this structure for notices of appeals, the appellate court, the appellate court clerk, and the litigants know well before briefing (unlike in Tennessee) what rights of appeal are being asserted.[169] Because any party may assert a cross-appeal or separate appeal within fourteen days after the filing of an original notice of appeal, parties largely satisfied with a judgment can wait and see if an original notice of appeal has been filed before deciding whether to assert their own appeals.[170] While this federal procedure has its own complexities, it is consistent with a party-driven, adversarial system in which each party seeking to perfect its own appeal must take its own action to do so, giving clear notice of its intent. Most states have adopted a similar structure for notices of appeal.[171]

An alternative, equally viable, and arguably preferable solution to Tennessee's problem of separate appeals is overhauling its entire structure for notices of appeal along the lines of the federal system. This solution would eliminate the problem posed by Tennessee Rule of Appellate Procedure 13(a) and would allow Tennessee to obtain more guidance from the analogous procedures of federal courts and most other states, but it would necessitate a more extensive reform of Tennessee's Rules of

166. *See infra* Section IV(C); *see also supra* note 102 & accompanying text.
167. *See supra* notes 69–71 & accompanying text; *see infra* Section IV(B).
168. *See* FED. R. APP. P. 3(c); FED. R. APP. P. 4(a)(1), (3).
169. *See supra* notes 68–69 & accompanying text.
170. *See supra* notes 68–69, 74, 163 & accompanying text.
171. *See supra* notes 70–71, 164 & accompanying text.

Appellate Procedure. The following is a non-exhaustive list of required changes and considerations: (1) Rule 13(a) would have to be amended to delete the provisions that notices of cross-appeal as well as notices of separate appeal are not required and that any question of law may be raised by any party; (2) Rules Advisory Commission Comments would have to be added to various rules clarifying this change, including Rules 3, 5, 13, 15, and 27; (3) the Advisory Commission should decide whether the timely filing of a notice of cross-appeal or separate appeal within a certain time after the filing of an original notice of appeal would be deemed a jurisdictional requirement; (4) the Advisory Commission should decide whether notices of cross-appeal should have the same required contents as an original notice of appeal; and (5) the Advisory Commission and appellate court clerk should consider how to manage the docketing of appeals and the sequencing of briefing and oral argument in light of the change.

C. Third Proposal: Amending Tennessee Rules of Appellate Procedure 3 and 4

A third alternative solution would be to leave Rule 13(a) and related comments as written and to revise Rules 3 and 4 to clarify that only one notice of appeal per appeal is ever required, regardless of whether the action involves a separate-appeal scenario. All separate appeals, including cross-appeals, would thus be treated the same. Although one might argue that the 2012 Advisory Commission comment on Rule 5(c) has already clarified that Rule 13(a) trumps Rules 3 and 4,[172] neither that comment nor Rules 3 or 4 expressly address the discrepancy between Rule 13(a) and Rules 3 and 4.[173] If Tennessee really wants Rule 13(a) to override the jurisdictional mandate of Rules 3 and 4 with respect to independent rights of separate appeal as well as rights of cross-appeal, it should say so expressly and unambiguously by rule and comment. Tennessee's current Rules of Appellate Procedure and comments have not done so.

Were Rule 13(a) to be retained in its current form, the following clarifications would be warranted. Rule 3(f) should be changed to state that only an original appeal (i.e., the first appeal asserted by any party to the action) must comply with the notice-of-appeal requirements of Rules 3, 4, 5 and 6. If Rule 13(a) is in fact to mean that separate notices of appeal of any kind are never required, then the conventions in Rule 3(f) for identifying multiple appellants within a single notice of appeal (the use of "et al." and so forth) would be rendered superfluous and should be deleted. Comments to the Rules should expressly clarify that, in light of Rule 13(a), appellate jurisdiction may be exercised over all rights of appeal, including independent rights of appeal, once any party to an action properly files an

172. *See* TENN. R. APP. P. 5(c) advisory comm'n cmt. (2012).
173. *See supra* notes 131–134 & accompanying text.

original notice of appeal. Rule 13(a) should also be clarified to provide that "separate *notices of* appeal" are not required, thus correcting a current stylistic deficiency.

Though apparently simple, resolving the discrepancy by amending Rule 3 and related comments in this manner would have the unavoidable effect of narrowing Tennessee's chosen jurisdictional aspect of the notice-of-appeal requirements currently embodied in Rules 3(f) and 4(a). Such an approach would yield the unusual result that some parties would routinely have the right to rely on the conduct of separate, adverse parties for purposes of perfecting their own independent appeals and obtaining appellate jurisdiction in the first instance (as opposed to derivatively asserting cross-appeals).[174] In essence, what is now viewed as a jurisdictional requirement for all putative appellants possessing independent rights of appeal would be reduced by rule to a jurisdictional requirement for no one in particular, so long as someone files a timely notice of appeal. Such an approach—as is in fact employed by the line of a cases applying Rule 13(a) in separate-appeal scenarios—essentially permits vicarious compliance with a jurisdictional requirement.

This approach would at base be inconsistent with the typical jurisdictional approach to notices of appeal.[175] Insofar as separate appellants might have mutually adverse interests with respect to an appeal, permitting an appellant possessing an independent right of appeal to rely on a notice of appeal filed by another, adverse party also possessing an independent right of appeal would be incongruous with typical civil procedure and the adversarial, party-driven nature of our legal system.[176]

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174. Some courts in other jurisdictions have on occasion excused the failure to file separate appeals in multi-party situations. *See, e.g.*, Ruggieri v. City of E. Providence, 593 A.2d 55, 57 (R.I. 1991); WRIGHT, *supra* note 53, § 3950.7 (citing federal cases and observing that "[t]he separate notice requirement is thus treated as a matter of practice, not appellate jurisdiction. Exercise of the power has been rare, however, requiring a showing of exceptional circumstances.").

175. *See* MOORE'S FEDERAL PRACTICE, *supra* note 59, § 303.40[1][b] (In federal courts, "[o]nly a person who has filed a timely notice of appeal may join in an appeal . . . . [A] person who has not filed a timely notice of appeal may not become an appellant by joining the appeal of a party who has filed a timely notice."); *id.*, § 304.11[c] ("[I]f a party desires to challenge an order or judgment of the district court, it must file a timely notice of appeal; a party cannot rely upon another party to act as its surrogate. Thus, if a party desires to challenge an order or judgment, the party ordinarily must file a notice of appeal, as opposed to arguing that it should benefit from the result in another party's appeal."); WRIGHT, *supra* note 53, § 3950.7 (in federal courts, "[t]he fact that one party has taken a timely appeal does not permit the appellee or any other party (even though aligned in the district court with the first appellant) to seek to have the judgment below overturned or modified in some respect."); *see also* Harrell v. Harrell, 321 S.W.3d 508, 513 (Tenn. Ct. App. 2010) (declining to exercise jurisdiction over a judgment that the appellant did not seek to alter or enlarge).

176. *See* Wood v. Milyard, 132 S. Ct. 1826, 1833 (2012) (describing "the principle of party presentation" as "basic to our adversary system"); Greenlaw v. United States, 554 U.S. 237, 252 (2008) (stating that the cross-appeal rule serves "the party presentation principle"); Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 729 n.5 (Tenn. 2006) (recognizing "the

In addition to being doctrinally atypical, this alternative approach could also entail potential procedural complications. As a practical matter, in actions involving multiple, independent parties represented by separate counsel, each party wishing to perfect its own appeal would still have to ensure that *someone* appealed and, thus, parties often would likely end up filing multiple, separate notices of appeal. Failed attempts at coordinating the filing of a single notice of appeal in such multi-party situations might give rise to litigation arising from that very failure, and the appellate courts might be asked to create special equitable rules to remedy such failures on behalf of parties not at fault.

D. Fourth Proposal: Making a Jurisdictional Exception for Separate Appeals Only

A fourth approach would be to remove the "separate appeals" phrase from Rule 13(a) as provided in the first proposal and to reiterate the notice-of-appeal requirements of Rules 3(e), 3(f), and 4(a), but to expressly provide by rule that, in separate-appeal scenarios involving independent rights of appeal, the appellate courts have the power and discretion to relieve a party from its failure to timely file a separate notice of appeal. This approach would eliminate the current conflict and would retain the current jurisdictional function of notices of appeal in most cases, but would incorporate the flexible spirit of current Rule 13(a). But as with the third proposal, an unavoidable corollary would be that the strict jurisdictional effect of notices of appeal would be weakened, and a new line of authority would necessarily arise concerning the fact-intensive questions of how and when courts may exercise their discretion to excuse the non-filing or late filing of a separate notice of appeal. There is no reason to think that the judiciary wants to add to its responsibilities as a general practice the fact-intensive analyses of determining whether to excuse the late filing of civil appeals.

CONCLUSION

Tennessee's separate-appeal problem needs to be corrected. Because this problem is imbedded with Tennessee's Rules of Appellate Procedure themselves, a rule-based solution is appropriate. Correcting the problem by reforming the Rules in one of the ways recommended by this Article would render the Rules more coherent and would provide more reliable guidance to litigants and courts.

Regardless of the solution, the problem addressed in this Article requires thinking about the jurisdictional function of notices of appeal. Were Tennessee not to provide that the timely filing of a notice of appeal is

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adversarial nature of our court system"); MEADOR & BERNSTEIN, *supra* note 7, at 69 (discussing party-driven aspect of American appellate system).

a jurisdictional requirement in civil actions, then the failure to file a separate notice of appeal in a separate-appeal scenario might easily be excused where appropriate. But any scaling back of the chosen jurisdictional requirement would also inevitably give rise to a new set of fact-dependent issues for Tennessee appellate courts to address. Should the notice-of-appeal requirement be deemed not only mandatory but also jurisdictional in civil actions? Any solution to the problem of separate appeals cannot avoid making decisions about the vitality and scope of the jurisdictional effect of notices of appeals and, in a broader sense, the nature of appellate jurisdiction.