No. 03-13-00580-CV

In the Court of Appeals
For the Third Judicial District
Austin, Texas

MARC T. SEWELL,
Appellant

v.

CITY OF LLANO, MIKEL VIRDELL, BRENTON LEWIS, DIANNE FIRESTONE, LETITIA MCCASLAND, MARCY METHVIN, TODD KELLER, JEANNE PURYEAR, TONI MILAM[1],
Appellees.

On Appeal from the
33rd Judicial District Court of Llano County, Texas

APPELLEES' REPLY TO APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR DAMAGES

TO THE HONORABLE THIRD COURT OF APPEALS:

The City of Llano, Mikel Virdell, Brenton Lewis, Dianne Firestone, Letitia McCasland, Marcy Methvin, Todd Keller, Jeanne Puryear, and Toni Milam, the Appellees in the above styled and numbered appeal, through their attorney of

[1] Toni Milam is the Llano City Secretary. Her name is incorrectly listed in the style of the case as "Tom Milam."

record, file this Reply to Appellant's Response to Appellees' Motion for Damages, and respectfully show this Court the following:

1. Appellant's Response to Appellees' Motion for Damages is an example of why Appellees filed their Motion for Damages. It is filled with factual contentions outside the record, inaccurate and conclusory statements regarding Texas statutes, inaccurate factual statements, and no citations to case law. Appellees will highlight a few of these incidences for this Court.

2. In Appellant's Response to Appellees' Motion for Damages ("Appellant's Response"), Appellant twice appeals to this Court that he is not a lawyer.[2] The Texas Supreme Court and this Court have held, it is well-settled law that a pro se litigant is held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure.[3] If this were not so, pro se litigants would be given an unfair advantage over litigants represented by counsel.[4] As stated in Appellees' Motion for Damages, Texas courts of appeal have held that failure to comply with certain minimum standards can give rise to damages under Texas Rule of Appellate Procedure 45. Appellant's statements that he is not an attorney

[2] *See* Appellant's Resp. To Appellees' Mot. For Damages 7, 11.
[3] *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978); *see also Palmer v. Candelario*, 03-07-00189-CV, 2007 WL 2462005 (Tex. App.—Austin Aug. 31, 2007, no pet.); *see also Moreno v. Silva*, 316 S.W.3d 815, 817 (Tex. App.—Dallas 2010, pet. denied); *see also Champion v. Robinson*, 392 S.W.3d 118, 128 (Tex. App.—Texarkana 2012, pet. denied); *see also Milteer v. W. Rim Corp.*, 303 S.W.3d 334, 335 (Tex. App.—El Paso 2009, no pet.).
[4] *Mansfield State Bank*, 573 S.W.2d at 185.

are not valid reasons for failing to comply with the legal standards set by Texas courts and do not address the issues raised by Appellees' Motion for Damages.

3. Appellant argues he has not ignored well-settled law because he has shown Texas Local Government Code § 211.011 (g) qualifies § 211.011 (a) for municipalities.[5] Appellant cites no case law supporting this argument. Section 211.011 (a) states: "Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the ***decision*** *of the board of adjustment* is illegal in whole or in part and specifying the grounds of the illegality: (1) a person aggrieved by a ***decision*** *of the board*; (2) a taxpayer; or (3) an officer, department, board, or bureau of the municipality."[6] By its express terms and Texas case law interpreting it, § 211.011 (a) requires a **decision** of a board of adjustment.[7] The term "decision" means the board of adjustment's minutes reflecting a vote on a particular question and the records related to that decision filed in the board's office.[8] Section 211.011 (b) states: "The petition must be presented within 10 days after the date the **decision** is filed in the board's

[5] *See* Appellant's Resp. To Appellees' Mot. For Damages 3, 5.
[6] Tex. Loc. Gov't Code Ann. § 211.011 (a) (West 2013) (emphasis added).
[7] *Id*; *see also Davis v. Zoning Bd. of Adjustment of City of La Porte*, 865 S.W.2d 941, 942 (Tex. 1993) (once a party files a petition within ten (10) days *after a zoning board* ***decision***, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally).
[8] *E. Cent. Indep. Sch. Dist. v. Bd. of Adjustment for City of San Antonio*, 387 S.W.3d 754, 762 (Tex. App.—El Paso 2012, pet. denied).

office."[9] The Texas Supreme Court has held, filing of the petition with the court within ten (10) days of the board of adjustment decision being filed is jurisdictional.[10] Therefore, if there is no board of adjustment decision to be filed there can be no jurisdiction under § 211.011.[11] A board of adjustment derives its power from both Texas Local Government Code § 211.009 and the city ordinance establishing it and defining its local function and powers.[12] Section 211.009 states:

> "The board of adjustment may: (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter; (2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; (3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and (4) hear and decide other matters authorized by an ordinance adopted under this subchapter."

As seen from a plain reading of Texas Local Government Code § 211.009, a board of adjustment does not have the authority to amend a zoning ordinance. In fact, the City of Llano Code of Ordinances specifically prohibits the Llano board of

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[9] Tex. Loc. Gov't Code Ann. § 211.011 (b) (West 2013) (emphasis added).
[10] *Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007) (citing *Davis v. Zoning Bd. of Adjustment of City of La Porte*, 865 S.W.2d 941 (Tex. 1993)).
[11] *See Davis* 865 S.W.2d at 942 (once a party files a petition within ten (10) days *after a zoning board* ***decision***, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally).
[12] *Town of Bartonville Planning & Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.*, 410 S.W.3d 23, 28 (Tex. App.—San Antonio 2013, pet. filed).

adjustment from granting a zoning amendment.[13] This is because, as the Texas Supreme Court has held, amending a zoning ordinance is a legislative act[14] and boards of adjustment are quasi-judicial bodies without legislative authority.[15] In the present case the Llano City Council amended the City's zoning ordinance through the passage of Ordinance No. 1247.[16] The City Council was not acting as the board of adjustment and was not exercising authority in one of the four express areas of authority in which a board of adjustment is authorized to act; rather, the City Council was acting as the governing body of the City exercising its legislative authority. Appellant attempts to rely on Texas Local Government Code § 211.011 (g) in support of Appellant's Response. Texas Local Government Code § 211.011 (g) states, "The court may not apply a different standard of review to a ***decision*** *of a board of adjustment* that is composed of members of the governing body of the municipality under Section 211.008 (g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality."[17] Appellant argues that this language qualifies § 211.011 (a) to allow Appellant to submit a verified petition challenging the passage of Ordinance No. 1247, a legislative act of the City Council. While the Llano City Council and

[13] Llano, Tex., Code Ordinances ch. 110, art II., § 110-104 (2008).
[14] *City of Bellaire v. Lamkin et ux.*, 159 Tex. 141, 317 S.W.2d 43, 45 (1958); *City of Waxahachie v. Watkins*, 154 Tex. 206, 275 S.W.2d 477 (1955).
[15] *Town of Bartonville Planning & Zoning Bd. of Adjustments*, 410 S.W.3d at 28.
[16] *See* Aff. Brenton Lewis 2.
[17] Tex. Loc. Gov't Code Ann. § 211.011 (g) (West 2013) (emphasis added).

Mayor, pursuant to § 211.008 (g), have been designated by ordinance to act as the board of adjustment in Llano,[18] the board of adjustment's authority is still limited to the four areas of authority listed in § 211.009. Appellant is essentially arguing that because the City Council has been designated to act as the board of adjustment, when a board of adjustment is required, he is entitled to challenge **any** action the City Council takes regarding zoning by utilizing § 211.011 (a). This is simply not the case. Section 211.011 (g) still requires a decision of a board of adjustment. Section 211.011 (g) does not grant the board of adjustment legislative authority. Nor does it state if a board of adjustment is comprised of the governing body of a municipality that a taxpayer can challenge the legislative acts of the governing body via § 211.011 (a). It simply states, if a board of adjustment is comprised of the governing body of the municipality, then a reviewing court cannot use a different standard of review when reviewing a decision of the board of adjustment.[19] However, the governing body must be acting in its board of adjustment capacity and make a decision as authorized under § 211.009 in order for there to be jurisdiction under § 211.011 (a) and for § 211.011 (g) to apply on review. As stated above, the Llano City Council was **not** acting in its board of adjustment capacity when it enacted legislation to adopt Ordinance No. 1247. There was no board of adjustment decision. The minutes regarding Ordinance No.

[18] Llano, Tex., Code Ordinances ch. 110, art II., § 110-101 (2008).
[19] Tex. Loc. Gov't Code Ann. § 211.011 (g) (West 2013).

1247 are from a Llano City Council meeting, not a board of adjustment meeting. The City Council was acting as the governing body of the City and exercising its legislative power, a power the City Council does not have when acting in its board of adjustment capacity. Therefore, Appellant has not "refuted [Appellees'] assertion that § 211.011 (a) shows lack of jurisdiction by referencing § 211.011 (g)"[20] because Appellant's interpretation of the statute, based on his personal opinion without citing any case law to support it, is incorrect. Appellant followed the wrong process for challenging a legislative act of the City Council and therefore the trial court did not have jurisdiction. Appellees have made this argument since Appellees first filed their Motion for Involuntary Dismissal. Copies of all cases cited by Appellees have been provided to Appellant. Appellant is continuing to ignore the authorities cited by Appellees and blindly arguing based on his personal opinions without citing any supporting legal authorities. Further, Appellant did not make any policy arguments or cite any case law arguing that § 211.011 should be changed to authorize the challenge of a legislative act of a city council. In Appellant's Response he states: "I didn't ask this Court to change the law, but is that frivolous?"[21] According to Texas courts of appeal, such a failure is frivolous as Texas courts have held that an appellant ignoring well-settled law

[20] *See* Appellant's Resp. To Appellees' Mot. For Damages 3.
[21] *Id*.

without making any effort to argue for change in that law is a factor to be considered in awarding damages under Texas Rule of Appellate Procedure 45.[22]

4. Texas courts of appeal have also held a failure to cite legal authorities is a factor to consider in awarding damages.[23] Appellant does not deny his failure to cite case law supporting his arguments throughout his briefs and motions, nor does Appellant cite case law in Appellant's Response. Instead, Appellant states, "Mr. Bovey dismissed, as dicta, the Supreme Court's use of § 10.001 in *Merril Dow Pharmaceuticals, Inc. v. Havner* while most legal analysis I have read use this case to demonstrate § 10.001's appropriateness. I would never be so audacious as to question the Texas Supreme Court or common legal interpretation. It just wouldn't be proper, appropriate, or respectful and I would probably do it wrong."[24] First, Appellant does not cite the legal analysis he has read that demonstrates § 10.001's appropriateness. Second, by failing to cite case law and ignoring the law cited by Appellees in their brief and motions, Appellant is doing the very thing he said he would never be so audacious as to do, question the common legal interpretation of the statutes cited in this appeal. For example, in their Response to Appellant's

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[22] *See Bradt v. West*, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Diana Rivera & Associates, P.C. v. Calvillo*, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied); *see also* Naydan v. Naydan, 800 S.W.2d 637, 643 (Tex. App.—Dallas 1990, no writ).

[23] *See Chapman v. Hootman*, 999 S.W.2d 118, 124-25 (Tex. App.—Houston [14th Dist.] 1999; *see also Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 306 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also Harris v. Schepp*, 818 S.W.2d 530, 531 (Tex. App.—Fort Worth 1991, no writ).

[24] Appellant's Resp. To Appellees' Mot. For Damages 7.

Motion for Sanctions, Appellees cited and provided Appellant a copy of *In re A.W.P.*, 200 S.W.3d 242 (Tex. App.—Dallas 2006, no pet.), in which the Dallas Court of Appeals held: "Additionally, both Kimberlee and Larry seek damages under section 10.001 of the civil practice and remedies code accusing the other party of filing improper motions in this Court. See TEX. CIV. PRAC. & REM.CODE ANN. § 10.001 (Vernon 2002). Section 10.001, by its own terms, applies only to motions filed in the trial court under the rules of civil procedure. See TEX. CIV. PRAC. & REM.CODE ANN. § 10.001 (Vernon 2002). It does not apply to motions filed in this Court or to sanctions requested for the first time in this Court. We deny both parties motions for sanctions under the civil practice and remedies code."[25] Appellant ignores this judicial interpretation of the statute by the Dallas Court of Appeals and states: "Mr. Bovey's statement that the language of Texas Civil Practice and Remedies Code §10.0015 requires a motion under the Texas Rules of Civil Procedure (TCRP) is incorrect. He has misquoted the statute. The reference to TCRP in Section 10.0015 is merely a qualifying statement regarding the requirement of the signing of a pleading, i.e. TCRP Rule 57 or TRAP Rule 9.1, and not a requirement for filing a motion in a specific court as he attempts to extrapolate."[26] This is another example of Appellant disregarding case law cited by Appellees and interpreting a statute based on his personal opinion and

[25] *In re A.W.P.*, 200 S.W.3d 242 (Tex. App.—Dallas 2006, no pet.).
[26] Appellant's Response To Appellees' Response To Motion For Sanctions 5.

belief without citing any legal authorities supporting his arguments. Further, Appellant's interpretation of the statute and statement that Appellees "misquoted the statute" directly conflict with the language from *In re A.W.P.* cited by Appellees.

5. In their Motion for Involuntary Dismissal, Appellees contended this Court does not have jurisdiction because the trial court lacked subject matter jurisdiction and personal jurisdiction over the Appellees; and in the alternative, the order appealed from, an "Order Denying Writ of Certiorari" under § 211.011, is not appealable. To support Appellees' alternative argument that this Court does not have jurisdiction because the order is not a final judgment and appealable, Appellees cited *Hagood v. City of Houston Zoning Bd. of Adjustment*, 982 S.W.2d 17 (Tex. App.—Houston [1st Dist.] 1998, no pet.). In *Hagood*, the appellants were appealing a denial of a petition for writ of certiorari sought under § 211.011, just as Appellant is in this appeal.[27] The court in *Hagood* held:

> "It does not appear to be an abuse of discretion for the district court to have denied the writ of certiorari. However, the denial of the writ does not end this case. TEX. LOC. GOV'T CODE ANN § 211.011(f) prescribes the final decisions the trial court may reach: "The court may reverse or affirm, in whole or in part, or modify the decision that is appealed." Jurisdiction of this Court is vested only in cases where a final judgment has been rendered, or where a statute specifically authorizes an interlocutory appeal. Until the district court renders a final judgment which disposes of all parties and all issues pending,

[27] *Hagood v. City of Houston Zoning Bd. of Adjustment*, 982 S.W.2d 17 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

> this Court lacks jurisdiction to review the merits of this case. Accordingly, we dismiss this appeal for want of jurisdiction."[28]

Appellees contend that if this Court does not agree with Appellees' primary arguments regarding lack of jurisdiction, *Hagood* clearly states the denial of a petition for writ of certiorari under § 211.011 is not a final judgment, is not appealable, and therefore this Court does not have jurisdiction. In their Motion for Damages Appellees showed that Texas courts have held an appeal brought when the court clearly has no jurisdiction is frivolous, particularly where the party makes no effort to assert why jurisdiction is proper.[29] Appellees then stated, "…Appellant has continued to file motions in this appeal and has yet to provide a coherent argument, citing case law or statutory authority in support thereof, as to why this Court has jurisdiction over this appeal. Appellant did not seek to distinguish the *Hagood* case in his response to Appellees' motion, nor did he cite contradictory case law or statutes authorizing this appeal."[30] In Appellant's Response, Appellant states, "I most definitely did address that the district court order was the "final judgment"….My request for a hearing was denied. No other avenue was available to me. It was final. Emails are a part of the district court record. They show the reason for denial, my further attempts at resolution, and that the order was a final

[28] *Id* at 18-19.
[29] *See Elm Creek Villas Homeowner Ass'n, Inc v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 155 (Tex. App.—San Antonio 1996, no writ); *see also Diana Rivera & Assoc.*, 986 S.W.2d at 799.
[30] Appellees' Mot. For Damages 5-6.

judgment…Mr. Bovey cited no law that precludes email as part of the court record."[31] This is another example of Appellant's disregard for case law cited by Appellees, inaccurate interpretation of the law based on Appellant's personal opinion, conclusory statements regarding the law without any legal authorities to support them, and inaccurate representation to this Court about the contents of Appellees' brief. First, Appellant states he did address that the district court order was final. In Appellant's Response to Appellees' Motion for Involuntary Dismissal, Appellant said, "There must be something not distinguishable to the pro se appellant because I saw the District Judge's actions as final…. Of course there was no judgment on the actual merits of my complaint but this was due to a procedural error by the District Court and that is all that I am appealing…. Procedural due process guarantees the right to a fair procedure. I was denied "due course" because, I believe, a district court judge made a procedural/legal error. I am appealing that decision only and my hope is that the Appeals Court, at least, hears the merits of my appeal. That is ultimate jurisdiction."[32] Appellant never cited a Texas statute or case that shows this court has jurisdiction, and again Appellant ignores case law cited by Appellees' and provided to Appellant, while basing his arguments on his personal opinion of how the legal system works (or should work). Second, Appellant makes further conclusory statements such as "[i]t

[31] Appellant's Response To Appellees' Mot. For Damages 8-9.
[32] Appellant's Response To Appellees' Mot. For Damages 7-8.

was final" and "[e]mails are part of the district court record" without providing any legal authority to support his position. Appellees contend these types of conclusory statements do not constitute a good faith effort by Appellant to present legal arguments to this Court. Third, Appellant states, "Mr. Bovey cited no law that precludes email as part of the court record."[33] This statement is false and a misrepresentation to this Court of the contents of Appellees' brief and the case law and rules that have been provided to Appellant. In their brief, Appellees stated: "With the exception of affidavits to support a challenge to a court's jurisdiction, courts of appeal are bound by the record as it appears in the certified copy made by the district clerk."[34] Appellees cited Texas Government Code § 22.220; *Nogle & Black Aviation, Inc. v. Faveretto*; *City of Farmers Branch v. Ramos*; and Texas Rule of Appellate Procedure 34.1 as support for this statement.[35] A copy of § 22.220, the cited cases, and Rule 34.1 were included in the appendix to Appellees' brief and provided to Appellant. Texas Rule of Appellate Procedure 34.1 states: "The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Even if more than one notice of appeal is filed, there should be only one appellate record in a case." There is no reporter's record in this case and the clerk's record does not contain the email exchanges Appellant cites as

[33] Appellant's Response To Appellees' Mot. For Damages 9.
[34] Appellees Br. 4.
[35] *Id* at footnote 6.

support for his arguments.[36] Therefore, Appellant's statement that Appellees "provided no law that precludes email as part of the court record" is false. Appellant's conclusory statement that "[e]mails are part of the district record" is also false as the record consists of the reporter's record and clerk's record and neither of these contain the email exchanges Appellant cites. This is another example of Appellant's disregard for the law cited by Appellees, inaccurate conclusory statements unsupported by legal authorities, and factual misrepresentations by Appellant.

6. In their Motion for Damages Appellees' showed Texas courts have cited various factors to consider when determining if an appeal is frivolous, such as: 1) an appellant ignoring well-settled law without making any effort to argue for change in that law;[37] 2) an appeal brought when the court clearly has no jurisdiction, particularly where the party makes no effort to assert why jurisdiction is proper;[38] and 3) briefing with no citations to the record or to legal authorities, or relying on materials outside of the record.[39] Appellees have fully documented how Appellant has violated each of these factors. As detailed above, Appellant's Response does not adequately address or refute Appellees' Motion for Damages,

[36] *See* Clerk's R.
[37] *See Bradt*, 892 S.W.2d at 79; *see also Diana Rivera & Associates, P.C.*, 986 S.W.2d at 799; *see also* Naydan, 800 S.W.2d at 643.
[38] *See Elm Creek Villas Homeowner Ass'n, Inc.*, 940 S.W.2d at 155; *see also Diana Rivera & Assoc.*, 986 S.W.2d at 799.
[39] *See Chapman*, 999 S.W.2d at 124-25; *see also Tate*, 954 S.W.2d at 875; *see also Casteel-Diebolt*, 912 S.W.2dat 306; *see also Harris*, 818 S.W.2d at 531.

instead it was another example of the Appellant's behavior that led Appellees to file their Motion for Damages.

Prayer for Relief

Therefore, Appellees respectfully request pursuant to Texas Rule of Appellate Procedure 45 that this Court award Appellees damages for Appellant's frivolous appeal in the amount of $16,992.86 in accordance with the updated Affidavit filed herewith; and that this Court issue any other order to which Appellees are entitled.

Respectfully submitted,

/s/ Cary L. Bovey

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Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Appellees' Reply to Appellant's Response to Appellees' Motion for Damages on Appellant, Mr. Marc Sewell, on January 22, 2014 by certified mail, return receipt requested to Mr. Marc Sewell, at 108 Summit, Llano, TX 78643 and by email to marcs@simonlabs.com.

/s/ Cary L. Bovey

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), this motion contains 3,828 words.

/s/ Cary L. Bovey

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APPENDIX

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No. 03-13-00580-CV

MARC T. SEWELL, APPELLANT	§	**IN THE COURT OF APPEALS**
	§	
V.	§	**THIRD SUPREME JUDICIAL DISTRICT OF TEXAS**
CITY OF LLANO, MIKEL VIRDELL, BRENTON LEWIS, DIANNE FIRESTONE, LETITIA McCASLAND, MARCY METHVIN, TODD KELLER, JEANNE PURYEAR, AND TONI MILAM, APPELLEES.	§	**AT AUSTIN, TEXAS**

AFFIDAVIT OF CARY L. BOVEY

STATE OF TEXAS §

§

COUNTY OF WILLIAMSON §

Before me, the undersigned authority, on this day personally appeared Cary L. Bovey, who, after being duly sworn, on oath states as follows:

1. My name is Cary L. Bovey. I am over the age of 18 years, of sound mind, and fully competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an attorney and the managing member of the Law Office of Cary L. Bovey, PLLC which is counsel for the Appellees. I have been licensed to practice law in the State of Texas since November 2, 1990. Since 1990, my law practice has been primarily focused on representing Texas municipalities. In 2009, I received the Individual Civil Law Merit Certification in Municipal Law from the Texas City Attorney's Association as recognition for substantial involvement and special competence in the practice of municipal law.

3. I am familiar with the nature of this case and the work which has been performed. I am familiar with the number of hours spent and the amounts charged by the Law Office of Cary L. Bovey, PLLC to the Appellees. I am familiar with what lawyers of similar ability were charging during the period of this appeal. I have over 23 years of experience working with and representing Texas municipalities. The representation of Appellees in this appeal required the following: review of the trial court record; review and evaluation of Appellant's brief; preparation of Appellees' Motion For Involuntary Dismissal; preparation of Appellees' Reply Brief; communications with Mr. Marc Sewell, pro se Appellant in this appeal; review and evaluation of Appellant's Motion to Fix Case Information; preparation of Appellees' Response to Appellant's Motion to Fix Case Information; review and evaluation of Appellant's Motion For

Sanctions; preparation of Appellees' Response to Appellant's Motion For Sanctions; review and evaluation of letters and emails from Mr. Marc Sewell, Appellant; preparation of Appellees' Motion For Damages; review and evaluation of Appellant's Response to Appellees' Motion For Damages; preparation of Appellees' Reply to Appellant's Response to Appellees' Motion for Damages; legal research regarding the issues raised in Appellant's brief and motions and consultation with Appellees to provide briefings of the matters involved in the appeal and proposed responses; and other relevant legal services associated with this appeal. The amount requested reflects the number of hours spent and the amount charged by hour at a rate of $125.00 per hour, and expenses incurred, from the inception of my firm's retention with regard to this appeal through January 22, 2014. All of the time spent and expenses incurred were reasonable and necessary.

4. I am the person who was and is in charge of this appeal on behalf of the Appellees.

5. Bearing in mind the time and labor required, the skill required, the difficulty of the questions, the preclusion of other employment, the customary fees charged in such a case, the time limits, the experience, reputations and abilities of the attorneys, the nature and length of the professional relationship with the client, it is my opinion that (1) reasonable and necessary attorney's fees for legal services rendered through the date of filing of the Appellees' Reply to Appellant's Response to Appellees' Motion For Damages would be the sum of $16,845.00; (2) reasonable and necessary costs and expenses to date would be the sum of $147.86.

Further Affiant sayeth not.

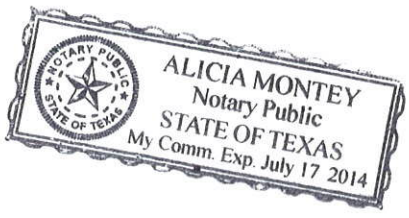
Signed this 22nd day of January, 2014.

Cary L. Bovey

Subscribed and sworn to before me by the said Cary L. Bovey on this 22nd day of January, 2014.

Notary Public of the State of Texas

My commission expires: July 17, 2014



No. 03-13-00580-CV

MARC T. SEWELL,	§	**IN THE COURT OF APPEALS**
APPELLANT	§	
	§	
V.	§	**THIRD SUPREME JUDICIAL**
	§	
CITY OF LLANO, MIKEL VIRDELL,	§	**DISTRICT OF TEXAS**
BRENTON LEWIS, DIANNE FIRESTONE,	§	
LETITIA McCASLAND, MARCY	§	
METHVIN, TODD KELLER, JEANNE	§	
PURYEAR, AND TONI MILAM,	§	**AT AUSTIN, TEXAS**
APPELLEES	§	

AFFIDAVIT OF BRENTON B. LEWIS

STATE OF TEXAS	§	
	§	
COUNTY OF LLANO	§	

Before me the undersigned authority, on this day personally appeared Brenton Lewis, Affiant, who by me first duly sworn upon his oath swears the following statements are true and are within the personal knowledge of Affiant:

"My name is Brenton B. Lewis. I am the City Manager of the City of Llano, Texas and have held that position since April 1, 2013. I hold a Bachelor of Business Administration degree in Management and have also completed 27 hours of coursework toward a Master of Public Administration degree. I have 29 years of professional experience working for local governments in Texas and other states, including 20 years of experience working as a zoning administrator.

As the City Manager, I am the City of Llano employee designated to provide staff support to the City of Llano Board of Adjustment, Planning and Zoning Commission, and City Council. My duties related to these afore-mentioned municipal governing boards include, but are not limited to: 1) coordinating the preparation of public meeting agendas; 2) preparing the agenda item reports, documents and other written materials for review and consideration by the members of said governing bodies; 3) attending the meetings of the said boards to provide City staff recommendations and other resources as requested; 4) presenting various agenda items and reports for review and consideration by the board members; 5) supervising other City employees to ensure that the meeting agendas, minutes, public notices, and similar items are properly prepared and published as required; and 6) other duties as requested by said governing boards.

As a result of the duties I perform as City Manager, as outlined hereinabove, I am personally familiar with the activities, operations, practices and decisions of the City of Llano Board of Adjustment, Planning and Zoning Commission, and City Council. The Planning and Zoning Commission held a regular meeting on June 13, 2013 at which meeting, after proper notice was published, a Public Hearing was held on proposed text amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. Further,

after said Public Hearing, the Planning and Zoning Commission voted to recommend to City Council that the proposed text amendments to Ordinance Nos. 735 and 1231 be approved by the City Council. A copy of the minutes (approved, but unsigned) of the June 13, 2013 Planning and Zoning Commission meeting is attached to this Affidavit as Exhibit "A" and incorporated herein for all purposes.

On June 17, 2013, the Llano City Council held a regular meeting at which meeting, after proper notice was published, a Public Hearing was held on proposed text amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. Further, after said Public Hearing, the City Council voted to approve the proposed text amendments to Ordinance Nos. 735 and 1231 by the enactment of Ordinance No. 1247. A copy of Ordinance No. 1247 and the minutes of the June 17, 2013 Llano City Council meeting are attached to this Affidavit as Exhibits "B" and "C" respectively, and incorporated herein for all purposes.

At no time did the Llano Board of Adjustment take any action, hold any meeting, or make any decision regarding the enactment of Ordinance No. 1247 by the Llano City Council. The Llano Board of Adjustment was not involved at all in the actions, hearings and decisions of the Llano Planning and Zoning Commission or the Llano City Council culminating in the enactment of Ordinance No. 1247 by the Llano City Council on June 17, 2013.

Further, I am aware that Marc T. Sewell filed a Petition for Judicial Review in Cause No. 18504, In the District of Llano County, 33rd/424th Judicial District, the Honorable J. Allan Garrett being the Presiding Judge ("District Court"). The City of Llano, Mikel Virdell (Mayor), Brenton Lewis (City Manager), Dianne Firestone (Planning & Zoning Commission Chairman), Letitia McCasland (Planning & Zoning Commission Member), Marcy Methvin (Planning & Zoning Commission Member), Todd Keller (City Councilmember), Jeanne Puryear (City Councilmember) and Toni Milam (City Secretary), listed as Appellees in No. 03-13-00580-CV, in the Court of Appeals, Third Supreme Judicial District of Texas, at Austin, Texas, as of the date of this Affidavit, have not been served with proper citation issued by the District Court in Cause No. 18504, nor have any of the Appellees made an appearance or waived service in Cause No. 18504."

Further Affiant sayeth not.

Signed this 9th day of October, 2013.

Brenton B. Lewis

Subscribed and sworn to before me by the said Brenton B. Lewis on this 9th day of October, 2013.

Notary Public of the State of Texas
My commission expires: 9/4/2017

REBECCA BOVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. September 4, 2017

EXHIBIT "A"

City of Llano
Regular Called Planning/Zoning Meeting Minutes
June 13, 2013 – 5:30 p.m.

A. CALL TO ORDER Chairman Diana Firestone called the meeting to order at 5:32 with the following present: Marcy Methvin, Sam Oatman, Leticia McCasland and Stacey Mangum-Oliver was absent.

B. PUBLIC COMMENTS-Non-Agenda Items
No public comments on non-agenda items.

C. CONSENT AGENDA ITEMS All consent agenda items listed are considered to be routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items unless a Council member so requests, in which event the item will be removed from the Consent Agenda and considered in its normal sequence on the Agenda.

1. Approval of the Planning and Zoning minutes as written, dated February 26, 2013.
   Toni Milam, City Secretary
   Motion by Commissioner Methvin, with a second by Commissioner Oatman to approve the minutes of February 26, 2013. With there being no discussion, motion approved.

D. PUBLIC HEARING

1. The City of Llano Planning and Zoning Commission will hold a public hearing on Thursday, June 13, 2013 at 5:30 p.m. in City Hall Council Chambers located at 301 W. Main Street to receive written and/or oral comments from the public, regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 overlay district.
   Chairman Firestone opened the public hearing at 5:32. Public Comments were heard:
   Marc Sewell spoke objecting to the process to get to this point. Mr. Sewell stated property owners were not property notified and that this meeting should have been held as a workshop since there were substantive changes.
   Vivian Koerner is looking to put a beauty salon in the overlay district and asked about the process of obtaining a specific use permit.
   Mayor Mike Virdell spoke in favor of opening up the SF-1 Overlay District to more uses; adding more value to the homes by adding more uses with expanded zoning. He stated it would be unlikely that a residence will sell without adding more uses. With there being no further comments, Chairman Firestone closed the public hearing at 5:40 p.m.

E. REGULAR AGENDA ITEMS

1. Discuss and consider possible action regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 Overlay District, and making recommendations to the City Council.
   Brenton Lewis, City Manager

After a brief discussion, motion by Commissioner McCasland, with a second by Commissioner Methvin to add the following uses of home occupation, accounting/book-keeping office, architect office, engineering office, insurance office, office general, barber/beauty salon, florist, gunsmith, palm reading and soil testing laboratory to the SF-1 Overlay District and to make the recommendation to the City Council. These additional uses would require a Specific Use Permit. Motion approved with Sam Oatman abstaining.

2. Discuss and consider action specifying meeting dates and times for future meetings.
   Brenton Lewis, City Manager
   By-laws currently state the Commission will meet the third Thursday of each month. No formal action taken.

3. Discussion only regarding the Planning and Zoning Commission's future projects.
   Brenton Lewis, City Manager
   After a brief discussion, it was discussed to take one section at a time in reviewing and coming up with ideas for suggestions on changing the zoning ordinance.

F. ADJOURNMENT

_____
Diana Firestone, Chairman

_____
Toni Milam, City Secretary

EXHIBIT "B"

ORDINANCE NO. _1247_

AN ORDINANCE OF THE CITY OF LLANO, TEXAS AMENDING ORDINANCE NO. 1231; DEFINING ADDITIONAL SPECIFIC USES; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

Whereas the Planning and Zoning Commission and City Council of the City of Llano, have given the requisite notices by posting and publication, and have held due hearings to afford a full and fair hearing to all property owners generally, and the City Council of the City of Llano is of the opinion that the Ordinance is in compliance with the Comprehensive Plan,

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LLANO, TEXAS:

SECTION 1. AMEND ORDINANCE 1231 BY INCLUSION OF SPECIFIC USES IN A SF-1 OVERLAY DISTRICT:

Section 1. Purpose-The City Council of the City of Llano finds that the preservation of residential properties and providing additional uses to the area defined within the overlay district will promote commerce and aesthetic continuity; encourage the orderly development along highway corridors; and is compatible with adjacent Zoning Districts and land uses.

Section 2. Definitions

Alteration: A physical change to the exterior appearance of a building as seen from any public Right of Way. Alterations shall include the changing of roofing or siding materials; changing, eliminating , or adding doors, door frames, windows, window frames, shutters, fences, railings, porches, or balconies.

Accounting or Bookkeeping Office: A facility or group of offices for one or more professional accountants, bookkeepers, and support staff for conducting consultation, accounting or bookkeeping work and research, and to prepare other documents and correspondence.

Architect's Office: A facility or group of offices for one or more professional architects and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Barber Shop or Beauty Salon: An establishment providing to men or women services to improve their appearance, such as hair cutting, hairdressing, manicuring, facial treatment, and massage.

Building: A structure such as a house, garage, accessory structure or similar construction designed for shelter of any form of human activity or for personal property.

CMU: concrete block material commonly called cinder block. Standard CMU is finished flat and is erected with mortar between joints.

Engineering Office: A facility or group of offices for one or more professional engineers and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Florist: An establishment for the display and retail sale of flowers, small plants and accessories.

Gunsmith: A facility or group of offices where the repair, modification, design, or building of firearms is performed.

Home occupation means an occupation which is secondary to the primary use of a dwelling as a residence, conducted on residential premises solely by an occupant of the residence. A home occupation is one that is customarily carried on in the home, but does not include a business that:
(1) Utilizes an advertisement, sign or display on the premises;
(2) Employs persons other than the occupants of the residence;
(3) Utilizes other than the ordinary household equipment;
(4) Operates during hours other than 8:00 a.m.—6:00 p.m. for outdoor activities, and 8:00 a.m.—10:00 p.m. for indoor activities;
(5) Involves more than six patrons on the premises at one time;
(6) Conducts outdoor activities, unless the activities are screened from neighboring property;
(7) Has exterior storage of material, equipment and/or supplies which are used in conjunction with such occupation;
(8) Has offensive noises, vibrations, smoke, dust, odors, heat or glare beyond the property lines; and
(9) Parking required is not more than four spaces, two of which are on site.
Examples of a home occupation are the teaching of music, swimming and operations carried on as telecommuting.

Insurance Office: A facility or group of offices for one or more professional architects and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Normal Business Hours: The period for conducting business or work defined as between the hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, and 8:00 a.m. through 12:00 noon Saturday.

Office, General, Professional: Means a room, or group of rooms, used for the provision of executive, management or administrative services. Typical uses include administrative offices and services, including real estate, insurance, property management, investment, personnel, travel, secretarial services, telephone answering and business offices of public utilities, organizations and associations, but excluding medical offices.

Ordinary Maintenance and Repair: Replacement or repair of like kind and quality of the original structure, façade, windows or doors.

Overlay District: A set of zoning requirements that are described in the Ordinance text, is mapped, and is imposed in addition to, or supplements, those of the underlying District. Development within the overlay zone must conform to the requirements of both zones or the more restrictive of the two. In certain cases, additional uses or requirements may be allowed that are not in the underlying District.

Palm Reading: An establishment where persons practice the art of palmistry or chiromancy.

Residential: A structure or building that is used for single family dwelling only. Residential also includes ancillary uses such as garages or accessory buildings that are incidental to the primary use.

Soil Testing Laboratory: A facility or group of offices that include a designated area for the analysis of soil to determine the content, composition, and other characteristics of the soil.

Section 3. Area Defined

The SF-1 Overlay District is an area designated as a part of the City of Llano Zoning Regulations and Official Zoning Map by reference.

Section 4. Specific Uses

In the SF-1 Overlay District the following Permitted Specific Uses shall be allowed, in addition to Specific Uses defined in Section 8B, City of Llano Zoning Regulations, Ordinance 735, and Ordinance 1231:

Home Occupation	Accountant or Bookkeeping Office	Architect's Office
Engineering Office	Insurance Office	Office, General, Professional
Barber Shop or Beauty Salon	Florist	Gunsmith
Palm Reading	Soil Testing Laboratory	

All other conditions for approval are outlined in Section 20, City of Llano Zoning Regulations, Ordinance 735, and Ordinance 1231.

Section 5. Design Standards

The purpose of the design standards is to maintain the residential character of the corridor while allowing additional options and requirements under a Specific Use Permit. Normal maintenance and repair is allowed without restriction in the SF-1 Overlay District.

Exterior Finishes: All exterior finishes shall be masonry, wood or composite lap siding, or stucco. Alterations and additions shall be constructed with like material and quality as the existing structure. Standard CMU is not allowed as an exterior finish.

Roof: All roofs shall be constructed with a minimum 1 to 12 roof pitch. Allowed roofing materials include metal, asphalt shingles or composite shingles. Eves shall be a minimum of eight inches.

Landscaping: Landscaping shall be maintained according to the City of Llano Property Maintenance Code. All parking areas shall be screened from Highway 16 by a minimum of 30" high plant screening excepting allowed drive way entrances or exits.

Signs: All signs shall conform to City of Llano Sign Ordinance No. 935.

Section 6. Operation

All Specific Uses of Home Occupation, Accountant or Bookkeeping Office, Architect's Office, Engineering Office, Insurance Office, Office - General, Professional, Barber Shop or Beauty Salon, Florist, Gunsmith Palm Reading, Soil Testing Laboratory shall be allowed to operate only during normal business hours except in the case of emergencies. Use of the building or structure for special events, holiday parties or open houses after normal business hours shall be allowed.

Section 7. Conditions

The Planning Commission and City Council may impose additional conditions when granting specific Use Permits per Section 20, City of Llano Zoning Regulations, Ordinance No. 735, and Ordinance 1231.

SECTION 2. CONFLICT / SEVERABILITY

All ordinances of the City of Llano, Texas found to be in conflict with the provisions of this ordinance or the Zoning Regulations are hereby repealed. Should any sentence, paragraph, subdivision, clause or phrase be found unconstitutional, illegal, invalid the same shall not affect the validity or this ordinance as a whole, or any part of provision thereof other than the part decided to be invalid, illegal or unconstitutional, and the same shall not effect the validity of the Ordinance as a whole.

SECTION 3. PENALTY

Any person, firm or corporation violating any of the provisions or terms of this ordinance or the Zoning Ordinance, as amended, shall be subject to the same penalty as provided for the Zoning Regulations of the City of Llano, Texas, and upon conviction shall be subject to a fine not to exceed Two thousand dollars ($2,000.00) for each offence, and each and every day such a violation is continued shall be deemed to constitute a separate offence.

SECTION 4. ENACTMENT

This Ordinance shall take effect immediately from and after its passage and the publication of the caption as the law in such cases provide.

PASSED AND APPROVED, this 17th day of June, 2013.

CITY OF LLANO
LLANO COUNTY, TEXAS

Mikel Virdell, Mayor

ATTEST

Toni Milam, City Secretary

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	USE CHART														
2	CITY OF LLANO, TEXAS														
3	ZONING ORDINANCE														
4		DISTRICT													
5			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
6	1. Primary Residential Uses														
7	Accessory dwelling unit	*	S	S		S	S	S	S				S		
8	Caretaker/guard residence	*	•												
9	Community home		•	•		•	•	•	•	•	•			•	•
10	Detached private garage	*	•	•		•	•	•	;bullt;	•		S		•	•
11	Detached single-family dwelling	*	•	•		•	•	•	;bulet;	•	•		•	•	•
12	Garage apartment	*	•	•		•	•	•	;bllet;	•		S			
13	Home occupations	*	•	•	S	•	•	•	•	•		S			
14	Industrialized housing		•	•		•	•	•	;bullt;	•		•			
15	Manufactured housing, less than than five years old						S	•							
16	Manufactured housing, greater than five years old							S							
17	Manufactured home park	*						•							
18	Multiple-family dwelling	*							•	•					
19	Recreational vehicle park	*												S	
20	Retirement home and/or nursing home	*				S	S	S	•	•	•			•	
21	Single-family dwelling with retail use	*								S	S	•	S	S	
22	Single-, two- or multifamily use above first floor level									•		•	•	•	
23	Two-family dwelling	*				•	•	•	•	•					
24	2. Educational, Institutional, Public and Special Uses														
25	Airport	*	•												
26	Athletic stadium or field, public		•	S		S	S	S	S	•	•			•	•
27	Athletic stadium or field, private	*	S											S	S
28	Child care or day care center	*	S	S		S	S	S	S	•	•			•	•
29	Church, including church related activities (i.e., day care, recreational building)	*	•	•		•	•	•	•	•	•	•	•	•	•
30	City, county, state and governmental offices	*	•	•		•	•	•	•	•	•	•	•	•	•
31	College, university or private boarding school		•											•	•
32	Community center, private	*	S	S		S	S	S	S	•	•	•	•	•	•
33	Farm, ranch, garden or orchard	*	•	•		•	•	•	•	•	•		•	•	•
34	Halfway house	*								S	•			•	•
35	Heliport and helistop	*	•							S					
36	Hospital	*	•							•	•			•	•
37	Hospital for insane, liquor or narcotic related patients	*	S							S	S			•	•
38	Landing fields, private		S												
39	Library, public	*	•	•		•	•	•	•	•	•	•	•	•	•
40	Metal accessory building, in excess of 200 square feet		•	•		•	•	•	•	•	•			•	•
41	Metal building, primary or main													•	•
42	Municipal uses operated by the city	*	•	•		•	•	•	•	•	•	•	•	•	•
43	Museum or art gallery, private									•	•	•	•	•	•
44	Parochial or private school	*	•	•		•	•	•	•	•	•	•	•	•	•
45	Private park	*	•	•		•	•	•	•	•	•	•	•	•	•
46	Private utilities	*	•	•		•	•	•	•	•	•	•	•	•	•
47	Public park or playground	*	•	•		•	•	•	•	•	•	•	•	•	•
48	Radio, television, or communications facilities (commercial)**	*	•	S		S	S	S	S	S	S	S	S	S	•
49	Religious or philanthropic institutions not listed		S	S		S	S	S	S	S	•	•	•	•	•
50	School, public	*	•	•		•	•	•	•	•	•	•	•	•	•
51	School, business or trade	*	•	•		•	•	•	•	•	•	•	•	•	•
52	3. Office and Professional Uses														
53	Accountant or bookkeeping office	*		S	S	S	S	S		•	•	•	•	•	•
54	Armed services recruiting center									•	•	•	•	•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
55			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
56	Architect's office	*		S	S	S	S	S		•	•	•	•	•	•
57	Attorney Office				S										
58	Bank, savings and loan mortgage and and credit unions	*								•	•	•	•	•	•
59	Chamber of commerce									•	•	•	•	•	•
60	Check cashing service and loan agency									•	•		•	•	•
61	Dental Office				S										
62	Engineering office	*		S	S	S	S	S		•	•	•	•	•	•
63	Insurance office			S	S	S	S	S		•	•	•	•	•	•
64	Long distance communication service									•	•		•	•	•
65	Medical clinic or office	*			S					•	•		•	•	•
66	Medical laboratory	*								•	•		•	•	•
67	Minor medical emergency clinic									•	•		•	•	•
68	Office, general, professional	*		S	S	S	S	S	S	•	•	•	•	•	•
69	Radio broadcasting, without tower	*								•	•		•	•	•
70	Real estate sales office	*								•	•	•	•	•	•
71	Surveyor office									•	•	•	•	•	•
72	4. Retail and Related Uses														
73	Art and craft supply store	*								•	•	•	•	•	•
74	Bakery or bake shop, retail	*								•	•	•	•	•	•
75	Barbershop or beauty salon	*			S	S	S	S		•	•	•	•	•	•
76	Bicycle, lawnmower sales/repair, enclosed										•		•	•	•
77	Bookstore	*								•	•	•	•	•	•
78	Boot and shoe sales and repair	*								•	•	•	•	•	•
79	Building materials and hardware, inside	*									•	•	•	•	•
80	Building materials and hardware, outside	*												•	•
81	Ceramics store	*								•	•	•	•	•	•
82	Clothing or apparel store, new	*								•	•	•	•	•	•
83	Computer sales	*								•	•	•	•	•	•
84	Convenience store with gas pumps										S			•	•
85	Convenience store without gas pumps									•	•			•	•
86	Dance studio or gymnastics	*								•	•		•	•	•
87	Department and dry goods store, retail	*									•	•	•	•	•
88	Donut shop	*								•	•	•	•	•	•
89	Driving school										•		•	•	•
90	Dry cleaning or shoe pickup/drop off	*								•	•		•	•	•
91	Dry cleaning, small shop	*								•	•	•	•	•	•
92	Fabric store	*								•	•	•	•	•	•
93	Feedstore	*											•	•	•
94	Florist	*		S	S	S	S	S		•	•	•	•	•	•
95	Furnishings	*								•	•	•	•	•	•
96	Gift shop									•	•	•	•	•	•
97	Grocery store or food market	*									•	•	•	•	•
98	Gunsmith				S						•	•	•	•	•
99	Hobby or toy store	*								•	•	•	•	•	•
100	Ice cream or frozen yogurt sales	*								•	•	•	•	•	•
101	Key shop or locksmith									•	•	•	•	•	•
102	Kiosk	*								•	•	•	•	•	•
103	Laundromat, self-service	*									•		•	•	•
104	Manufactured housing sales	*												•	•
105	Meat market, retail	*									•	•	•	•	•
106	Medical aids and equipment									•	•	•	•	•	•
107	Musical instrument sales and repair									•	•	•	•	•	•
108	Novelty or jewelry shop	*								•	•	•	•	•	•
109	Nursery, retail	*		S		S	S	S	S		S	S	S	•	•
110	Outside display	*									•			•	•
111	Optical store	*								•		•	•	•	•

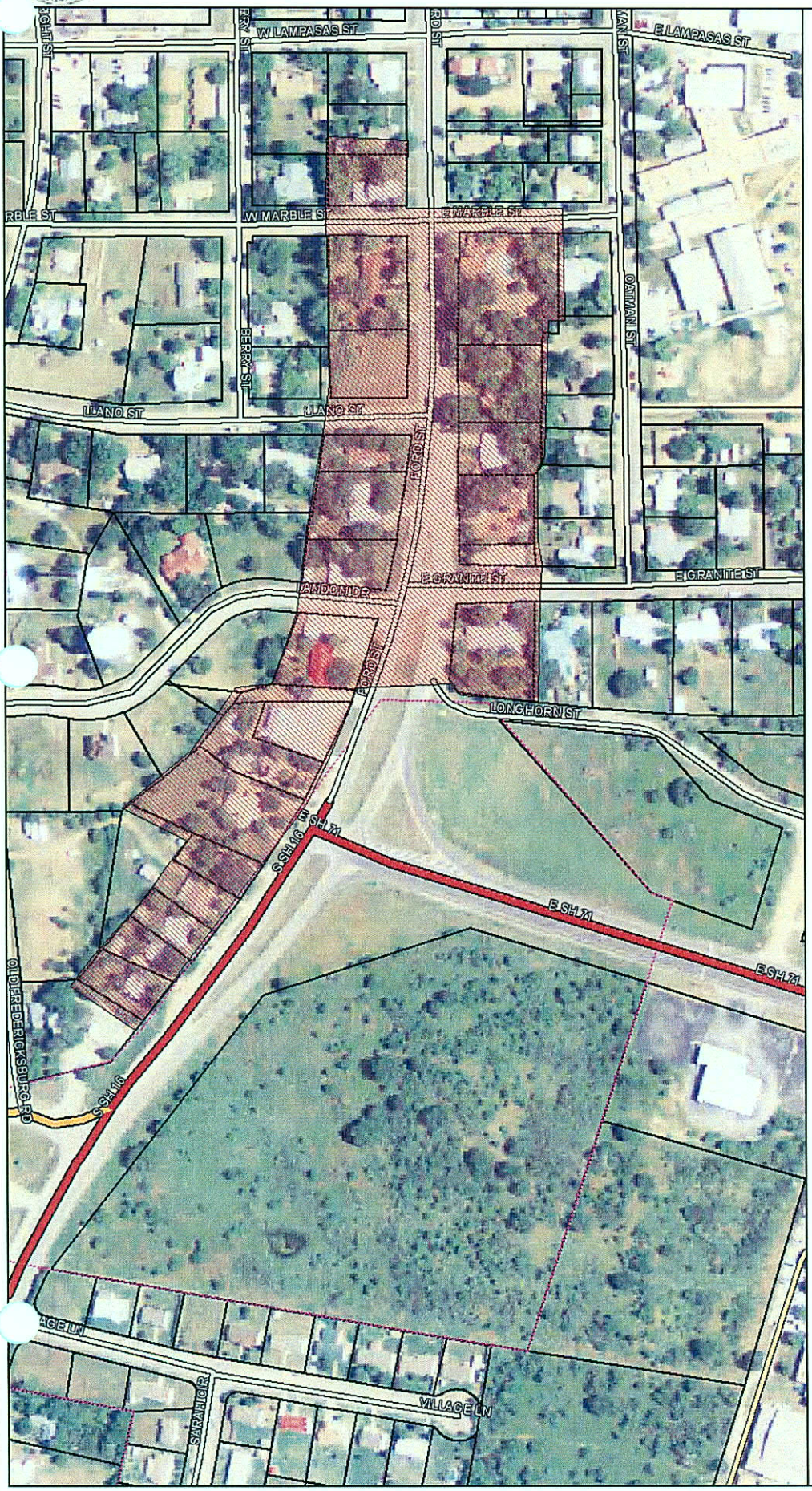
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
112			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
113	Paint store	*									•	•	•	•	•
114	Pawnshop	*									•		•	•	•
115	Pet shop	*									•	•	•	•	•
116	Pharmacist or drugstore	*								•	•	•	•	•	•
117	Printing shop	*								S	•	•	•	•	•
118	Produce stand, including wood and other seasonal sales	*	Temporary certificate of occupancy by building official												
119	Radio sales and installation										•	•	•	•	•
120	Recycling collection center	*									•			•	•
121	Restaurant, cafe or cafeteria	*								•	•	•	•	•	•
122	Restaurant, drive-in	*									•	•		•	•
123	Restaurant with drive-through										•	•	•	•	•
124	Retail service, incidental	*									•	•	•	•	•
125	Security systems installation company									•	•	•	•	•	•
126	Sporting goods, including firearm sales										•	•	•	•	•
127	Temporary sales and street vending[3]	*									•	•	•	•	•
128	Trophy sales and engraving									•	•	•	•	•	•
129	TV sales and repair									•	•	•	•	•	•
130	Used clothing store									S	S		•	•	•
131	Vacuum cleaner sales and service									•	•	•	•	•	•
132	Veterinarian clinic, no outside pens	*									•		•	•	•
133	Wallpaper, flooring and carpet supply									•	•	•	•	•	•
134	Weight and aerobic center									•	•	•	•	•	•
135	5. Automobile, Transportation, Utility, Communication and Related Uses														
136	All local utilities, municipal or franchised	*	•	•		•	•	•	•	•	•	•	•	•	•
137	Amateur radio, TV or CB antenna	*	•	•		•	•	•	•	•	•	•	•	•	•
138	Antenna (commercial radio, TV, relay or microwave over 40 feet)	*	S											•	•
139	Auto glass sales and repair													•	•
140	Automobile leasing or renting	*									S		•	•	•
141	Automobile parts and sales	*									•	•	•	•	•
142	Automobile reconditioning, body/fender repair													•	•
143	Automobile repair, major	*												•	•
144	Automobile repair, minor	*									S			•	•
145	Automobile sales, new	*												•	•
146	Automobile sales, used	*												•	•
147	Automobile service station	*									S		•	•	•
148	Boat sales, new													•	•
149	Bus terminal	*										•	•	•	•
150	Electric transmission substation	*	S	S		S	S	S	S	S	S	S	S	S	S
151	Freight or truck terminal yard	*												•	•
152	Gas regulating station		S	S		S	S	S	S	S	S	S	S	S	S
153	Heavy machinery sales and service	*												•	•
154	Heavy vehicle storage	*												S	•
155	Heliport	*	•							S					
156	Motorcycle sales, new	*												•	•
157	Motor raceway	*												S	•
158	Private landing field		•												
159	Recreation vehicle, new	*												•	•
160	Recreation vehicle, used	*												•	•
161	Trailer rental	*												•	•
162	Truck rental or leasing	*												•	•
163	Truck repair and overhaul	*												•	•
164	Truck sales, new	*												•	•
165	Truck sales, used	*												•	•
166	Used automotive auction	*												•	•
167	Vehicle or car wash	*												•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
168			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
169	6. Amusement and Commercial Uses														
170	Alcohol sales	*									•	•	•	•	•
171	Amusement arcade	*									•	•	•	•	•
172	Antique shop and used furniture	*									•	•	•	•	•
173	Appliance rental										•	•	•	•	•
174	Banking, automated teller only										•	•	•	•	•
175	Bed and breakfast	*	S	S		S	S	S	S	S	•	•	•	•	•
176	Boardinghouse	*												•	•
177	Cabinet and upholstery shop	*									•		•	•	•
178	Cemetery or mausoleum, new or expansion	*	S	S		S	S	S	S	S	S			S	S
179	Commercial amusement, indoor	*									•		•	•	•
180	Commercial amusement, outdoor	*									S		S	S	•
181	Dancehall	*										S	S	•	•
182	Dancehall (as incidental/accessory use only)	*										S	S	•	•
183	Firing range, indoor/outdoor													•	•
184	Flea market	*									S	S	S	S	•
185	Fraternal club, lodge, sorority and fraternity, etc.	*								•	•	•	•	•	•
186	Funeral parlor or mortuary	*											•	•	•
187	Golf course and county club	*	S	S		S	S	S	S						S
188	Miniature golf, driving range and putting course	*												•	•
189	Greenhouse and nursery, commercial	*												•	•
190	Horse racing track		S												S
191	Hotel or motel	*									S	•	•	•	•
192	Interior decorator's office	*								•	•	•	•	•	•
193	Insurance or insurance estimator's office	*								•	•	•	•	•	•
194	Kindergarten, private		S	S		S	S	S	S	S	•		S	•	S
195	Leather goods shop										•	•	•	•	•
196	Massage establishment	*								•	•		•	•	•
197	Open or outside storage of products or materials, not screened		*											S	•
198	Outside storage, screened	*												S	•
199	Palm reading				S										S
200	Printing company, commercial	*											•	•	•
201	Private club with alcoholic beverage sales	*									•	•	•	•	•
202	Roller skating rink												•	•	•
203	Sign shop											•		•	•
204	Stable, commercial	*												S	•
205	Stable, private	*	•	S		S	S	S	S						•
206	Stained glass studio										•	•	•	•	•
207	Studio, photography	*								•	•	•	•	•	•
208	Tattoo parlor	*													S
209	Taxidermist													•	•
210	Theater, indoor	*									•		•	•	•
211	Theater, outdoor	*												•	•
212	Tire dealer, new	*									•		•	•	•
213	Tool and machinery rental shop	*									•		•	•	•
214	Video rental store										•	•	•	•	•
215	7. Light Industrial and Heavy Commercial Uses														
216	Assembly of heavy electronic devices	*												•	•
217	Assembly of light electronic instruments and devices, enclosed building	*												•	•
218	Assembly of radios and phonographs												•	•	•
219	Bakery and confectionary works, commercial	*									•		•	•	•
220	Batching plant, concrete or asphalt	*												S	•
221	Batching plant, temporary	*	(Temporary permit issued by building official)												
222	Book bindery												•	•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
223			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
224	Boot or shoe manufacturer													•	•
225	Bottling works													•	•
226	Brick company, sales													•	•
227	Building materials and lumber storage yards and sales	*												S	•
228	Candy manufacturing													•	•
229	Carting or express hauling											•		•	•
230	Commercial engraving													•	•
231	Contractor's shop or storage yard	*											•	•	•
232	Cosmetics manufacturing, enclosed building													•	•
233	Dairy products													•	•
234	Dog kennel and veterinarian office, outside pens	*												•	•
235	Drapery manufacturing and sales												•	•	•
236	Drug and pharmaceutical manufacturing, enclosed building													•	•
237	Dry cleaning plant or commercial laundry	*												•	•
238	Feedlot														S
239	Food product manufacturing													•	•
240															
241	Foundry casting, nonferrous, enclosed building													S	•
242	Frozen food locker													•	•
243	Fur goods manufacturing, but no tanning, dyeing or slaughtering													•	•
244	Furniture manufacture	*												•	•
245	Furniture restoration										S		S	•	•
246	Glass products from previously manufactured glass													•	•
247	Heating and air conditioning sales and service										•		•	•	•
248	Heat processing													•	•
249	Housing prefabrication													•	•
250	Ice company sales, wholesale	*												•	•
251	Instrument and meter manufacturing	*												•	•
252	Jewelry and watch manufacturing										•		•	•	•
253	Landfill, commercial														S
254	Landscaping service										S			•	•
255	Leather goods fabrication										•		•	•	•
256	Light fabrication and assembly													•	•
257	Light manufacturing	*												•	•
258	Light sheet metal products													•	•
259	Machine shop													•	•
260	Metal fabrication													•	•
261	Monument and headstone sales													•	•
262	Moving company												•	•	•
263	Newspaper printing												•	•	•
264	Office showroom	*											•	•	•
265	Official goods manufacturing													•	•
266	Overnight delivery and service center												•	•	•
267	Paper and chemical supply												•	•	•
268	Paper products manufacturing														•
269	Perfume toilet soaps, enclosed building													•	•
270	Plaster shop													•	•
271	Plastic products manufacturing, but not raw materials processing														•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
272			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
273	Plumbing shop and related services													•	•
274	Portable building sales	*												•	•
275	Private utility service yard													S	•
276	Research and scientific laboratory	*											•	•	•
277	Restaurant, incidental to main use	*									•	•	•	•	•
278	Restaurant supply													•	•
279	Rock quarry, sand, gravel or earth excavation														S
280	Roofing and siding supply										S			•	•
281	Self-service or miniwarehouse	*											•	•	•
282	Soil testing laboratory				S									•	•
283	Sporting goods manufacturing	*												•	•
284	Tire retreading														•
285	Tool manufacturer													•	•
286	Welding shop or company													•	•
287	Wholesale beauty supply												•	•	•
288	Wholesale distribution center	*											•	•	•
289	Wholesale food distribution	*												•	•
290	Wholesale sales	*											•	•	•
291	Wrecking yard, auto salvage, junkyard or outside reclamation														S
292	8. Industrial Processing Uses														
293	High risk or hazardous industrial manufacturing, not wholly enclosed within a building														S
294	High risk or hazardous industrial manufacturing, wholly enclosed within a building														S
295	Low risk industrial manufacturing, not wholly enclosed within a building														S
296	Low risk industrial manufacturing, wholly enclosed within a building													S	S
297															

SF-1 Overlay District



City Street Labels
- City Street Labels

City Streets
- City Streets
- Private Drives

Local Road Labels
- Local Road Labels

Local Roads
- State Hwy
- FM or RR Road
- County Road
- Other City Streets
- Private Drives

Extra-territorial Jurisdiction
- Extra-territorial Jurisdiction

City Limits
- City Limits

Rivers
- Rivers

LCAD Tax Parcels
- Parcels

Data displayed were gathered by the City of Llano for municipal purposes. No guarantee is made regarding suitability for any other use or purpose.

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07/25/12 15:27

EXHIBIT "C"

City of Llano
Regular Called City Council Minutes
June 17, 2013 – 5:30 p.m.

A. CALL TO ORDER
Mayor Virdell called the City Council meeting to order at 5:37 p.m. Those in attendance were Mayor Pro-Tem Hazel, Alderman Hopson, Alderwoman Puryear, Alderman Keller, and Alderman Miiller;

B. PLEDGE OF ALLEGIANCE

C. INVOCATION – Pastor Gretal Morgan

D. PUBLIC COMMENTS – Non Agenda Items
No public comments

E. PRESENTATION

1. Jonathan Blackwell from the company LEED AP to make a presentation to the Mayor and Council regarding the electronic meter reading equipment.
   Brenton Lewis, City Manager
   Jonathan Blackwell with Aqua Metrics made a presentation to the Mayor and Council regarding the electronic meter reading equipment. Some of the highlights of the presentation include but were not limited to the accuracy of the meter reading equipment; utilizing existing towers. The project scope would replace all existing residential and commercial water meters and replace with Sensus iPERL and Omni water meters. Replacing all existing residential and commercial electric meters with Sensus AMI electric meters. Every meter will be connected to the Sensus FlexNet system enabling the City of Llano to read all meters remotely. Installation of all meters is included in scope; performed by a sister company Utiliuse. Installation also includes data integration into billing system and access to Utilicenter for daily project progress tracking. Logic Customer Connect is included, plus 5 years of annual support. This would be approximately a 7-12 month project schedule. Other additional benefits would be real-time monitoring of all water and electric meters. Alerts of tampering and other issues delivered to city daily; frequency controlled by city; water conservation capabilities; water rates not having to be adjusted, future water loss costs controlled; and efficiency warranty.

F. CONSENT AGENDA ITEMS All consent agenda items listed are considered to be routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items unless a Council member so requests, in which event the item will be removed from the Consent Agenda and considered in its normal sequence on the Agenda.

1. Approval of the regular called City Council meeting minutes as written, dated June 3, 2013.
   Mayor Mike Virdell/Toni Milam, City Secretary

2. Approval of the special called City Council meeting minutes as written, dated June 10, 2013.
   Mayor Mike Virdell/Toni Milam, City Secretary

3. Approval on the request from the Llano County Library System Foundation for temporary street closure on Haynie Street for a street dance to be held on June 21, 2013.

Mayor Mike Virdell/Toni Milam, City Secretary

Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to approve the consent agenda as presented. With there being no discussion, motion approved.

G. PUBLIC HEARING

Mayor Videll opened the public hearing at 5:58 p.m.

1. The City of Llano City Council will hold a public hearing on Monday, June 17, 2013 at 5:30 p.m. in City Hall Council Chambers located at 301 W. Main Street to receive written and/or oral comments from the public, regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 overlay district.

Marc Sewell, resident of Llano spoke during the public hearing portion of the meeting. Mr. Sewell stated there were four issues: technical errors, legal violations, no respect for property owners, and concerns regarding zoning overhaul. He recommended not approving these changes except for the beauty salon. Suggested finishing the comprehensive plan. Sherry Simpson, resident of Llano also spoke stating she isn't ready to see a palm reading use in the overlay district. With there being no further public comments, Mayor Virdell closed the public hearing at 6:15 p.m.

H. REGULAR AGENDA ITEMS

1. Discuss and consider action on the approval of Ordinance 1247 regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 Overlay District, and making recommendations to the City Council.

Mayor Mike Virdell/Brenton Lewis, City Manager

Motion by Alderman Bryan Miiller, with a second by Mayor Pro-Tem Hazel to approve Ordinance 1247 amending the text and defining the following uses specifically in the SF-1 Overlay District: Barber/beauty salon, home occupation, accountant or bookkeeping office, architect office, engineering office, insurance office, office general professional, palm reading florist, gunsmith, and soil testing laboratory. With there being no further discussion, motion was approved.

2. Discussion and update on the "Llano Red Top Jail".

Mayor Mike Virdell/Brenton Lewis, City Manager

Sherri Zoch, Friends of the Llano Red Top Jail reported to Council that due to the contractor not being able to get bonding to perform the work. Ms. Zoch expressed a concern for future projects using local contractors not being able to secure the required bonding. She also advised the Council the Friends of the Llano Red Top Jail 501C3 was revoked by the IRS and they are currently working on getting their 501C3 status reinstated. She requested the City deed both the building and the property over to the Friends of the Llano Red Top Jail. No formal action taken.

3. Discuss and consider action on the award of the bid on the City of Llano Disaster Relief Project Raw Water Aeration System Improvement Project.

Mayor Mike Virdell/Brenton Lewis, City Manager

John Ferguson, resident spoke regarding the agenda item, and provided a list of questions proposed to Council. Mr. Ferguson inquired about the sediment, total cost per year, and any other purification, and if there were any other hidden costs. Marc Sewell asked what the budget was for this project, and stated there were incomplete business plans submitted by Staff.

Dan Hejl, with Hejl, Lee & Associates spoke briefly regarding the Disaster Relief Project Raw Water Aeration System Improvement project. After a lengthy presentation and discussion between Mr. Hejl and Council, questions were answered as was the cost of the project.

Motion by Mayor Pro-Tem Hazel, with a second by Alderman Miiller to award the bid Excel Construction contingent upon a confirmation from the State on the approved contractor and subject to the approval of the change order number. With there being no further discussion, motion was approved.

4. Discuss and consider action regarding a Request for Proposal on audit services for FY12-13.

Mayor Mike Virdell/Brenton Lewis, City Manager

Sherry Simpson, resident, stated Neffendorf, the current auditor was a good auditor, however, during the last audit, they were asked to provide specific information and didn't. Motion by Alderman Keller, with a second by Alderwoman Puryear to direct Staff to send a Request for Proposal for audit services for the FY12-13. With there being no further discussion, motion was approved.

5. Discuss and consider action regarding a business license.

Mayor Mike Virdell/Brenton Lewis, City Manager

Marc Sewell spoke regarding the business license and saw no benefit to business owners. Vivian Koerner spoke and agreed a business license is needed and had that been in place she may not have incurred issues when opening her business. Doris Messer stated it could be a process issue. Sherry Simpson agreed with Ms. Messer.
No formal action taken.

6. Discuss and consider action on the approval of Ordinance 1246 regarding the creation of a Recreation Board, and the proposed by-laws.

Mayor Mike Virdell/Brenton Lewis, City Manager

Jessie Blackmon with the Llano Parks Project reported the group has filed for a 501C3 and is ready to move forward. Mayor Pro-Tem Hazel complimented the group for taking action themselves and stepping up.
Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to approve Ordinance 1246 creating the Recreation Board and proposed by-laws. With there being no further discussion, motion was approved.

7. Discuss and consider action on authorizing the hiring of a Permit Clerk in the Public Works Department.

Mayor Mike Virdell/Brenton Lewis, City Manager

Marc Sewell spoke regarding this agenda item. He state the hiring of a permit clerk is just the opposite of the direction the City needs to go. Don't need GED's, but rather needs more skill, and there was no salary in the job description, suggested hiring a temporary employee and to wait until after the budget process. Gail Lang spoke and stated she was offended by Mr. Sewell's comments about GED's being unskilled. Mr. Sewell did apologize for the comment. Sherry Simpson spoke and stated whenever the City had a Code Enforcement Officer, he worked well with the citizens. Alderwoman Puryear stated that with the previous Code Enforcement Officer, there were also complaints.
Motion by Alderman Keller, with a second by Mayor Pro-Tem Hazel to table this item until the budget hearings. With there being no further discussion, motion was approved.

8. Discuss and consider action on setting dates for the upcoming FY13-14 budget workshop sessions.

Mayor Mike Virdell/Brenton Lewis, City Manager

Discussion was held regarding the upcoming budget workshop sessions.
Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to direct Staff to set the budget schedules. With there being no further discussion, motion was approved.

I. ADJOURNMENT 7:50 p.m.

Mayor Mike Virdell

CITY OF LLANO
LLANO COUNTY, TEXAS

Toni Milam, City Secretary

892 S.W.2d 56
Court of Appeals of Texas,
Houston (1st Dist.).

L.T. BRADT and L.T. Bradt, P.C., Appellants,
v.
W. David WEST, Judy Sebek, Earle Lilly, William J. Delmore III, Piro & Lilly, P.C., Joel Nass, Foundation for Depelchin Children's Center, Baylor College of Medicine, Ernest Kendrick, M.D., Michael D. Cox, Jean Guez, Barbara Taylor Chase Hopkins, Luisa Maria Acevedo Lohner, Ann M. Hodges, Edward J. Hennessy, Hennessy & Zito, Donald B. McFall, McFall & Sartwelle, P.C., Alan Magenheim, Hirsch, Glover, Robinson & Sheiness, P.C., William R. Pakalka, Nancy Locke, Fulbright & Jaworski, Donald M. Hudgins, Hudgins, Hudgins & Warrick, P.C., James H. Barker, Giessel, Stone, Barker & Lyman, P.C., Aetna Casualty & Surety Company, The Automobile Insurance Company of Hartford, Connecticut, Texas Lawyers Insurance Exchange, Sheryl Mulliken Fike, R. Edward Perkins, John Kapacinskas, Wade Quinn, Matt Shafer, Dean Barth, American Home Assurance Company, Lexington Insurance Company, and American Psychiatric Association, Appellees.

No. 01–94–00284–CV. | Dec. 22, 1994. | Rehearing Denied Dec. 22, 1994.

Attorneys who had represented former husband in divorce action sued opposing counsel and others for conduct relating to his being held in contempt in course of divorce and related actions. The 240th District Court, Fort Bend County, Thomas Culver, J., granted summary judgment against attorney on all grounds, and appeal was taken. The Court of Appeals, Frank C. Price, J. (assigned), held that: (1) judges and prosecutors involved in divorce action were entitled to immunity from attorney's claims relating to his being held in contempt; (2) attorney lacked cause of action against opposing counsel for their conduct in representing clients; and (3) damages for bringing frivolous appeal were warranted.

Affirmed.

Attorneys and Law Firms

***60** L.T.“ Butch” Bradt, Houston, for appellants.

William J. Delmore, III, Donald M. Hudgins, Alfred C. Koenig, Wayne R. Luck, Houston, Dan Morales, Jorge Vega, Toni Hunter, Michelle F. Wakefield, Austin, Michael Y. McCormick, Paul E. Stallings, Larry R. Veselka, Harold A. Odom, III, Jeffrey R. Parsons, David A. Clark, Keith A. Rowley, Houston, G. Byron Sims, for appellees.

Before DUGGAN, HUTSON–DUNN and PRICE, JJ.

Opinion

OPINION

PRICE, Justice (Assigned). [*]

“The worst of law is that one suit breeds twenty.”

—George Herbert, *Jacula Prudentum*

An attorney and his professional corporation appeal summary judgments granted to the defendants in a multi-cause of action lawsuit. In an earlier opinion, we affirmed the trial court's judgment. The appellants moved for rehearing. We hereby overrule the appellants' motion for rehearing, but withdraw our earlier opinion and issue this one in its stead. *Nothing of substance has been changed from our original opinion* ; this one is issued in its place *only* to address some arguments made by the appellants in their motion for rehearing.

I. The Facts

In 1986, spouses Mark Metzger and Judy Metzger (now Sebek) separated. In October of that year, Mr. Metzger (hereinafter “Metzger”) filed for divorce. Out of that seemingly innocuous lawsuit, which ultimately settled, sprung four new lawsuits of considerable proportions.

***61 1. Lawsuit number one: Metzger's first federal lawsuit**

On July 13, 1989, Metzger brought the first lawsuit, filing in federal court. He pursued claims against several defendants, complaining of various acts and omissions that allegedly occurred during the period in which he and Judy Sebek were going through their divorce.

Metzger alleged that the defendants were all participants in a "child abuse enterprise." According to Metzger's pleadings, the enterprise worked as follows. In order to squeeze money from Metzger in a settlement of the divorce action, Earle Lilly, Joel A. Nass, and Piro & Lilly, P.C.—all of whom represented Judy Sebek—decided to make false allegations that Metzger sexually abused one of the couple's three children. In furtherance of the scheme, Sebek claimed that the couple's middle child (of three) told her that Metzger had abused him. The accusation was then reported to mental health care professionals Jean Guez (a psychologist appointed to the case by the judge) and Barbara Taylor, [1] who confirmed the child's accusations. Guez then threatened that she would recommend to the judge that the child be hospitalized, and that Metzger's visitation rights be all but extinguished, if Metzger did not accept a less favorable settlement than he ordinarily would have accepted. Metzger capitulated to the threat. As part of the settlement, the child was put in Depelchin Children's Center, where Ernest Kendrick (from Baylor College of Medicine) headed the child's treatment team. Also on the treatment team were Luisa Maria Acevedo Lohner and Ann M. Hodges. By installing the issue of child abuse in the divorce action, everyone made money from Metzger's misfortune: Judy Sebek's lawyers leveraged a better settlement for Judy, which made money for her and for her attorneys, too, in the form of attorney's fees. All of the health care professionals who evaluated and/or treated the child for the alleged sexual abuse also profited, because Metzger paid, at least in part, for all of their services through the settlement. As indicated above, this description of the alleged "child abuse enterprise" is only from Metzger's pleadings in lawsuit number one, not from any evidence.

Allegedly as a collateral effect of the "child abuse enterprise's" success, a grand jury looked into Metzger's alleged sexual abuse of the child. Michael D. Cox, another health care professional, gave testimony favorable to Metzger before the grand jury. Nevertheless, Metzger was indicted. [2]

Metzger sued Judy Sebek, Earle Lilly, Joel A. Nass, Piro & Lilly, P.C., Jean Guez, Barbara Taylor, Depelchin Children's Center, Ernest Kendrick, Luisa Maria Acevedo Lohner, Ann M. Hodges, and Baylor College of Medicine. He also named other defendants who were eventually dismissed, and, surprisingly, Michael D. Cox, who apparently incurred Metzger's wrath because he told the prosecutor, during a skilled cross-examination before the grand jury during which he was informed that the child had picked Metzger from a photospread when asked to identify the man who had abused him, that he "believe[d] kids." [3]

On August 16, 1990, the federal court dismissed Metzger's case on the ground that "the Court abstains from exercising jurisdiction even if, arguably, that jurisdiction exists."

2. Lawsuit number two: Metzger's state lawsuit

A. The substance of Metzger's lawsuit

Metzger then brought suit in state court, suing the same defendants and making the same allegations. At the time of trial in state court, Metzger's petition asserted the following causes of action:

1. civil conspiracy;

***62** 2. civil conspiracy to extort from and defraud him of property and liberty interests protected by the Texas and United States Constitutions;

3. malicious prosecution;

4. "deprivation of civil rights based upon malicious prosecution";

5. intentional infliction of emotional distress;

6. medical negligence (asserted only against Depelchin, Baylor, Kendrick, Lohner, Cox, and Taylor);

7. negligent infliction of emotional distress (asserted only against Depelchin, Baylor, Kendrick, Lohner, Cox, and Taylor); and

8. civil RICO (Racketeer Influenced and Corrupt Organizations Act) [4].

Aetna Casualty & Surety Company and The Automobile Insurance Company of Hartford, Connecticut, retained Hennessy & Zito to defend Judy Sebek. Texas Lawyers Insurance Exchange retained McFall & Sartwelle to defend Earle Lilly, Joel A. Nass, and Piro & Lilly, P.C. Lexington Insurance Company retained Hirsch, Robinson, Sheiness & Glover to defend Depelchin Children's Center. Lexington Insurance Company and Baylor College of Medicine, which is partially self-insured, retained Fulbright & Jaworski to defend Baylor College of Medicine, Ernest Kendrick, Luisa Maria Acevedo Lohner, Ann M. Hodges, and the particularly unfortunate Michael D. Cox. The American Psychiatric

Association paid for part of Luisa Maria Acevedo Lohner's defense. American Home Assurance Company retained Hudgins, Hudgins & Warrick to defend Jean Guez, and Giessel, Stone, Barker & Lyman to defend Barbara Taylor Chase Hopkins.

At trial, L.T. "Butch" Bradt and Joe Alfred Izen, Jr., represented Metzger; Edward J. Hennessy of Hennessy & Zito represented Judy Sebek; Donald M. Hudgins and Sheryl Mulliken Fike of Hudgins, Hudgins & Warrick represented Jean Guez; James H. Barker of Giessel, Stone, Barker & Lyman represented Barbara Taylor Chase Hopkins; Alan Magenheim of Hirsch, Robinson, Sheiness & Glover represented Depelchin Children's Center; Donald B. McFall and R. Edward Perkins of McFall & Sartwelle represented Earle Lilly, Joel A. Nass, and Piro & Lilly, P.C.; and William R. Pakalka and Nancy J. Locke of Fulbright & Jaworski represented Baylor College of Medicine, Ernest Kendrick, Luisa Maria Acevedo Lohner, Ann M. Hodges, and Michael D. Cox. The Honorable W. David West presided. Attorneys John Kapacinskas (of Fulbright & Jaworski), Wade Quinn (of Giessel, Stone, Barker & Lyman), Mat Shafer (of Hirsch, Robinson, Sheiness & Glover), and Dean Barth (of Hennessy & Zito) played minor defense roles in the proceedings.

Trial lasted over a month. During the course of the trial, Judge West twice held Bradt in contempt. One of the contempt charges is the subject of this appeal, and is discussed in detail directly below.

B. The contempt of court and the verdict

Before trial, the defendants filed a joint motion in limine. In relevant part, the motion asked Judge West

> to instruct plaintiff and his counsel not to mention within the hearing of any member of the Jury Panel ... by the interrogation of witnesses ... or otherwise any of the following matters, either directly or indirectly, nor refer to, nor interrogate concerning, nor otherwise apprise the Jury of any of the following matters until each such matter has been called to the Court's attention out of the presence and hearing of the Jury and a ruling had by the Court as to the competency of each matter outside of the presence and hearing of any members of the Jury or Jury Panel. It is further moved that Plaintiff and his counsel be instructed to apprise each of plaintiff's witnesses of the contents of this Motion, to the end that such Motion not be inadvertently violated by a witness....
>
> . . . . .
>
> That the Court enter an order precluding plaintiff, his attorneys and witnesses from mentioning or offering any evidence or ***63** testimony that plaintiff has offered to, taken or passed a lie detector test....

Judge West granted the defendants' motion in limine.

One of Metzger's witnesses at trial was Marie Munier, the prosecutor who had presented the case against him to the grand jury. When Bradt was examining Munier regarding the "relevant records" available to her at the time she presented the case to the grand jury, the following occurred:

> Q. Okay. So that would not be a separate entry?
>
> A. No. I had information—and I don't know whether I had the actual record or not about his negative polygraph. They were in the papers that Mr. Metzger submitted. So I would say that some of his information was relevant also.
>
> Q. Okay. Negative polygraph.

The judge instructed the jury to disregard the evidence of the negative polygraph. He also stated that he had decided to exclude the evidence of the negative polygraph and that the evidence "has no bearing on the case."

Shortly thereafter, in the same examination, Bradt led Munier through a summary of the "relevant records." As he asked Munier about them one by one, Bradt made a list of the records on a large pad for the jury to view. Despite the judge's previous words, the following occurred during this part of the testimony:

> Q. So you have the CPS records—
>
> A. Uh-huh.
>
> Q. —the offense report from the Houston Police Department—
>
> A. Uh-huh.
>
> Q. —you had Barbara Taylor's two letters of October 6th, 1987—
>
> A. (Nods.)
>
> Q. —which are contained in Plaintiff's Exhibit No. 19; you have [nine other documents referred to individually by

> Bradt]; and then you had a negative polygraph, and that is what you consider to be the relevant record available to—
>
> Mr. Barker: Judge—
>
> Mr. Magenheim: Excuse me, Your Honor—
>
> Mr. Barker: —how can we say it? How can we say it again? He wants to write it down. He wants to say it after the Court has instructed this jury to disregard—this is the most outrageous violation of the Court's orders ... How do we get a fair trial?

This was followed by several more objections and a reproach issued by Judge West to Bradt.

Bradt did not call the matter of the negative polygraph to Judge West's attention and seek a ruling regarding the competency of the evidence before his first mention of the negative polygraph. Before Bradt's second mention of the negative polygraph, the judge had already ruled out the evidence; after Bradt's first mention of the evidence, the judge instructed the jury to disregard the evidence of the negative polygraph, and also stated that he had decided to exclude the evidence and that the evidence "has no bearing on the case." Further, at a hearing on the contempt issue, Munier testified that she was never told about the motion in limine:

> Q. (Mr. Barker): Ms. Munier, you were called as a witness in this case by the plaintiff, were you not?
>
> A. That's correct.
>
> Q. At any time before you were called to the stand in this case, were you ever apprised by any attorney representing the plaintiff about the existence of the Court's rulings on a motion in limine in this case?
>
> A. No, I was not.
>
> Q. I hand to you ... a file copy of defendants' joint motion in limine. Would you glance at that document and see if you were ever aware that that document had been filed or those motions had been made to the Court?
>
> A. No, I've never seen this document or been told of its existence.
>
> . . . . .
>
> A. I had no knowledge of the limine regarding the polygraph.

The defense attorneys moved Judge West to hold Bradt in contempt. On April 10, ***64** 1992, the judge did so. The contempt order imposes punishment of (1) a $500 fine to be paid on April 13, 1992, and (2) confinement for 30 days. The order states that the confinement portion of the punishment is "suspended until the conclusion of the evidence" in the trial. Judge West further ruled that, at the conclusion of the evidence, he would consider whether to suspend the confinement portion of the contempt order again. Bradt timely paid the fine.

After hearing the rest of Metzger's evidence, Judge West granted a directed verdict to all defendants on all applicable causes of action. Judge West then sanctioned Metzger and his trial attorneys, Bradt and Izen. The judge signed a final judgment on May 21, 1992.

On June 16, 1992, Bradt filed a motion styled "Motion for New Trial And Motion To Recuse Judge West From Ruling On The Motion For New Trial." The motion states that "the judge should recuse himself from any further proceedings in this case, including ruling on the motion for new trial." On July 1, 1992, Judge West signed an order stating that he refused to recuse himself, and asked the presiding judge of his administrative judicial region to assign another judge to hear the motion to recuse.

On August 18, 1992, Judge West signed an order directing Bradt to show cause why he should not be held in contempt for his conduct on April 10 concerning the negative polygraph. Bradt moved for the determination of guilt or innocence of contempt by a judge other than the one who had held him in contempt. *See* TEX. GOV'T CODE ANN. § 21.002(d) (Vernon Supp.1994). The presiding judge of the administrative judicial region assigned another judge to determine Bradt's guilt or innocence. *See id.* The assigned judge dismissed the contempt charges that resulted from Bradt's conduct on April 10. Bradt was reimbursed the fine he had paid. He was never confined.

C. The appeal

Metzger, Bradt, and Izen appealed. We affirmed the directed verdict, affirmed the imposition of sanctions against Metzger but reversed and remanded for a new determination regarding the amount of sanctions, reversed and remanded the sanctions against Bradt, reversed the sanctions against Izen and rendered judgment that he not be sanctioned, and dismissed the portion of the appeal in which Bradt complained of being

held in contempt, holding that we had no jurisdiction in the matter. *See Metzger v. Sebek*, 892 S.W.2d 20 (Tex.App.—Houston [1st Dist.], 1994, n.w.h.). We affirmed the directed verdict on all of Metzger's claims because (1) some were not viable to begin with,[5] and (2) there was no evidence to support the ones that were viable. *See id.*, at 41–48. In dismissing for want of jurisdiction the portion of the appeal in which Bradt complained of being held in contempt, we relied on a long line of Texas cases that holds that decisions in contempt proceedings are not appealable. *See id.*, at 54 (citing *Ex parte Williams*, 690 S.W.2d 243 n. 1 (Tex.1985); *Ex parte Cardwell*, 416 S.W.2d 382, 384 (Tex.1967); *Mendez v. Attorney Gen. of Texas*, 761 S.W.2d 519, 521 (Tex.App.—Corpus Christi 1988, no writ); *Smith v. Holder*, 756 S.W.2d 9, 10–11 (Tex.App.—El Paso 1988, no writ); *Gensco, Inc. v. Thomas*, 609 S.W.2d 650, 651 (Tex.Civ.App.—San Antonio 1980, no writ); *Anderson v. Burleson*, 583 S.W.2d 467 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ)).

3. Lawsuit number three: Metzger returns to federal court

Soon after Judge West held Bradt in contempt, Metzger filed a civil rights action in federal court against Sebek, Judge West, the attorneys for the defendants in lawsuit number two, the court reporter who transcribed the trial of lawsuit number two, and William Delmore III, the prosecutor who prosecuted the contempt charge. The federal court dismissed the case and ordered Metzger to pay the attorney's fees and costs incurred by West and Delmore.

***65 4. Lawsuit number four: Bradt's lawsuit**

The fourth lawsuit to emerge from the divorce case is the one at issue in this appeal. On October 8, 1993, Bradt sued the appellees for alleged conduct relating to his being held in contempt on April 10, 1992. He pled the following causes of action: (1) conspiracy to maliciously prosecute; (2) malicious prosecution; (3) intentional infliction of emotional distress; (4) tortious interference with contractual relations; and (5) "liab[ility] ... for actual damages ... under the Texas Torts [sic] Claims Act."[6] Bradt asserted the latter cause of action against only appellees West and Delmore.

The trial court granted summary judgment to all appellees on all applicable causes of action, the last such motion being granted on January 24, 1994. None of the summary judgment orders specify a particular ground on which summary judgment is granted.

II. The Standard of Review

One of the purposes of summary judgment is to eliminate patently unmeritorious claims. *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (1952). A defendant who seeks summary judgment must prove conclusively that the plaintiff cannot prevail. *Griffin v. Rowden*, 654 S.W.2d 435, 436 (Tex.1983); *Jaime v. St. Joseph Hosp. Found.*, 853 S.W.2d 604, 607 (Tex.App.—Houston [1st Dist.] 1993, no writ). Below, we address three grounds on which summary judgment for a defendant is proper, and set out the guidelines for our review of a summary judgment.

1. The negation of an element of the plaintiff's cause of action

[1] **[2]** A defendant can prove conclusively that the plaintiff cannot prevail by showing that at least one element of the plaintiff's cause of action has been conclusively established against him. *Gray v. Bertrand*, 723 S.W.2d 957, 958 (Tex.1987); *Jaime*, 853 S.W.2d at 607. A matter is "conclusively established" for summary judgment purposes if ordinary minds cannot differ regarding the conclusion to be drawn from the evidence. *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 657–58 (Tex.App.—Dallas 1992, no writ) (citing *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex.1982)).

[3] **[4]** When the defendant has produced competent evidence negating a necessary element of the plaintiff's cause of action, the plaintiff, to avoid summary judgment, must then introduce evidence that raises a fact issue on the element the defendant is trying to negate. *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107–108 (Tex.1984); *Jaime*, 853 S.W.2d at 607. If the plaintiff fails to introduce such evidence, i.e., if the summary judgment evidence establishes that there is no genuine issue of material fact, then summary judgment is proper. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex.1993); *Enchanted Estates Community Ass'n v. Timberlake Improvement Dist.*, 832 S.W.2d 800, 801 (Tex.App.—Houston [1st Dist.] 1992, no writ).

2. The lack of a cause of action

[5] **[6]** If the plaintiff's petition affirmatively demonstrates that no cause of action exists or that the plaintiff's recovery is barred, no opportunity to amend is necessary, and summary judgment or dismissal is proper. *Peek v. Equipment Serv.*

Co., 779 S.W.2d 802, 805 (Tex.1989). Summary judgment is proper where the plaintiff's allegations cannot constitute a cause of action as a matter of law. *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 116 (Tex.App.—Dallas 1991, no writ) (citing *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538 (Tex.App.—Houston [1st Dist.] 1988, writ denied)).

3. Proof of an affirmative defense

[7] **[8]** **[9]** A party that relies on an affirmative defense must specifically plead the defense, and, when the rules of civil procedure require, must verify the pleading by affidavit. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex.1991). The properly pled affirmative defense, when supported by uncontroverted summary judgment evidence, ***66** may serve as a basis for summary judgment. *Id.; Albright v. Texas Dept. of Human Servs.*, 859 S.W.2d 575, 578 (Tex.App.—Houston [1st Dist] 1993, no writ). Even an unpled affirmative defense may serve as a basis for summary judgment when it is raised in the motion for summary judgment and the opposing party does not object to the lack of pleading either in a written response to the motion for summary judgment or before the rendition of judgment. *Roark*, 813 S.W.2d at 494.

[10] Whether the affirmative defense is pled or unpled, the defendant must conclusively establish all of the essential elements of the affirmative defense to be entitled to summary judgment. *Roark*, 813 S.W.2d at 495; *Rose v. Baker & Botts*, 816 S.W.2d 805, 809 (Tex.App.—Houston [1st Dist.] 1991, writ denied). If the defendant does so, the plaintiff, to avoid summary judgment, must then introduce evidence that raises a fact issue on some element of the defendant's affirmative defense. *Albright*, 859 S.W.2d at 578; *Poncar v. City of Mission*, 797 S.W.2d 236, 240 (Tex.App.—Corpus Christi 1990, no writ).

4. Appellate review of a summary judgment

[11] **[12]** **[13]** **[14]** On appellate review of a summary judgment, we must take all evidence favorable to the nonmovant as true, indulge every reasonable inference in favor of the nonmovant, and resolve all doubts in favor of the nonmovant. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex.1985); *Jaime*, 853 S.W.2d at 607. We will not affirm a summary judgment on a ground that was not specifically presented in the motion for summary judgment. *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex.1992); *Bill De La Garza & Assocs., P.C. v. Dean & Ongert*, 851 S.W.2d 371, 373 (Tex.App.—Houston [1st Dist.] 1993, no writ). Nor will we reverse a summary judgment on a ground that was not expressly presented to the trial court by a written motion, answer, or other response to the motion for summary judgment. *Travis*, 830 S.W.2d at 99–100; *Universal Savings Ass'n v. Killeen Savings & Loan Ass'n*, 757 S.W.2d 72, 75 (Tex.App.—Houston [1st Dist.] 1988, no writ); *see Manoogian v. Lake Forest Corp.*, 652 S.W.2d 816, 819 (Tex.App.—Austin 1983, writ ref'd n.r.e.). Further, we will not reverse a summary judgment on a ground that was expressly presented to the trial court by a written motion, answer, or other response to the motion for summary judgment, but that was subsequently abandoned by the nonmovant. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). When the trial court's summary judgment order does not specify the ground or grounds on which summary judgment is granted, we will affirm the summary judgment if any of the grounds stated in the motion are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989); *Jaime*, 853 S.W.2d at 608.

III. The Summary Judgment in Favor of West

In their fourth point of error, the appellants contend that the trial court erred in granting summary judgment to Judge West. West moved for summary judgment on the ground of absolute immunity. [7]

According to the appellants, "West was not sued for his conduct on April 10, 1992, wherein he signed an order of contempt against L.T. Bradt. West was sued for his conduct after he refused to recuse himself in [lawsuit number two]...." Specifically, the appellants complain of "the ex parte contact with Nancy Locke and the signing of a show cause order on August 18, 1992—when [West] was devoid of any jurisdiction to act in [lawsuit number two]." We must determine whether West has absolute judicial immunity from being sued for the acts of which the appellants complain in their pleadings.

[15] **[16]** The judges of Texas courts have absolute immunity for their judicial acts "unless such acts fall clearly outside the judge's subject-matter jurisdiction." *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957–58 (Tex.App.—Dallas 1985, no writ); *see* ***67** *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir.1985), *cert. denied*, 474 U.S. 1101,

106 S.Ct. 883, 88 L.Ed.2d 918 (1986). Thus, in determining whether absolute judicial immunity applies, we face a two-part inquiry: First, were the acts of which the appellants complain "judicial" ones? Second, were those acts "clearly outside" the judge's jurisdiction?

Before turning to the first question, we note that no improper ex parte contacts occurred in lawsuit number two, a conclusion we also reached in *Metzger v. Sebek*. *See* 892 S.W.2d at 50. Here, the same assertion is made under a record that consists in part of different materials. This record, too, fails to show any improper ex parte contacts. Thus, we are left with the signing of the show-cause order on August 18, 1992.

1. Was West's act a "judicial" one?

[17] The factors we consider in determining whether a judge's act is a "judicial" one are (1) whether the act complained of is one normally performed by a judge, (2) whether the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) whether the controversy centered around a case pending before the judge, and (4) whether the act arose out of a visit to the judge in his judicial capacity. *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir.1993) (citing *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir.1972)); *Adams*, 764 F.2d at 297 (also citing *McAlester*, 469 F.2d at 1282). These factors should be broadly construed in favor of immunity. *Malina*, 994 F.2d at 1124; *Adams*, 764 F.2d at 297. Not all of the factors must be met for immunity to exist. *Malina*, 994 F.2d at 1124; *Harris v. Deveaux*, 780 F.2d 911, 915 (11th Cir.1986); *Adams*, 764 F.2d at 297. In some circumstances, immunity may exist even if three of the four factors are not met. *Adams*, 764 F.2d at 297 n. 2. Nor are the factors to be given equal weight in all cases; rather, they should be weighted according to the facts of the particular case. *Id.* at 297.

[18] *Adams* is on point in regard to the first factor. The issuance of a show-cause order directing someone to show cause why he should not be held in contempt for his conduct is an act normally performed by a judge. 764 F.2d at 297, 298. The second factor is unimportant here, where the act complained of is the signing of an order. Where Judge West actually was when he signed the order is irrelevant; an order signed by a judge somewhere other than in his courtroom or chambers is as valid as it would have been had he signed it at the bench.

The third and fourth factors are easily met on this record. The controversy clearly centered around a case pending before the judge (lawsuit number two). The act arose out of a "visit" to the judge in his judicial capacity: the judge signed the show-cause order (the signing is the "act") based on Bradt's conduct during the trial of lawsuit number two (in which Bradt, in representing the plaintiff, was before the judge—thus "visiting" him—who was acting in his judicial capacity in presiding over the trial). [8]

We answer the first question in the affirmative. West's act was a judicial one.

2. Was West's act "clearly outside" his jurisdiction?

The appellants argue that when West signed the show-cause order on August 18, 1992, "West was without any jurisdiction to act...." According to the appellants, West lacked jurisdiction because, on June 16, 1992, well before he signed the show-cause order, he had been presented with a timely motion to recuse in lawsuit number two, and so should have either recused himself or asked the presiding judge of the administrative judicial district to assign a judge to hear the motion. This argument misses the point.

The term "jurisdiction" has a connotation in judicial immunity analyses that is entirely different from its usual meaning. ***68** *Adams*, 764 F.2d at 298. "Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes." *Malina*, 994 F.2d at 1125; *Adams*, 764 F.2d at 298; *accord Harris*, 780 F.2d at 916 (holding that a judge acts in the "clear absence of all jurisdiction" only if the judge "completely lacks subject matter jurisdiction"). Furthermore, "the term 'jurisdiction' is to be broadly construed to effectuate the policies of guaranteeing a disinterested and independent judicial decision-making process." *Holloway*, 765 F.2d at 523; *accord Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978).

[19] **[20]** In determining whether an act was clearly outside a judge's jurisdiction for judicial immunity purposes, the focus is not on whether the judge's specific act was proper or improper, but on whether the judge had the jurisdiction necessary to perform an act of that kind in the case. *See Mireles v. Waco*, 502 U.S. 9, 13, 112 S.Ct. 286, 289, 116 L.Ed.2d 9 (1991) (where judge was alleged to have authorized and ratified police officers' use of excessive force in bringing recalcitrant attorney to judge's courtroom, and thus to have acted in excess of his authority, his alleged actions were still not committed in the absence of jurisdiction where he

had jurisdiction to secure attorney's presence before him); *Malina*, 994 F.2d at 1124 (because judge had power to cite for contempt and to sentence, where judge cited motorist for contempt and sentenced him to jail, these acts were within his jurisdiction, even though judge had acted improperly in stopping the motorist himself, privately using an officer to unofficially "summon" the motorist to court, and charging the motorist himself); *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C.Cir.1993) (judge's prohibiting plaintiff from filing any new civil actions pro se before paying outstanding sanctions was "well within" judge's "jurisdiction" as term is used for judicial immunity test); *Holloway*, 765 F.2d at 523 (where judge was alleged to have committed many illegal acts from the bench, but there was "no question that he was generally empowered to conduct proceedings of the sort he [was] conduct[ing]" at the time he allegedly committed the illegal acts, the acts were within his jurisdiction for judicial immunity purposes). Even the commission of "grave procedural errors" does not deprive a judge of jurisdiction as the term is meant in absolute judicial immunity analyses. *Stump*, 435 U.S. at 359, 98 S.Ct. at 1106; *Malina*, 994 F.2d at 1125.

[21] Thus, the question is not whether West acted improperly when he signed the specific order complained of, but whether he had the jurisdiction necessary to sign an order of that kind, i.e., a show-cause order, in the case. He clearly did. Signing a show-cause order—even a void one—in a case before him is an act within a district judge's "jurisdiction," as that term is used for judicial immunity purposes. Therefore, regardless of the motion to recuse, West acted within his "jurisdiction," *as that term is used in judicial immunity analyses*, when he signed the show-cause order. We answer the second question, too, in the affirmative.

[22] The appellants argue that West "was [also] sued for his conduct ... [in] joining the conspiracy to maliciously prosecute Bradt...." This contention does not aid the appellants. "The fact that it is alleged that the judge acted pursuant to a conspiracy ... is not sufficient to avoid absolute judicial immunity." *Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir.1991).

Furthermore, the appellants have waived any cause of action for conspiracy to maliciously prosecute. The appellants pled this cause of action, and all of the appellees received summary judgment on it, but on appeal the appellants do not adequately complain of the summary judgments on this particular cause of action. In their brief, the appellants do not discuss the facts relevant to a cause of action for conspiracy sufficiently to maintain a complaint that the court should not have granted summary judgment on that cause of action. The appellants do mention the alleged conspiracy a few times in the brief, but in general, conclusory terms, such as "Judge West joined in the conspiracy to maliciously prosecute L.T. Bradt for contempt." These statements are not a discussion of the facts as contemplated by TEX.R.APP.P. 74(f)(2); they do not amount to "such discussion of the facts ... as may be ***69** requisite to maintain the point at issue." There is no such discussion in the appellants' brief. This violation of rule 74(f)(2) waives any contention that the trial court erred in granting judgment for the appellees on this cause of action.

[23] In their motion for rehearing, the appellants point out that their brief contains authorities on conspiracy. While true, authorities alone are not sufficient to comprise an "argument" that suffices under rule 74(f)(2), just as a discussion of the facts, without authorities, is not a sufficient "argument" under that rule. Rule 74(f)(2) plainly requires *both*. Each violation of rule 74(f)(2) is a separate, independent ground of waiver of the contention. Here, the contention that the trial court erred in granting judgment for the appellees on this cause of action is waived by the appellants' failure to adequately discuss the facts.

3. Conclusion regarding West

Judge West has absolute judicial immunity from being sued for the acts of which the appellants complain. "[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles*, 502 U.S. at 11, 112 S.Ct. at 288. Therefore, it makes no difference what specific causes of action the appellants brought against West; he is immune from being sued at all. *See id.*

[24] Despite the unfairness to litigants that sometimes results, the existence of the doctrine of judicial immunity is in the best interests of justice. *Stump*, 435 U.S. at 363, 98 S.Ct. at 1108. It allows a judge, in exercising the authority vested in him, to be free to act according to his best judgment, unencumbered by anxiety about being sued for acts he performs in discharging his duties. *Id.* The public has a right to expect the unfettered execution of those duties; this doctrine helps the judge fulfill those expectations. Thus, absolute judicial immunity "should not be denied where the denial carries the potential of raising more than a frivolous concern in a judge's mind that to take proper action might expose him to personal liability." *Malina*, 994 F.2d at 1124; *accord Adams*, 764 F.2d at 297. "The fact that the issue before the

judge is a controversial one is all the more reason that he should be able to act without fear of suit." *Stump*, 435 U.S. at 364, 98 S.Ct. at 1108.

We overrule the appellants' fourth point of error and affirm the summary judgment granted to Judge West.

IV. The Summary Judgment in Favor of Delmore

In their fifth point of error, the appellants argue that the trial court erred in granting summary judgment to William Delmore. Delmore moved for summary judgment on the grounds of absolute immunity and qualified immunity. [9]

In *Font v. Carr*, 867 S.W.2d 873, 878 (Tex.App.—Houston [1st Dist.] 1993, writ pending), this Court, following the lead of the Supreme Court in *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991), applied the "functional approach" to the issue of absolute prosecutorial immunity. This approach focuses on the nature of the official acts of which the plaintiff complains. *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1053 (8th Cir.1992), *cert. denied*, 509 U.S. 923 – ——, 113 S.Ct. 3036–3037, 125 L.Ed.2d 723 (1993); *see Burns*, 500 U.S. at 487–92, 111 S.Ct. at 1940–42.

The appellants sued Delmore for prosecuting the contempt proceeding against Bradt. Their first reason that Delmore should not have proceeded with the prosecution is that he "act[ed] on a void charging instrument"—void because the show-cause order was signed after Bradt had filed his June 16, 1992, motion to recuse Judge West. The appellants' second reason that Delmore should not have proceeded with the prosecution is that he allegedly had "no jurisdiction or authority" to prosecute the contempt proceeding.

[25] Regardless of the specific reasons that the appellants contend Delmore should not have prosecuted, their complaint is that he should not have prosecuted. The act of ***70** which the appellants complain—a prosecution in a state court—is the quintessential function of a prosecutor like Delmore. It is an act that is intimately associated with the judicial phase of the criminal process. *Enlow v. Tishomingo County*, 962 F.2d 501, 511 (5th Cir.1992); *Kadivar v. Stone*, 804 F.2d 635, 637 (11th Cir.1986). Under the functional approach, a prosecutor's acts that are "intimately associated with the judicial phase of the criminal process" are protected by absolute immunity. *DeCamp*, 978 F.2d at 1053; *see Burns*, 500 U.S. at 492, 111 S.Ct. at 1942; *Kadivar*, 804 F.2d at 637. We therefore hold that Delmore is absolutely immune from being sued for the acts of which the appellants complain.

Even if Delmore proceeded under a "void charging instrument" and had "no jurisdiction or authority" to prosecute the contempt proceeding—questions we need not decide—these facts would not deprive him of absolute immunity in this case. We recognize that "a prosecutor might lose absolute immunity when he acts with a complete and clear absence of authority...." *Snell v. Tunnell*, 920 F.2d 673, 694 (10th Cir.1990), *cert. denied*, *Swepston v. Tunnell*, 499 U.S. 976, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991); *accord Haynesworth v. Miller*, 820 F.2d 1245, 1265 (D.C.Cir.1987). However, the focus of the inquiry into whether a prosecutor had the "authority" to perform the act of which the plaintiff complains—like the focus of the "jurisdiction" element of the test for judicial immunity [10]—is not on the propriety or impropriety of the defendant's specific act. Rather, the focus is on whether the prosecutor had the authority to perform an act of that kind. *See Haynesworth*, 820 F.2d at 1265 (where plaintiff alleged that state official established and implemented policy of retaliatory prosecution, and official had the authority to establish and implement policies governing criminal prosecutions, official's alleged actions were actions within his authority). The act of which the appellants complain is one that Delmore had the authority to effect.

[26] Our conclusion under the "functional approach" is supported by the case law in whose wake we write. At least three courts have held that Texas prosecutors enjoy absolute immunity in initiating prosecutions and presenting the State's case. *See Kimmel v. Leoffler*, 791 S.W.2d 648, 651 (Tex.App.—San Antonio 1990, writ denied) (per curiam); *Dayse v. Schuldt*, 894 F.2d 170, 172 (5th Cir.1990); *Keeble v. Cisneros*, 664 F.Supp. 1076, 1078 (S.D.Tex.1987). Our conclusion also promotes public policy considerations that undergird the concept of absolute prosecutorial immunity:

> First, forcing a prosecutor to answer in a civil lawsuit for his decision to initiate and pursue a prosecution could skew his decisionmaking, tempting him to consider the personal ramifications of his decision rather than rest that decision purely on appropriate concerns. Further, prosecutors haled into court to defend

> their decisions would, even if they prevailed on the merits, have had their energies diverted from their important duty of enforcing the criminal law. Lastly, because the prosecutor may be responsible annually for hundreds of indictments and trials, and because so many of these decisions to prosecute could engender colorable claims of constitutional deprivation, forcing him to defend these decisions could impose intolerable burdens. Thus, it has long been established that even where the prosecution has so little merit that a verdict is directed in favor of the defendant "upon the prosecutions's evidence," the decision to prosecute is protected by absolute immunity.

Schloss v. Bouse, 876 F.2d 287, 289–90 (2d Cir.1989) (citations omitted).

Absolute immunity is "strong medicine." *Snell*, 920 F.2d at 696. We are cognizant of the "presumption [ ] that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns*, 500 U.S. at 486–487, 111 S.Ct. at 1939. Some facts, however, compel a finding of absolute prosecutorial immunity. *See, e.g.,* ***71** *id.* at 492, 111 S.Ct. at 1942 (holding that prosecutor's "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity"); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir.1991) (holding that prosecutor is absolutely immune from claim arising from decision not to prosecute and from claim arising from "actions taken prior to deciding not to prosecute, such as reviewing and evaluating [ ] tapes"), *cert. denied*, 502 U.S. 1044, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992); *Schloss*, 876 F.2d at 293 (holding that prosecutor "is entitled to absolute immunity in a suit for damages challenging his demand for a release in exchange for a decision not to prosecute"); *Russell v. Millsap*, 781 F.2d 381, 383 (5th Cir.1985) (holding that Texas prosecutors were absolutely immune from claim arising from their role in obtaining state court injunction that "restrain[ed] massage parlor and prostitution activities which violated Texas law"), *cert. denied*, 479 U.S. 826, 107 S.Ct. 103, 93 L.Ed.2d 53 (1986). This case belongs in the same category.

Delmore is absolutely immune from being sued for the acts of which the appellants complain. The absolute immunity protects him from a civil suit for damages. *Hunt v. Jaglowski*, 926 F.2d 689, 692 (7th Cir.1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976)). Therefore, it makes no difference what specific causes of action the appellants brought against Delmore; he is immune from being sued for damages. *See Hunt*, 926 F.2d at 692.

Because Delmore is absolutely immune, we do not consider whether qualified immunity applies. *See Snell*, 920 F.2d at 696 (court proceeded to determine whether prosecutor was entitled to qualified immunity only after first determining she was not entitled to absolute immunity). We overrule the appellants' fifth point of error and affirm the summary judgment granted to Delmore.

V. The Summary Judgment in Favor of the "Attorney–Appellees"

In their first point of error, the appellants contend that the trial court erred in granting summary judgment to the "attorney-appellees," who are Earle Lilly, Piro & Lilly, P.C., Joel Nass, Edward J. Hennessy, Hennessy & Zito, Donald B. McFall, McFall & Sartwelle, P.C., Alan Magenheim, Hirsch, Glover, Robinson & Sheiness, P.C., William R. Pakalka, Nancy Locke, Fulbright & Jaworski, Donald M. Hudgins, Hudgins, Hudgins & Warrick, P.C., James H. Barker, Giessel, Stone, Barker & Lyman, P.C., Sheryl Mulliken Fike, R. Edward Perkins, John Kapacinskas, Wade Quinn, Matt Shafer, and Dean Barth. As indicated above, these are the attorneys and firms who represented the defendants in lawsuit number two.

The attorney-appellees moved for summary judgment on the ground (among others) that the appellants have no right of recovery against them for their conduct in lawsuit number two. We agree with the attorney-appellees.

[27] The public has an interest in "loyal, faithful and aggressive representation by the legal profession...." *Maynard v. Cabellero*, 752 S.W.2d 719, 721 (Tex.App.—El Paso 1988, writ denied). An attorney is thus charged with the duty of zealously representing his clients within the bounds of the law. *Id.* In fulfilling this duty, an attorney "ha[s] the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [the attorney] deem[s] proper and necessary, without making himself subject to liability in damages...." *Morris v. Bailey*, 398 S.W.2d 946, 947 (Tex.Civ.App.—Austin 1966, writ ref'd

n.r.e.); *accord Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex.App.—Houston [1st Dist.] 1985, no writ). Any other rule

> would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.

Morris, 398 S.W.2d at 947–48.

[28] Adhering to these principles, we hold that an attorney does not have a right of ***72** recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party. An attorney should not go into court knowing that he may be sued by the other side's attorney for something he does in the course of representing his client; such a policy would favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice.

[29] The rule stated above focuses on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit. For example, an attorney would have no right of recovery against the second attorney for the second attorney's having made certain motions in the underlying lawsuit, regardless of whether the motions were meritless or even frivolous, because making motions is conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit. This is not to say, however, that an attorney cannot be punished for conduct he engaged in as part of the discharge of his duties in representing a party in a lawsuit when that conduct is wrongful. The law provides for the punishment of such acts. *See, e.g.*, TEX.R.CIV.P. 13 (power to punish attorney for filing improper pleadings, motions, and "other papers"); TEX.R.CIV.P. 215 (power to punish attorney for abusing discovery); TEX.GOV'T CODE ANN. § 21.002 (Vernon 1988) (power to punish attorney for contempt of court). But the law does not provide a cause of action to the attorney on the other side for the performance of such acts.

Bradt violated the court's order on the attorney-appellees' motion in limine on three occasions. He violated it when he failed to advise Marie Munier, before she took the stand, of the contents of the granted portions of the motion in limine, whereupon she mentioned the negative polygraph in response to one of his questions; he violated it when he mentioned the negative polygraph right after Munier did; and he violated it when, despite the judge's words after the preceding occasion, he mentioned the negative polygraph yet again. The attorney-appellees, upon hearing Bradt's second mention of the negative polygraph, and thus witnessing what was to them at the time the second violation of the court's order on their motion in limine,[11] moved the court to hold Bradt in contempt. This was nothing more than attorneys, as part of the discharge of their duties in representing a party in a lawsuit, fervently attempting to protect their clients' right to a fair and proper trial. This conduct should not be actionable. An attorney clearly has the right to ask the court to hold an attorney for the other side in contempt when the other side's attorney has violated a court order. This is particularly true where the other side's attorney's misconduct has jeopardized a right of the first attorney's client.

[30] The appellants argue that attorneys should not be able to "inflict indiscriminate damage" merely because they are attorneys representing parties. Our holding will give no such license. To use one of the appellants' hypotheticals, had one of the attorney-appellees physically assaulted Bradt during the trial of lawsuit number two, that attorney-appellee's conduct would not be protected by our holding, because such conduct would not be part of the discharge of the attorney-appellee's duties in representing a party in the lawsuit. Assaulting the opposing attorney is not part of the discharge of an attorney's duties in representing a party.

The appellants also contend that the attorney-appellees' motion for contempt was necessarily outside the discharge of the attorney-appellees' duties in representing the client-appellees because the attorney-appellees knew that Bradt

> could not be held in contempt for referring to the polygraph test in violation of the Order in Limine—because the Order in ***73** Limine did not order L.T. Bradt not to refer to the results of the polygraph test, nor did

> it order L.T. Bradt to perform any act nor to refrain from performing any act. This Order was simply incapable of being violated.

We find this argument disingenuous at best.

I. GRANTED _____ DENIED _____

II. GRANTED _____ DENIED _____

_____

The order continues in this fashion until the last Roman numeral, XXXIII. It then reflects the date of signature and the signature of the judge. Each Roman numeral corresponds to a section of the motion in which the defendants sought

XVI. GRANTED [check mark] DENIED _____

_____

While the order *itself* does not order Bradt to refrain from performing any act, it is too obvious for credible dispute that a trial attorney who reads the order should understand that it refers to corresponding sections of the attached and incorporated defendants' motion in limine and informs the attorney of the court's ruling regarding the corresponding sections.

This is the standard, accepted way of producing an order on a motion in limine. It is also entirely sensible. It prevents the attorneys and the trial court from having to produce a court document that would merely repeat much of the substance of an often-lengthy document that is already before the court: the motion in limine. This logical method saves time and the needless creation of still more court papers. Furthermore, Bradt testified at the contempt hearing that he was served with a copy of the defendants' motion in limine; that he was present in the courtroom when the judge ordered that the polygraph examination not be discussed or referred to by anybody before first approaching the bench; that he felt "bound" by the court's order; and that he felt "bound" by the court's order to discuss the contents of the motion in limine with all of his witnesses before calling them to the stand so they would not unknowingly violate the court's order on the motion in limine.

The foundation for the appellants' argument is faulty; the order on the defendants' motion in limine was capable of being violated, and Bradt violated it. The attorney-appellees were justified in moving for contempt.

Before the trial of lawsuit number two commenced, Judge West granted the defendants' motion in limine. The document styled "Order on Defendants' Joint Motion in Limine" states that "The Court has considered the Motion in Limine filed by defendants ... and rules as follows." The order then splits into three columns, as shown:

to exclude potential evidence. For example, in section XVI of their motion in limine, the defendants sought to exclude potential evidence regarding the polygraph test. The court's order corresponds like this:

[31] **[32]** Furthermore, an attorney does not owe a duty to the attorney on the other side to ultimately be correct in his legal arguments; even if the attorney-appellees' motion for contempt had been meritless, their conduct in so moving, coming as it did in the discharge of their duties in representing a party in a lawsuit, would still not be actionable.

The appellants also argue that the attorney-appellees' motion for contempt was necessarily outside the discharge of their duties in representing the client-appellees because "it simply cannot be a contemptuous act to refer to a document which has been previously admitted into evidence, for all purposes ***74** and without objection...." [12] This argument presumes that once a judge unconditionally admits an exhibit into evidence, he can never subsequently restrict the presentation of certain of its contents to the jury. This is not, and should not be, the law. If it was, a judge who had erroneously unconditionally admitted an exhibit could never right his wrong by subsequently prohibiting a party from presenting to the jury those of its contents that are inadmissible, even on proper motion of one of the parties. We know of no authority —and the appellants cite none—that would have prevented Judge West, after admitting the exhibit that contained the polygraph results, from restricting the presentation of the polygraph results themselves to the jury by an order on a motion in limine.

In any event, that the exhibit containing the polygraph results had been previously admitted, and the terms of the exhibit's admission, are irrelevant. Regardless of the circumstances of the admission of the exhibit that contained the polygraph results, Bradt was still bound to obey the terms of the court's subsequent order on the motion in limine. Even if we were to assume that the court's order on the defendants' motion in limine was erroneous because the results had been admitted previously, we are still left with the rule that an attorney is in peril of contempt when he disobeys a court's order, even if the order was an erroneous one. *See Ex parte Fernandez*, 645 S.W.2d 636, 638 (Tex.App.—El Paso 1983, no writ). [13]

Thus, Bradt's conduct was contemptuous even if the court's order on the defendants' motion in limine was erroneous. Further, as noted, an attorney does not owe a duty to the attorney on the other side to ultimately be correct in his legal arguments; even if the attorney-appellees' motion for contempt had been meritless, their conduct in so moving, coming as it did in the discharge of their duties in representing a party in a lawsuit, would still not be actionable.

The appellants also argue that the attorney-appellees failed to disprove with summary judgment evidence any of the elements of the appellants' cause of action of abuse of process. They contend that the attorney-appellees were therefore not entitled to summary judgment on this cause of action. For two independent reasons, we disagree.

First, the appellants did not plead the cause of action of abuse of process. The appellants' live petition is clear and specific in setting out their causes of action. The petition presents the causes of action with individual, bolded headings, followed by a discussion of the facts that allegedly support the particular cause of action. The headings are as follows:

> **FIRST CAUSE OF ACTION—CONSPIRACY TO MALICIOUSLY PROSECUTE AND MALICIOUS PROSECUTION**
>
> **SECOND CAUSE OF ACTION—INTENTIONAL INFLICTION OF MENTAL ANGUISH**
>
> **THIRD CAUSE OF ACTION—TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS**
>
> **ADDITIONAL GROUNDS OF LIABILITY**

Under the heading **"ADDITIONAL GROUNDS OF LIABILITY,"** the appellants state:

> In the alternative, but without waiving any of the foregoing, Plaintiffs would show that West and Delmore are state actors who used tangible personal property to injure the Plaintiffs, as described above. West ***75** and Delmore are thus liable to Plaintiffs for actual damages caused by their conduct under the Texas Torts [sic] Claim [sic] Act.

There is no heading entitled **"ABUSE OF PROCESS."** The words "abuse of process" do not appear in the petition. While neither a heading entitled "Abuse of Process" or the words "abuse of process" are required for the petition to sufficiently plead that cause of action, the petition does not refer to the cause of action even indirectly, and does not set forth facts that, if proven, would prove the elements of that cause of action.

[33] In deciding whether a pleading sufficiently sets out a particular cause of action, we determine whether the pleading gives fair and adequate notice to the pleader's adversary of the nature of the cause of action asserted against him. *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex.1981); *Ghazali v. Southland Corp.*, 669 S.W.2d 770, 775 (Tex.App.—San Antonio 1984, no writ); *see Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 186 (Tex.1977); *Lawyers Surety Corp. v. Royal Chevrolet, Inc.*, 847 S.W.2d 624, 627–28 (Tex.App.—Texarkana 1993, writ denied). The pleading must give the required notice so that the pleader's adversary can adequately prepare his defense. *Castleberry*, 617 S.W.2d at 666; *Lawyers Surety*, 847 S.W.2d at 627; *Ghazali*, 669 S.W.2d at 775. Guided by these principles, we hold that the appellants did not plead the cause of action of abuse of process.

We considered a similar situation in *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex.App.—Houston [1st Dist.] 1993, writ denied). The plaintiffs in that case pled seven causes of action. *Id.* at 620. The trial court granted summary judgment on all seven. *Id.* at 618.

In their brief, the plaintiffs referred not only to the seven causes of action they indisputably had pled, but to two other causes of action, conspiracy and interference with inheritance

rights, that they also allegedly brought against the defendant. 859 S.W.2d at 620–21. We wrote:

> Nowhere in their [live] petition did the Thompsons allege that V & E engaged in a conspiracy. Their causes of action are individually set out in highlighted headings, in a specific, orderly fashion. Under each heading is a list of the defendants against whom the Thompsons are bringing that particular cause of action. There is no mention of conspiracy, regarding V & E or any other defendant. Conspiracy simply was not pled. This claim was not before the trial court, and, as such, the Thompsons' claim of conspiracy cannot be considered by this Court.
>
> Nor did the Thompsons plead "interference in inheritance rights." We cannot consider this claim, either.

Id. at 621 (citations omitted).

[34] Even under our policy of construing petitions liberally in favor of the pleader when special exceptions are not filed, [14] the appellants have simply not pled the cause of action of abuse of process. "Liberal" does not mean "far-fetched"; the policy does not allow us to read into a petition a cause of action that was plainly omitted. The appellants just did not plead abuse of process.

The cause of action of abuse of process was not before the trial court. As such, we cannot consider it, either. *See Thompson,* 859 S.W.2d at 621.

The appellants argue that we must conclude that they pled the cause of action of abuse of process in their live petition because the appellees did not file special exceptions to the petition. We disagree.

[35] There is no duty to file special exceptions that in effect ask a plaintiff whether he wants to add a cause of action that he left out to the one(s) he has already pled. Under the appellants' argument, the attorney-appellees would have a duty to file special exceptions inquiring whether the appellants intended by their pleadings to bring the cause of action of violation of civil rights, the cause of action of RICO, and so on until they covered all causes of action that might arguably apply to the facts pled. This is not what ***76** special exceptions are for, and it is not the way our system of pleading works.

The second reason germane to abuse of process that we affirm the attorney-appellees' summary judgment is that our holding applies to *all* causes of action brought by an attorney against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party. Thus, the appellants would have no right of recovery in this case under any cause of action.

[36] An attorney has no right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party. We overrule point of error one and affirm the summary judgment granted to the attorney-appellees. [15]

VI. The Summary Judgment in Favor of the "Client–Appellees"

In their second point of error, the appellants argue that the trial court erred in granting summary judgment to the "client-appellees," who are Judy Sebek, Foundation for Depelchin Children's Center, Baylor College of Medicine, Ernest Kendrick, M.D., Michael D. Cox, Jean Guez, Barbara Taylor Chase Hopkins, Luisa Maria Acevedo Lohner, and Ann M. Hodges. As indicated above, these were the defendants in lawsuit number two.

The client-appellees moved for summary judgment on the ground (among others) that they were not bound by the conduct of their attorneys in moving to hold Bradt in contempt. We agree with the client-appellees.

[37] **[38]** The appellants contend that the attorney-client relationship is one of agency. We agree with the appellants that this is the law. *See Gavenda v. Strata Energy, Inc.,* 705 S.W.2d 690, 693 (Tex.1986). Our agreement ends, however, at the point where the appellants argue that, merely because such an agency relationship existed in this case, the client-appellees are automatically liable for any tortious conduct on the part of their attorneys. The mere existence of an agency relationship is not enough to visit tort liability on a principal. *Graham v. McCord,* 384 S.W.2d 897, 898 (Tex.Civ.App.—San Antonio 1964, no writ); *see Miller v. Towne Servs., Inc.,* 665 S.W.2d 143, 145–46 (Tex.App.—Houston [1st Dist.] 1983, no writ) (holding that even though agency relationship existed, principal was not liable for tort of agent). Therefore, contrary to the appellants' argument, the mere fact that an agency relationship existed between the client-appellees and the attorney-appellees does not mean that the client-appellees

would automatically be liable for any tortious conduct on the part of the attorney-appellees.

[39] **[40]** In the context of sanctions, a party to a civil suit cannot be liable for the intentional wrongful conduct of his attorney unless the client is implicated in some way other than merely having entrusted his legal representation to the attorney. *See TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex.1991); *Ogunboyejo v. Prudential Property & Casualty Co.,* 844 S.W.2d 860, 863 (Tex.App.—Texarkana 1992, writ denied); *Glass v. Glass,* 826 S.W.2d 683, 687–88 (Tex.App.—Texarkana 1992, writ denied). We hold that the same rule applies here. Unless a client is implicated in some way other than merely being represented by the attorney alleged to have committed the intentional wrongful conduct, the client cannot be liable for the attorney's conduct. A contrary holding would in effect obligate ***77** clients to monitor the actions taken by their attorneys when their attorneys are representing them, and require the clients to seize the helm of their representation at the slightest hint of intentional wrongful conduct. Most clients cannot possibly monitor their attorneys to the degree that would be required to meet such an obligation, and most, clearly, are not qualified for such monitoring, anyway. Imposing such an obligation on clients would, unjustly, make plaintiffs reluctant to file suit, and defendants far too tentative about defending themselves vigorously. This would not only chill the willingness of Texas citizens to vindicate their legal rights, it would make them ultimately responsible for their own legal representation—the very act for which they hire an attorney in the first place.

The record shows that the client-appellees are not implicated in their attorneys' conduct other than merely having entrusted their legal representation to the attorney-appellees. We overrule the appellants' second point of error and affirm the summary judgment granted to the client-appellees. [16]

VII. The Summary Judgment in Favor of the "Insurance Company–Appellees"

In their third point of error, the appellants argue that the trial court erred in granting summary judgment to the "insurance company-appellees," who include Aetna Casualty & Surety Company, The Automobile Insurance Company of Hartford, Connecticut, Texas Lawyers Insurance Exchange, American Home Assurance Company, Lexington Insurance Company, and the American Psychiatric Association. As indicated above, these are the entities who paid for the defenses of some of the defendants in lawsuit number two.

The insurance company-appellees moved for summary judgment on the ground (among others) that, under this record, they cannot be liable for the conduct of the attorney-appellees in moving to hold Bradt in contempt. We agree with the insurance company-appellees.

[41] **[42]** The appellants argue that liability can be visited upon the insurance-company appellees for the wrongful acts of the attorneys they hired to represent their insureds because the insurance company-appellees had an attorney-client relationship with those attorneys. We disagree. There is no attorney-client relationship between an insurer and an attorney hired by the insurer just to provide a defense to one of the insurer's insureds. *Employers Casualty Co. v. Tilley,* 496 S.W.2d 552, 558 (Tex.1973). Even though such an attorney is typically selected by the insurer, paid by the insurer, and periodically reports to the insurer about the progress of the case against the insured, these facts do not mean that the insurer is the client. *Id.; Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves,* 929 F.2d 103, 108 (2d Cir.1991). In the context of insurance, the client is the insured. *Employers Casualty,* 496 S.W.2d at 558; *Continental Casualty,* 929 F.2d at 108. It is the insured to whom the attorney owes his allegiance in such a case, and the insured's interests that he represents. *Employers Casualty,* 496 S.W.2d at 558; *Continental Casualty,* 929 F.2d at 108. There was no attorney-client relationship between the attorney-appellees and the insurance company-appellees.

[43] The appellants also contend that an agency relationship existed between the attorney-appellees and the insurance company-appellees. We agree. *See Ranger County Mut. Ins. Co. v. Guin,* 704 S.W.2d 813, 820 (Tex.App.—Texarkana 1985), *aff'd,* 723 S.W.2d 656 (Tex.1987); *Highway Ins. Underwriters v. Lufkin–Beaumont Motor Coaches, Inc.,* 215 S.W.2d 904, 932 (Tex.Civ.App.—Beaumont 1948, writ ref'd n.r.e.); *Blakely v. American Employers' Ins. Co.,* 424 F.2d 728, 734 (5th Cir.1970). Again, however, the mere existence of an agency relationship is not enough to visit tort liability on a principal. *Graham,* 384 S.W.2d at 898; *see Miller,* 665 S.W.2d at 145–46 (holding that even though agency relationship existed, ***78** principal was not liable for tort of agent). It is fundamental that the agent's acts must be in some way wrongful before the principal can be "liable" for the acts of the agent.

Because the acts of the attorney-appellees were not wrongful, the appellants' case against the insurance company-appellees necessarily fails. A principal cannot possibly be in danger of liability for the acts of its agent when those acts are not wrongful.

We overrule point of error three and affirm the summary judgment granted to the insurance company-appellees. [17]

VIII. The Denial of the Appellants' Motion for Summary Judgment

In their sixth point of error, the appellants contend that the trial court erred in denying their motion for summary judgment. We have held that the trial court was correct in granting the appellees' motions for summary judgment; it necessarily follows that the court did not err in denying the appellants' motion. We overrule point of error six.

IX. The Insurance Company–Appellees' Cross–Point

[44] In a cross-point, the insurance company-appellees assert that we should award damages from the appellants under Texas Rule of Appellate Procedure 84 for bringing this appeal. Only the insurance company-appellees have asked for damages for the appellants' filing of this appeal. However, we have the authority to impose damages under rule 84 even when an appellee does not ask for those damages. *McGuire v. Post Oak Lane Townhome Owners Ass'n,* 794 S.W.2d 66, 68 (Tex.App.—Houston [1st Dist.] 1990, writ denied); *Dolenz v. A.B.,* 742 S.W.2d 82, 86 (Tex.App.—Dallas 1987, writ denied); TEX.R.APP.P. 84. We do so in this case.

Rule 84 states in relevant part:

> In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellees as damages against such appellant. If there is no amount awarded to the prevailing appellee as money damages, then the court may award, as part of its judgment, each prevailing appellee an amount not to exceed ten times the total taxable costs as damages against such appellant.

TEX.R.APP.P. 84. The purpose of rule 84 is to shift to the appellant part of the expense and burden incurred by the appellee in defending against a frivolous appeal. *Peterson v. Dean Witter Reynolds, Inc.,* 805 S.W.2d 541, 554 (Tex.App.—Dallas 1991, no writ); *Dallas County Appraisal Dist. v. The Leaves, Inc.,* 742 S.W.2d 424, 431 (Tex.App.—Dallas 1987, writ denied).

"The right to appeal is a most sacred and valuable one...." *In re Estate of Kidd,* 812 S.W.2d 356, 360 (Tex.App.—Amarillo 1991, writ denied). We should therefore apply rule 84 with prudence and caution, and only after careful deliberation. *Dyson Descendant Corp. v. Sonat Exploration Co.,* 861 S.W.2d 942, 952 (Tex.App.—Houston [1st Dist.] 1993, no writ); *Exxon Corp. v. Shuttlesworth,* 800 S.W.2d 902, 908 (Tex.App.—Houston [14th Dist.] 1990, no writ).

[45] **[46]** In deciding whether to award damages under rule 84, we look at the record from the viewpoint of the advocate and determine whether it had reasonable grounds to believe the case could be reversed. *Dyson Descendant,* 861 S.W.2d at 952; *Hicks v. Western Funding, Inc.,* 809 S.W.2d 787, 788 (Tex.App.—Houston [1st Dist.] 1991, writ denied); *Shuttlesworth,* 800 S.W.2d at 908. Before assessing rule 84 damages against an appellant, we must conclude both that the appellant had no reasonable ground to believe the case would be reversed and that the appeal was not taken in good faith. *Dyson Descendant,* 861 S.W.2d at 952; *McGuire,* 794 S.W.2d at 68.

***79** **[47]** "Delay" under rule 84 does not necessarily mean delay that benefits the appellant in some specific way, financial or otherwise; it may also mean simply putting off the final disposition of the litigation. *The Leaves,* 742 S.W.2d at 431; *Dolenz,* 742 S.W.2d at 86. Under rule 84, "[i]t is the fact of delay that is important, not the reason." *The Leaves,* 742 S.W.2d at 431. "It is enough under the rule for us to find that [the appellant] has delayed the final resolution of this matter by this appeal." *Id.*

We will not permit spurious appeals, which unnecessarily burden parties and our already crowded docket, to go unpunished. *McGuire,* 794 S.W.2d at 69; *Dolenz,* 742 S.W.2d at 86. Such appeals take the court's attention from appeals filed in good faith, wasting court time that could and should

be devoted to those appeals. *Bullock v. Sage Energy Co.*, 728 S.W.2d 465, 469 (Tex.App.—Austin 1987, writ ref'd n.r.e.). No litigant has the right to put a party to needless burden and expense or to waste a court's time that would otherwise be spent on the sacred task of adjudicating the valid disputes of Texas citizens.

Our reasons for awarding rule 84 damages are as follows.

1. The "blind eye"

[48] **[49]** Showing conscious indifference to settled rules of law—i.e., turning a "blind eye" to established law—is one factor to consider in deciding whether to award rule 84 damages. *Texas Employers' Ins. Ass'n v. Armstrong*, 774 S.W.2d 755, 756 (Tex.App.—Houston [1st Dist.] 1989, no writ); *Bullock*, 728 S.W.2d at 469. When an appellant discusses existing law adverse to its position, and raises a legitimate argument for the change of that law, we should not assess rule 84 damages. *Guzman v. Guzman*, 827 S.W.2d 445, 448 (Tex.App.—Corpus Christi 1992), *writ denied*, 843 S.W.2d 486 (Tex.1992). On several points, the appellants have turned the "blind eye"; they have not discussed existing law that defeats some of their contentions, and have not argued that those rules of law should be changed.

[50] For example, the appellants argued that there was an attorney-client relationship between the attorney-appellees and the insurance company-appellees. That there is an attorney-client relationship between an insurer and an attorney the insurer hires just to represent an insured is a theory that was laid to rest in this state by our supreme court approximately 21 years ago. *See Employers Casualty*, 496 S.W.2d at 558. No court in this state or in any other jurisdiction has made a contrary holding. Indeed, one court has stated that the rule is "clear beyond cavil." *See Continental Casualty*, 929 F.2d at 108. The appellants made no argument that we should change this by-now rudimentary rule.

As noted, this is but one example of the appellants turning the "blind eye" to well-established law that defeats one of their contentions.

2. Asserting a new cause of action on appeal

We also note that the appellants advanced a new cause of action, abuse of process, against the appellees in this appeal. Bradt, an experienced trial and appellate attorney, either knew or should have known that this is impermissible. However, by ignoring this fundamental rule, the appellants caused some of the appellees additional expense by obliging their attorneys to brief the impropriety of bringing this new cause of action on appeal. The appellants' arguments regarding why their petition should be read to state a cause of action for abuse of process were wholly implausible.

3. No response to the cross-point

The appellants did not even file a response to the insurance company-appellees' cross-point. This, too, is a fact for us to consider in deciding whether to impose damages under rule 84. *See Lewis v. Deaf Smith Elec. Coop.*, 768 S.W.2d 511, 514 (Tex.App.—Amarillo 1989, no writ).

In oral argument, Bradt did not address the subject of the cross-point until, at the end of his rebuttal, a justice asked him specifically about the cross-point. His one-sentence reply was that it had no merit because it ***80** cannot not be said that his petition does not present a good faith argument for the extension of existing law. Bradt then immediately left the subject. His reply does not address the arguments in the insurance company-appellees' cross-point or have anything to do with the standards set out in rule 84. [18]

4. The summary judgment evidence

[51] Perhaps the most compelling reason that we assess rule 84 damages in this case is that *the appellants could not have obtained a reversal of the summary judgments even if we had ruled that they have valid claims against all the appellees*. In other words, even if we had not held that West and Delmore are absolutely immune, that the appellants have no right of recovery against the attorney-appellees and the client-appellees, and that the appellants have no right of recovery against the insurance company-appellees on this record, the appellants still could not have obtained a reversal of the summary judgments.

In addition to the grounds discussed in this opinion, the appellees also moved for summary judgment on the ground that they had produced proper summary judgment proof that negates at least one element of each cause of action that the appellants brought. Their summary judgment evidence is competent in all respects, and the appellants do not attack it. Rather, the appellants urge that we must reverse the summary judgments because they raised a fact issue on all of the targeted elements with their *own* summary judgment evidence, thus precluding summary judgment.

The appellants' arguments find support only in Bradt's summary judgment affidavit, which is no support at all. It offers legal conclusions, hearsay, statements made on information and belief, and testimony not shown to be based on personal knowledge, on these elements, a fact pointed out by the appellees in the trial court and here. The affidavit is overtly incompetent. Bradt, an experienced trial and appellate attorney, either knew or should have known that such an affidavit would not support the appellants' arguments that they raised fact issues. He could not have reasonably believed that this affidavit would support an argument to reverse a summary judgment.

Because of the unmistakable incompetence of the only evidence that "supports" Bradt's arguments regarding fact issues, the appellants' attempt to reverse the trial court's judgment was absolutely bound to fail, even if we had ruled that the appellants have valid claims against all the appellees. [19] Because Bradt knew or should have known that he could not get a reversal of the trial court's judgment, he should not have brought this appeal.

5. Conclusion on rule 84 damages

Considering all of the above, we hold that the appellants did not have reasonable grounds to believe that the summary judgments granted to the appellees could be reversed. We conclude both that the appellants had no reasonable ground to believe that the case, or any part of it, would be reversed, and that the appeal was not taken in good faith. We can see no reason for the appeal of the summary judgments granted to ***81** the appellees other than to delay the final disposition of the appellants' case against them. As part of our judgment, we therefore award the appellees 10 times the total taxable costs as damages against the appellants, jointly and severally.

X. Conclusion

Our system of justice should not allow everybody to sue everybody else for everything. This case presents some good examples of claims we should not allow.

We affirm the summary judgments granted to the appellees. Under rule 84, we also award the appellees 10 times the total taxable costs as damages against the appellants, jointly and severally.

Footnotes

* The Honorable Frank C. Price, former justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

1 Barbara Taylor is the appellee listed in the style of this case as "Barbara Taylor Chase Hopkins."

2 The indictment was eventually dismissed because the judge ruled that the child was not competent to testify.

3 The judge in lawsuit number two (in which Cox was also a defendant) expressed shock at the decision to sue Cox, telling Metzger and his attorneys that, rather than a defendant, Cox should have been their "star witness," because he had vigorously supported Metzger before the grand jury.

4 18 U.S.C. §§ 1961–1968 (1991 & Supp.1994).

5 Metzger had no claim as a matter of law for negligent infliction of emotion distress, *see id.* at 41, or for medical negligence, *see id.* at 41.

6 TEX.CIV.PRAC. & REM.CODE ANN. §§ 101.001–.109 (Vernon 1986 & Supp.1994).

7 Immunity is an affirmative defense. *See Poncar,* 797 S.W.2d at 239. West pled the affirmative defense of absolute immunity.

8 The "*McAlester* visit" factor may be applied loosely. *See Adams,* 764 F.2d at 298. Here, however, it need not be. Representing a party in a trial is most certainly a "visit" to the judge presiding over the trial as that term is used in determining immunity.

9 Delmore pled both of these affirmative defenses.

10 At least one court has noted that the test for whether a prosecutor acted outside his authority is analogous to the "jurisdiction" element of the test for judicial immunity. *See Snell,* 920 F.2d at 694.

11 Although Bradt's second mention of the negative polygraph was actually his third violation, the fact of the first violation did not become certain until Munier testified that none of the plaintiff's counsel had advised her of the court's ruling on the attorney-appellees' motion in limine. Thus, to the attorney-appellees, Bradt's second mention of the negative polygraph was only the second violation at the time it occurred.

12 Before the commencement of trial, and before the court's ruling on the defendants' motion in limine, some exhibits were "preadmitted" for trial, i.e., admitted before trial so the proceedings before the jury would not be prolonged by the parties offering evidence whose admission could have been ruled on earlier. During this "preadmission," the sizable exhibit that contained the polygraph results was

admitted. The polygraph results were not separately admitted into evidence at any time, nor separately offered into evidence at any time.

13 We are aware of the exception to the rule. If the court exceeded its jurisdiction in entering the order, the order is void, and will not support a contempt charge. *Id.; see McCullough v. McCullough,* 483 S.W.2d 869, 871 (Tex.Civ.App.—Tyler 1972, no writ) (holding that "a person may not be punished as for contempt for violating an order for which a court has no power to enter"). This exception clearly does not apply here.

14 *See Roark v. Allen,* 633 S.W.2d 804, 809 (Tex.1982); *Stone,* 554 S.W.2d at 186; *Lawyers Surety,* 847 S.W.2d at 627.

15 Because we affirm the summary judgment granted to the attorney-appellees on the ground discussed above, we need not here discuss the other grounds on which they moved for summary judgment.

In their motion for rehearing, the appellants assert that, by our holding on this issue, we have "abrogat[ed] the cause of action for malicious prosecution." This is obviously not the case. The only impact that our holding has on the tort of malicious prosecution is that an attorney will not be able to recover under that cause of action (or any other) against another attorney for conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party.

16 Because we affirm the summary judgment granted to the client-appellees on the ground discussed above, we need not here discuss the other grounds on which they moved for summary judgment.

17 Because we affirm the summary judgment granted to the insurance company-appellees on the ground discussed above, we need not here discuss the other grounds on which they moved for summary judgment.

18 Apparently, counsel was referring to Texas Rule of Civil Procedure 13, which concerns the filing of frivolous pleadings, but not appeals taken for delay and without sufficient cause. Perhaps counsel did not read the insurance company-appellees' cross-point. It is likely that, if he did read it, he would have known that the insurance company-appellees were not seeking sanctions on appeal for the filing of a frivolous petition.

19 Our decision to award rule 84 damages is in no part based on the fact that the appellants have no right of recovery against the client-appellees and the attorney-appellees. This is the first time that we have considered whether these specific rights of recovery exist; thus, clearly, the appellants should not be penalized for presenting us these issues. Nevertheless, the appellants knew or should have known that, even if we had held that these rights of recovery exist, we would have affirmed the summary judgments. The appellees' summary judgment proof negated at least one element of each of the appellants' causes of action, *and Bradt's affidavit, with its incompetent evidence, very obviously failed to raise a fact issue on any of the causes of action.* Thus, even presuming that the appellants had a right of recovery against every appellee, Bradt still did not have reasonable grounds to believe that any of the summary judgments granted to the appellees could be reversed.

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912 S.W.2d 302
Court of Appeals of Texas,
Houston (14th Dist.).

Cynthia CASTEEL–DIEBOLT, Appellant,
v.
Daniel DIEBOLT, Appellee.

No. 14–94–00229–CV. | Oct. 12, 1995. | Rehearing Overruled Dec. 14, 1995.

In connection with custody dispute, the 247th District Court, Harris County, Dean C. Huckabee, J., granted former husband sole managing conservatorship of minor children, and wife appealed. The Court of Appeals, Murphy, C.J., held that: (1) former wife waived challenge to sufficiency of jury charge; (2) there was no fundamental error absent showing that trial court lacked jurisdiction or that child custody state modifications were adversely affecting public interest; (3) former wife failed to preserve challenges to legal and factual sufficiency of evidence; and (4) sanctions were warranted against former wife for bringing appeal for purpose of delay without sufficient cause.

Affirmed.

Attorneys and Law Firms

***304** John D. Payne, Houston, for appellant.

Jolene Wilson-Glah, Houston, for appellee.

Before MURPHY, C.J., and AMIDEI and ANDERSON, JJ.

Opinion

OPINION

MURPHY, Chief Justice.

The appellant, Cynthia Casteel–Diebolt, appeals from an order granting the appellee, Daniel Diebolt, sole managing conservatorship of their two minor children. Appellant brings eleven points of error and appellee brings six cross points. We affirm.

In January 1991, the trial court signed an agreed order, providing that both appellant and appellee serve as joint managing conservators of their two children. Following several months of disharmony, including allegations made by appellant of sexual abuse committed by appellee and contempt proceedings brought by appellee against appellant for violating an agreed order, both parties sought modification of the joint managing conservatorship. *See* TEX.FAM.CODE ANN. § 14.081(d). A jury appointed appellee the sole managing conservator of the children.

In her first point of error, appellant contends the jury was not correctly charged. She argues the trial court should have included the enumerated factors in section 14.081(d) of the family code that are used to determine whether a joint managing conservatorship should be replaced with a sole managing conservatorship.

[1] **[2]** We do not reach the merits of the sufficiency of the jury charge, however, because appellant waived her complaint by failing to object at trial. TEX.R.APP.P. 52(a). To preserve error in a jury charge, the party complaining on appeal must have made the trial court aware of the complaint and must have obtained a ruling. *State Dep't of Highways v. Payne,* 838 S.W.2d 235, 241 (Tex.1992). Because appellant failed to comply with this rule, she has waived any error. Moreover, appellant agreed to the submitted jury charge. Appellant is now estopped from taking a different position on appeal by complaining the charge was defective. *See, e.g., Litton Indus. Products Inc. v. Gammage,* 668 S.W.2d 319, 322 (Tex.1984); *Marino v. Hartsfield,* 877 S.W.2d 508, 513 (Tex.App.—Beaumont 1994, writ denied); *Furnace v. Furnace,* 783 S.W.2d 682, 684 (Tex.App.—Houston [14th Dist.] 1989, dis'm w.o.j.); *Mullins v. Coussons,* 745 S.W.2d 50, 51 (Tex.App.—Houston [14th Dist.] 1987, no writ).

[3] **[4]** Appellant further contends the error was fundamental. Fundamental error exists only under rare circumstances in which the record shows on its face that either the trial court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes and constitution of this state. *Cox v. Johnson,* 638 S.W.2d 867, 868 (Tex.1982). Fundamental error is not present in this case. The record is devoid of any evidence that the trial court lacked jurisdiction or that the child custody modifications were a public interest. Accordingly, appellant's first point of error is overruled.

[5] **[6]** **[7]** **[8]** In points of error two through five, appellant contends: (1) inadmissible hearsay testimony was admitted; (2) an audio tape was admitted without the proper predicate; (3) leading questions were improperly allowed;

and (4) deposition testimony was improperly used. Appellant, however, fails to support any of these points of error with legal authority, or with any accurate reference to the portions of the record upon which she relies. A point of error not supported by ***305** authority is waived. *Trenholm v. Ratcliff,* 646 S.W.2d 927, 934 (Tex.1983); *Budd v. Gay,* 846 S.W.2d 521, 524 (Tex.App.—Houston [14th Dist.] 1993, no writ); *Elder v. Bro,* 809 S.W.2d 799, 801 (Tex.App.—Houston [14th Dist.] 1991, writ denied); *see also* TEX.R.APP.P. 74(f). This Court has no duty to search a voluminous record without guidance from appellant to determine whether an assertion of reversible error is valid. *Stevens v. Stevens,* 809 S.W.2d 512, 513 (Tex.App.—Houston [14th Dist.] 1991, no writ); *Most Worshipful Prince Hall v. Jackson,* 732 S.W.2d 407, 412 (Tex.App.—Dallas 1987, writ ref'd n.r.e.). Instead, the burden is on appellant to demonstrate the record supports her contentions and to make accurate references to the record to support her complaints on appeal. *Elder,* 809 S.W.2d at 801. The failure to cite to relevant portions of the trial court record waives appellate review. *Tacon Mechanical Contractors v. Grant Sheet,* 889 S.W.2d 666, 671 (Tex.App.—Houston [14th Dist.] 1994, writ denied). Accordingly, appellant's points of error two through five are overruled.

[9] In points of error six through eleven, appellant challenges the legal and factual sufficiency of the evidence. As with points two through five, however, appellant failed to preserve error because her brief lacked authority and accurate references to the record. In addition, appellant judicially admitted to material and substantial changes in the circumstances of her children and that the prior custody order had become unworkable under the existing circumstances. Consequently, she is precluded from challenging the sufficiency of the evidence to support the change of conservatorship. *Thompson v. Thompson,* 827 S.W.2d 563, 566 (Tex.App.—Corpus Christi 1992, writ denied). Appellant's points of error six through eleven are overruled.

[10] **[11]** Appellee has asserted six cross-points for our consideration. In cross-points one and three, appellee contends that because he substantially prevailed in his cross-motion to modify child custody, the trial court abused its discretion by failing to award him costs and attorney fees. Provisions of the family code with respect to attorney fees and costs are intended to supplant rules of civil procedure. *Gross v. Gross,* 808 S.W.2d 215, 221–222 (Tex.App.—Houston [14th Dist.] 1991, no writ). Thus, appellee's ability to recover attorney fees and costs is limited to section 11.18 of the family code, which provides for reasonable attorney fees, as well as other costs, in suits affecting the parent-child relationship. *In Interest of Pecht,* 874 S.W.2d 797, 803 (Tex.App.—Texarkana 1994, no writ); *In Interest of R.M.H.,* 843 S.W.2d 740, 742 (Tex.App.—Corpus Christi 1992, no writ). The decision to award attorney's fees and costs, however, is within the discretion of the trial court. *Pecht,* 874 S.W.2d at 803; *R.M.H.,* 843 S.W.2d at 742. Absent a showing of an abuse of discretion, we will not reverse the trial court's decision on attorney fees. *Cohen v. Sims,* 830 S.W.2d 285, 290 (Tex.App.—Houston [14th Dist.] 1992, writ denied). Upon thorough review of the record, we find no abuse of discretion by the trial court; therefore, cross-points one and three are overruled.

[12] In his fifth cross-point, appellee urges this Court to sever and remand the issues of attorney fees and costs because these issues were not ruled on by the trial court. Appellee relies exclusively on *A.V.I., Inc. v. Heathington,* 842 S.W.2d 712, 718 (Tex.App.—Amarillo 1992, writ denied), in which the court severed and remanded the attorney fees issue. *Id.* In that case, the trial court disregarded the jury's findings as to attorney fees, but failed to enter on the judgment the amount of attorney fees to be awarded. *Id.* The Amarillo court reasoned that because the trial court intended to award some amount of attorney fees, severance and remand of the attorney fees issue was appropriate. *Id.*

In the present case, despite appellee's specific request for attorney fees and costs in his "Second Amended Cross Motion to Modify In Suit Affecting the Parent–Child Relationship," the trial court awarded attorney fees and costs only to the attorney/guardian ad litem who was appointed by the trial court to represent the minor children. Moreover, unlike *Heathington,* the record is devoid of any evidence of intent by the trial court to award the appellee costs or attorney fees. Therefore, ***306** because we find the trial court neither intended to award the appellee attorney fees and costs, nor abused its discretion by failing to do so, appellee's fifth cross-point is overruled.

In appellee's second cross-point, he asserts the trial court erred in overruling his motion to quash appellant's motion for new trial. Appellee contends the trial court lacked plenary power when it denied appellant's motion for new trial, and thus, points of error two through eleven were not properly preserved for our review. Appellant's motion for new trial, however, was required to preserve only those points of error challenging legal and factual sufficiency. *See* TEX.R.CIV.P. 324(b). Because we have already determined that these points of error were waived by the appellant and not subject to our

review, we find it unnecessary to reach the merits of this issue. Appellee's second cross-point is overruled.

[13] **[14]** By his fourth cross-point, appellee requests sanctions against appellant. TEX.R.APP.P. 84. Although granting sanctions under this rule is within an appellate court's discretion, *Maronge v. Cityfed Mortgage Co.*, 803 S.W.2d 393, 396 (Tex.App.—Houston [14th Dist.] 1991, no writ), this rule should only be applied with prudence, caution, and after careful deliberation. *Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902, 908 (Tex.App.—Houston [14th Dist.] 1990, no writ). Rule 84 requires this court to ask first whether the appeal was brought "for delay and without sufficient cause." TEX.R.APP.P. 84. The focus of this test is whether appellant had a reasonable expectation of reversal or whether he merely pursued the appeal in bad faith. *Francis v. Marshall*, 841 S.W.2d 51, 54–55 (Tex.App.—Houston [14th Dist.] 1992, no writ). The "[c]ourt should impose damages only if the likelihood of a favorable result was so improbable as to make this an appeal taken for delay and without sufficient cause." *Francis*, 841 S.W.2d at 55 (citing *Ambrose v. Mack*, 800 S.W.2d 380, 383 (Tex.App.—Corpus Christi 1990, writ denied)).

[15] Upon review of the record and in light of appellant's failure to comply with rules of appellate procedure 50(d), 52(a) and 74(f), we find that sanctions are warranted. First, Appellant readily admits in her brief that: (1) her complaint as to the charge was not properly preserved for appeal; and (2) the jury charge was submitted by agreement of the parties. Appellant was aware her challenge as to the sufficiency of the charge was groundless. Appellant, nonetheless, asserts this complaint in her first point of error, arguing that fundamental error by the trial court precluded waiver of her complaint, yet, appellant failed to cite to authority to show fundamental error existed. *See* TEX.R.APP.P. 74(f). Second, as to appellant's points two through eleven, she failed to cite to *any* authority or make *any* accurate references to the record to support her arguments. Under these circumstances, we are compelled to hold that appellant has taken this appeal for delay and without sufficient cause. We, therefore, exercise our discretion to assess damages in the sum of two times the total taxable costs to be paid to appellee, Daniel Diebolt. *See* TEX.R.APP.P. 84. Because frivolous litigation should not go unsanctioned, appellee's fourth cross-point is sustained.

[16] In his sixth cross-point, appellee asks this court to sanction appellant's attorney for committing fraud during this appeal. However, whether a fraud has been committed is a fact question to be determined by the trier of facts. *Berquist v. Onisiforou*, 731 S.W.2d 577 (Tex.App.—Houston [14th Dist.] 1987, no writ). Moreover, findings of fact are the exclusive province of the jury and trial court. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744 (Tex.1986). Therefore, because this court has no authority to decide whether fraud was committed by appellant, appellee's sixth cross-point is overruled.

The judgment of the court below is affirmed and we assess sanctions against appellant in the amount of two times the total taxable costs.

392 S.W.3d 118
Court of Appeals of Texas,
Texarkana.

Billy H. CHAMPION, Appellant
v.
David R. ROBINSON, Appellee.

No. 06–12–00032–CV. | Submitted: Oct. 23, 2012. | Decided: Dec. 19, 2012.

Synopsis

Background: Owner of percentage of land sued 19 other owners, seeking partition by sale. The 76th Judicial District Court, Camp County, Danny Woodson, J., ordered sale, and denied one defendant's motion to vacate, finding that land was not amenable to partition in kind. Defendant appealed.

Holdings: The Court of Appeals, Morriss, C.J., held that:

[1] evidence was sufficient to support finding that property was incapable of partition in kind, and

[2] evidence was sufficient to support rejection of fraud claim regarding plaintiff's ownership.

Affirmed.

Moseley, J., filed dissenting opinion.

Attorneys and Law Firms

***121** Bill H. Champion, pro se.

Michael P. Setty, Attorney at Law, Pittsburg, TX, for Appellee.

Before MORRISS, C.J., CARTER and MOSELEY, JJ.

Opinion

OPINION

Opinion by Chief Justice MORRISS.

How will 187.09 acres of land mostly surrounded by Ferndale Lake in Camp County be partitioned, by sale or in kind? There is no question before us that would change the trial court's finding that the property is owned 83.8109 percent by appellee, David R. Robinson, 0.1490 percent by appellant, Billy H. Champion,[1] and the remainder by some eighteen other individuals, some possibly with fractional interests smaller than 1/2600ths of the whole. The trial court found that the property was not amenable to partition in kind and ordered a sale of the property. Champion[2] appeals, urging numerous points of error, but principally that the evidence is insufficient to support that judgment. The evidence addressing whether the property is subject to partition in kind does not include any expert testimony and is the principal focus of this opinion.

We affirm the trial court's judgment, because (1) sufficient evidence supports the finding that the property was incapable of partition in kind, (2) sufficient evidence supports the trial court's rejection of fraud, and (3) Champion's other issues do not demonstrate any reversible error.

The property in question had been originally purchased by James Champion in 1911. James and his wife Lizzie, both of whom died intestate, had eight children, including Willie Champion and Ecotrell Champion. Willie was married twice. Willie and his first wife, Fannie Bell Watson Champion, had three children, including James Champion, Jr. James, Jr. and his wife, Kathryne, both died intestate and had fourteen children including Appellant, Champion. Willie and his second wife, Esther Cummings, had three children.

In the 1970s, Lela Ann Shaw, a daughter of Ecotrell, obtained powers of attorney from several, but not all, of the descendents of James. Shaw testified that, because she paid the taxes, she believed the property belonged to her. Shaw then transferred the property to a relative[3] ***122** who transferred the property back to Shaw. Shaw later transferred the property to Wanda Wagner who then transferred the property back to Shaw. In 2004, Shaw transferred the property to her company, J & L Diversified Business Services, Inc., which used the property as collateral for a loan. J & L, though, did not own the property in its entirety. Numerous family members of Shaw, including Champion, still had undivided interests in the property. The J & L loan was foreclosed, and that interest in the property was purchased by Lloyd Gillespie. In 2011, Robinson purchased, by special warranty deed, his interest in the property from Gillespie.

[1] Robinson brought a lawsuit against the other property owners seeking a partition by sale. At trial, Robinson testified that he owned 83.8109 percent of the property and that

Champion owned 0.1490 percent.[4] Robinson admitted that he purchased the property with knowledge that there was a "cloud" on the title but testified he did not worry because he was given a "warranty deed." Robinson testified that the property, which was mostly surrounded by Ferndale Lake, had a single access location and could not be partitioned. According to Robinson, the property had only fourteen acres of valuable lake front property, and the remainder of the property consisted of oil fields and swamps. Given the small percentages of some of the owners, Robinson testified it would be impossible to partition the property.

The trial court rendered judgment awarding Robinson 84.1087 percent interest, awarding Champion 0.1490 percent interest, and ordering a partition by sale. Champion timely filed a post-judgment motion titled "motion to vacate" in which he asked the trial court to reconsider its judgment on the basis that the evidence was factually insufficient to establish that the property was incapable of partition.

[2] **[3]** Champion has appealed urging six issues. Champion's first four issues raise, in essence,[5] legal and factual sufficiency challenges to the evidence, including a challenge to the trial court's order of a partition by sale. Champion alternatively argues that the evidence is legally and factually insufficient to support the trial court's implied rejection that Shaw committed fraud or fraudulent inducement—an issue not pled, but which may have been tried by consent. Champion also argues that the trial court erred in denying his motion for continuance, that he received inadequate notice of the trial setting,[6] that the trial court erred in admitting ***123** the power of attorney, that he never waived his right to a jury trial, that the trial court erred in failing to hold a "due process" hearing on a 1979 heirship affidavit, and that the attorney ad litem rendered ineffective assistance of counsel and committed ethics violations.

(1) Sufficient Evidence Supports the Finding that the Property Was Incapable of Partition in Kind

Champion argues that the trial court erred in granting a partition by sale instead of a partition in kind. Champion says he favors a partition in kind. Robinson argues the property cannot be partitioned in kind. Champion cites the standards for legal and factual sufficiency and requests a new trial.

[4] **[5]** **[6]** Partition of property is provided for in the Texas Rules of Civil Procedure. *See* TEX.R. CIV. P. 756–71. Texas law "favors partition in kind over partition by sale." *Cecola v. Ruley*, 12 S.W.3d 848, 853 (Tex.App.-Texarkana 2000, no pet.). "Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition...." TEX.R. CIV. P. 770. This Court has explained that, although the Rule seems to provide that the property must be "incapable" of partition in kind, the Rule "does not mean incapable in a physical sense." *Cecola*, 12 S.W.3d at 855. Our inquiry is focused on whether partition in kind is "fair and equitable," which includes whether "property can be divided in kind without materially impairing its value." *Id.* The party seeking partition by sale bears the burden of proving a partition in kind would not be fair and equitable. *Id.* at 853–54.

Robinson directs this Court to a number of facts he claims support a partition by sale: (a) there is "a single dirt road to the property"; (b) the property contains geographically diverse features including lake frontage, oil wells, timber, bottomland, and swamp land; (c) there are multiple undivided interests, including some very small interests; and (d) "the costs of attempting to carve out these small interest tracts." *Id.* at 853. Robinson argues we must defer to the trial court's findings of historical fact.

[7] **[8]** **[9]** **[10]** The evidence is legally insufficient if there is a complete absence of evidence establishing a vital fact, the only evidence offered to prove a vital fact cannot be considered due to a rule of law or evidence, there is less than a scintilla of evidence to prove the vital fact, or the opposite of the vital fact is conclusively established. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex.2010). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003). In a legal sufficiency analysis, we credit favorable evidence if a reasonable fact-finder could and disregard contrary evidence unless a reasonable fact-finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005).

[11] **[12]** When reviewing a factual sufficiency challenge, we examine the entire record, considering the evidence in favor of ***124** and contrary to the challenged finding, and set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong

and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex.2001); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986). When the party without the burden of proof on a fact issue complains the evidence is factually insufficient, the complaining party must show the credible evidence supporting the finding is too weak or that the finding is against the great weight and preponderance of the credible evidence contrary to the finding. *Clayton v. Wisener*, 190 S.W.3d 685, 692 (Tex.App.-Tyler 2005, no pet.); *see Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965).

[13] **[14]** At trial and on appeal, Robinson has emphasized the lack of roads. Robinson testified the property had only a single, private road, which he described as a "trail used by the oil and gas companies."[7] In *Cecola*, this Court considered the lack of evidence supporting common law easements in affirming a partition by sale. *Cecola*, 12 S.W.3d at 852. Since our opinion in *Cecola*, the Texas Property Code has been amended to provide a statutory right to an express easement when property is partitioned. *See* TEX. PROP.CODE ANN. § 23.006 (West Supp.2012) (added 2001). Thus, the fact that the property has only a single road does not require a conclusion that the tract is incapable of partition.

[15] *Cecola* is also distinguishable due to the size and peculiar shape of the property in dispute. In *Cecola*, the property was a ".257–acre strip of land, measuring 40 feet wide by 280 feet long," owned by two individuals in equal shares. *Cecola*, 12 S.W.3d at 853. The property in dispute here consists of 187.09 acres, owned by numerous individuals in varying proportions. Because the size of the property and the fractional interests owned in it have a distinct effect on whether property can be partitioned in kind, this fact makes *Cecola* largely distinguishable.

Another distinguishing feature between this case and *Cecola* is the lack of expert testimony in this case. In *Cecola*, the record contained expert testimony that partitioning would materially impair the narrow lot's value. *Id.* at 854. The record in this case does not contain any such testimony. The question is whether that evidentiary deficiency is fatal.

[16] **[17]** Robinson testified as a lay witness, not an expert. The record contains no request that Robinson be certified as an expert and contains no evidence that Robinson has any qualifications to testify as an expert.[8] While lay persons may testify concerning the value of property they own,[9] Robinson's testimony goes beyond that. When asked whether "you could ***125** possibly try to divide that into all the little pieces ...," Robinson responded, "I can't see a way." Robinson also testified that it would be expensive to partition the property. Normally, whether property can be partitioned in kind and the cost of such a partition are matters outside the experience of the average lay person. *Lopez–Juarez v. Kelly*, 348 S.W.3d 10, 19 (Tex.App.-Texarkana 2011, pet. denied) (discussing requirements of lay opinions). When expert testimony is required, lay evidence cannot substitute for it. *City of Keller*, 168 S.W.3d at 812. Robinson's lay opinion that the property could not be partitioned is not expert testimony.

[18] The property also hosts oil and gas activities. Although Gillespie reserved the mineral estate in the special warranty deed transferring the property to Robinson, the record does not contain evidence concerning whether the mineral estate had been previously severed. Robinson testified he did not know who owned the mineral estate. Assuming the mineral estate had not been previously severed from the surface estate, Champion would have an interest in the mineral estate. Regardless, it is presumed, in the absence of proof to the contrary, that minerals are equally distributed, and a partition in kind will not result in an inequitable distribution of the mineral estate. *Gilbreath v. Douglas*, 388 S.W.2d 279, 283 (Tex.Civ.App.-Amarillo 1965, writ ref'd n.r.e.). The record does not contain any evidence that partition would result in an inequitable distribution of the mineral estate.

The evidence presented in support of the trial court's judgment is Robinson's testimony that the 187.09 acres are geographically diverse, there are multiple interest holders, and some of the lots would be "itty-bitty."[10]

We believe that the diminutive size of the smallest shares is particularly telling here. Eleven named individuals own fractional interests of less than 15/100ths of a percentage point, equating to a bit over a quarter of an acre each on a homogenous tract. To further complicate the situation, one of those so-called quarter-acre shares is itself to be subdivided, likely among four or more individuals. Specifically, one interest of 0.1489 percent is listed in the amended judgment of the trial court as being owned by Marilyn J. Hill, Kathryn Yvonne Champion McDonald, "and other children of Willie James Champion." Our review of the record does not indicate the number of the "other children," but the use of the plural would indicate that this share would be shared by at least four people, the two named individuals and at least two unspecified "children." If that is true, at the very largest, the shares of those "children" would be 0.037225 percent each,

equating to a lot size of less than 7/100ths of an acre, if the land were relatively homogenous. [11] If the two named owners split the share equally, and there are no other owners, each share would be 0.07445 percent, equating to less than 14/100ths of an acre.

[19] While, expert testimony is usually needed to establish that a tract cannot ***126** feasibly be divided in kind, we believe such is not needed in situations such as this, where rural, varied land is owned in such small interests that the fact-finder is justified in concluding, without the benefit of expert testimony, that an in-kind division is simply not workable. [12]

We are persuaded by two memorandum opinions from our sister court in Austin. *See Wheeler v. Phillips,* No. 03–10–00221–CV, 2011 WL 4011455, at *8–9, 2011 Tex.App. LEXIS 7402, at *24–26 (Tex.App.-Austin Sept. 7, 2011, no pet.) (mem. op.) (varied 82.201 acres in Bastrop County; share equates to less than 57/100ths of acre); *Taylor v. Hill,* No. 03–03–00540–CV, 2004 WL 1469300, at *1, 2004 Tex.App. LEXIS 5747, at *1 (Tex.App.-Austin July 1, 2004, no pet.) (mem. op.) (varied 100 acres in Lee County; share equates to about 13/100ths of acre). The smallest fractional share involved here–7/100ths of an acre—is much less than either of the interests in those Austin cases.

We conclude there is more than a scintilla of evidence that a partition in kind would not be fair and equitable. Thus, the evidence is legally sufficient to support the trial court's ruling on that issue.

[20] Moving on to our consideration of the factual sufficiency of the evidence, we are to consider whether the evidence is so weak that the trial court's conclusion that Robinson met his burden of proof is clearly wrong. Champion did not present any contrary evidence to dispute Robinson's testimony, but Robinson had the burden of proof. Certainly, the fact that a 187.09–acre property contains lake frontage, oil and gas activities, mining activities, and swamp land does not necessarily preclude partition in kind. Nor does partition in kind require equal size lots. On the other hand, much of this rural land is “swampy,” some of it lies beneath the lake, and there is the evidence of numerous, quite small, individual interests in this property, which we have already detailed.

While the better practice may be to present expert testimony on the issue, and in most cases such testimony is needed, we conclude that, here, the evidence is factually sufficient to support the trial court's finding that a partition in kind would not be fair and equitable. We overrule these issues.

(2) Sufficient Evidence Supports the Trial Court's Rejection of Fraud

Champion advances a legal sufficiency challenge alleging the trial court erred in rejecting his unpled collateral attack on Robinson's title. Champion argues that Shaw admitted she committed fraud in obtaining the power of attorney, that Shaw forged Otis Champion's signature on the power of attorney, and that the foreclosure was fraudulent. [13] Champion argues these wrongful acts defeat Robinson's title.

Robinson and the attorney ad litem argue that Champion lacks standing to challenge their acquisition of title through Shaw's power of attorney. Robinson was required to establish title or interest in the ***127** land to demand partition. *See* TEX.R. CIV. P. 756. Assuming, without deciding, that these affirmative defenses were tried by consent [14] and, assuming further, without deciding, that Champion has standing to make this challenge, the evidence is sufficient to support the trial court's findings.

[21] **[22]** The record contains sufficient evidence to reject Champion's fraud and fraudulent inducement claims. As noted above, Shaw testified her family members signed the power of attorney because she had paid the taxes on the property. The record does not contain any expert testimony supporting the claim that the signature of Otis was forged. [15] Although Shaw testified that the property was “illegally” [16] foreclosed, Shaw failed to explain why it was “illegal” or “bogus” other than denying that there was ever a mortgage on the property. Shaw later admitted she had used the property as collateral. Robinson introduced the relevant deeds, deeds of trust, and foreclosure documents. Because the record contains more than a scintilla of evidence supporting a rejection of Champion's fraud and fraudulent inducement claims, the evidence is legally sufficient. Further, the rejection of fraud and fraudulent inducement is not contrary to the great weight and preponderance of the evidence. The evidence is factually sufficient to support the trial court's implied rejection of fraud and fraudulent inducement.

(3) *Champion's Remaining Issues Fail to Demonstrate Reversible Error*

Champion also argues that the trial court erred in denying his motion for continuance, he received inadequate notice of

the trial setting, the trial court erred in admitting the power of attorney, he never waived his right to a jury trial, the trial court erred in failing to hold a "due process" hearing on the 1979 heirship affidavit, and the attorney ad litem rendered ineffective assistance of counsel and committed ethics violations. We overrule these complaints.

[23] Because Champion's motion for continuance was not accompanied by an affidavit, we may not find an abuse of discretion. *See* TEX.R. CIV. P. 251; *Mathew v. McCoy*, 847 S.W.2d 397, 399 (Tex.App.-Houston [14th Dist.] 1993, no writ).

Champion argues he received notice only that a preliminary hearing was to be held. Unlike most proceedings, a partition cause of action has two final appealable judgments. *See Griffin*, 610 S.W.2d 466. The first judgment, often characterized as preliminary, determines "the interest of each of the joint owners or claimants, all questions of law affecting the title, and appoints commissioners and gives them appropriate directions." *Ellis v. First City Nat'l Bank*, 864 S.W.2d 555, 557 (Tex.App.-Tyler 1993, no writ). The record does not support Champion's claim that he received inadequate notice.

***128** **[24]** Champion argues that the trial court erred by admitting the power of attorney as an ancient document. [17] Shaw testified she hired an attorney to draft the power of attorney and traveled around East Texas with a notary public to secure the signatures. Even if the trial court erred in admitting the power of attorney as an ancient document under Rule 803(16) of the Texas Rules of Evidence, any error was rendered harmless by Shaw's testimony. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex.2004) (any error in admission of evidence "is deemed harmless and is waived if the objecting party subsequently permits the same or similar evidence to be introduced without objection"). Robinson has failed to show the error probably caused the rendition of an improper verdict. *See* TEX.R.APP. P. 44.1.

Champion argues he never waived his right to a jury trial. A civil litigant can waive a jury trial by failing to make a timely written jury demand. TEX.R. CIV. P. 216 ("No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the nonjury docket, but not less than thirty days in advance."). The record does not contain a timely jury demand.

[25] **[26]** **[27]** Champion claims that the trial court was obligated to hold a due process hearing on the 1979 heirship affidavit. Champion has failed to cite any authority that such a hearing was required. The law is well settled that "[a] party proceeding pro se must comply with all applicable procedural rules" and is held to the same standards as a licensed attorney. *Weaver*, 942 S.W.2d at 169. We review and evaluate pro se pleadings with liberality and patience, but otherwise apply the same standards applicable to pleadings drafted by lawyers. *Foster v. Williams*, 74 S.W.3d 200, 202 n. 1 (Tex.App.-Texarkana 2002, pet. denied). We are not responsible for conducting a party's legal research. *See Canton–Carter v. Baylor College of Med.*, 271 S.W.3d 928, 932 (Tex.App.-Houston [14th Dist.] 2008, no pet.). This issue has been inadequately briefed and, thus will be overruled. TEX.R.APP. P. 38.1(h); *see Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 896 (Tex.App.-Dallas 2010, no pet.).

[28] Finally, Champion argues that the attorney ad litem rendered ineffective assistance of counsel and committed ethics violations. The ad litem argues he never represented Champion and that Champion represented himself pro se at trial. It is not necessary for us to decide whether Champion ever had an attorney-client relationship with the attorney ad litem, [18] whether the attorney ad litem's performance was deficient, or whether any ethics violations occurred. Under the fact presented here, Champion, as an indigent civil litigant, did not have a constitutional right to appointed counsel. [19] Champion has ***129** failed to provide this Court with any authority supporting his argument that the alleged ineffective assistance of counsel was reversible error or that the alleged ethics violations are reversible error. This issue has been inadequately briefed and is overruled. TEX.R.APP. P. 38.1(h).

Legally and factually sufficient evidence supported the trial court's finding that the property was incapable of partition in kind. Sufficient evidence supports the trial court's rejection of fraud. Champion's other issues do not demonstrate any reversible error. For the reasons stated, we affirm the trial court's judgment.

Dissenting Opinion by Justice MOSELEY.

BAILEY C. MOSELEY, Justice, dissenting.

The bench trial of this case appears to have been no easy task for the trial court. The fact that a number of joint owners of the property sought to be partitioned appeared pro se and

participated in the trial (most of whom seemed to have had very little familiarity with procedures followed in court or with the Texas Rules of Evidence) give the feeling that the trial court did a yeoman's job in trying to prevent the trial from resembling the activities often observed in a three-ring circus.

At the conclusion of the trial, a judgment was entered that purported to determine the interests of the parties,[20] in which the trial court determined that "[a]fter consideration of the interests owned by the multiple parties and the limited quantity of acreages owned by multiple Defendants being partitioned, the Court finds that the property is not susceptible to a fair and equitable partition in kind." The judgment purported to appoint a receiver[21] to sell the property.

This dissent centers solely on the issue of whether there was sufficient evidence to support a finding that the real property the subject of the suit for partition was not capable of partition in kind and, therefore, was required to be partitioned by sale.

It has long been the law in Texas that partition in kind is favored over partition by sale. *Henderson v. Chesley,* 273 S.W. 299, 303 (Tex.Civ.App.1925). "The law does not favor compelling an owner to sell his property against his will, but prefers a division in kind when such can be fairly and equitably made." ***130** *Rayson v. Johns,* 524 S.W.2d 380, 382 (Tex.Civ.App.-Texarkana 1975, writ ref'd n.r.e.). This preference was incorporated in Rule 770 of the Texas Rules of Civil Procedure, which provides, "[s]hould the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition...." TEX.R. CIV. P. 770. However, even though the preference of partition in kind existed for many years, before this Court handed down a ruling in 2000, there were no reported cases in Texas which set out the standards by which the trial courts were to measure the "partionability" of a tract of land. That yardstick or measure was first set out by this Court in *Cecola v. Ruley,* 12 S.W.3d 848, 853 (Tex.App.-Texarkana 2000, no pet.). In *Cecola,* the inquiry on review focused on whether "property can be divided in kind without materially impairing its value." *Id.* at 855. In other words, the party seeking partition by sale must show that the value of the property would be materially impaired if there were a partition in kind.

Robinson, acting as his sole witness, was asked, "[D]o you believe there's any fair, reasonable way to carve out this property in as little interest to give everybody an equal share of the waterfront, the well area, and the bottoms?" Robinson testified that he did not believe that to be possible. He also pointed out that there were distinct differences in the property, some of which was inundated by a lake, some of which was in a creek area, and some of which had well sites for oil and gas drilling. In addition, he pointed out that there was "a single dirt road to the property." The most persuasive of the arguments that Robinson makes on appeal involve the fact that there are multiple, undivided interests, including some interests of small size and complains of "the costs of attempting to carve out these small interest tracts." Robinson argues we must defer to the trial court's findings of historical fact.

The primary problem with Robinson's arguments is that the very limited evidence he presented at trial simply does not, for the most part, support his argument. Making certain that each distributive share after a partition shares a portion of each liability or each asset a property possesses (e.g., each getting a part of the roadway, lakefront, or inundated portion of the property) is not the aim of the partition; rather, the goal is to make certain that each joint owner of the property is set aside a piece of the property which has a value which reflects his proportionate share of the value of the property. That is why the Rules governing the role of the commissioners of partition require the commissioners to set out their opinion of the value of each tract. TEX.R. CIV. P. 769(c).

To the question, "You anticipate that would be a pretty expensive cost to start carving that property up?" Robinson testified in the affirmative. However, there was no evidence of the anticipated cost of dividing the tract up and the term "pretty expensive" is extraordinarily nebulous. One can observe that paying a receiver fee and the other attendant costs of a sale of the property could likewise be "pretty expensive" in the eyes of Robinson. That lack of certainty leaves the trier of fact with no real evidence to weigh the desirability of partition in kind against partition by sale.

Robinson also mentions the presence of timber on the tract, something that could have a tremendous impact on the value of the property (or portions of it); even so, he presents us with nothing concerning the value of the timber or its concentrations on one part of the tract versus another. ***131** These are things (along with the topography of the property, its access to public roads, and other influences on the value of real estate) that commissioners of partition would be required to weigh in determining a fair and equitable partition in kind. Although the majority assumes that very small portions of

the property would be valueless, there was absolutely no evidence upon which we can base that assumption. [22]

The majority opinion does scholarly work in defining the standards for determining whether there is sufficient evidence upon which to base a judgment, but then (for all practical purposes) ignores the very standards that are described.

The important thing that the *Cecola* case taught us was to focus on the impact of a partition in kind on the value of the property as a whole as a means of determining whether a partition by sale was necessary. Here, the evidence zeroed in on the potential size of the tracts, the difference in topography and improvements, and the availability of access in its current form. No evidence was introduced as to the value of the property in any state: as an intact parcel or divided into shares. Other than to describe partition in kind as being "expensive" in the eyes of the proponent of partition by sale, there is nothing shown as to the costs that would be incurred in a partition in kind. The majority opinion assumes that a partition in kind of the property would be based upon acreages and not proportions of value, something that is prohibited to be done in a partition in kind. *See* TEX.R. CIV. P. 768.

The evidence presented by Robinson is so weak that the trial court's conclusion that he met his burden of proof is clearly wrong. While Champion did not present contrary evidence to dispute Robinson's testimony, it was never Champion's burden to show that it could be effectively partitioned in kind. Rather, Robinson had the burden of proving that it could not. The Texas Supreme Court has instructed, "Undisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed." *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex.2005). The fact that a 187.09–acre property contains lake frontage, oil and gas activities, mining activities, and swamp land does not absolutely preclude partition in kind. Partition in kind does not require equal size lots. With no more evidence concerning the values of the land that was presented at trial, the land could be as valuable as if it were in downtown Manhattan or as worthless as if it were in the middle of the Sahara Desert. The size of the lots set aside to the various owners could depend on the value of the land. Further, lots less than an acre in size are not microscopic, and there is no evidence that lots of that size would lack economic value in this area of Camp County. There is simply no evidence that a partition in kind would materially decrease the overall value of the property.

Champion's right to retain his land can only be overcome by sufficient evidence that the property is incapable of being partitioned in kind. Robinson had the burden to prove, by a preponderance of the evidence, that partition in kind would ***132** not be fair and equitable. Although Robinson presented some evidence, the evidence was so very weak that the trial court's conclusion is clearly wrong.

The evidence is legally insufficient to support the trial court's implied finding [23] that a partition in kind cannot be made in a fair and equitable manner. We should reverse the judgment of the trial court finding that the property is not capable of partition in kind.

I respectfully dissent.

Footnotes

1 Champion has argued on behalf of the heirs of James Champion in his brief. While a party may prosecute or defend his or her own suit pro se, a pro se appellant may not represent others. *See* TEX.R. CIV. P. 7; TEX. GOV'T CODE ANN. § 81.102(a) (West 2005); TEX. PENAL CODE ANN. § 38.123 (West 2011); *Crain v. The Unauthorized Practice of Law Comm. of the Sup.Ct. of Tex.*, 11 S.W.3d 328, 332–34 (Tex.App.-Houston [1st Dist.] 1999, pet. denied). Although the caption of the notice of appeal references "James Champion Heirs," the text of the notice of appeal claims an appeal for only Billy H. Champion. Only Champion signed the notice of appeal. Thus, Billy H. Champion is the only appellant in this case.

2 Any reference to "Champion" throughout this opinion refers to appellant, Billy H. Champion; others are identified by their first names.

3 This "straw man" relative was Virlee Shaw, but any further reference to Shaw will continue to refer to Lela Ann Shaw.

4 This calculation presumes that none of the bequests to James' children lapsed or that the Anti-lapse Statute prevents such lapse. *See* TEX. PROB.CODE ANN. § 68 (West 2003) (current version to be amended effective Jan. 1, 2014). Champion has not challenged these percentages on appeal. The law is well settled that "[a] party proceeding pro se must comply with all applicable procedural rules" and is held to the same standards as a licensed attorney. *Weaver v. E–Z Mart Stores, Inc.*, 942 S.W.2d 167, 169 (Tex.App.-Texarkana 1997, no pet.). Ownership has not been assigned for our review.

5 We must liberally construe issues and must address them on the merits if we can discern their substance. *Perry v. Cohen*, 272 S.W.3d 585, 588 (Tex.2008) ("we liberally construe issues presented to obtain a just, fair, and equitable adjudication of the rights of the litigants") (quoting *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 316 (Tex.1999)).

6 Champion argues he received notice only that a preliminary hearing was to be held. Unlike most proceedings, a partition cause of action has two final appealable judgments. *See Griffin v. Wolfe*, 610 S.W.2d 466 (Tex.1980). The first judgment, often characterized as preliminary, determines "the interest of each of the joint owners or claimants, all questions of law affecting the title, and appoints commissioners and gives them appropriate directions." *Ellis v. First City Nat'l Bank*, 864 S.W.2d 555, 557 (Tex.App.-Tyler 1993, no writ). The record does not support Champion's claim that he received inadequate notice.

7 On appeal, Robinson argues this road is a public road. Robinson attempts to attach documents and pictures to his brief in support of this argument. We cannot consider documents, that are not part of the record, attached as appendices to briefs. *Paselk v. Rabun*, 293 S.W.3d 600, 613 (Tex.App.-Texarkana 2009, pet. denied); *WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 465 n. 23 (Tex.App.-Houston [14th Dist.] 2005, pet. denied). The appellate record does not contain any evidence that a public road exists on this property.

8 Robinson responded in the affirmative when asked "[O]ne of the things you do for a living is buy and sell real estate" and later testified, "I buy and sell land all the time."

9 Under certain conditions, a property owner can testify to the market value of his or her own property. *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex.1984).

10 There is no evidence concerning the size of the lots. We note that 0.1490 percent of 187.09 acres results in approximately a quarter acre. Since the land apparently has differing values, a larger lot of less valuable land could be partitioned.

11 We do not suggest that partition in kind would be accomplished by simply dividing 187.09 acres into the fractional ownership interests, without consideration of the relative values of the resulting parcels. Depending on how a partition were accomplished—because values should be considered—a resulting parcel could be larger or smaller than such a mechanical division would produce.

12 The dissenting opinion posits that, without evidence of land value, the land in question might be as valuable as realty in Manhattan or as worthless as a parcel in the Sahara Desert. While in the abstract that might be true, here, the evidence shows this land to be rural Camp County lowland. We believe that, even without explicit value evidence, the trial court is authorized to recognize the reality that this case is about land that cannot be compared to expensive urban commercial property.

13 Champion argues that the trial court impliedly ruled on fraud when he reinstated the interests of Melvin L. Champion and Maggie Lene Champion. The record establishes these interests were reinstated by agreement.

14 At trial, the trial court permitted the pro se defendants to present evidence on common law fraud and fraudulent inducement. We will assume, without deciding, these issues were tried by consent. *See* TEX.R. CIV. P. 67. On appeal, Champion argues statutory real estate fraud. *See* TEX. BUS. & COM.CODE ANN. § 27.01 (West 2009). Any statutory fraud claims have not been preserved for appellate review and will not be considered. *See* TEX.R.APP. P. 33.1.

15 Champion argues we can compare the signature in the record with a signature attached to his brief and determine the trial court erred. Documents attached to appellate briefs do not thereby become evidence. Further, any such comparison would require expert testimony by a handwriting expert.

16 Any procedural irregularities in the foreclosure have not been challenged.

17 The power of attorney may have been admissible under Rule 803(14), providing a hearsay exception for recorded documents affecting interests in property, or Rule 803(15), providing a hearsay exception for uncontested statements affecting interests in property. *See* TEX.R. EVID 803(14), (15). Because Shaw's testimony verifying the power of attorney rendered any error harmless, we leave this issue for another day.

18 The attorney ad litem was appointed to represent the defendants who were served by publication. Champion, who was served by publication, filed a pro se answer and represented himself at trial.

19 While there is a constitutional right to effective assistance of counsel in criminal cases involving imprisonment, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this is a civil case. In most civil cases, an indigent civil litigant does not have a constitutional right to appointed counsel. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (due process did not require appointment of counsel for indigent civil litigant in parental rights termination case); *cf. Turner v. Rogers*, ——U.S. ——, ——, 131 S.Ct. 2507, 2520, 180 L.Ed.2d 452 (2011) (considering lack of counsel in concluding civil contempt incarceration violated Due Process Clause); *Scott v. Illinois*, 440 U.S. 367, 370, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) (right to counsel in criminal cases depends on whether there is "actual deprivation of a person's liberty").

20 One cannot help but notice that although some of the conveyances introduced by Robinson purported to reserve portions of the mineral estate of the tract, the judgment entered makes no mention of the reservation of the mineral estate and the owners of those reserved mineral interests do not appear to be parties to the lawsuit. Although the appellant does not raise the issue of the failure to join some of the possessory interest holders, "An attempted partition of the whole of a tract of land, where all the owners are

not joined as parties, is not binding even on those who are parties." *Mustang Drilling v. Cobb*, 815 S.W.2d 774, 777 (Tex.App.-Texarkana 1991, writ denied).

21 No bond was set for the receiver as required by Rule 695a of the Texas Rules of Civil Procedure. TEX.R. CIV. P. 695a. No complaint was raised by Champion regarding this failure.

22 There is evidence that one of the owners had secured a $420,000.00 note with her interest in the land and also evidence that the property was sold for over $200,000.00. Although there is evidence that Ferndale Lake (an apparently sizeable body of water) inundates at least a part of the property, there is neither evidence as to precisely how much is inundated, nor the enhancement in value, if any, which the presence of the lake would cause.

23 Since Champion did not request findings of fact, we imply any findings necessary to support the trial court's judgment. *See In re Naylor*, 160 S.W.3d 292, 294 (Tex.App.-Texarkana 2005, pet. denied).

999 S.W.2d 118
Court of Appeals of Texas,
Houston (14th Dist.).

Pat CHAPMAN, Sr., Appellant,
v.
Timothy HOOTMAN, Appellee.

No. 14–98–00817–CV. | July 29, 1999.

Attorney brought action against former client for breach of contract related to their contingency fee agreement. The County Civil Court at Law, Harris County, Tom Sullivan, J., granted summary judgment to attorney. Client appealed. The Court of Appeals, Frost, J., held that: (1) attorney's negotiation of settlement that completely eliminated client's obligation under $356,000 note unambiguously triggered client's duty to pay attorney $35,600, and (2) client did not pursue appeal in good faith, and thus, appellate sanctions would be imposed.

Affirmed.

Attorneys and Law Firms

***120** Lana R. Dieringer, Houston, for appellants.

Timothy A. Hootman, Dale W. Felton, Houston, for appellees.

Panel consists of Justices YATES, FOWLER and FROST.

Opinion

O P I N I O N

KEM THOMPSON FROST, Justice.

This is a breach of contract case arising out of a fee dispute between an attorney and his client. Appellant Pat Chapman, Sr., the client, appeals from a summary judgment entered in favor of appellee Timothy Hootman, his former attorney. By cross-point, Hootman seeks sanctions against Chapman for filing a frivolous appeal.

Factual Background

In 1991, Chapman hired Hootman to represent him in various legal matters. To memorialize the terms of their fee agreement, Chapman (client) and Hootman (attorney) entered into a contract entitled *Agreement for Professional Services*, which outlined the compensation to be paid to Hootman under various possible outcomes resulting from the pursuit and defense of claims asserted by and against Chapman. Chapman and Hootman later disagreed as to the sum owing to Hootman for the professional services rendered to Chapman, prompting Hootman to sue Chapman for breach of contract.

The written contingency fee agreement provided that Hootman, acting as Chapman's attorney, would seek to reduce or eliminate a major financial obligation of Chapman to the Federal Deposit Insurance Corporation ("FDIC"), successor to First State Bank of Liberty, Texas. In 1988, the bank had sold Chapman a piece of property in Hardin County, Texas, for which Chapman had given the bank a $356,000 promissory note. The following year the bank was declared insolvent and the note was sold to the FDIC. In October 1989, Eddie Boothe, a prior lien holder on the property, foreclosed and took title through a substitute trustee's deed. When Chapman discovered that he did not have good title to the property, he refused to pay his note to the FDIC. Multiple lawsuits followed. At the heart of Chapman's litigation with the FDIC and Boothe was the title to the Hardin County property and Chapman's purchase money indebtedness to the FDIC.

In anticipation of defending against the FDIC collection action and pursuing his own claims against both the FDIC and Boothe, Chapman agreed to pay Hootman on the basis of specific results obtained vis-a-vis the litigation. Section II(2) of the fee agreement between Hootman and Chapman states in pertinent part:

> If no cash recovery is obtained but [Hootman] is successful in reducing or eliminating the note amount, [Hootman] shall be compensated at a rate of ten percent (10%) of the amount reduced from the original principle [sic] amount of $356,000.00 and [Chapman] shall be obligated to pay [Hootman] $1000.00 per ***121** month until the full amount owed is paid off.
>
> If a cash recovery is obtained and [Hootman] is successful in reducing or eliminating the note amount, [Hootman]'s compensation shall be fifty percent (50%) of any cash recovery and [Hootman] shall be compensated at a rate of ten percent (10%) of the amount reduced from the original principal amount of $356,000.00, and [Chapman] shall be

obligated to pay [Hootman] $1000.00 per month until the full amount owed is paid off.

Hootman filed one state lawsuit and two federal lawsuits on behalf of Chapman under the parties' fee agreement. In 1994, Hootman negotiated a settlement on Chapman's behalf. Under the terms of the settlement, Chapman was to have no personal liability to the FDIC in the event Boothe (the prior lien holder on the property) prevailed in the lawsuit Chapman had filed against him (the "Boothe Litigation") and title to the Hardin County property was found to be vested in Boothe. In December 1995, the trial court in the Boothe Litigation ruled that Boothe held legal title to the property and that Chapman remained personally liable on the promissory note he had signed to purchase the property. At that point, the sums due on Chapman's note held by the FDIC would have exceeded $443,000, but under Chapman's settlement agreement with the FDIC (negotiated by Hootman), Chapman's financial obligation had been completely eliminated.

Despite the fact that his debt to the FDIC had been eliminated through Hootman's efforts, Chapman took the position that Hootman was not entitled to any fee because he failed to obtain a cash recovery. According to Chapman, under the second provision of Section II(2) cited above, *both* a cash recovery *and* the elimination of the debt were conditions precedent to Hootman's entitlement to a fee. Hootman argues that Chapman's strained interpretation ignores the express language of the first and operative provision cited above, which entitles Hootman to ten percent (10%) of the reduction in the note balance regardless of whether any cash was recovered.

Hootman moved for summary judgment, seeking $35,600 (10% of the amount of the eliminated obligation), plus prejudgment interest and attorney's fees. Chapman filed a timely response, claiming that fact questions existed as to the meaning of Section II of the agreement. The trial court entered summary judgment in favor of Hootman for the principal amount claimed, plus interest, $1,875.00 in attorney's fees, [1] and costs of suit.

Chapman filed a motion for new trial, claiming that the trial court had improperly considered "extensive testimony from a witness not sworn" at the summary judgment hearing. Hootman filed a response to Chapman's motion for new trial, stating that no witness had testified at the summary judgment hearing. The trial court denied Chapman's motion and refused to grant a new trial.

Issues on Appeal

Chapman presents three issues for our review: (1) whether the trial court erred in hearing testimony at a summary judgment hearing; (2) whether the trial court erred in excluding evidence offered by the non-movant; and (3) whether the trial court erred in failing to interpret the parties' fee agreement according to its plain meaning. The sole issue Hootman presents by cross-point is whether Chapman should be sanctioned for filing a frivolous appeal.

**122 Standard of Review for Summary Judgment*

The movant's initial burden requires a showing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548–49 (Tex.1985). If the movant's motion and summary judgment proof facially establish his right to judgment as a matter of law, then the burden shifts to the non-movant to raise a fact issue sufficient to defeat summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the non-movant is taken as true, and all reasonable inferences are indulged in favor of the non-movant. *See Nixon*, 690 S.W.2d at 548–549; *see also Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995).

Oral Testimony at the Summary Judgment Hearing

[1] **[2]** In the first issue he presents, Chapman argues that the trial court erred in hearing testimony of a nonparty at the summary judgment hearing. A hearing on a motion for summary judgment is purely one of law and no oral testimony is allowed at the hearing. *See* TEX.R. CIV. P. 166a(c); *Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex.App.—Houston [14th Dist.] 1991, no writ). Chapman, however, has not identified the witness that purportedly testified at the hearing, nor is there anything in the record (other than the unsubstantiated allegation in Chapman's motion for new trial) to indicate that the court took testimony, sworn or otherwise, at the summary judgment hearing. Matters that are not part of the record may not be considered on appeal. *See Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex.1998); *America Online,*

Inc. v. Williams, 958 S.W.2d 268, 278 n. 4 (Tex.App.—Houston [14 th Dist.] 1998, no pet.). As appellant, Chapman has the burden of demonstrating that the record supports his contentions. By failing to do so, he has waived appellate review of this point. *See* TEX.R.APP. P. 38.1(h); *Tacon Mechanical Contractors, Inc. v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666, 671 (Tex.App.—Houston [14 th Dist.] 1994, writ denied).

Exclusion of Summary Judgment Evidence

[3] In his second issue, Chapman complains that the trial court excluded his summary judgment evidence. There is no order or other reference in the record to indicate that the trial judge excluded any evidence proffered by either party. Having failed to demonstrate that the record supports this contention, Chapman has waived this complaint. *See* TEX.R.APP. P. 38.1(h).

Contract Interpretation

[4] In his final issue, Chapman contends that the trial court erred in failing to interpret the contract according to its plain meaning. Although Chapman now claims that "[t]he language of the engagement agreement is susceptible to a definite interpretation without resorting to parole [sic] evidence," in the court below, he claimed that the contract was ambiguous "because it failed to clearly state the intentions of the parties to the agreement." In response to Hootman's summary judgment motion, Chapman argued that there was a disputed fact issue about the interpretation of the contract's terms. Under Chapman's view, "a specific pair of circumstances must occur together in order for [Hootman] to earn his fee"-(1) a cash recovery *and* (2) an elimination of the note amount. We do not agree.

[5] **[6]** **[7]** **[8]** The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995). If an instrument is worded so that it can be given an ***123** exact or certain legal interpretation, it is not ambiguous and a court can construe the contract as a matter of law. *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 461 (Tex.App.—Houston [1st Dist.] 1994, writ denied). Absent a finding of ambiguity, a court must interpret the meaning and intent of a contract from the four corners of the document without the aid of extrinsic evidence. *Carrabba v. Employers Cas. Co.*, 742 S.W.2d 709, 716 (Tex.App.—Houston [14th Dist.] 1987, no writ). Only after a contract is found to be ambiguous may parol evidence be admitted for the purpose of ascertaining the true intentions of the parties expressed in the contract. *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 283 (Tex.1996).

[9] Chapman claims that it was improper for the trial court to have entered summary judgment because he had "raised a fact issue on the element of the ambiguity of the contract terms." Whether a contract is ambiguous is a question of law. *See Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex.1983). Therefore, Chapman could not and did not raise a fact issue on the question of ambiguity.

The fee agreement at issue in this case is not ambiguous. The express language of the contract clearly supports Hootman's interpretation. Section II(2) specifically provides that even if no cash recovery is obtained, Hootman "shall be compensated at a rate of ten percent (10%) of the amount reduced from the original principal amount of $356,000.00." Chapman completely ignores this provision and bases his interpretation entirely on the provision that immediately follows (the second one cited above). The second provision was not intended to address the situation presented here (*i.e.*, obtaining no cash recovery but eliminating the note amount), but applied to another scenario—one in which Hootman would receive an additional amount if he obtained a cash recovery in addition to reducing or eliminating the note amount. The applicable provision of the agreement (the first one cited above) did not require Hootman to recover cash for Chapman from the FDIC as a condition to Hootman's entitlement to a fee for eliminating Chapman's note obligation. The intent of the parties, as plainly expressed in the fee agreement, was for Hootman to be compensated in an amount equal to ten percent (10%) of any reduction in the principal amount of Chapman's debt ($356,000) and for Hootman to recover an additional amount if he were also successful in obtaining a cash recovery. Chapman's interpretation is patently unreasonable and is belied by the express language of the agreement.

It is undisputed that the settlement Hootman negotiated entirely eliminated Chapman's debt to the FDIC. This event triggered Chapman's obligation to pay Hootman $35,600 (10% of the amount eliminated). Because there is no genuine issue of material fact as to Hootman's entitlement to payment, the trial court correctly entered summary judgment for

Hootman. We overrule Chapman's point of error and affirm the judgment of the trial court.

Sanctions for Filing of Frivolous Appeal

[10] Hootman seeks sanctions against Chapman under Rule 45, Texas Rules of Appellate Procedure,[2] for the filing of a frivolous appeal, citing as grounds (1) Chapman's failure to cite to the record or present authority in support of his first two issues on appeal; (2) Chapman's reliance on an inapplicable provision of the contract made the subject of the suit; and ***124** (3) Chapman's unjustified use of the appellate process solely as a means of delay. Chapman has had notice of Hootman's request for sanctions for more than nine months, yet has failed to respond in any way.

[11] **[12]** **[13]** Whether to grant sanctions is a matter of discretion, which we exercise with prudence and caution, and only after careful deliberation. *Casteel–Diebolt v. Diebolt,* 912 S.W.2d 302, 306 (Tex.App.—Houston [14th Dist.] 1995, no writ). Although imposing sanctions is within our discretion, we will do so only in circumstances that are truly egregious. *City of Houston v. Crabb*, 905 S.W.2d 669, 676 (Tex.App.—Houston [14 th Dist.] 1995, no writ). Where an appellant's argument on appeal fails to convince the court, but has a reasonable basis in law and constitutes an informed, good-faith challenge to the trial court's judgment, sanctions are not appropriate. *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex.1991) (interpreting former TEX.R.APP. P. 84).

[14] **[15]** In determining whether sanctions are appropriate, we carefully consider the record from the appellant's point of view at the time the appeal was filed. *See City of Alamo v. Holton*, 934 S.W.2d 833, 837 (Tex.App.—Corpus Christi 1996, no writ). Among the factors we consider are whether the appellant had a reasonable expectation of reversal and whether he pursed the appeal in bad faith. *Tate v. E.I. DuPont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex.App.—Houston [14 th Dist.] 1997, no pet.); *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 624 (Tex.App.—Houston [14 th Dist.] 1995, no writ). The fact that no response is filed to a cross-point requesting penalties is itself a factor to consider in determining whether an appeal is frivolous. *See Tate*, 954 S.W.2d at 875.

In applying the various factors to determine whether this is an appropriate case for sanctions, Chapman's appeal does not fare well. Given the plain terms of the contract, viewed from Chapman's point of view at the time this appeal was filed, he could not have had any reasonable expectation that this court would reverse the ruling of the lower court. In making his argument on appeal, Chapman neither addressed the operative provision of the contract nor proffered any reason why it was not applicable. He made no attempt to explain why the provision on which the trial court relied to rule against him should not control the disposition of the case, nor did he even attempt to address the matter. Instead, Chapman took the anomalous position that the contract was unambiguous *and* presented a "fact question" on ambiguity.

Chapman's appeal also has other earmarks of a bad faith filing. His brief fails to give appropriate citations to authorities and the record,[3] a fact which is not altogether surprising given the lack of support for his factual contentions in the record and the lack of legal authority to support his arguments on appeal. In the prayer of his brief, Chapman asks this court to reverse the judgment of the trial court and to render judgment for him, a remedy that is clearly not available given the procedural posture of this case.[4] Perhaps most indicting is the fact that Chapman has not responded to Hootman's cross-point asserting that the appeal is frivolous, nor has he otherwise challenged Hootman's claim for damages as sanctions under Rule 45, despite notice and an opportunity to do so.

***125** A party's decision to appeal should be based on professional judgment made after careful review of the record for preserved error in light of the applicable standards of review. Here, it is obvious that Chapman was motivated by other factors in pursuing his appeal. No amount of wishful thinking could have led Chapman to a reasonable belief that this court would overrule the trial court's judgment based on the issues he raised on appeal, especially given the inadequate briefing and meritless arguments. There is no room at the courthouse for frivolous litigation. When a party pursues an appeal that has no merit, it places an unnecessary burden on both the appellee and the courts. More importantly, it unfairly deprives those litigants who pursue legitimate appeals of valuable judicial resources.

[16] We impose appellate sanctions only where the record clearly shows the appellant had no reasonable expectation of reversal, and that he did not pursue the appeal in good faith. *Finch v. Finch,* 825 S.W.2d 218, 226 (Tex.App.—Houston

[1st Dist.] 1992, no writ) (interpreting former Rule 84, Texas Rules of Appellate Procedure). It is not unreasonable to infer that Chapman pursued this appeal in bad faith and for improper purposes, including delay and harassment. The numerous deficiencies in Chapman's brief, coupled with his failure to challenge Hootman's request for sanctions, lead to the inescapable conclusion that his appeal is frivolous. We find that Chapman's filing of this appeal warrants the assessment of damages under Rule 45. Accordingly, we sustain Hootman's cross-point and order Chapman to pay Hootman damages of $5000, a sum representing the reasonable attorney's fees and related expenses Hootman incurred in responding to this appeal.

The judgment of the trial court is affirmed.

Footnotes

1 Chapman disputed Hootman's entitlement to attorney's fees on his breach of contract claim as well as the amount of fees Hootman sought to recover in connection with his lawsuit against Chapman. However, the parties later stipulated that reasonable attorney's fees for the handling of Hootman's claim against Chapman were $1,875.00.

2 Rule 45, entitled “Damages for Frivolous Appeals in Civil Cases,” reads in pertinent part:

> If the court of appeals determines that an appeal is frivolous, it may -on motion of any party or on its own initiative, after notice and a reasonable opportunity for response -award each prevailing party just damages.

3 *See Lewis v. Deaf Smith Elec. Coop., Inc.*, 768 S.W.2d 511, 514 (Tex.App.—Amarillo 1989, no writ)(holding that where appellant's statement, arguments, and cited authorities are minimal, and authorities cited only tenuously relate to appellant's claimed points of error, the appeal is frivolous, warranting award of a ten percent penalty under Rule 84).

4 Chapman did not file a cross-motion for summary judgment in the court below. Where the only issue is whether the appellee's motion for summary judgment was improvidently granted, a rendition on appeal is improper. *Chevron U.S.A., Inc. v. Simon*, 813 S.W.2d, 491 (Tex.1991) (per curiam).

159 Tex. 141
Supreme Court of Texas.

CITY OF BELLAIRE, Texas, Petitioner,
v.
M. A. LAMKIN et ux., Respondents.

No. A-6678. | Oct. 29, 1958.

Action by city for injunction requiring landowners to remove a certain fence from sides of their lot and to remove a wooden fence from front of their lot. The District Court, Harris County, Spurgeon E. Bell, J., entered judgment refusing injunction as to side fences but granting injunction requiring removal of front yard fence, and landowners appealed. The Waco Court of Civil Appeals, Tenth Supreme Judicial District, 308 S.W.2d 70, reversed District Court judgment and city brought error. The Supreme Court, Griffin, J., held that where elimination of fences from areas between street and fronts of houses in single family residence districts made it easier for operators of police patrol cars to see what was going on down the street, made it easier to police area by depriving criminals of concealment in front yards, made it easier for fire fighting and made it easier for drivers of vehicles using streets to see children and vehicles which might come or run into street, zoning ordinance forbidding fences had reasonable relationship to public health, safety or general welfare and ordinance was within discretionary power conferred upon city council of home rule city in exercise of its legislative power.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

Smith, J., dissented.

Attorneys and Law Firms

***141** ****44** Paul Strong, Houston, for petitioner.

Charles H. Sherman, Jr., Houston, for respondents.

Opinion

GRIFFIN, Justice.

The petitioner, City of Bellaire, Texas, hereinafter called City is a Home Rule city and under the authority of Articles 1011, 1011a et seq., Vernon's Annotated Civil Statutes, it duly and legally passed a comprehensive zoning ordinance on April 19, 1950. As far as is material in our cause, this ordinance defined a front yard as 'the open space between a building and the street on which it fronts.' Further, the ordinance provided that 'no fence, wall or anything similar shall be permitted in the front yard.' Section 24, Subsection 7 of the said ordinance provides ***142** that 'no wall, fence, or other structure shall be erected and no hedge, shrub, tree or other growth shall be maintained on any corner lot within the required front and/or side street yard space so as to cause danger to traffic by obstructing the view.'

Respondents, Mr. and Mrs. Lamkin, own a corner lot in the City. After the effective date of the zoning ordinance, the Lamkins erected a fence thirty inches high in their front yard with a gate approximately in the middle of the fence. This fence consists of 4 X 4 posts sunk in the ground to which posts are nailed three 1 X 6 railings, or strips, with the flat sides against the posts. The front yard fence was set back about 32 feet from the street on which the Lamkins' house faced, and some 40 feet from their house. The Lamkins did not apply to the City for a permit to erect the fence, and, of course, would have received no permit had they applied. After the postholes were dug, but before the posts were inserted therein, a representative of the City came to the Lamkins' home and inquired as to the purpose Lamkin had in digging the postholes. Upon being informed that the Lamkins proposed to erect the fence, this representative informed them they were prohibited from erecting the fence under the zoning ordinance of the City. He also told them the City would not permit the fence to be erected, or to continue in existence, if erected. The Lamkins went ahead and erected the fence claiming they had a constitutional right to do so. Various negotiations were had between the City and ****45** the Lamkins seeking to have the fence removed, but no progress was made. Finally, the City filed this suit against the Lamkins for a permanent injunction requiring them to remove the cyclone side fences and this front yard fence. Upon a trial before the Court without a jury, the injunction was denied as to the removal of the cyclone side fences, and granted as to the removal of the fence in the front yard.

The Lamkins appealed to the Court of Civil Appeals which court reversed the judgment of the trial court and rendered for the Lamkins on the ground that the ordinance, as applied to the Lamkins' fence, was unreasonable and that it had no reasonable relationship to public health, safety and general welfare. 308 S.W.2d 70. We reverse the Court of Civil Appeals and affirm the judgment of the trial court.

[1] **[2]** The application for writ of error by the City was granted. There is no dispute that the City, in the exercise

of its police power under statutory authority, including the Home Rule amendment to our Constitution, has authority to promulgate ***143** zoning ordinances regulating the use, and, where necessary or appropriate, to prohibit the use of property for certain purposes in aid of the general welfare, safety and public health and morals of the community. Lombardo v. City of Dallas, 1934, 124 Tex. 1, 73 S.W.2d 475; City of San Antonio v. Pigeonhole Parking of Texas, Inc., 1958, Tex., 311 S.W.2d 218; Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016. It is also the law that harmless structures occupations, etc. may sometimes be brought within the regulations or prohibitions of an ordinance in order to abate or destroy the harmful. Lombardo v. City of Dallas, supra: Euclid, Ohio v. Ambler Realty Co., supra.

[3] **[4]** **[5]** The City, in passing zoning ordinances, acts in the exercise of its legislative powers, and its ordinances are presumed to be valid. City of Waxahachie v. Watkins, 1955, 154 Tex. 206, 275 S.W.2d 477; Town of Ascarate v. Villalobos, 1949, 148 Tex. 254, 223 S.W.2d 945. The courts have no authority to interfere with the City in the passage and enforcement of its zoning ordinances unless the action of the city is arbitrary and unreasonable. Town of Ascarate v. Villalobos, supra. The courts cannot interfere unless it appears that the ordinance represents a clear abuse of municipal discretion, and the 'extraordinary' burden rests on one attacking the ordinance to show that no conclusive, or even controversial or issuable fact or condition existed which would authorize the governing board of the municipality to exercise the discretion confided to it in the passage of that part of the zoning ordinance under attack.

'This query presents a question of law, not a question of fact, and in deciding it the court should have due regard 'to all the circumstances of the city, the object sought to be attained and the necessity existing for the ordinance.' And if there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material. Edge v. City of Bellaire, Tex.Civ.App., 200 S.W.2d 224, 227, error refused.' City of Waxahachie v. Watkins, 1955, 154 Tex. 206, 275 S.W.2d 477, 481.

See also King v. Guerra, Tex.Civ.App. 1927, 1 S.W.2d 373, wr. ref.; Town of Ascarate v. Villalobos, supra; City of Dallas v. Lively, Tex.Civ.App.1942, 161 S.W.2d 895, and from City of Coleman v. Rhone, Tex.Civ.App.1949, 222 S.W.2d 646, 649, wr. ref., as follows:

'Courts are thus reluctant to disturb legislative action if the ***144** subject matter involved lies within the police power and will not do so unless it clearly appears pears that the regulation is unnecessary and unreasonable and not justified by the facts. If there is room for a ****46** fair difference of opinion as to the necessity and reasonableness of a legislative enactment or ordinance on a subject which lies within the police power, the courts will not hold it void. 16 C.J.S. Constitutional Law s 198, page 569. * * *' (Emphasis added.)

In our case the only evidence offered by the Lamkins, aside from the description of their property and of the fence, was to the effect that they claimed the ordinance was invalid because, in their opinion, it violated their constitutional right of privacy, and their right to landscape their property the way they wanted to landscape it; and also that the fence would keep out (or keep in) dogs.

In their reply to the City's application for writ of error filed in this Court, the Lamkins, with commendable frankness, say: 'The real question here being a matter of law to be determined, the Court is called upon to balance the rights of a municipality to attempt to promote, by zoning, the orderly growth of the community and to protect its collective citizenry as it may be opposed to be the individual citizen's inherent, necessary, valuable and constitutionally protected right in the ownership of property and the normal rights of usage therein, such as his rights of privacy and the rights to have and to exercise pride in the beautification of his home, property, and surroundings, as is clearly the situation relating to the Lamkins' fence in this case.' With regard to the fence and its relation to the public health, safety, welfare and morals of the City of Bellaire, the following testimony was given. Here we have used the summary of the testimony contained in the City's application for writ of error, in order to reduce the length of this opinion. The Lamkins do not attack the correctness of the summary and we have read the statement of facts and it supports this summation.

'Bellaire's Chief of Police, O'Brien, who had been in police work since 1939, who has had 20-35 auto accidents investigated a month in that 18 years, a total of over 4,000, testified that Bellaire was a City of homes and children. There are 27 children in one block; having fences in front yards affects children, as it increases danger to them 100% when they run into the street. Chief O'Brien believed from looking at it that this hazard existed with reference to Respondents' property, and that similar fences would multiply the problems by the number of corners ***145** in the City. The police have

trouble with children in driveways; there is a stream of them in wagons, scooters, skates, bicycles going out into the streets. The chief also said that in his experience criminals hid behind fences in front yards. He pointed out that Bellaire had a population of 25,000 and covered 3 1/2 square miles, of which only one quarter of a square mile was in the business district, and had no foot patrolmen, except in the business district. The City only has to do a small amount of night patrolling, because it is without fences in the front yard and the car can ride down the street and see any one in the front yards. A good illustration of this advantage may be gained by looking at the aerial photograph.

'L. I. Moody, Fire Captain, with 11 years of experience in the Bellaire Fire Department, covering 350 fire calls a year, a total of over 3800 in all, who had looked at appellants' property testified that the fences in the front yard around the house were very inconvenient for firemen because they had to drag hose over it and an additional fireman had to stay at the fence to lift the hose over since the couplings hang on the fence. Further, they have to throw their ladders over the fence, climb over and pick them up again. There is added difficulty in getting through the gate with equipment and firemen have to make several trips back ****47** and forth. Only one fireman could go through the Respondents' gate at a time. At night there is danger of firemen falling over the fence. The firemen had to put up a ladder to get over a fence at a school fire.'

[6] After hearing the evidence offered by both sides, the trial judge filed Findings of Fact and Conclusions of Law. The material portion of Finding No. 11 is set out in the opinion of the Court of Civil Appeals as follows:

> 'The elimination of fences from areas between a street and a parallel line drawn through the fronts of houses facing such street, in districts zoned for single family residences, has a reasonable relationship to the public health, safety and general welfare in that elimination of such fences: 1) makes it easier for police patrol cars to see what is going on down the street; 2) makes it easier to police the area by depriving criminals of places of concealment in front yards; 3) makes it easier and quicker for fire fighting in the homes of residents, by eliminating the necessity of going through a gate or over a fence to bring ladders, hoses and men to fight fires; 4) makes it easier for drivers of vehicles using the street to see children and vehicles which might come or run into the street.'

***146** We agree with the trial court that the respondents did not produce evidence showing, as a matter of law, that the provisions of this zoning ordinance forbidding fences have no reasonable relationship to the public health, safety or general welfare, and such provisions were, therefore, within the discretionary power conferred upon the City Council of the City of Bellaire in the exercise of its legislative power.

We reverse the judgment of the Court of Civil Appeals and affirm the judgment of the trial court.

SMITH, J., dissenting.

Parallel Citations

317 S.W.2d 43, 66 A.L.R.2d 1289

154 Tex. 206
Supreme Court of Texas.

CITY OF WAXAHACHIE, Texas, Petitioner,
v.
Milton WATKINS et al., Respondents.

No. A-4647. | Jan. 19, 1955.
| Rehearing Denied March 9, 1955.

Suit was brought to annul two amendatory zoning ordinances of city. The District Court, Ellis County, Frank G. McDonald, J., entered judgment decreeing the ordinances null and void, and city appealed. The Waco Court of Civil Appeals of the Tenth Supreme Judicial District, Hale, J., 265 S.W.2d 843, affirmed the judgment, and the city brought error. The Supreme Court, Brewster, J., held that where size, shape, and location of certain area in city made it undesirable for residence purposes, and adjoining land to the east had already been zoned for business purposes, and all lots in the immediate locality and lying north, northeast, east, southeast, and south of the area were already devoted to business purposes, and area could be used as part of a retail shopping center, with off-street parking for the public, so that congestion of traffic in downtown area would be lessened, there were issuable facts involved, and therefore city council did not abuse its discretion in rezoning the area in order to change the area from a dwelling district to a local retail district.

Judgments reversed, and judgment rendered for city.

Attorneys and Law Firms

***208** ****478** Warwich H. Jenkins, Waxahachie, for petitioner.

Stuart B. Lumpkins and J. C. Lumplins, Waxahachie, for respondents.

Opinion

BREWSTER, Justice.

This suit was filed by Milton Watkins et al., respondents, against the City of Waxahachie, petitioner, and Eldon Berry, to annul two ordinances passed by the city designed to amend its basic zoning ordinance adopted on April 6, 1937, and to enjoin Berry from taking advantage of the amendatory ordinances. The trial court rendered judgment as prayed by Watkins et al.; and the Court of Civil Appeals has affirmed. 265 S.W.2d 843. Berry did not appeal.

These ordinances were passed under the power granted the legislative bodies of ****479** cities by Art. 1011a, Vernon's Ann.Civ.Stats.

The original zoning ordinances were passed as 'a comprehensive plan for the purpose of promoting health, safety, morals and the general welfare of the community'; and 'with reasonable consideration, among other things, to the character of the district, and its peculiar suitability for the particular uses'; with 'the view of conserving the value of buildings and encouraging the most appropriate use of land throughout the community.'

On basis of use, the city was divided into four classes, namely, dwelling, local retail, commercial and manufacturing, 'all as shown on the zoning map which accompanies this ordinance' and which map 'is hereby declared to be a part (of the ordinance) for all intents and purposes.'

On Feb. 28, 1952, petitioner's city council passed an ordinance by which it changed 'part of Block 28A, Williams Addition, and part of Lot 5, Block 9, University Annex Addition,' from its designation under the original zoning ordinance as in a dwelling district to a local retail district. That action resulted in this lawsuit.

***210** To aid in a better understanding of this case, we insert the following plat, drawn to a scale of 1 inch to 100 feet:

****480** The area sought to be re-zoned (less than 1/2 acre) is marked 'Subject Property' and is heavily outlined in black. It faces south on Sycamore Street for a distance of 139.6 feet; its western boundary of 200 feet coincides with the eastern boundary of plaintiff Watkins' property; its northern boundary parallels its southern boundary but is only 54 feet long, with the consequence that its eastern boundary is not parallel with its western boundary but extends obliquely 222.3 feet to the point of beginning, thus excluding the small northeast corner ***211** of Lot 5, Block 9, but including a larger southwest corner of Block 28A.

As for the remainder of the area shown on the map to be local retail property, only the small northern tip of Block 28A facing on Highway 77 and the lots facing west on Ferris Avenue and shown to be in Ferris Second Addition were given such designation by the over-all ordinance of 1937. (They are marked '1937 Zoning Map'.) All the other lots

shown black were designated for building use under the 1937 ordinance and later became local retail property by numerous spot-zoning ordinances. For example, the property joining 'Subject Property' on the ease and not included in the 1937 ordinance and being the larger part of Block 28A was so zoned by ordinance passed June 3, 1941. The lots to the southeast of 'Subject Property' and facing north on Sycamore Street and east on Ferris Avenue were re-zoned on Nov. 1, 1938, and are now occupied by a filling station and a tourist court. On the same date the triangular lot on the northwest corner of the plat, across Ovilla Road from the property of plaintiff Lockman, was changed to local business use.

The main issue here is whether the Court of Civil Appeals erred in holding the amendatory ordinance void. Petitioner says it is not void because (1) 'there is ample evidence to support the decision of the City Council in re-zoning the property'; (2) the ordinance is not arbitrary and unreasonable, since 'the findings of fact of the trial court and the undisputed evidence show that such amendment was justified'; and (3) the action of the council 'was a valid exercise of the police power of the City, supported by disputable facts, and the courts may not lawfully substitute their discretion for that of the appropriate legislative body, in a purely legislative matter.'

One authority notes that comprehensive zoning laws are of relatively modern origin; that in late years a veritable flood of zoning legislation has swept the country; that in the many decisions of state and federal courts dealing with such ordinances, there has been some conflict and confusion; that the tendency, however, is in the direction of extending the power of restriction in aid of city planning. 58 Am.Jur., p. 942, sec. 5.

[1] With the recent rapid growth of urban centers in Texas spot-zoning cases have come to court much more frequently and many of them have got into the books. Candor compels the admission that not all of these decisions have been either enlightening or convincing. However, that situation can be explained in part, ***212** at least by the fact that the controlling considerations are seldom, if ever, the same in any two cases. Hence final determination of the validity of the ordinance must turn on the circumstances of each case and the character of the regulations involved. See Annotation in 149 A.L.R., pp. 292, 293.

Of course, there are basic principles which must be considered in determining the validity of any zoning ordinance.

[2] Since it is an exercise of the legislative power of the city's council, the ordinance must be presumed to be valid.

[3] **[4]** The courts cannot interfere unless it appears that the ordinance represents a clear abuse of municipal discretion. And the 'extraordinary burden' rests on one attacking the ordinance 'to show that no conclusive, or even controversial or issuable, facts or conditions existed which would authorize the governing board of the municipality to exercise the discretion confided ****481** to it.' City of Dallas v. Lively, Tex.Civ.App., 161 S.W.2d 895, 898, error refused, quoting from King v. Guerra, Tex.Civ.App., 1 S.W.2d 373, error refused.

[5] **[6]** The presumption of validity accorded original comprehensive zoning applies as well to an amendatory ordinance. Weaver v. Ham, 149 Tex. 309, 232 S.W.2d 704. In either case the courts have no authority to interfere unless the change is clearly unreasonable and arbitary. Clesi v. Northwest Dallas Imporvement Ass'n, Tex.Civ.App., 263 S.W.2d 820, 827, error refused, N.R.E., quoting 62 C.J.S., Municipal Corporations, s 228, p. 561.

[7] **[8]** If reasonable minds may differ as to whether or not a particular zoning restriction has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the restriction must stand as a valid exercise of the city's police power. City of Corpus Christi v. Jones, Tex.Civ.App., 144 S.W.2d 388, error dism., correct judgt. Otherwise expressed by the court in the case just cited, if the issue of validity is fairly debatable courts will not interfere.

Have Watkins et al. met their 'extraordinary' burden to show that there were no controversial or issuable facts which would authorize the city council of Waxahachie to exercise its discretion in the manner herein complained of?

[9] **[10]** **[11]** ***213** This query presents a question of law, not a question of fact, and in deciding it the court should have due regard 'to all the circumstances of the city, the object sought to be attained and the necessity existing for the ordinance.' And if there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material. Edge v. City of Bellaire, Tex.Civ.App., 200 S.W.2d 224, 227, error refused.

In its application for writ of error petitioner points out many factors shown in the testimony which would support the city council in passing the ordinance in question. Some of them are: The size, shape and location of the subject property made it undesirable for residence purposes; its contiguous relation and unitization with the tract lying immediately to the east already zoned for business purposes; the fact that all lots in that immdiate area lying north, northeast, east, southeast, and south of the subject property are already devoted to business purposes; the fact that the subject property if developed in connection with the lots around it and already zoned for business would be entirely suitable for a retail shopping center and provide off-street parking for the public, which is a present need of the City of Waxahachie; the fact that use of the subject property as part of a local shopping center would lessen the congestion of traffic in the downtown area, would increase the wealth of the city by attracting new business and would tend to increase tax values in the city.

But respondents claim that the city enacted a zoning ordinance on May 23, 1950, which substantially increased the local retail area of the city with the purpose to settle the business needs of Waxahachie within the foreseeable future and thereby render spot-zoning, especially that before us, unnecessary.

In the first place, this ordinance had to do only with downtown Waxahachie, and made no pretense of dealing with the area involved in this case.

Moreover, the chairman of the City's Zoning Commission testified that in reconsidering the ordinance of May 23, 1950, 'in so far as the city as a whole was concerned that recommendation was not a comprehensive recommendation' but 'was just to enlarge this area downtown that was already zoned,' and that 'we wanted to take care of any growth we might have in the downtown area.'

***214** As further evidence on that issue various ordinances were passed after the ordinance ****482** of May 23, 1950, three of which are in the record as defendant's exhibits.

[12] We conclude, therefore, that there were issuable facts shown which tend to establish that petitioner's council did not abuse its discretion in re-zoning the property involved here; hence its action must stand as a valid exercise of its police power.

Petitioner complains of the holding by the Court of Civil Appeals that the amendatory ordinance of Feb. 28, 1952, was void because it was not published within a reasonable time.

On this question it is interesting to note that of 31 amendatory ordinances passed by petitioner's council after the basic ordinance of Apr. 6, 1937, and before the passage of the one here under attack, not one was ever published after its adoption. Nor was the ordinance of May 23, 1950, which affected a large portion of downtown Waxahachie with the purpose to take care of prospective growth, ever published.

Petitioner's charter provides: 'Every ordinance imposing a penalty, fine or imprisonment, or a forfeiture, shall, after its passage and record, be published in a newspaper published in the City, and adopted by the Council as the official paper, and such ordiance shall take effect ten days after the appearance of such publication.'

Petitioner argues that this provision does not apply to the ordinance at bar because the latter does not impose a penalty, fine, imprisonment or forfeiture. We are not obliged to decide that question because the ordinance was in fact published in compliance with the charter provision.

Respondents point out that this suit was filed March 27, 1952, but was not set for trial until Nov. 24, 1952; that on Nov. 15, 1952, they filed an amended petition raising for the first time the fact that the ordinance had not been published; that within two hours after he got a copy of the amended petition, petitioner's attorney went to a newspaper in Waxahachie and caused the ordinance to be published on Sunday, Nov. 16, 1952. Respondents insist that this publication, made eight and one-half months after the ordinance was passed, was not a publication within a reasonable time.

[13] It will be noted that petitioner's charter provision, supra, ***215** specifies no time for publication of an ordinance; neither does it provide that an ordinance shall be invalid unless or until it is published. Following an admission that there is possibly some authority to the contrary, 62 C.J.S., Municipal Corporations, s 427, p. 821, states: 'But it has also been held that such requirements are liberally construed, and that they are directory only and not mandatory if the nature of the act to be performed or the language used in the enactment does not indicate the contrary, especially where the public is protected by the further provision that an ordinance shall not take effect until ten days after its publication; * * *. If no special time is limited as the period for publication, then it will be sufficient if it is made within a reasonable time after passage of the ordinance, and, where there has

been a publication of the ordinance, it is immaterial that several meetings of the council have taken place between the passage and the publication of the ordinance.' (Italics ours.) Under the circumstances of this case, especially the absence of an showing that somebody was hurt by the delay, we have concluded that this quotation correctly states the law applicable to this case, so petitioner's point is sustained. See City of Corpus Christi v. Jones, supra, Tex.Civ.App., 144 S.W.2d 388.

Petitioner's remaining point is that the Court of Civil Appeals erred in holding that the ordinance was void because no public hearing was had by the City Board of Adjustment and because no notice was given to property owners within 200 feet of the property in question prior to the Board's recommendation to the city council.

[14] At the outset of this opinion we stated that respondents brought this suit to annul two ordinances designed to amend ****483** its basic zoning ordinance. One of these was that passed on Feb. 28, 1952, which we have already described. The other was enacted on Feb. 5, 1952. The two ordinances dealt with identical subject matter and all parties at interest knew they did. Both re-zoned 'Part of Block 28A, Williams addition, and partof Lot 5, Block 9, Addition, and part of Lot 5, Block 9, to business use'; but the ordinance of February 5 did not give a correct description of the property so that it could be located on the ground. The ordinance of February 28 Gave a full and accurate description of the property by metes and bounds. If the requirements for notice and hearing were sufficient as to the ordinance of Feb. 5, 1952, we hold they were sufficient as to that of Feb. 28, 1952. It is not disputed that before its council came up with the ordinance of Feb. 5, 1952, it had mailed written notice of the proposed change in classification of the property involved here to all owners of property lying within 200 feet ***216** of the lot (sought to be re-zoned) or portion thereof, and had given the required newspaper publicity. That gave the matter much publicity, because the meeting was largely attended, and discussions were heated and tempers flared. That is certainly as much as could have been done by the Board of Adjustment.

Moreover, before the ordinance of Feb. 5, 1952, was passed it was recommended by the Board to petitioner's council for passage.

Under such circumstances we find ourselves unwilling to hold that the ordinance in question was void.

Both judgments below are reversed and judgment is here rendered for petitioner.

WALKER, J., not sitting.

Parallel Citations

275 S.W.2d 477

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865 S.W.2d 941
Supreme Court of Texas.

Albert W. DAVIS, Rita Davis, Betty Mills, and Edwin N. Mills, Petitioners,
v.
ZONING BOARD OF ADJUSTMENT OF the CITY OF LA PORTE, Respondent.

No. D–3831. | Nov. 24, 1993.

Landowners petitioned for review of decision of local zoning board of adjustment. The 269th District Court, Harris County, David West, J., granted board's plea and abatement, and appeal was taken. The Houston Court of Appeals, Fourteenth Judicial District, 853 S.W.2d 650, Sam Robertson, J., affirmed, and writ of error was sought. The Supreme Court held that failure to timely obtain service of writ of certiorari did not preclude judicial review of zoning board's decision.

Reversed and remanded.

Attorneys and Law Firms

***941** Jack G. Carnegie, Jack E. Urquhart, Houston, for petitioners.

***942** John D. Armstrong, La Porte, Victor N. Makris, Houston, for respondent.

Opinion

PER CURIAM.

In this cause, we consider whether a trial court abused its discretion in dismissing a zoning board appeal. The court of appeals held that service of the writ of certiorari, as required by section 211.011 of the Texas Local Government Code, is a jurisdictional prerequisite to appeal a zoning board's decision, and therefore upheld the trial court's dismissal of the Petitioners' case. 853 S.W.2d 650. We disagree, and therefore reverse.

Albert Davis and others (the "Davises") sought judicial review of a decision made by the Zoning Board of Adjustment of the City of La Porte (the "Board") allowing David and Debbie Couch to construct a large building on a residential lot. After reviewing the Davises' petition, the court ordered the court clerk, upon the posting of a $100 bond, to issue a writ of certiorari to the Board. The bond was not posted, and the writ was not served.

Eleven days before trial, the Board filed a plea in abatement complaining that it had not been served with the writ of certiorari. The Board did not seek dismissal for want of prosecution; nor did it attempt to establish that it had suffered any prejudice. The trial court granted the Board's plea in abatement and allowed the Davises thirty days to file an amended complaint. In a hearing conducted as the result of the Davises' amended complaint, the trial court dismissed the Davises' appeal. The court of appeals affirmed, reasoning that the Davises "did not timely invoke the jurisdiction of the court." 853 S.W.2d at 653.

[1] **[2]** Jurisdictional power is defined as "jurisdiction over the subject matter, the power to hear and determine cases of the general class to which the particular one belongs." *Middleton v. Murff,* 689 S.W.2d 212, 213 (Tex.1985). Once a party files a petition within ten (10) days after a zoning board decision, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally. *See* TEX.LOC.GOV'T CODE § 211.011. [1] The writ of certiorari is the method by which the court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the particular zoning decision being challenged. [2] *See* Tex.R.App.P. 54 (filing of a record is not jurisdictional); *Hare v. Hare,* 786 S.W.2d 747, 748 (Tex.App.—Houston [1st Dist.] 1990, no writ) (filing a bond is jurisdictional but service of a bond is not). [3]

[3] The statute does not contain a specific time limit for issuance of the writ; nor has the Board shown any prejudice caused by the delay. Thus, having complied with the procedures established by the legislature for challenging board of adjustment decisions, the Davises are entitled to their day in court. *See Scott v. Board of Adjustment,* 405 S.W.2d 55, 56 (Tex.1966). Accordingly, we conclude that the trial court abused its discretion in dismissing the Davises' appeal for lack of jurisdiction. We therefore grant Petitioner's application for writ of error and pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, a majority of the court reverses the judgment of the court of appeals and remands this cause to the trial court for further proceedings.

Footnotes

1 "[A] petition must be filed within 10 days after the [board's] decision is filed in the board's office ... On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision." TEX.LOC.GOV'T CODE § 211.011(b), (c).

2 The jurisdiction of district courts to issue writs is derived from the Texas Constitution. *See* TEX. CONST. ART. V, § 8.

3 We disapprove the opinion in *City of Lubbock v. Bownds*, 623 S.W.2d 752 (Tex.App.—Amarillo 1981, no writ) to the extent it holds that a trial court's jurisdiction under § 211.011 depends upon service and return of the writ of certiorari.

986 S.W.2d 795
Court of Appeals of Texas,
Corpus Christi.

DIANA RIVERA & ASSOCIATES, P.C., Appellant,
v.
David CALVILLO, Appellee.

No. 13–98–604–CV. | Feb. 18, 1999.
| Rehearing Overruled April 1, 1999.

Attorney and her firm filed action for declaratory judgment that no contract existed concerning referral of breast implant litigation cases, and another party intervened and asserted interest in referral fees. The 275 th District Court, Hidalgo County, Juan Partida, J., entered order requiring attorney and her firm to prepare sworn accounting and tender portion of referral fees into registry of court. Attorney filed interlocutory appeal and intervening party filed motion to dismiss appeal and impose sanctions. The Court of Appeals, Rodriguez, J., held that: (1) trial court's order was not order for appointment of receiver or order for temporary injunction from which interlocutory appeal could be taken, and (2) attorney would be required to pay opposing party's appellate attorney fees as sanction for filing of frivolous appeal.

Appeal dismissed and sanctions imposed.

Attorneys and Law Firms

***796** Yolanda Jurado, Edinburg, for appellant.

Jose Antonio Gomez, Edinburg, Raymond L. Thomas, Kittleman, Thomas, Ramirez & Gonzalez, John Gregory Escamilla, Rodriguez, Pruenda, Tovar, Calvillo & Garcia, McAllen, for appellee.

Before Justices DORSEY, CHAVEZ, and RODRIGUEZ.

Opinion

OPINION

RODRIGUEZ, Justice.

This is an attempted interlocutory appeal from an order requiring appellant, Diana Rivera and Diana Rivera & Associates, [1] to prepare a sworn accounting and to tender legal fees into the registry of the court. Appellee, David Calvillo, has filed a motion to dismiss this appeal for want of jurisdiction and for sanctions for the filing of a frivolous appeal. We grant the motion to dismiss and impose sanctions against Rivera in the amount of $8,800.

Rivera originally sued attorneys John O'Quinn and Bonham, Carrington & Fox for a declaratory judgment that no contract existed between them concerning the referral of breast implant litigation cases. The suit against O'Quinn was settled, and the suit against Bonham, Carrington & Fox was nonsuited. Prior to the settlement and nonsuit, Calvillo intervened, asserting an interest in the referral fees.

On May 13, 1998, the trial court ordered that Rivera prepare and deliver to Calvillo a sworn accounting of all breast implant cases Rivera acquired since February 1, 1993, and to tender into the registry of the court at least fifty percent of all fees Rivera had recovered from those cases. The court further ordered that should Rivera fail to provide the accounting, the court would appoint

> Veronica Gonzalez to serve as an auditor whose duties shall include performing research and investigation necessary to prepare and deliver the accounting described above. [Rivera] shall fully cooperate with the auditor and provide the auditor access to [Rivera's] records pertaining to all breast implant claims acquired by [Rivera] on or after February 1, 1993.

On October 23, 1998, the court modified the May 13th order by substituting a new compliance date and a new auditor. The remainder of the May 13th order was unchanged.

MOTION TO DISMISS

A party may bring an interlocutory appeal from an order appointing a receiver, TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(1) (Vernon Supp.1999), or from an order that grants a temporary injunction. TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(4) (Vernon Supp.1999). Rivera's original notice of appeal asserted the order appealed from appointed a receiver. The notice of appeal was subsequently amended to state the order appealed from was also an order granting a temporary injunction. *See*

TEX.R.APP. P. 25.1(f). Calvillo asserts the order at issue does not appoint a receiver or constitute a temporary injunction. We agree.

THE ORDER DID NOT APPOINT A RECEIVER

[1] Pursuant to the civil practice and remedies code, a receiver has the following duties and powers:

(1) take charge and keep possession of the property;

(2) receive rents;

(3) collect and compromise demands;

(4) make transfers; and

(5) perform other acts in regard to the property as authorized by the court.

***797** TEX. CIV. PRAC. & REM.CODE ANN. § 64.031 (Vernon 1997). By contrast, an auditor is defined as "a person appointed and authorized to audit an account or accounts." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 123 (2d ed.1980). "Audit" is defined as "an **examination** of an account or accounts by proper officers or persons appointed for that purpose who compare the charges with the vouchers, examine witnesses, and **report** the results." *Id.* (emphasis added). The rules of civil procedure specifically provide for the appointment of an auditor to investigate accounts and make a report thereof to the court. TEX.R. CIV. P. 172.

Despite Rivera's attempts to characterize the court's actions as appointing a receiver, the order at issue merely appointed an auditor to review Rivera's accounts and to report the results. The auditor was not authorized to take over the financial aspects of Rivera's law practice. Moreover, the order specified that the auditor would be authorized to commence the examination only if Rivera failed to provide the information to the court herself.

THE ORDER DID NOT IMPOSE A TEMPORARY INJUNCTION

[2] Relying on *Pilot Eng'g Co. v. Robinson*, 470 S.W.2d 311, 312 (Tex.Civ.App.—Waco 1971, no writ), Rivera next argues the order can properly be characterized as a temporary injunction because it directed her to deliver property, *i.e.*, Rivera's breast implant contracts, the referral contracts with other lawyers, and all ledgers reflecting the status of those cases, to the auditor. More importantly, Rivera argues the court ordered her to deposit into the registry of the court fifty percent of all fees generated from the contested cases.

In *Pilot Engineering*, the owner of a one-third interest in Pilot Engineering Company sued Pilot Engineering and the other two owners for an accounting and damages. After an interlocutory hearing, the trial court denied the plaintiff's request for appointment of a receiver, but ordered that cashier's checks in the amount of $10,000 be placed into the court's registry. The court of appeals held this order to be an appealable temporary injunction. *Id.*

Pilot Engineering relied on *Whatley v. King*, 151 Tex. 220, 249 S.W.2d 57 (1952). In *Whatley*, the trial court entered an order that required the plaintiff to restore replevied personal property to the defendant. The supreme court concluded the trial court's order was a mandatory injunction subject to appeal. *Id.* at 58. *Whatley* is distinguishable in that the plaintiff was ordered to deliver the property in issue directly to the defendant, rather than into the registry of the court for later distribution. The supreme court held that "the order issued by the trial court contains all the elements of finality so far as petitioner is concerned." *Id.* No mention was made of article 4662, the predecessor to section 51.014 of the civil practice and remedies code. Thus, we conclude *Whatley* was limited to the extraordinary situation in which the order is a mandatory injunction that effectively and finally adjudicates the rights of the complaining party. No such situation exists here. The trial court's order to deposit money into the registry of the court does not finally adjudicate the rights of the parties. It merely protects contested funds against depletion or loss pending final disposition of the case.

Because of its reliance on *Whatley*, which we find distinguishable, we decline to follow *Pilot Engineering*, and instead find the reasoning and authority of *Prodeco Exploration, Inc. v. Ware*, 684 S.W.2d 199 (Tex.App.—Houston [1st Dist.] 1984, no writ), persuasive. In *Prodeco Exploration*, the owner and operator of a working interest in a producing oil and gas leasehold brought an action for declaratory relief alleging that the royalty claimant was not entitled to certain monies under the lease. The trial court ordered the owner to deposit $80,000 and future monthly production payments into the registry of the court. Finding that a trial court has the inherent authority to order a party to deposit disputed funds into the registry of the court, the First

Court of Appeals held such an order is interlocutory and not appealable. *Prodeco Exploration*, 684 S.W.2d at 201.

Prodeco Exploration relied on the Texas Supreme Court's opinion in *Castilleja v. Camero*, 414 S.W.2d 431 (1967), a proceeding in which a co-winner of a Mexican lottery ticket filed a writ of mandamus to compel the constructive trustee of the lottery proceeds to deposit funds in the registry of the court. The supreme court held that where the ownership of the funds was in dispute and the funds were in danger of being lost or depleted, a court can order payment of the disputed funds into its registry until ownership is decided. *Id.* at 433. [2]

***798**

The Dallas Court of Appeals has also declined to follow *Pilot Engineering*, and expressly disagrees with its holding. In *McQuade v. E.D. Sys. Corp.*, 570 S.W.2d 33, 35 (Tex.Civ.App.—Dallas 1978, no writ), the trial court ordered the defendant to deliver for attachment "all cash which is presently in his possession or under his control, up to $15,000." The *McQuade* court engaged in an excellent analysis of why *Whatley* is limited to its facts, and the error of the holding in *Pilot Engineering* that an order to deposit funds into the registry of the court amounts to a mandatory injunction. *McQuade*, 570 S.W.2d at 34.

Were we to agree with Rivera and hold that the order to deposit funds into the registry of the court constituted a temporary injunction, every order by a trial court to deposit contested funds into the court's registry would be interlocutorily appealable. Like the *McQuade* court, we are "loathe to hold that the mere fact that the defendant was directed to do a certain thing pending trial makes the court's order a temporary injunction." *McQuade*, 570 S.W.2d at 35; *see also Furr v. Furr*, 346 S.W.2d 491, 495 (Tex.Civ.App.—Fort Worth 1961, writ ref'd n.r.e.); *Alpha Petroleum Co. v. Dunn*, 60 S.W.2d 469, 471 (Tex.Civ.App.—Galveston 1933, writ dism'd) (orders to deposit money into the registry of the court cannot be characterized as appealable temporary injunctions).

We find it significant that in *Furr* and *Alpha Petroleum*, the orders to deposit funds were contained within a request for injunctive relief. Even in these cases, the court refused to find the orders to deposit funds appealable:

> This record only presents a case in which the trial court, holding that appellants were stakeholders, ordered them to pay the money in their possession into the registry of the court, and it matters not how erroneous or unauthorized such order may be, this court is without jurisdiction to hear and determine an appeal therefrom.

Furr, 346 S.W.2d at 495 (citing *Alpha Petroleum*, 60 S.W.2d at 471).

The order from which Rivera appeals is neither one that appoints a receiver nor one that creates an injunction. Thus, there is no basis for this Court to assume jurisdiction and the appeal must be dismissed.

MOTION FOR SANCTIONS

[3] Calvillo has also requested that we assess damages for the filing of a frivolous appeal. Rule 45 of the rules of appellate procedure provides that

> If the court of appeals determines that an appeal is frivolous it may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award each prevailing party just damages.

TEX.R.APP. P. 45. Rivera received notice of our preliminary determination that the appeal may be frivolous. She filed a response, and the court conducted an oral hearing.

We find that the underlying trial in this case has been fraught with delay occasioned by Rivera's dilatory tactics for which she has twice been sanctioned. In 1998, Antonio Gomez, Rivera's attorney at the time, challenged Judge Juan Partida, the trial judge, in an election for the bench. On March 9, 1998, three days before the primary election, Rivera filed a motion to recuse Judge Partida on the basis that the judge had a long-standing personal and professional relationship with Calvillo's law firm. Presiding Judge Darrell Hester appointed Judge Joaquin Villarreal to hear the motion. Judge Villarreal determined the motion to recuse was frivolous, and sanctioned Rivera in the amount of ***799** $8,000 as reasonable costs and attorney's fees.

Imposition of the second sanction occurred after Rivera disregarded a rule 11 agreement regarding discovery. [3] Rivera's violation of the rule 11 agreement, coupled with

her failure to present herself at three previously scheduled depositions, led Judge Partida to order that Rivera comply with the rule 11 agreement, and to sanction her in the amount of $6,500 as reasonable attorney's fees and costs.

As additional evidence of Rivera's delay tactics, the instant appeal was filed on Friday, November 6, 1998, three days before the underlying trial was set to commence. Rather than filing this appeal, Rivera could have filed a petition for writ of mandamus. The inference from this choice is clear: proceedings in a mandamus action are only stayed pursuant to a request for emergency relief, TEX.R.APP. P. 52.10, while the filing of an appeal automatically confers jurisdiction on the appellate court, TEX.R.APP. P. 25.1(a), thereby precluding the trial court from going forward with the scheduled trial.

[4] In determining whether sanctions are appropriate, we must decide whether Rivera had a reasonable expectation of reversal or whether she pursued the appeal in bad faith. *Tate v. E.I. DuPont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex.App.—Houston [14th Dist.], no writ). In light of the provisions of the Texas Civil Practice and Remedies Code pertaining to interlocutory appeals, and the case law from four different courts of appeal construing Rivera's position adversely, we cannot conclude that Rivera had any reasonable expectation that this Court would assume jurisdiction of the appeal. Given Rivera's previously sanctioned dilatory tactics, and the timing and effect of the filing of this appeal, we can only conclude Rivera filed the appeal in bad faith.

At our request, Calvillo has filed documentation indicating the amount of attorney's fees he has incurred in responding to the appeal to be $8,800. Accordingly, we award Calvillo, as just damages for having to respond to this frivolous appeal, attorney's fees in the amount of $8,800.

CONCLUSION

Calvillo's motion to dismiss is granted. The appeal is DISMISSED FOR WANT OF JURISDICTION. The motion for sanctions is also granted. Diana Rivera and Rivera & Associates are ORDERED to pay to David Calvillo, on or before March 2, 1999, the sum of $8,800. Rivera's motions to determine the excessiveness of bond and extend the time to file her brief are DENIED AS MOOT.

Footnotes

1 Diana Rivera and Diana Rivera & Associates will be collectively referred to as “Rivera.”

2 *Castilleja* was not an appeal from the order to deposit funds into the registry of the court, but an appeal from a writ of mandamus granted in the trial court.

3 Contrary to the rule 11 agreement, Rivera noticed Calvillo for his deposition before she responded to his outstanding discovery requests.

387 S.W.3d 754
Court of Appeals of Texas,
El Paso.

EAST CENTRAL INDEPENDENT SCHOOL DISTRICT, Appellant,
v.
BOARD OF ADJUSTMENT FOR the CITY OF SAN ANTONIO and Sarosh Management, L.L.C., a/k/a ZRS Management, Inc., Appellees.

No. 08–10–00201–CV. | Feb. 22, 2012. | Rehearing Overruled Apr. 4, 2012.

Synopsis
Background: School district and city's planning department sought review of decision by board of adjustment reversing decision by city's planning department to revoke a convenience store's certificate of occupancy. Store filed a plea to the jurisdiction. The District Court, Bexar County, Pat Priest, J., granted the plea. School district and planning department appealed.

[Holding:] The Court of Appeals, Ann Crawford McClure, C.J., held that board's decision was not filed for purposes of statute regarding appeals from board decisions when administrative assistant transcribed the minutes and stored them on the hard drive of her laptop computer.

Reversed and remanded.

Attorneys and Law Firms

***755** Donald Craig Wood, Walsh, Anderson, Brown, Gallegos & Green, P.C., San Antonio, TX, for Appellant.

Albert Lopez, Law Office of Albert Lopez, Mayo J. Galindo, San Antonio, TX, for Appellees.

Deborah Lynne Klein, Assistant City Attorney, Office of the City Attorney, Litigation Division, San Antonio, TX, for Real Party in Interest.

Before McCLURE, C.J., RIVERA, and ANTCLIFF, JJ.

Opinion

OPINION

ANN CRAWFORD McCLURE, Chief Justice.

The East Central Independent School District appeals from an order granting a ***756** plea to the jurisdiction filed by Sarosh Management, L.L.C. a/k/a ZRS Management, Inc. (Sarosh). We sustain Issue Two and reverse and remand.

FACTUAL SUMMARY

On April 27, 2009, Sarosh applied for a certificate of occupancy for a convenience store, A–Z Food Mart, in San Antonio and indicated on the application that alcohol sales would be made at the location. It is undisputed that the convenience store is located less than 300 feet from an elementary school located in ECISD. In determining the store's distance from the elementary school, the building inspector mistakenly measured from the door of the convenience store to the door of the school rather than measuring the distance between the respective property lines. Consequently, the building inspector recommended that the certificate of occupancy be issued. The Planning Department subsequently became aware of the building inspector's error and on August 12, 2009, it revoked Sarosh's certificate of occupancy because the convenience store was selling beer within 300 feet of an elementary school. Sarosh appealed and, on October 5, 2009, the Board of Adjustment, by a 9–2 vote, reversed the decision revoking the certificate of occupancy. On October 19, 2009, the Board of Adjustment approved the minutes of the October 5 meeting and filed the minutes in the Board of Adjustment offices.

On October 28, 2009, ECISD filed suit in the 224th District Court of Bexar County seeking judicial review of the Board of Adjustment's decision.[1] *See* TEX.LOCAL GOV'T CODE ANN. § 211.011 (West 2008). On that same date, Roderick Sanchez, the Director of Planning and Development Services Department of the City of San Antonio, and the Planning and Development Services Department of the City of San Antonio[2] filed suit in the 131st District Court of Bexar County appealing the Board of Adjustment's decision.[3] Sarosh filed a plea to the jurisdiction in each case asserting that the district court lacked jurisdiction of the suits because they were not filed within ten days after the date the decision

was filed in the Board of Adjustment's office as required by Section 211.011(b) of the Texas Local Government Code. Following an evidentiary hearing, the district court granted Sarosh's plea to the jurisdiction in each case. The Planning Department and ECISD filed notices of appeal in their respective cases.

JURISDICTION

In Issues One and Two, ECISD argues that the district court erred by granting the plea to the jurisdiction. In Issue One, ECISD maintains that it filed its suit as a collateral attack on the Board of Adjustment's decision, and therefore, the requirements of Section 211.011 are inapplicable. Alternatively, ECISD contends in its second issue that it timely filed its petition within ten days after the Board of Adjustment approved its the minutes and filed them in its office on October 19, 2009. We will address the second issue first.

*757 *Standard of Review*

[1] **[2]** **[3]** A plea to the jurisdiction is a dilatory plea by which a party challenges the court's authority to determine the subject matter of the action. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex.2004); *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex.2000). The plaintiff bears the burden to allege facts affirmatively proving that the trial court has subject matter jurisdiction. *Texas Department of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex.2001). Whether a party has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction and whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction are questions of law which we review *de novo*. *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004); *Texas Natural Resource Conservation Commission v. IT–Davy*, 74 S.W.3d 849, 855 (Tex.2002).

[4] **[5]** **[6]** When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must review the relevant evidence to determine whether a fact issue exists. *Miranda*, 133 S.W.3d at 226. When reviewing a trial court's ruling on a challenge to its jurisdiction, we consider the plaintiff's pleadings and factual assertions, as well as any evidence in the record that is relevant to the jurisdictional issue. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex.2010); *Bland ISD*, 34 S.W.3d at 555. If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea, and the issue must be resolved by the trier of fact. *Miranda*, 133 S.W.3d at 227–28; *see City of Elsa*, 325 S.W.3d at 626. On the other hand, if the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Miranda*, 133 S.W.3d at 228.

Judicial Review Pursuant to Section 211.011

[7] In the case below, ECISD sought judicial review of the Board of Adjustment's decision reversing the Planning Department's revocation of the certificate of occupancy. Under Section 211.011, a person aggrieved by a decision of the board may present to a district court a verified petition stating that the decision of the board is illegal in whole or in part and specifying the grounds of the illegality. TEX.LOCAL GOV'T CODE ANN. § 211.011(a)(1). Under subsection (b), the "petition must be presented within 10 days after the date the decision is filed in the board's office." TEX.LOCAL GOV'T CODE ANN. § 211.011(b). This requirement is jurisdictional. *See Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex.2007). Although the statute speaks in terms of the petition being presented, jurisdiction exists once a party files a petition within ten days after the board's decision. *Id.*

The Board of Adjustment

The City of San Antonio has established a board of adjustment comprised of eleven members appointed for a term of two years. *See* TEX.LOCAL GOV'T CODE ANN. § 211.008(a) (providing that the governing body of a municipality may provide for the appointment of a board of adjustment). According to Article II of the Board of Adjustment's Articles of Rules and Procedures, the Board elects a Chair and a Vice–Chair from its membership by majority vote. [4] The Director of the Planning and Development Services Department, or ***758** a designated representative, serves as Executive Secretary of the Board. Pursuant to Article VI, all meetings and hearings of the Board are subject to the Texas Public Information Act and any action calling for a formal vote shall take place only at a public meeting or hearing. Article VI, Section G addresses the relationship between the Board and the Planning Department:

> Staff of the City of San Antonio Planning and Development Services Department, herein referred to as 'Staff', shall conduct all official correspondence of the Board; send out all official notices required by law; keep records of each examination or other official action of the Board and perform all other duties required by law and these Rules and Procedures.
>
> With respect to the Board's minutes, Article VI, Section I provides that "[t]he Board, through its Secretary, shall keep minutes of all meetings that indicate the vote of each member on every question on which it is required to act, or the fact that a member is absent." The Rules additionally require that the minutes be filed in the Office of the Planning and Development Services Department. Finally, the Rules and Procedures provide that approval of the minutes is part of the usual order of business in a meeting of the Board.

The Evidence

In support of its position that the Board's decision was filed on October 19, 2009, the Planning Department relied on the affidavit of Rudy Niño, Jr., a Planning Supervisor in the Planning and Development Services Department. Niño averred that he was familiar with the policies, procedures, and practices of the Planning Department as they relate to the Board of Adjustment. Following a meeting of the Board of Adjustment, the staff prepares the minutes to reflect the Board's decisions and those minutes are "voted on and approved at a subsequent Board meeting." Niño further stated that: "Decisions of the Board are generally not filed until some time after the Board meeting where the initial vote is conducted." In this particular case, the minutes were approved and the Board's decision was filed on October 19, 2009.

At the hearing on the plea to the jurisdiction, Sarosh introduced the depositions of Sandra Ann Gonzalez, an administrative assistant employed by the City of San Antonio, and Niño. Gonzalez's duties include performing administrative work related to the Board of Adjustment. Gonzalez attends the Board of Adjustment meetings and creates an electronic audio recording of the meeting. Sometime after the October 5, 2009 meeting, Gonzalez transferred the digital audio recording onto a CD which is normally retained for ninety days before it is destroyed. Gonzalez's duties also included transcribing the minutes of the meeting by listening to the audio recording. [5] Within one week after the October 5 meeting, Gonzalez transcribed the minutes using a laptop at work and saved the document on her laptop. On October 19, 2009, the Board of Adjustment approved the minutes of the ***759** October 5, 2009 meeting. Gonzalez posted the minutes online after they were approved by the Board so they could be viewed by the public. She testified that if a member of the public called after a meeting but prior to approval of the minutes, she would inform the person of the Board's decision made at the meeting.

Niño's duties include supervising planners who write recommendations regarding variance cases that go before the Board of Adjustment and attending the Board's meetings to provide information or answer questions. After the October 5, 2009 meeting, Niño sent a letter to counsel for Sarosh informing him that the Board of Adjustment had voted to overturn the decision of the Planning Department revoking the certificate of occupancy. Niño advised counsel that: "A summary [6] of the actions taken by the Board of Adjustment, including the results of your request, will be filed in the Planning and Development Services Department on October 19, 2009." The letter was not dated, but Niño testified that it would have been sent sometime after October 5 but before the approval of the minutes on October 19. There is no evidence that Niño's letter was filed in the Board's office. Like Gonzalez, Niño testified that if someone called the Planning Department requesting information about the Board's vote after the October 5 meeting, he would have informed them of the Board' decision.

Sarosh also introduced into evidence: (1) a copy of the minutes reflecting they were approved by the Board of Adjustment's chairman, Michael Gallagher, on October 19, 2009 and attested to by the Board's executive secretary [7] on October 21, 2009; and (2) the court reporter's transcription of the October 5, 2009 meeting.

The Parties' Arguments

ECISD contends that the appellate timetable did not begin running until October 19, 2009 when the Board of Adjustment approved the written minutes and filed them in the Board's offices. The Board of Adjustment takes the opposite view and responds that it is not required to keep or approve minutes but instead is permitted to file its decision in electronic form. The Board maintains that its staff created two electronic records of the Board's decision: (1) the audio recording of the October 5, 2009 meeting which included the Board's final decision; and (2) the minutes transcribed by Gonzalez on a

computer prior to October 19, 2009 and maintained in the custody of the Board. Sarosh likewise argues that Section 211.011(b)'s timetable began running on October 5, 2009 when the Board made its decision and Gonzalez created the electronic recording of the Board meeting. These arguments raise a question regarding the meaning of the statute.

Rules of Statutory Construction

Statutory construction is a legal question that we review *de novo* in order to ascertain and give effect to the Legislature's intent. *F.F.P. Operating Partners., L.P. v. Duenez,* 237 S.W.3d 680, 683 (Tex.2007). When construing a statute, we begin with its language. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex.2006). We must interpret the statute according to the plain meaning of the language used, and must read the statute as a whole without giving effect to certain provisions at the expense of others. *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 25 (Tex.2003). ***760** Each word, phrase, or expression must be read as if it were deliberately chosen, and we will presume that words excluded from a provision were excluded for a purpose. *Gables Realty Ltd. Partnership v. Travis Central Appraisal District,* 81 S.W.3d 869, 873 (Tex.App.-Austin 2002, pet. denied). We may consider other matters in ascertaining legislative intent, including the objective of the law, its history, and the consequences of a particular construction. *See* TEX.GOV'T CODE ANN. § 311.023(1), (3), (5) (West 2005); *Shumake,* 199 S.W.3d at 284.

Meaning of the Term "Decision" Under § 211011(b)

Section 211.011(b) requires that a party file its petition "within 10 days after the date the decision is filed in the board's office." TEX.LOCAL GOV'T CODE ANN. § 211.011(b). Significantly, the statute does not provide that the appellate timetable begins running from the date the decision is *made* by the board of adjustment, but rather from the date the decision is *filed* in the board's office. The statute does not define "decision" nor does it expressly require that the decision be a written one. Nevertheless, Section 211.011(b) contemplates that some kind of physical record of the decision will be made and filed in the board office. The meaning of the term "decision" is better understood when examined in light of Section 211.008(f) which provides that:

> The board shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a member is absent or fails to vote. The board shall keep records of its examinations and other official actions. *The minutes and records shall be filed immediately in the board's office and are public records.* [Emphasis added].

TEX.LOCAL GOV'T CODE ANN. § 211.008(f).

Minutes are a permanent record of what action was taken at a meeting, not a record of what was said. *Robert's Rules of Order Newly Revised* p. 468 (11th ed. 2011).[8] Consistent with parliamentary procedure, a board of adjustment's decision, as reflected by the vote of each member on a particular question, must be recorded in the board's minutes and those minutes must be filed in the board's office. TEX.LOCAL GOV'T CODE ANN. § 211.008(f); *see also* TEX.GOV'T CODE ANN. § 551.021(b) (West 2004) (requiring that the minutes (1) state the subject of each deliberation; and (2) indicate each vote, order, decision, or other action taken). Section 211.008(f)'s additional requirement that the board keep a record of its examinations is a means of creating a record of what was said at the meeting.

Citing Section 551.021 of the Texas Open Meetings Act, the Board of Adjustment argues that it is not required to keep minutes, but has the option to instead make a tape recording of its meetings. The Board of Adjustment reasons that the audio recording of its proceedings constitutes its "decision" for purposes of Section 211.011(b). The Texas Open Meetings Act requires a governmental body[9] to prepare and keep minutes or make a tape recording of each open meeting. *See* TEX.GOV'T ***761** CODE ANN. § 551.021 (West 2004). In this case, the Board of Adjustment did both. The Board of Adjustment's argument that it is not required to keep minutes not only ignores Section 211.008(f)'s mandate that it do so but is contrary to its own Rules and Procedures.[10]

[8] In attempting to ascertain what the Legislature intended by use of the term "decision" in Section 211.011(b), we believe it is important to consider the legislative history. The Legislature enacted the predecessor statute, Article 1011g, in 1927. Acts 1927, R.S., 40th Leg., ch. 283, § 7, 1927 TEX.GEN.LAWS 424. Article 1011g § 7 contained the

requirements of both Sections 211.008(f) and 211.011(b) in the same section and in substantially the same language. [11] At the time of Article 1011g's enactment, the keeping of minutes was the accepted means for the decisions of a board or other assembly to be recorded and preserved, and that is a recognized use of minutes in our current society. The Board of Adjustment suggests that keeping minutes is an antiquated and outdated concept, but we note that the statute has remained unchanged for more than eighty years. Given that the Legislature has required since 1927 that a board of adjustment file in its office minutes which record its vote on a particular question, we believe the Legislature's use of the term "decision" in Section 211.011(b) refers to the decision recorded in the board's minutes and subsequently filed in the Board's office.

Our conclusion is supported by consideration of the consequences of holding that the Legislature intended the term "decision" to refer to an electronic recording of the meeting. A party who wishes to appeal should be able to readily determine when a board of adjustment's decision has been filed in the board's office so it can timely file its petition pursuant to Section 211.011(b). This is easily done when, as in this case, the board of adjustment approves its minutes, files them in its office, and posts them online for public access. According to counsel for ECISD, he contacted the Board of Adjustment to determine the filing date and was advised that the decision would be filed in the Board's office on October 19 when the minutes were approved and filed. Were we to hold that the board's decision is the CD created by an employee from the electronic recording of the board's meeting, a party who wished to appeal would not be able to readily determine when that recording has been created or when it is considered by the board of adjustment to have been filed in its office because there is no requirement that notice be given to the parties. After reading Sections 211.008(f) and 211.011(b) together and considering the history of the statute and the consequences ***762** of the possible constructions, we conclude that the term "decision" means the board of adjustment's minutes reflecting a vote on a particular question and the records related to that decision.

Approval of the Minutes

[9] We turn now to address whether the Board's decision was filed for purposes of Section 211.011(b) when Gonzalez transcribed the minutes and stored them on the hard drive of her laptop computer as a pdf file. Citing *Hall v. Board of Adjustment of City of McAllen,* 239 S.W.2d 647 (Tex.Civ.App.-San Antonio 1951, no writ), the Board of Adjustment argues that its decision can be filed before the minutes are approved. In *Hall,* the board of adjustment did not have a regularly elected secretary, but an individual named Patterson customarily acted as the secretary. At the meeting in question, Patterson wrote the minutes in longhand on yellow paper and placed them in the minute book. The following day, the minutes were typed into the minute book kept in the office of the building inspector for the City of McAllen. A certified copy of the minutes introduced into evidence bore the signatures of the chairman and board members, and was attested by the secretary. The minutes did not reflect the date the minutes had been approved by the board. Hall and the other appellants did not file their petition until twenty-five days after the minutes were typed into the minute book.

The San Antonio Court of Appeals held that the appellate timetable began running, not when the board approved the minutes, but when the minutes were "prepared by the proper officer" and typed into the minute book. *Hall,* 239 S.W.2d at 649. We agree with the analysis in *Hall,* but the instant case is distinguishable. Simply put, there is no evidence here that the executive secretary, or a designated representative, ever typed the minutes into a minute book or took some action indicating that the minutes had been approved and filed in the Board's office. Gonzalez's preparation of the minutes for approval by the Board at a subsequent meeting and storing the pdf file on the hard drive of her laptop is not the functional equivalent of typing the minutes into the minute book.

The Board of Adjustment additionally relies on *Reynolds v. Haws,* 741 S.W.2d 582, 586–87 (Tex.App.-Fort Worth 1987, writ denied). In that case, the board of adjustment filed in its office a written document which summarized the board's decision. Almost a month later, the board filed its minutes. The court of appeals determined that the summary filed in the board's office constituted the decision of the board for purposes of triggering the appellate timetable under the predecessor to Section 211.011(b). The instant case is factually distinguishable because the Board of Adjustment did not file a summary of its decision at any time.

The Board of Adjustment additionally argues that there is no longer a requirement that the minutes be approved but it cites no authority for that statement and it did not offer any evidence in support of that assertion. Approval of the minutes by the assembly or by the secretary in accordance with the assembly's procedures is a well-established requirement

of parliamentary procedure. *See Robert's Rules of Order Newly Revised* p. 469 (11th ed. 2011).[12] In contrast with the argument it ***763** makes on appeal, the Board's own Articles of Rules and Procedures requires that the Board of Adjustment approve its minutes at a subsequent meeting as evidenced by the signature of the Chairman or Vice–Chair as attested to by the Executive Secretary. The evidence reflects that the Board followed that procedure in this case. Gonzalez's testimony is clear that she does not post the minutes online for public access until after the minutes have been formally approved by the Board. It is apparent that the Board's procedures require approval of the minutes before the minutes are treated by the Board as a public record of its decision. From this evidence we conclude that the minutes are not filed in the Board's office for purposes of Section 211.011(b) until the minutes have been approved. Consequently, we decline to find that Gonzalez's storage of the unapproved draft on her laptop constituted filing of the Board's decision for purposes of Section 211.011(b).

The record before us establishes that the Board filed its approved minutes on October 19, 2009. Consequently, ECISD timely filed its petition on October 28, 2009. The trial court erred by granting the plea to the jurisdiction. Issue Two is sustained. Given our disposition of Issue Two, it is unnecessary to address Issue One. We reverse the order granting the plea to the jurisdiction and remand the cause to the district court.

Footnotes

1 The suit was filed in cause number 2009–CI–17596 and is styled *East Central Independent School District v. Board of Adjustment for the City of San Antonio and Sarosh Management, L.L.C. d/b/a A–Z Food Mart.*

2 The opinion will refer to Sanchez and the Planning Department collectively as the Planning Department.

3 The suit was filed in cause number 2009CI17593 and is styled *Roderick Sanchez, Director, Planning and Development Services Department, City of San Antonio, and Planning and Development Services Department, City of San Antonio v. Board of Adjustment for the City of San Antonio and Sarosh Management, L.L.C. a/k/a ZRS Management, Inc.*

4 The Articles of Rules and Procedures of the Board of Adjustment (revised April 2009) are available online on the official website of the City of San Antonio, Development Services Department, Zoning Section.

5 At the hearing on the plea to the jurisdiction, Sarosh's counsel stated that Gonzalez "presse[d] a button" and created a seventy-three page transcription of the entire October 5 meeting. Counsel argued that this transcription was filed in the Board's office when it was prepared by Gonzalez. The transcription, however, was prepared by a certified court reporter, Lindi S. Roberts, and Gonzalez made clear in her deposition that she had not prepared the seventy-three page transcription, and in fact, had never seen it before. The record does not reflect when the court reporter prepared the transcription of the meeting or whether it was ever filed in the Board's office.

6 In his deposition, Niño referred to the minutes as a "summary" of the Board's actions.

7 The executive secretary's signature is illegible, but it can be ascertained that it is not Gonzalez's signature.

8 Article VII, Section C of the Articles of Rules and Procedures of the City of San Antonio's Board of Adjustment provides: "Any question regarding parliamentary procedure not covered by these rules shall be decided according to the latest edition of Robert's Rules of Order."

9 The Texas Open Meetings Act defines "governmental body" as "a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality." TEX.GOV'T CODE ANN. § 551.001(3)(D) (West Pamph. 2011).

10 The Board of Adjustment does not argue that there is a conflict between Section 211.008(f) of the Local Government Code and Section 551.021 of the Government Code.

11 Article 1011g, § 7 provided, in relevant part, that: "The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the offices of the board and shall be a public record." Acts 1927, R.S., 40th Leg., ch. 283, § 7, 1927 TEX.GEN.LAWS 424. Six paragraphs later, the statute provided: "Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 10 days after the filing of the decision in the office of the board." *Id.*

12 Black's Law Dictionary gives the following definition of "minutes" based on parliamentary procedure: The formal record of a deliberative assembly's proceedings, approved (as corrected, if necessary) by the assembly. BLACK'S LAW DICTIONARY 1087 (9th ed. 2009).

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940 S.W.2d 150
Court of Appeals of Texas,
San Antonio.

ELM CREEK VILLAS HOMEOWNER ASS'N, INC., Pat Grimes, and John Corbisiero, Appellants,
v.
BELDON ROOFING & REMODELING CO., Appellees.
ELM CREEK VILLAS HOMEOWNER ASS'N, INC., Pat Grimes, and John Corbisiero, Appellant,
v.
AMERICAN CEMWOOD CORPORATION, Appellee.

Nos. 04–96–00205–CV, 04–96–00416–CV. | Nov. 27, 1996. | Rehearing Overruled Jan. 30, 1997.

Homeowners' association and two homeowners sued roofing company, after dispute arose regarding quality of roofing shakes and installation. The 224th District Court, Bexar County, David Peeples and David Berchelman Jr., JJ., granted roofing company's and manufacturer's pleas in abatement and compelled arbitration. Plaintiffs appealed. The Court of Appeals, Green, J., held that: (1) orders compelling arbitration were not appealable; (2) plaintiffs could not claim that they were appealing denial of injunction to stay arbitration proceedings; and (3) filing frivolous appeal justified sanctions of two times taxable costs.

Appeals dismissed and sanctions imposed.

Attorneys and Law Firms

***151** Edward P. Cano, Law Offices of Edward P. Cano, San Antonio, for appellants.

C. David Kinder, James D. Rosenblatt, Jo Beth Eubanks, Akin, Gump, Strauss, Hauer & Feld, L.L.P., San Antonio, Mike Windsor, Loe, Warren, Rosenfield, Kaitcher & Hibbs, P.C., Fort Worth, for appellees.

Before RICKHOFF, LÓPEZ and GREEN, JJ.

Opinion

OPINION

GREEN, Justice.

Appellants, Elm Creek Homeowner's Association (Elm Creek), Pat Grimes, and John Corbisiero, brought these accelerated, interlocutory appeals from two separate orders compelling arbitration. The orders were entered in response to pleas in abatement filed by appellees Beldon Roofing and Remodeling (appeal number 96–205–CV) and American Cemwood Corporation (appeal number 96–416–CV). Both appeals were subsequently consolidated and submitted together. For the following reasons, the appeals are dismissed for lack of jurisdiction, and appellate sanctions are imposed.

BACKGROUND

The Cast of Characters

Elm Creek contracted with Beldon Roofing and Remodeling Company (Beldon) to install new roofs on 33 residential units in the Elm Creek Villas subdivision. Pat Grimes and John Corbisiero are owners of two of the residential units. Grimes was also the president of the Elm Creek Homeowner's Association who reviewed and signed the roofing contract with Beldon. Corbisiero is the current president of Elm Creek and a past board member who was involved in the negotiation and execution of the roofing contract. Both individuals are former real estate agents. Appellee Dick Zucker is the vice president of Beldon who negotiated the sales contract. American Cemwood is the manufacturer of the roofing shakes installed by Beldon at Elm Creek Villas.

The Agreements

In February of 1994, Beldon and Elm Creek began to discuss the repair and replacement of the roofs at Elm Creek Villas. Zucker presented Grimes and Corbisiero with a sample agreement, which included three documents: (1) "Shingle Roofing Proposal and Contract," (2) "Limited Residential Warranty," and (3) "Standard Residential General Conditions." Negotiations continued and, on June 1, 1994, Elm Creek and Beldon executed a contract to replace the existing wooden roof shakes with shakes manufactured by American Cemwood.

Grimes signed the agreement on behalf of Elm Creek. The three documents signed by him—(1) the "Shingle Roofing Proposal and Contract," (2) the "Limited Residential Warranty," and (3) the "Standard Residential General Conditions"—each contained an arbitration clause.

Paragraph 9 of the "Shingle Roofing Proposal and Contract" provided:

> Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

The clause in the "Limited Residential Warranty" and the "Standard Residential General Conditions" stated:

> Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration, *binding on both parties*, in accordance with the construction industry arbitration rules of the ***152** American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Each clause appeared in the document above the signature line, and the clause in the "Limited Residential Warranty" appeared in all capital letters immediately above the signature line. The italicized portion, "binding on both parties," was not included in the clauses of the original sample documents given to Elm Creek in February of 1994. The "Standard Residential Conditions" signed by Grimes also contained the following provision:

> This proposal and contract shall become a contract under the laws of the state where the work is to be done and will thereby be a binding contract upon both Beldon and Buyer. This proposal and contract shall be the entire agreement between the parties, notwithstanding any previous communications or negotiations, whether oral or written, there being no covenants or agreements, inducements, guarantees, warranties or considerations, other than as set out herein. It is agreed that any changes in this proposal and contract must be approved in writing by Beldon at its office address shown in these documents.

The Dispute

Disputes subsequently arose between Elm Creek and Beldon concerning the quality of the roofing shakes and the installation. Beldon initiated arbitration proceedings on November 22, 1995. Elm Creek filed suit on January 19, 1996, alleging various causes of action and seeking temporary and permanent injunctive relief from arbitration. Beldon and Zucker responded by filing a plea in abatement, motion to compel arbitration, answer and counterclaim. Following an evidentiary hearing, the trial court denied appellants' application for injunctive relief and granted Beldon's motion to abate and motion to compel arbitration. Appellants immediately brought an interlocutory appeal from the trial court's order of February 15, 1996 (cause number 96–205–CV).

Later, American Cemwood also filed a plea in abatement and asked that all claims between Elm Creek and Cemwood be ordered to arbitration. Cemwood based its argument on the fact that the contract between Beldon and Elm Creek mentioned Cemwood by name and incorporated the manufacturer's 50–year warranty; there was no written agreement between Elm Creek and Cemwood. Following an evidentiary hearing, the trial judge granted the plea in abatement and ordered all claims against Cemwood sent to arbitration. This order, which was signed on April 19, 1996, was the subject of a second interlocutory appeal (cause number 96–416–CV). Both cases were subsequently consolidated and submitted together. Although requested by appellants, the trial court did not enter findings of fact and conclusions of law. [1]

DISCUSSION

Introduction

In its appeal from the order granting Beldon's motion to compel arbitration, Elm Creek raises three points of error: (1) the trial court erred in granting Beldon's plea in abatement and motion to compel binding arbitration of all claims between Elm Creek and Beldon; (2) the trial court erred in denying Elm Creek's request for an injunction staying binding arbitration because the arbitration contract

between Elm Creek and Beldon was unconscionable; and (3) the trial court erred in denying Elm Creek's request for an injunction staying binding arbitration proceedings because the arbitration contract between Elm Creek and Beldon should have been set aside on equitable grounds. As for American Cemwood, Elm Creek claims the trial court erred in granting American Cemwood's plea in abatement because there is no agreement to arbitrate between Elm Creek and American Cemwood. Both Beldon and American Cemwood claim we should dismiss ***153** the appeals for lack of jurisdiction.[2] This argument will be the focus of our discussion.

Jurisdiction

[1] **[2]** Beldon correctly notes that the trial courts' orders compelling arbitration are interlocutory, and that appeals of interlocutory orders are permitted only by statute. Under the Texas Arbitration Act, appeals may only be taken from final orders or judgments which dispose of all the legal issues and parties. *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272 (Tex.1992); *Gathe v. Cigna Healthplan of Texas, Inc.,* 879 S.W.2d 360, 362 (Tex.App.—Houston [14th Dist.] 1994, writ denied); *Bethke v. Polyco, Inc.,* 730 S.W.2d 431, 434 (Tex.App.—Dallas 1987, no writ); *Citizens Nat'l Bank v. Callaway,* 597 S.W.2d 465, 466 (Tex.Civ.App.—Beaumont 1980, writ ref'd). Interlocutory orders, like the ones raised in this case, may be appealed only if such appeals are permitted by statute. *Jack B. Anglin,* 842 S.W.2d at 272; *Gathe,* 879 S.W.2d at 362.

[3] Unfortunately for appellants, however, orders compelling arbitration do not fall within the coverage of any statute which would allow their appeal. The general Texas statute permitting appeal of interlocutory orders does not include an order compelling arbitration as one of those which may be appealed. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 51.014 (Vernon Supp.1996). Nor does the Texas Arbitration Act, which provides for an interlocutory appeal from (1) an order denying an application to compel arbitration; (2) an order granting an application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) "a judgment or decree entered pursuant to the provisions of this chapter." TEX.CIV.PRAC. & REM.CODE ANN. § 171.017 (Vernon Supp.1996), formerly TEX. REV.CIV.STAT.ANN. arts. 238–2 (Vernon 1987), Acts 1965, 59th Leg., R.S. ch. 689, effective January 1, 1966.

Four different Texas courts, including this one, have noted that an order compelling arbitration under the Texas or Federal Arbitration Acts is an unappealable interlocutory order. *See Gathe v. Cigna Healthplan of Texas, Inc.,* 879 S.W.2d at 362; *Bethke v. Polyco, Inc.,* 730 S.W.2d at 434; *McMullen v. Yates,* 697 S.W.2d 500, 501–02 (Tex.App.—San Antonio 1985, orig. proceeding); *Citizens Nat'l Bank v. Callaway,* 597 S.W.2d at 466.[3] In *McMullen v. Yates,* for example, we assumed, without deciding the issue, that the trial court had erred in compelling arbitration; both sides acknowledged that an order compelling arbitration was not subject to judicial review until completion of the arbitration and entry of the final judgment by the district court. 697 S.W.2d at 501–02 (citing *Citizens Nat'l Bank of Beaumont v. Callaway*). In *Callaway,* the Beaumont court of appeals explained the legislative intent in denying the right to appeal an order compelling arbitration:

> If the court denies arbitration, that puts an end to the matter and, if the moving party desires relief, he must perfect his appeal. Such is tantamount to a take nothing judgment in a suit for damages. On the other hand—as we have in our case, an order compelling arbitration—the court has simply taken the first step in the ultimate disposition of the dispute between the parties. The Court still has jurisdiction to modify the award [under TEX.CIV.PRAC. & REM.CODE ANN. § 171.015] and to confirm, correct, and enforce such an award under [TEX.CIV.PRAC. & REM.CODE ANN. § 171.016].

597 S.W.2d at 466. The court concluded:

> The order entered by the trial court simply required the parties to arbitrate; the questions ***154** of whether the defendant was required to arbitrate, had exercised its option in a timely manner, or had effectively withdrawn such exercise of its option have not yet been determined. These issues remain in the trial court untried and unadjudicated. The order entered is not an appealable judgment and this court had no jurisdiction over the question presented.

Id. (citations omitted) Likewise, in *Bethke v. Polyco,* the Dallas court held that appellate review of a trial court's

> determination to compel arbitration can only be had from a final judgment; an order compelling arbitration was not an appealable judgment. 730 S.W.2d at 434.

The Texas Legislature seems to have approved this line of cases when it redesignated and amended TEX.REV.CIV.STAT.ANN. art. 238–2 (Vernon Supp.1997). *See* Acts 1995, 74th Leg., R.S. ch. 588, § 1, effective September 1, 1995. The current form of the statute, TEX.CIV.PRAC. & REM.CODE ANN. § 171.017 (Vernon Supp.1997), as we have already noted, discusses a number of situations regarding arbitration from which an appeal can be taken. While the statute now provides that an order denying an application to compel arbitration or an order staying arbitration may be appealed, no mention is made of orders *compelling* arbitration. *Id.* By not adding orders compelling arbitration to the list of appealable orders in § 171.017, the Texas Legislature seems to have approved the line of cases construing former article 238–2. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex.1981) (holding that "every word excluded from a statute must also be presumed to have been excluded for a purpose.").

The only contrary authority we have been able to find is a statement in *Jack B. Anglin Co. v. Tipps.* In that case, which was decided before the recent amendment of article 238–2, the Texas Supreme Court stated that "[b]oth the Texas and Federal [Arbitration] Acts permit a party to appeal from an interlocutory order *granting or denying a request to compel arbitration.*" *Id.* at 271–72 (emphasis added). In *Gathe v. Cigna Healthplan of Texas, Inc.*, however, the Houston Fourteenth Court of Appeals concluded this statement was dicta and elected not to follow it. 879 S.W.2d at 362. They reasoned:

> First, the case was a mandamus proceeding, not an appeal. Second, the order at issue in the case was an order *denying* the relator's application to compel arbitration. Further, we are unable to find support for the court's statement, either in the language of the Texas Act, or in the cases cited by the court, which all state that an order denying arbitration is appealable, but do not address orders compelling arbitration. Therefore, we elect not to follow the dicta in *Jack B. Anglin*, and hold that an order compelling arbitration under the Texas Act is not appealable.

Id. We agree with the Houston court that the dicta in *Jack B. Anglin* does not control the outcome of this appeal, and therefore, that an order compelling arbitration under the Texas Arbitration Act is not appealable.

[4] The only remaining question is whether Elm Creek can circumvent § 171.017 by arguing they are really appealing the denial of an injunction requesting a stay of the arbitration proceedings. Section 51.014(4) of the Texas Civil Practice and Remedies Code authorizes an interlocutory appeal from orders granting or denying a temporary injunction. TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(4) (Vernon Supp.1996). Beldon argues that Elm Creek is attempting to circumvent § 171.017 by cloaking an otherwise unappealable order in injunction terms. We agree.

[5] Generally, when a party appeals from two interlocutory orders, only one of which is made appealable by statute, the proper course is to dismiss that portion which is non-appealable and to rule on the portion from which an appeal may be taken. *See National Western Life Ins. Co. v. Walters*, 663 S.W.2d 125, 126 (Tex.App.—Austin 1983, no writ). In this case, however, we conclude that Elm Creek is simply attempting to appeal an otherwise unappealable order by disguising it as an injunction. We note, for example, that the injunctive relief Elm Creek sought is really nothing more than a request to prohibit Beldon from arbitrating the dispute. Assuming such an appeal were permissible (and we do not believe it is), the ***155** arguments and points of error brought by Elm Creek attack only the decision to compel arbitration, not the denial of injunctive relief. Elm Creek's brief scarcely even mentions the portion of the order denying the request for an injunction, much less analyzes it under the principles of law which govern injunctive relief. Arbitration, so heavily favored both under statute and caselaw, is not so easily avoided.

[6] When, as in this case, an appellate court lacks jurisdiction, it may not address the merits of the appeal. *Callaway*, 597 S.W.2d at 466; *see also Gathe*, 879 S.W.2d at 363 (appellate courts commit fundamental error when they assume jurisdiction over an interlocutory order if not authorized by statute). We may not act except to dismiss the appeal for want of jurisdiction. *Callaway*, 597 S.W.2d at 466. Therefore, the appeal must be dismissed for lack of jurisdiction. For this reason, we will not address appellants' points of error.

Appellate Sanctions

The only remaining issue concerns Beldon's cross-point, which argues that we should sanction appellants under TEX.R.APP.P. 84 for filing a frivolous appeal. American Cemwood also claims this appeal was taken for delay and without sufficient cause, and that sanctions should be imposed pursuant to rule 84. Again, we agree.

We recently addressed the issue of frivolous appeals in *Campos v. Investment Management Props., Inc.*, 917 S.W.2d 351 (Tex.App.—San Antonio 1996, writ denied). We imposed sanctions on a party who affirmatively misrepresented the law to the court on appeal. *Id.* at 358 (Green, J., concurring). We found that the appellant had no reasonable basis to believe the case would be reversed on appeal, and that the appeal was taken for delay tactics only. *Id.* at 356.

[7] **[8]** Our *Campos* opinion also noted that we may impose sanctions of up to ten times the total taxable costs against an appellant for bringing a frivolous appeal. *Id.* at 356. But, an award of damages under rule 84 will be imposed only if the record shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith. *Finch v. Finch*, 825 S.W.2d 218, 226 (Tex.App.—Houston [1st Dist.] 1992, no writ). To justify sanctions, we must determine that the appeal was taken for delay only and without sufficient cause. *Eustice v. Grandy's*, 827 S.W.2d 12, 15 (Tex.App.—Dallas 1992, no writ); *Jones v. Colley*, 820 S.W.2d 863, 867 (Tex.App.—Texarkana 1991, writ denied). In making this determination, we must review the case from appellant's point of view at the time the appeal was taken, and decide whether he had any reasonable grounds to believe the case would be reversed. *Campos*, 917 S.W.2d at 356.

[9] After reviewing the record and the relevant law, we conclude the appellants had no reasonable basis to believe their case would be reversed on appeal. We note, for example, that American Cemwood filed its motion to dismiss for lack of jurisdiction on May 29, 1996. This motion clearly raised the question of whether the trial court's April 19th order was a final, appealable order. Even so, appellants filed a brief (in appeal number 96–416–CV) which cited no authority for an interlocutory appeal, save for the cryptic statement, "This appealable interlocutory order is before this Court of Appeals in case no. 94–96–205–CV." Turning to appellants' brief in appeal number 96–205–CV, which involves Beldon Roofing and Remodeling, we note again that appellants cite virtually no authority to support an interlocutory appeal, except for the cursory statement, "Judge Gaither also granted Appellees [sic] Motion to Compel under Section 171.002(a) of the Texas Civil Practice and Remedies Code which was subject to interlocutory appeal." Appellants cite § 171.017(a)(1) of the Texas Civil Practice and Remedies Code for support of this statement, but the statute actually provides for interlocutory appeals from orders *denying* an application to compel arbitration. Again, no mention is made of orders *granting* an application to compel arbitration—the situation in the present case.

During oral argument, when we asked appellants' counsel about the statutory basis for these appeals, he reluctantly admitted that ***156** § 171.017 of the Texas Civil Practice and Remedies Code does not give appellants the right to appeal. Given the representations contained in appellants' brief, however, this eleventh-hour conversion is dubious, if not misleading. Although appellants tried to seek refuge under § 51.014(4) of the Texas Civil Practice and Remedies Code, the provision, as we have already noted, simply does not apply to this case. In other words, there is nothing in either the record or the caselaw to justify an appeal like the present one.

As we have noted in the past, the mere fact that an interlocutory appeal is theoretically possible does not mean one should be filed, nor does it immunize frivolous appeals like the present one from sanctions, whether imposed pursuant to a motion for sanctions or sua sponte. *See* TEX.R.APP.P. 84 (recognizing that sanctions may be imposed with or without a request). An appeal must be based upon more than wishful thinking. Accordingly, we sustain the appellees' cross-points and assess sanctions against appellants in the amount of two times the taxable costs of these consolidated appeals, or $1,068.00. This amount shall be awarded equally between the appellees, Beldon Roofing and Remodeling and American Cemwood Corporation. Furthermore, the awarded sanctions shall earn interest at a rate of ten percent (10%) per annum from the date of this Court's judgment until paid in full.

The appeals are dismissed; however, judgment for sanctions is awarded against appellants.

Footnotes

1 We note, however, that a trial court is not required to enter findings of fact and conclusions of law in an accelerated appeal. TEX.R.APP.P. 42(a)(1); *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111, 114 (Tex.App.—Houston [1st Dist.] 1994, no writ). Furthermore, appellants have not raised the issue.

2 American Cemwood's jurisdictional arguments were raised in a motion to dismiss for lack of jurisdiction. Beldon's jurisdictional arguments were raised in its brief. To simplify matters, we will address both sets of arguments together.

3 Nearly all of the arbitration cases cited by appellants regarding an interlocutory appeal concern the trial court's *denial* of arbitration to a party seeking it. *See, e.g., Fridl v. Cook,* 908 S.W.2d 507, 509 (Tex.App.—El Paso 1995, writ dism'd w.o.j.); *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111, 113 (Tex.App.—Houston [1st Dist.] 1994, no writ); *City of Alamo v. Garcia,* 878 S.W.2d 664, 664 (Tex.App.—Corpus Christi 1994, no writ). Appellate courts routinely grant mandamus relief to those denied their right to arbitrate. *See, e.g., Prudential Securities, Inc. v. Marshall,* 909 S.W.2d 896, 897 (Tex.1995); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 267 (Tex.1992).

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982 S.W.2d 17
Court of Appeals of Texas,
Houston (1st Dist.).

Gene S. HAGOOD and Cyndal Porter, Appellants,
v.
CITY OF HOUSTON ZONING
BOARD OF ADJUSTMENT, Appellee.

No. 01–97–00172–CV. | March 5, 1998.

Appeal was taken from an order of the 190th District Court, Harris County, John P. Devine, J., denying a writ of certiorari seeking review of a city zoning board decision granting a variance. The Court of Appeals, Nuchia, J., held that: (1) writ of certiorari is method by which court conducts review, and has nothing to do with court's jurisdiction; (2) granting of writ of certiorari was discretionary; (3) it did not appear to be an abuse of discretion for district court to have denied writ; and (4) until district court rendered final judgment on appeal which disposed of all parties and all issues pending, Court of Appeals lacked jurisdiction to review merits.

Dismissed.

Mirabal, J., filed dissenting opinion.

Attorneys and Law Firms

***17** Gene Hagood, Alvin, for Appellants.

Robert Cambrice, John J. Hightower, Houston, for Appellee.

Before NUCHIA, MIRABAL and O'CONNOR, JJ.

Opinion

***18 OPINION**

NUCHIA, Justice.

This is an appeal from the district court's denial of a writ of certiorari in zoning board appeal. We dismiss for want of jurisdiction.

BACKGROUND

The City of Houston Zoning Board ("the Board") granted a variance to David Weekley Homes, Inc., for a lot at 5354 Navarro, Houston, Texas. Hagood and Porter took exception to this variance and filed a petition for writ of certiorari on May 31, 1996. In response, the Board filed a motion to deny writ of certiorari which requested that the district court refuse to assert its jurisdiction. Porter and Hagood filed a response. The trial court, without granting an oral hearing, issued an order stating it had considered the petition, the Board's motion to deny, the evidence presented, the pleadings and other documents on file, and denied the petition for writ of certiorari. In a single point of error, Hagood and Porter argue that the trial court erred and abused its discretion in denying, on the merits, their petition for writ of certiorari.

DISCUSSION

Apparently, the parties and district court have mistakenly assumed that the writ of certiorari in TEX. LOC. GOV'T CODE ANN § 211.011(c) (Vernon 1988) is a discretionary appeal and that the district court by denying the writ of certiorari was refusing to exercise its discretion to assert jurisdiction. These are incorrect assumptions.

[1] [2] [3] Once a party files a petition within 10 days after a zoning board decision, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally. TEX. LOC. GOV'T CODE ANN § 211.011 (Vernon 1988); *Davis v. Zoning Bd. of Adjustment,* 865 S.W.2d 941, 942 (Tex.1993). The *Davis* court held that where the appellants comply with the procedures established by the legislature for challenging board of adjustment decisions, they "are entitled to their day in court." *Davis,* 865 S.W.2d at 942. A writ of certiorari is the method by which the court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the zoning decision being challenged, and has nothing to do with the court's jurisdiction. *Id.*

[4] [5] The granting of the writ itself is discretionary, because TEX. LOC. GOV'T CODE ANN § 211.011 (C) (Vernon 1988), provides that upon application, the district court "may" issue the writ. However, section 211.011(e) provides that evidence may also be submitted at a hearing on the appeal. Should the district court not issue the writ, then the appellants would have the burden of providing a sufficient record at the hearing to determine the illegality of the Board's decision. *Cf. Barry Nussbaum v. City of Dallas,*

948 S.W.2d 305, 307 (Tex.App.—Dallas 1996, no writ) (holding that under the similar TEX. LOC. GOV'T CODE ANN § 214.0012(a), where appellant failed to request writ of certiorari and no evidence existed in record, presumption was that sufficient evidence existed to uphold board's decision).

It does not appear to be an abuse of discretion for the district court to have denied the writ of certiorari. However, the denial of the writ does not end this case. TEX. LOC. GOV'T CODE ANN § 211.011(f) (Vernon 1988) prescribes the final decisions the trial court may reach: "The court may reverse or affirm, in whole or in part, or modify the decision that is appealed." *Id.*

[6] **[7]** Jurisdiction of this Court is vested only in cases where a final judgment has been rendered, or where a statute specifically authorizes an interlocutory appeal. *See Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex.1985); *see, e.g.*, TEX. CIV. PRAC. & REM.CODE ANN. § 51.014 (Vernon 1997 & Supp.1998). Until the district court renders a final judgment which disposes of all parties and all issues pending, this Court lacks jurisdiction to review the merits of this case. *See, e.g., Schlipf v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex.1982); *Central Nat'l Ins. Co. of Omaha v. Glover*, 856 S.W.2d 490, 492 (Tex.App.—Houston [1st Dist.] 1993, no writ).

***19** Accordingly, we dismiss this appeal for want of jurisdiction.

MIRABAL, J., dissenting.

MIRABAL, Justice, dissenting.
What we have here is a failure to communicate.

Appellants tell us they are appealing a judgment on the merits. Appellee totally agrees. The majority, however, insists that the trial court did not rule on the merits—rather, according to the majority, the trial court refused to exercise jurisdiction over the case and never ruled on the merits.

What we also have here is "form" reigning victorious over "substance."

Appellants and appellee all say that the trial court affirmed the decision of the zoning board of adjustment. The majority, however, insists that the trial court, in *denying the writ of certiorari*, did not "reverse or affirm or modify the decision appealed" as prescribed for final decisions under section 211.011(f) of the Local Government Code. TEX. LOC. GOV'T.CODE ANN. § 211.011(f) (Vernon 1988). Therefore, the majority concludes that no final, appealable judgment has been rendered.

In my opinion, the trial court did exercise jurisdiction over the appeal; the trial court considered and ruled on the merits of the appeal, affirming the zoning board of adjustment's decision; and the case is properly before us for review.

Accordingly, I dissent.

Procedure

An appeal from a decision of a zoning board of adjustment is governed by section 211.011 of the Local Government Code. TEX. LOC. GOV'T.CODE ANN. § 211.011 (Vernon 1988). [1] A writ of certiorari is the method by which a court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the particular zoning decision being challenged. *Davis v. Zoning Bd. of Adjustment*, 865 S.W.2d 941, 942 (Tex.1993).

In the present case, it is uncontested that it was not necessary for the trial court to "grant a writ of certiorari directed to the zoning board of adjustment" because the board automatically filed in the trial court all of the records from the board of adjustment's proceedings, as well as a verified response that stated "pertinent and material facts that show the grounds of the decision under appeal." Thus, the zoning board of adjustment filed the "return" required by section 211.011(d) of the Local Government Code without a writ of certiorari first being granted ***20** and served on it. TEX. LOC. GOV'T CODE ANN. § 211.011(d) (Vernon 1988). Effectively, the zoning board of adjustment waived service, and the issues were joined for the trial court's consideration.

The Pleadings

Appellants filed in the trial court a "Petition for Writ of Certiorari to Review Decision of Board of Adjustment." The petition states in part:

VII

Plaintiffs allege that the decision made by the Board of Adjustment of the City of Houston, Texas, is a clear abuse of discretion for the following reasons: The decision is illegal, arbitrary, unreasonable and capricious and would cause unnecessary hardship on plaintiffs and would materially reduce the value of plaintiffs' properties.

....

IX

The decision of the Board of Adjustment is final. The Board erred in making its decision, and a new trial or hearing of such matter in this court should result in a judgment that the exception granted be reversed and denied.

WHEREFORE, PREMISES CONSIDERED, plaintiffs request that:

1. The Court order a writ of certiorari to issue herein to the Board of Adjustment of the City of Houston, Texas;

2. The cause be removed to this court;

3. The Defendant be cited to appear and answer herein;

4. A new trial of the cause be had herein;

5. The action of the Board of Adjustment granting the exception to the zoning ordinance be reversed.

....

The zoning board of adjustment filed an original answer, and later filed "Defendant's Motion to Deny Writ of Certiorari." The motion sets out the factual background of the proceedings before the zoning board of adjustment, and then presents the following argument, in part:

Plaintiffs have filed their Petition for Writ Certiorari for this Court to review this decision of the Board.

....

In order to prevail on a challenge by writ of certiorari, "The party attacking the order must present a *very clear showing* that the board abused its discretion." *Board of Adjustment of Dallas v. Patel,* 882 S.W.2d 87 (Tex.App.—Amarillo 1994, writ denied). The test for abuse of discretion is whether the Board of Adjustment acted arbitrarily, unreasonably, or without reference to any guiding rules and principles. *Id.* at 89.

In the instant case, the guiding rules and principles followed by the Zone are set forth in the Regulations adopted by the Board of Directors of Reinvestment Zone Number 1. The evidence set forth in the Affidavit of David Hawes attached hereto as Exhibit 1, and the documents authenticated thereby, clearly establish that the Board acted in reliance upon the Regulations adopted by the Reinvestment Zone and that the Board acted within its discretion in approving the variance requested by David Weekley Homes. Finally, the evidence before the Board and before this Court, clearly supports the Board's granting of the variance in question. Therefore, the Board acted neither arbitrarily, unreasonably, or without reference to any guiding rules or principles. In addition, the house that is the subject of the variance has already been constructed.

Conclusion and Prayer

Because the Board followed the required procedures and made the required findings before granting the variance to David Weekley Homes, the Board's actions were not illegal. In light of the evidence accompanying this Motion, this Court should decline to accept jurisdiction over this matter and deny Petitioner's Petition for Writ of Certiorari. Attached to the zoning board of adjustment's motion are six exhibits and an affidavit, amounting to 91 pages of supporting evidence.

***21** More than 30 days later, appellants filed "Plaintiffs' Response to the Defendant's Motion to Deny Writ of Certiorari." The 11–page response, with 33 pages of supporting documents and photos, contested the accuracy of the board of adjustment's recitation of the evidence, and submitted additional evidence to "show the defendant abused its discretion in allowing the variance." The response concluded with the prayer that "the Court grant the Plaintiffs' Application for Writ of Certiorari overruling the Board's granting of the variance."

Almost two months after the filing of the last pleading, the trial court signed an order that states in full:

The Court, having considered petitioners' Petition for Writ of Certiorari and having reviewed the City of Houston Tax Increment Reinvestment Zone No. 1 Zoning Board of Adjustment's Motion to Deny Writ of Certiorari, *the*

evidence presented, and the pleadings *and other documents on file with this Court,* finds that the Writ of Certiorari should not be granted. It is therefore,

ORDERED that the Petition for Writ of Certiorari be DENIED.

(Emphasis added).

On appeal, appellants bring a sole point of error complaining that the trial court erred and abused its discretion in making its ruling because the merits of the case show appellants are entitled to have the board of adjustment's decision set aside. In its reply brief, the board of adjustment argues that the trial court ruled correctly because the decision by the board of adjustment was not an abuse of discretion, and thus, not illegal.

There is no complaint raised in this appeal about the "procedure" followed in the trial court, *i.e.*, we have no issue to decide regarding the submission of the case without oral argument; or the sufficiency of the record transmitted from the board of adjustment to the trial court; or the adequacy of notice at any point; or the adequacy of the amount of time to file pleadings and responses. The only issue the parties present to us is whether the trial court ruled correctly *on the merits,* considering all the evidence in the record.

I acknowledge that the parties used the wrong titles to describe what they were seeking in the trial court. But the record is crystal clear that when the trial court "denied" the "petition for writ of certiorari," it was denying the relief sought by appellants in their petition: the reversal of the board of adjustment's decision. The issue presented to the trial court for ruling by full briefing and presentation of evidence, and by the prayers for relief in the parties' pleadings, was whether the board of adjustment's decision was illegal.

We are to judge the character of a motion by its ***substance*** rather than its form or caption. *State Bar v. Heard,* 603 S.W.2d 829, 833 (Tex.1980); *Toubaniaris v. American Bureau of Shipping,* 916 S.W.2d 21, 23 (Tex.App.—Houston [1st Dist.] 1995, no writ). To determine the character of the motion, we look to the ***substance of the plea for relief,*** not merely at the title. *Toubaniaris,* 916 S.W.2d at 23. The majority has not followed these basic tenets in this case.

I would not dismiss this case for want of jurisdiction. We should reach the merits of the appeal.

Footnotes

1 **211.011. Judicial Review of Board Decision**

(a) Any of the following persons may present to a court of record a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:
(1) a person aggrieved by a decision of the board;
(2) a taxpayer; or
(3) an officer, department, board, or bureau of the municipality.
(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.
(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.
(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.
(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.
(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith or with malice in making its decision.

818 S.W.2d 530
Court of Appeals of Texas,
Fort Worth.

Larry HARRIS and Joanne Harris,
d/b/a Park Lodge, Appellants,
v.
Walter SCHEPP and Gloria Schepp,
Individually and d/b/a A–OK Motel, Appellees.

No. 2–90–261–CV. | Oct. 23, 1991.
| Rehearing Overruled Dec. 4, 1991.

Individual partners brought suit alleging vendors had fraudulently misrepresented value of motel. Vendors cross-claimed for unpaid balance of note that partners had executed in connection with purchase of motel. Following bench trial, the 97th District Court, Montague County, Roger E. Towery, J., entered judgment denying individual partners recovery, but awarding damages to vendors on their cross action. Individual partners appealed. The Court of Appeals, Farris, J., held that: (1) bankruptcy relief granted limited partnership did not release individual general partners who were not debtors named in bankruptcy petition, and (2) vendors were entitled to delay damages equal to 10% of damages awarded them by trial court where appeal lacked sufficient cause and was brought for delay only.

Affirmed.

Attorneys and Law Firms

***530** Alley & Alley and Richard Alley, Fort Worth, (on appeal only), for appellants.

Oldham & Barnard and Charles Oldham and Charles Barnard, Wichita Falls, for appellees.

Before FARRIS, LATTIMORE and DAY, JJ.

Opinion

OPINION

FARRIS, Justice.

The appellants sued the appellees for damages alleging the appellees fraudulently misrepresented the value of a motel which appellees sold appellants. Appellees cross-claimed for the unpaid balance of the note appellants executed in consideration for the sale of the motel. Following a bench trial, the court entered judgment denying appellants recovery but awarding damages to appellees on their cross-action. In three points, appellants complain that they were debtors in a bankruptcy case which precludes appellees' recovery in this case. We overrule each of the points of error and affirm the judgment of the trial court. We also find this appeal is taken for delay only and without sufficient cause; consequently, we award appellees additional damages equal to ten percent of the damages awarded to appellees by the trial court. *See* TEX.R.APP.P. 84.

[1] ***531** Appellants' brief asserts: "The Bankruptcy Court ... granted Appellants a discharge in Bankruptcy and ... established ... the full amount of the value of the claim of the Appellees herein." Appellants refer to a chapter eleven bankruptcy proceeding in which the only debtor was a limited partnership, Bowie Holiday Lodge LTD. Appellants Larry and Joanne Harris were general partners in Bowie, but they were not debtors named in the bankruptcy petition. Further, the bankruptcy court records before us do not support appellants' claim that their liability to appellees was limited by order of the bankruptcy court. Even the records tendered by appellants but not admitted into evidence do not support appellants' claim. Bankruptcy relief granted a partnership debtor does not release the individual partners. *See Aboussie Bros. Constr. Co.*, 8 B.R. 302 (E.D.Mo.1981). Appellants' points of error are overruled.

[2] We sustain appellees' counterpoint seeking delay damages because appellants' frivolous approach to this appeal demonstrates they lacked sufficient cause, and appeal was brought for delay only: appellants brought this suit as plaintiffs, never pleading the pendency of any bankruptcy stay affecting the suit; the debtor partnership intervened in the suit, by pleadings signed by the attorney who also then represented appellants; the debtor partnership did not plead that this suit was stayed, and is not a party to this appeal; and appellants never amended their pleadings to raise the affirmative defense of discharge in bankruptcy. Appellants' brief makes unqualified assertions of fact, not supported by record references, and of law made without reference to any authority; these assertions are bald misrepresentations. Appellants' brief refers to documents which are not part of the record. Accordingly, we award appellees damages against appellants in an amount equal to ten percent of damages awarded to appellees by the trial court.

The judgment of the trial court is affirmed.

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200 S.W.3d 242
Court of Appeals of Texas,
Dallas.

In re A.W.P., C.D.P., C.A.P., Children.

No. 05–05–00638–CV. | July 18, 2006.

Synopsis

Background: Ex-husband filed motion to reduce amount of court-ordered child support. The 401st Judicial District Court, Collin County, Mark A. Rucsh, J., denied motion, deemed ex-wife's requests for admissions admitted, and ordering ex-husband to pay ex-wife's court costs and attorney fees. Ex-husband appealed.

Holdings: The Court of Appeals, O'Neill, J., held that:

[1] evidence did not support award of attorney fees to ex-wife for ex-husband filing frivolous appeal, and

[2] statute providing sanctions for frivolous pleadings and motions did not apply to motions filed in appellate court.

Affirmed.

Attorneys and Law Firms

***243** Paul A. Lockman, The Law Office of Paul A. Lockman, Dallas, for Appellant.

William Henry Underwood, McKinney, for Appellee.

Before Justices WHITTINGTON, O'NEILL, and MAZZANT.

Opinion

OPINION

Opinion by Justice O'NEILL.

Appellant Larry Wayne Parent (Larry) appeals the denial of his motion to modify. In three issues, Larry contends (1) the trial court erred in denying his motion for new trial, (2) the trial court erred in deeming appellee Kimberlee Ann Parent's (Kimberlee) requests for admissions, and (3) there is no evidence to support the trial court's award of attorney fees. For the following reasons, we affirm the trial court's judgment.

***244** Larry and Kimberlee were divorced in May 2004 and Larry was ordered to pay child support for their three minor children. In February 2005, Larry filed a motion to modify seeking to reduce the amount of court-ordered child support. At the hearing on the motion to modify, Kimberlee asserted Larry had failed to timely answer her requests for admissions. She thus asserted the requests were automatically deemed admitted as a matter of law. *See* TEX.R. CIV. P. 198.3. She objected to any evidence contrary to Larry's admissions. Larry did not dispute that his responses were late. Nor did he request to withdraw the deemed admissions. The trial court deferred ruling on the issue of the deemed admissions and granted Kimberlee a running objection to any evidence contrary to the admissions. The trial court proceeded to hear the motion to modify. One week later, the trial court signed an order (1) denying the motion to modify, (2) deeming Kimberlee's requests for admissions admitted for all purposes, and (3) ordering Larry to pay Kimberlee's court costs and attorney fees.

Larry subsequently filed a motion for new trial asserting the trial court erred in deeming the requests for admission admitted because he timely answered the requests. Larry acknowledged that he served untimely responses on Kimberlee, but claimed he did so due to a secretarial error. Larry claimed that, in addition to serving the late responses, he had also previously timely served Kimberlee with the responses. In Kimberlee's response to the motion for new trial, she disputed Larry's claim, maintaining she did not receive any timely responses. The motion for new trial was overruled by operation of law. This appeal followed.

[1] **[2]** In his first issue, Larry contends the trial court erred in "not hearing" his motion for new trial. According to Larry, the trial court refused to hear his motion for new trial because it incorrectly concluded it had lost plenary jurisdiction over the case. [1] Larry cites no place in the record to support his contention that the trial court refused to consider his motion for new trial. Statements in a brief that are not supported by the record will not be considered on appeal. *Marshall v. Housing Auth.*, 198 S.W.3d 782 (Tex. 2006); TEX. R. APP. P. 38.1(h) (requiring argument to be supported by appropriate references to the record). Further, Larry cites no legal authority under this issue. Therefore, this issue is inadequately briefed and present nothing to review. *See*

Hope's Fin. Mgmt. v. Chase Manhattan Mortgage Corp., 172 S.W.3d 105, 107 (Tex.App.-Dallas 2005, pet. denied). We resolve the first issue against Larry.

[3] **[4]** **[5]** **[6]** In his second issue, Larry contends the trial court improperly deemed admitted Kimberlee's requests for admissions. This Court has only a partial reporter's record of the trial court's hearing on the motion to modify. Generally, in an appeal with only a partial reporter's record, we must presume the omitted portions of the record are relevant and support the trial court's judgment. *Feldman v. Marks*, 960 S.W.2d 613, 614 (Tex.1996). Texas Rule of Appellate Procedure 34.6(c) provides an exception to the general rule. *See* TEX.R.APP. P. 34.6(c). Under that rule, an appellant may present an appeal on a partial reporter's record if he includes in ***245** his request for the reporter's record a statement of the points or issues to be presented on appeal. *Id.* The appellant must file a copy of his request with the trial court clerk. *See* TEX.R.APP. P. 34.6(b)(2). If an appellant fails to file a notice of issues with the clerk, we assume the missing portions of the record support the trial court's judgment. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex.2003) (per curiam).

In this case, the clerk's record does not include a request to the court reporter showing a statement of the points or issues relied upon or other document showing the points or issues relied upon. We sent the clerk a letter requesting her to file with this Court Larry's designation of the record to the court reporter, including any statement of points or issues under rule 34.6(c). The clerk responded that Larry never filed a designation with the clerk. Under these circumstances, we must presume the missing portions of the record support the trial court's judgment. *See Bennett*, 96 S.W.3d at 229; *see also Farahmand v. Thang Do*, 153 S.W.3d 601, 602 (Tex.App.-Dallas 2004, pet. denied) (affirming trial court's refusal to withdraw deemed admissions where appellant failed to file record of hearing on motion to withdraw). Thus, we cannot conclude the trial court erred in granting judgment on Larry's deemed admissions.

[7] Furthermore, under this issue, Larry relies solely on evidence he presented to the trial court in his motion for new trial. However, Larry attacks only the trial court's decision to grant judgment on the deemed admissions. [2] In determining whether the trial court properly granted judgment on the deemed admissions, we consider only the evidence before the trial court at the time it made that decision. *Cf. Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608, 611 (Tex.App.-Dallas 1988, writ denied) (reviewing court considers only evidence before trial court at time of summary judgment hearing); *Clark v. Noyes*, 871 S.W.2d 508, 518 & n. 5 (Tex.App.-Dallas 1994, no writ) (refusing to consider evidence that was not presented at time of hearing on special appearance). Because Larry has not shown the trial court's decision was incorrect when made, he presents no reversible error. We resolve the second issue against Larry.

[8] In the third issue, Larry asserts there is no evidence to support the trial court's award of attorney's fees to Kimberlee. Because we have only a partial reporter's record, we must assume the missing portions of the record support the trial court's judgment. *See Tull v. Tull*, 159 S.W.3d 758, 761 (Tex.App.-Dallas 2005, no pet.). We resolve the third issue against Larry.

[9] **[10]** In this appeal, Kimberlee has requested damages for filing a frivolous appeal. This Court is authorized to award "just damages" if an appeal is objectively frivolous and injures the appellee. *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex.App.-Dallas 2000, pet. denied). An appeal is frivolous if, at the time asserted, the advocate had no reasonable grounds to believe the judgment would be reversed or when an appeal is pursued in bad faith. *Id.*

Here, Kimberlee's motion for frivolous appeal damages is largely based on Kimberlee's allegation that the evidence attached to Larry's motion for new trial was falsified. We have disposed of this appeal primarily based on Larry's failure to present ***246** a complete record. This failure does not alone render his appeal frivolous. *See Sam Houston Hotel, L.P. v. Mockingbird Rest., Inc.*, 191 S.W.3d 720, (Tex.App.-Houston [14th Dist.] 2006, no pet.). Nor can we conclude Larry's appeal was otherwise frivolous. *See* TEX.R.APP. P. 45. We decline to award frivolous appeal damages under the facts of this case.

[11] Additionally, both Kimberlee and Larry seek damages under section 10.001 of the civil practice and remedies code accusing the other party of filing improper motions in this Court. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 10.001 (Vernon 2002). Section 10.001, by its own terms, applies only to motions filed in the trial court under the rules of civil procedure. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 10.001 (Vernon 2002). It does not apply to motions filed in this Court or to sanctions requested for the first time in this Court. We deny both parties motions for sanctions under the civil practice and remedies code.

We affirm the trial court's judgment.

Footnotes

1 In his "summary of the argument," appellant represents that his argument under the first issue will attack the merits of the trial court's refusal to grant the motion for new trial. However, the substance of his brief attacks only the trial court's alleged determination that it had lost plenary jurisdiction to consider the motion for new trial. We will consider only the issue actually presented in appellant's brief. *See* TEX.R.APP. P. 38.1(h).

2 Particularly, Larry does not attack the trial court's ruling on the motion for new trial—which is a obviously a different issue than the trial court's initial decision to grant judgment and is governed by a different standard of review.

573 S.W.2d 181
Supreme Court of Texas.

MANSFIELD STATE BANK, Petitioner,
v.
Maurice J. COHN, Respondent.

No. B-7511. | Oct. 18, 1978.

Payee brought action against maker on promissory note. The District Court, Tarrant County, James E. Wright, J., entered judgment for payee, and maker brought error. The Court of Civil Appeals, Spurlock, J., 562 S.W.2d 923, reversed and remanded, and appeal was taken by payee. The Supreme Court, Denton, J., held that even though party was not represented by counsel, where such party received proper notice of trial date in accordance with both local rule and Texas Rule of Civil Procedure, governing notice of trial date, such notice was sufficient to bind the party, especially in light of evidence showing the party to be attorney living in New York.

Affirmed in part and reversed in part.

Daniel, J., dissented and filed an opinion in which Steakley, J., joined.

Attorneys and Law Firms

***182** Day & Day, Marshall J. Day, Joe Day, Jr., and Lewis D. Wall, III, Fort Worth, for petitioner.

Strother, Davis, Stanton & Levy, Linda S. Aland, Dallas, for respondent.

Opinion

DENTON, Justice.

The issue presented in this case is whether the defendant, Maurice J. Cohn, was given adequate notice of a trial setting. Suit was filed by Mansfield State Bank against Cohn and two corporations of which he was president, seeking recovery on a promissory note. After a general denial was filed on behalf of all of the defendants, the action against Cohn was severed and later set for trial. The trial court rendered judgment for the bank against Cohn. The court of civil appeals reversed and remanded, holding that notice of the trial setting which was sent to Cohn by the bank's counsel was insufficient to apprise Cohn that the case had been set for trial. 562 S.W.2d 923. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

Mansfield State Bank brought this suit against two corporations and their president, Maurice J. Cohn, on a promissory note and guaranty agreement. Cohn had executed the promissory note and guaranty thereof in his capacity as president of the two corporations. Cohn was also sued in his individual capacity under Tex.Tax.-Gen.Ann. art. 12.14 (1969), since Cohn had knowledge that the corporate charters of both corporations had been forfeited prior to incurring the debts. All of the defendants answered by general denial. In September, 1976, summary judgment against the two corporations was granted to the bank, and the action against Cohn individually was severed for trial. At about the same time, Cohn's attorney of record filed a motion requesting leave to withdraw as counsel for Cohn.

In October, 1976, counsel for the bank sent by certified mail two letters to both Cohn and his counsel of record. The first letter said:

Re: Mansfield State Bank
Re: V.

Re: Maurice J. Cohn

Re: No. 141-40245-76

Dear Mr. Cohn:
It is my understanding that Mr. Dilts has withdrawn as counsel in this cause, ***183** and therefore, I am writing you direct. You will please find enclosed a copy of our standard setting letter notifying you that the Bank's suit against you . . . has been set for trial for the week of November 1, 1976. I have purposely set this case a month in advance to give you adequate time to retain new local counsel should you deem that desirable.
The second letter was addressed to the district clerk with reference to “Mansfield State Bank v. Maurice J. Cohn, No. 141-40245-76,” and read as follows:
Please set the above numbered and styled cause on the non-jury docket for the week of November 1, 1976.

This request is made in good faith in the belief that Plaintiff will be ready for trial at the time requested. All of Plaintiff's pleadings are now in order or will be at least seven days prior to trial date.

There are no special exceptions or other pre-trial matters which should be presented to the Court in advance of trial. All necessary ad litem appointments have been made. All other attorneys in this cause are being mailed a copy of the request for setting on this date.

The return receipt shows, and Cohn does not deny, that he received these letters. The November 1 trial date was passed, however, because the attorney's motion for leave to withdraw as Cohn's counsel was still pending. That motion for leave to withdraw was granted on November 2, 1976, and Cohn received a copy of the order permitting withdrawal. The withdrawing attorney also wrote a letter to Cohn on November 8, informing Cohn that the motion for leave to withdraw had been granted and that the case was not set for trial at that time. On November 11, the bank's counsel sent the district clerk another request for trial setting identical to the previous one sent to the district clerk, except that the requested trial date was December 27, 1976. Cohn was sent a copy of this letter by certified mail; the return receipt shows, and Cohn does not deny, that he received the letter on November 15. Pursuant to the request letter, the district clerk placed the cause on the trial court's docket for the week of December 27. No further notice of the setting was requested by or sent to Cohn. The case came on to be heard on December 27, but Cohn made no appearance. After the bank presented evidence, testimony, and argument, the trial court rendered judgment that the bank recover against Cohn on the promissory note. Interest and attorney's fees were also awarded to the bank.

On January 19, 1977, three weeks after rendition of judgment, Cohn filed a motion to set aside the judgment. He alleged that the letter sent to the district clerk, of which he received a copy, indicated that it was merely a Request for a trial setting rather than an actual setting of the case. Therefore, he did not receive adequate notice of the trial setting. After a hearing, the trial court denied Cohn's motion to set aside the judgment.

On appeal by writ of error, the court of civil appeals reversed and remanded for new trial. The court held that no evidence supported the award of attorney's fees, which holding the bank does not here attack. With respect to Cohn's contention that he had not received adequate notice of the trial setting, the court held:

> (T)his court recognizes that persons unrepresented by counsel may not realize that the letter requesting a setting in a non-jury case is their only notice that the case is actually being set for trial. Such failure to receive notice of the actual trial date is a denial of due process for a litigant not represented by counsel.

562 S.W.2d at 925. The bank now contends that adequate notice of the trial setting was sent to Cohn under the applicable rules, and that there is no basis for differentiation between litigants represented by counsel and litigants representing themselves.

In Plains Growers, Inc. v. Jordan, 519 S.W.2d 633 (Tex.1974), this Court held that ***184** no rule required notice to the parties of a trial setting made at the regular call of the docket. Where there is no statute or rule to the contrary, "parties over whom the court has properly obtained jurisdiction are expected to keep themselves informed of the time a case is set for trial and are not entitled to notice of the trial other than the setting of the case on the docket." In response to that case, Rule 245 was amended and Rule 330(b) was repealed so that Rule 245 is now fully applicable to all district courts and requires ten days notice of a trial setting. The basis of the dissenting writer's disagreement with the outcome in Plains Growers has been eliminated by Rule 245 as amended. See Morris v. Morris, 554 S.W.2d 792 (Tex.Civ.App. San Antonio 1977, no writ). Rule 245 now provides:

> The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than 10 days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. With respect to a party who had no notice of setting of a contested case for trial, the provisions of Rule 329b governing motions for new trial and finality of judgments shall operate from the time of receipt of notice of rendition of the judgment; provided that the original motion for new trial shall in any event be filed within 90 days from the rendition of judgment.

Thus, ten days' notice of a trial setting is now required by Rule 245 where the case is set on the motion of one party or on the court's own motion.

[1] Pursuant to Rule 817, local rules of civil procedure have been adopted in Tarrant County, where this case was tried. Rule 1 of the Tarrant County rules provides:

Jury and Non-Jury Settings
(a) On the first Monday in each calendar month the judge of each district court shall set for trial during the calendar month following the month in which a request for setting is made, all contested jury and non-jury cases for which setting has been requested by one of the parties. (b) Either at or before the time the written request for setting is made to the District Clerk, a copy thereof must be served upon all counsel of record and upon all parties not represented by counsel.
(Emphasis added). Rule 1 of the local rules and Tex.R.Civ.P. 245 have both been satisfied in this case. Notice was Received by Cohn on November 15 for a trial setting on December 27. This is obviously more than ten days notice, in compliance with Rule 245. Also, a copy of the request for setting was sent to Cohn, a party not represented by counsel, at the time the request for setting was made to the district clerk, in accordance with local rule 1. No further notice is required by the local rules, and the form requesting setting which was sent to Cohn by the bank was the same form set out by local rule 1 as a suggested form. We therefore hold that Cohn received proper notice of the trial setting in accordance with both the local rules and the Texas Rules of Civil Procedure.

[2] The bank also asserts that the court of civil appeals erred in holding that the "failure to receive notice of the actual trial date is a denial of due process for a litigant not represented by counsel." We agree with the bank that no basis exists for differentiating between litigants represented by counsel and litigants not represented by counsel in determining whether rules of procedure must be followed. With respect to a Criminal case, the United States Supreme Court has said:

> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with the relevant rules of procedural and substantive law.

Faretta v. California, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing ***185** themselves. Litigants who represent themselves must comply with the applicable procedural rules, or else they would be given an unfair advantage over litigants represented by counsel. Stein v. Lewisville Independent School District, 481 S.W.2d 436 (Tex.Civ.App. Fort Worth 1972, writ ref'd n. r. e.), Cert. denied, 414 U.S. 948, 94 S.Ct. 272, 38 L.Ed.2d 203 (1973).

[3] We also regard the letter requesting a trial setting, a copy of which was sent to Cohn, as sufficient notice of the trial setting. The letter asked the district clerk to Set the cause on the nonjury docket for the week of December 27. It is reasonable to assume that if a trial setting is requested from the district clerk, a litigant is put on notice that trial may be on that requested date. Furthermore, in connection with the bank's first requested trial setting on November 1, the bank sent Cohn another letter stating that the case had been Set for trial by the standard setting letter on the requested date. After this November 1 trial date was passed, Cohn should have known, upon receipt of the second setting letter, that the case would actually be set for trial on the requested date. Even though he was a litigant not represented by counsel, Cohn is bound by a proper setting of the case as if he were represented. This should be true especially in this case since the evidence shows that Cohn is himself an attorney living in New York. We hold that the notice of the setting for trial was sufficient.

The judgment of the court of civil appeals, as to the principal debt and interest thereon, is reversed and the judgment of the trial court in favor of the bank is affirmed. The portion of the court of civil appeals' judgment which denies the bank attorney's fees is not attacked, and is affirmed.

Dissenting opinion by DANIEL, J., in which STEAKLEY, J., joins.

DANIEL, Justice, dissenting.

I dissent only from that portion of the Court's opinion holding that Rule 245, which specifically requires a trial setting notice of not less than ten days, is satisfied by notice of a mere written request for a setting directed to the district clerk in accordance with local rules adopted by the Tarrant County District Courts pursuant to Rule 817. [1]

The Court accurately states that "ten days' notice of a Trial setting is now required by Rule 245 where the case is set on the motion of one party or on the court's own motion." (Emphasis supplied.) Then, without recognizing any

difference between an Actual trial setting made by the court in accordance with Rule 245, and a motion filed with the district clerk Requesting a trial setting under Tarrant County local rules, the majority holds that notice of the latter was sufficient compliance with the positive Notice of setting requirement of Rule 245; and this, even though no notice was given to the defendant as to whether or not the setting was granted for the week requested. I particularly disagree with the following portion of the majority opinion:

"We also regard the letter Requesting a trial setting, a copy of which was sent to Cohn, As sufficient notice of the trial setting. The letter asked the district clerk to set the cause on the non-jury docket for the week of December 27. It is reasonable to assume that if a trial setting is requested from the district clerk, a litigant is put on notice that trial May be on that requested date. . . ." (Emphasis supplied.)

Rule 245 was intended to leave no room for assumptions or "may be so" speculation as to the time for which the trial of a contested case is actually set by the court. [2] It speaks not of notice of requests for future settings which may or may not be ***186** made, but only of "reasonable notice of not less than 10 days to the parties" of actual settings theretofore made by the court. There is a distinct difference between a trial setting and a request for a setting. This is the main difference between Rule 245 and the request provisions of the Tarrant County local rule. While Rule 245 applies to notice of actual settings already made, Section (b) of the Tarrant County local rules applies to requested settings to be made in the future for jury or non-jury weeks. This local rule of the Tarrant County District Courts was effective March 1, 1970, [3] more than six years prior to the effective date of the present wording of Rule 245. A full reading of the local rule indicates that its purpose is to assist the courts and the parties in getting pending cases docketed for future jury or non-jury weeks. Nowhere in the local rules does it appear that the requirement for notice of "a written request for setting" was intended to serve as a notice that the court had actually set the case for a particular date or week. This seems to be clear from the following provision of Section (c) of the Tarrant County Rules:

". . . Nothing herein ordered shall preclude continuation of the present practice of setting contested non-jury cases for trial by giving the required ten (10) days written notice to the opposing party of the week of such setting. Non-jury cases may be set each month for both jury and non-jury weeks by giving such notice to the opposing party or his attorney of record and furnishing a copy of such notice to the clerk of the court. . . ." [4]

It is undisputed that the defendant had no notice that his case had been actually set for trial, as distinguished from the notice of a letter requesting that a setting be made for a certain week. Therefore, under the plain wording of Rule 245, his motion for new trial was timely filed. [5]

The effect of the majority opinion is to read Rule 245 as though it required "either notice of ten days of a trial setting Or of a written request for a setting filed with the district clerk under local rules." As long as this interpretation prevails, it is suggested that the rule be rewritten accordingly so that no one who receives a copy of a written request for a setting under local rules will mistakenly rely on the present wording of Rule 245 as requiring that he receive any further notice of a day or week when his case has been actually set down by the court for trial.

STEAKLEY, J., joins in this dissent.

Footnotes

1 All citations to Rules are to the Texas Rules of Civil Procedure unless otherwise noted. Rule 817 authorizes district courts to adopt local rules which are "not inconsistent" with the Rules promulgated by the Supreme Court.

2 As noted by the majority, the present wording of Rule 245, effective January 1, 1976, was the result of dissatisfaction with the outcome of Plains Growers, Inc. v. Jordan, 519 S.W.2d 633 (1974), in which it was held that no rule promulgated by this Court required notice of a trial setting made on the motion of a party at the regular call of the docket. The repeal of Rule 330(b) and amendment of Rule 245 were specifically designed to require such notice, and to provide for later filing of motions for new trial by "a party who had no notice Of setting of a contested case for trial" as required by the amended Rule 245. (Emphasis supplied.)

3 Local Rules of District Courts of Texas, Texas Civil Judicial Council (1974), page 277. From this compilation of local rules, it appears that practically all of the larger counties had a similar rule prior to April 15, 1974.

4 Id., 278-279.

5 The applicable portion of Rule 245 reads: "With respect to a party who had no notice of setting of a contested case for trial, the provisions of Rule 329b governing motions for new trial and finality of judgments shall operate from the time of the receipt of notice of rendition of the judgment . . . ."

303 S.W.3d 334
Court of Appeals of Texas,
El Paso.

Rick MILTEER, Appellant,
v.
WESTERN RIM CORPORATION and Western Rim Property Management, Appellees.

No. 08–08–00124–CV. | Dec. 16, 2009.

Synopsis
Background: Tenant brought premises liability action against landlord for injuries sustained in incident involving a garage door. The 219th District Court, Collin County, Curt B. Henderson, J., entered summary judgment in landlord's favor. Tenant appealed.

[Holding:] The Court of Appeals, Guadalupe Rivera, J., held that tenant's failure to adequately brief his issues precluded appellate review.

Affirmed.

Attorneys and Law Firms

***335** Rick Milteer, McKinney, TX, pro se.

Meredith Prykryl Walker, Dallas, TX, for Appellees.

Before McCLURE, J., RIVERA, J., and CHEW, Judge.

Opinion

OPINION

GUADALUPE RIVERA, Justice.

Appellant, Rick Milteer, appeals the trial court's rendition of summary judgment in favor of Appellees, Western Rim Corporation and Western Rim Property Management ("Rim"), in Milteer's suit against Rim for premises liability and gross negligence. Finding Appellant failed to adequately brief his issues, we determine that nothing is presented for review and therefore affirm the trial court's judgment.

BACKGROUND

The factual background and proceedings are well known to the parties, and we do not recite them here in detail. An abbreviated recitation shows that when Appellant moved into his apartment on July 9, 2006, his wife and the leasing consultants manually opened the leased garage door since the remote was not working. Later that day, the garage door closed on Appellant, causing injuries.

After Appellant filed his petition alleging premise liability and gross negligence, Rim filed answers, denying his allegations, and claimed the incident was unavoidable or unforeseeable, or caused by the acts or omissions of Appellant or some other party. Rim later filed a motion for summary judgment, and Appellant responded. After notice of hearing, the trial court granted summary judgment in favor of Rim.

DISCUSSION

[1] Appellant, appearing *pro se*, contends in three issues that the trial court's decision to sanction him was retaliatory, that the trial court failed to consider his summary-judgment evidence, and that the trial court improperly denied his request to continue the case before final judgment was entered. We need not reach any of Appellant's complaints as we find them inadequately briefed.

[2] **[3]** Initially, we recognize that Appellant is acting *pro se* on appeal, and that we must construe his appellate brief liberally. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989). However, the law is well-settled that a party proceeding *pro se* must comply with all applicable procedural rules. *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex.App.-El Paso 2007, no pet.); *Sweed v. City of El Paso*, 195 S.W.3d 784, 786 (Tex.App.-El Paso 2006, no pet.); *Clemens v. Allen*, 47 S.W.3d 26, 28 (Tex.App.-Amarillo 2000, no pet.); *Weaver v. E–Z Mart Stores, Inc.*, 942 S.W.2d 167, 169 (Tex.App.-Texarkana 1997, no pet.); *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex.App.-Dallas 2007, no pet.). If that were not the case, *pro se* litigants would be afforded an unfair advantage over those represented by counsel. ***336** *Valadez*, 238 S.W.3d at 845; *Martinez v. El Paso County*, 218 S.W.3d 841, 844 (Tex.App.-El Paso 2007, pet. struck); *Holt v. F.F. Enterprises*, 990 S.W.2d 756, 759 (Tex.App.-Amarillo 1998, pet. denied). Therefore, on appeal, the *pro se* litigant must properly present his case. *Valadez*, 238 S.W.3d

at 845; *Martinez*, 218 S.W.3d at 844; *Strange v. Continental Cas. Co.*, 126 S.W.3d 676, 678 (Tex.App.-Dallas 2004, pet. denied); *Plummer v. Reeves*, 93 S.W.3d 930, 931 (Tex.App.-Amarillo 2003, pet. denied).

[4] [5] [6] The rules of appellate procedure require Appellant's brief to contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX.R.APP. P. 38.1(i). When the appellate issue is unsupported by argument or lacks citation to the record or legal authority, nothing is presented for review. *Republic Underwriters Ins. Co. v. Mex–Tex, Inc.*, 150 S.W.3d 423, 427 (Tex.2004); *Valadez*, 238 S.W.3d at 843; *Martinez*, 218 S.W.3d at 844; *Plummer*, 93 S.W.3d at 931; *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex.App.-Houston [14th Dist.] 2002, no pet.). As we noted in *Valadez:*

> It is the Appellant's burden to discuss her assertions of error. An appellate court has no duty—or even right—to perform an independent review of the record and applicable law to determine whether there was error. Were we to do so, even on behalf of a *pro se* appellant, we would be abandoning our role as neutral adjudicators and become an advocate for that party.

Valadez, 238 S.W.3d at 845 (citations omitted).

Here, Appellant provided no record citations for any of his issues. Moreover, his first and third issues are merely brief conclusory statements unsupported by legal citations. And his second issue, although containing legal authority for the standard of review and applicable law on premises liability, provided no discussion or argument of the cases cited or explanation of how those cases supported his specific contentions. We therefore overrule his complaints as inadequately briefed. *See* TEX.R.APP. P. 38.1; *Kupchynsky v. Nardiello*, 230 S.W.3d 685, 692 (Tex. App.-Dallas 2007, pet. denied) (issue inadequately briefed when party gave general cite to one case stating elements of cause of action); *Sterling v. Alexander*, 99 S.W.3d 793, 799 (Tex.App.-Houston [14th Dist.] 2003, pet. denied) (issue inadequately briefed when party failed to make proper citations to authority or the record and in failing to make a cogent argument); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 646 (Tex.App.-Houston [1st Dist.] 2002, no pet.) (issue inadequately briefed when party did little more than summarily state his point of error, without citations to legal authority or substantive analysis); *Velasquez v. Waste Connections, Inc.*, 169 S.W.3d 432, 436 (Tex.App.-El Paso 2005, no pet.) (issue inadequately briefed when argument did not contain any references to relevant cases or legal principles).

The trial court's judgment is affirmed.

CHEW, Judge sitting by assignment.

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316 S.W.3d 815
Court of Appeals of Texas,
Dallas.

Mariano MORENO, Appellant,
v.
Sergio SILVA, Appellee.

No. 05–09–00624–CV. | July 20, 2010.

Synopsis

Background: Plaintiff filed suit against defendant, to recover money defendant allegedly owed to him. Parties were ordered to mediation, and reached settlement, but defendant then failed to pay plaintiff according to terms of settlement agreement. Plaintiff filed amended petition asserting additional claim for breach of settlement agreement. The 44th District Court, Dallas County, Kent M. Sims, J., granted summary judgment to plaintiff. Defendant appealed.

Holdings: The Court of Appeals, Richter, J., held that:

[1] trial court did not abuse its discretion in denying defendant's pro se motion for continuance, and

[2] defendant's motion for continuance of summary judgment hearing was not competent summary judgment evidence.

Affirmed.

Attorneys and Law Firms

***816** Frank P. Hernandez, Dallas, TX, for Appellant.

Jeffrey L. Clark, Kelsoe, Anderson, Khoury & Clark, Dallas, TX, for Appellee.

Before Justices RICHTER, LANG–MIERS, and MURPHY.

Opinion

OPINION

Opinion By Justice RICHTER.

This is an appeal from the trial court's order granting summary judgment in favor of Sergio Silva. In two issues, appellant Mariano Moreno contends the trial court abused its discretion by denying his motion for a continuance and granting Silva's motion for summary judgment. Finding no reversible error, we affirm the trial court's judgment.

I. BACKGROUND

Silva sued Moreno to recover money Moreno owed him. The trial court ordered the parties to mediation. At mediation the parties entered into a written settlement agreement that required Moreno to pay Silva the sum of $24,500 within one year, on or before November 27, 2008. The agreement stated that the case would be administratively closed and dismissed with prejudice if Moreno fully paid Silva. The settlement agreement was signed by Moreno, Silva, and both of their attorneys. The trial court granted an agreed motion ***817** to administratively close the case on December 31, 2007.

Moreno failed to pay Silva in accordance with the settlement agreement. On December 4, 2008, Silva filed a motion to reopen the case. The trial court granted Silva's motion to reopen on December 10, 2008. On December 10, 2008, Moreno's attorney filed a motion to withdraw as counsel for Moreno, due to an unmanageable conflict of interest between attorney and client. The trial court granted the motion to withdraw on January 12, 2009.

On December 11, 2008, Silva filed a second amended original petition, adding a claim for breach of the written settlement agreement. Moreno did not file an answer to Silva's second amended original petition. On January 22, 2009, Silva filed a motion for summary judgment. Moreno did not file a response to Silva's motion for summary judgment. The motion was scheduled to be heard on February 19, 2009, but was postponed to March 2, 2009, at the request of Moreno.

On the date of the hearing, Moreno filed a document titled “Defendant's Verified Motion For Continuance.” In his pro se motion, which was not verified, Moreno stated he needed additional time to hire a new attorney to file an answer to the amended second petition and the motion for summary judgment. Moreno also asserted that although he signed the settlement agreement, he did so under duress and later advised his attorney that he did not agree with it. Moreno refused to sign the final draft of the settlement agreement.

After hearing the arguments of the parties, the trial court denied Moreno's motion for continuance and granted Silva's

motion for summary judgment. A final judgment was signed on March 2, 2009.

On April 1, 2009, Moreno filed a pro se motion for reconsideration of the trial court's ruling on Silva's motion for summary judgment and Moreno's motion for continuance, and a pro se response in opposition to Silva's motion for summary judgment. On May 6, 2009, Moreno filed an affidavit in support of his motion for reconsideration. On May 18, 2009, Silva filed a response objecting to Moreno's motion for reconsideration. Silva also asserted that because seventy-five days had passed, Moreno's motion was overruled by operation of law on May 18, 2009. At a hearing on May 22, 2009, the trial court ruled from the bench that Moreno's motion for reconsideration was overruled by operation of law. The trial court also signed an order denying Moreno's motion for reconsideration. This appeal followed.

II. DISCUSSION

[1] Although we construe pro se pleadings and briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable laws and rules of procedure. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex.1978); *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 693 (Tex.App.-Dallas 2008, no pet.). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *In re N.E.B.*, 251 S.W.3d 211, 212 (Tex.App.-Dallas 2008, no pet.).

Motion for Continuance

In his first issue, Moreno asserts the trial court abused its discretion by refusing to grant his pro se motion for continuance. The denial of a motion for continuance is reviewed under an abuse of discretion standard. *General Motors v. Gayle*, 951 S.W.2d 469, 476 (Tex.1997) (orig. proceeding); *Garner v. Fidelity* ***818** *Bank, N.A.*, 244 S.W.3d 855, 858 (Tex.App.-Dallas 2008, no pet.). The trial court's ruling will not be reversed unless the record shows a clear abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986). After reviewing the entire record, we may reverse for abuse of discretion only if we determine the trial court's ruling was clearly arbitrary and unreasonable. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex.2002).

[2] Pursuant to rule 251, a trial court may grant a continuance for sufficient cause supported by affidavit or by consent of the parties. TEX.R. CIV. P. 251. According to Moreno's motion, he requested the continuance because he needed additional time to hire a new attorney. Moreno cites *Villegas v. Carter* to support his argument that the trial court abused its discretion by denying his motion for continuance. *See Villegas*, 711 S.W.2d at 626–27. In *Villegas*, the Texas Supreme Court concluded that the trial court should have either denied the attorney's motion to withdraw two days before trial or granted Villegas' request for a continuance to hire a new attorney. *Id.* at 627. When a trial court allows an attorney to voluntarily withdraw, it must give the party time to obtain new counsel and time for the new counsel to investigate the case and prepare for trial. *Id.* at 626. In contrast to *Villegas*, Moreno had sufficient time within which to obtain new counsel but did not take steps to do so. Moreno's attorney filed a motion to withdraw on December 11, 2008. Moreno did not object to his attorney's motion to withdraw. The motion to withdraw was granted on January 12, 2009. At Moreno's request, the trial court rescheduled the hearing on Silva's motion for summary judgment from February 19 to March 2. There is nothing in the record to suggest that Moreno tried to hire a new attorney after his attorney withdrew. Instead, at the hearing on March 2, 2009, Moreno told the trial court he had not hired a new attorney or filed a response to Silva's motion for summary judgment because he had been talking to Silva and thought they were going to work out a deal.

[3] Furthermore, Moreno's motion for continuance was not verified or supported by affidavit. *Id.; see also Garner*, 244 S.W.3d at 858. Moreno titled his motion "Defendant's Verified Motion for Continuance" and suggests it meets the requirements for an affidavit because he included the statement, "I affirm under the penalties of perjury that the foregoing representations are true." However, there is no evidence that Moreno made such statements in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document. *See Serrano v. Ryan's Crossing Apartments*, 241 S.W.3d 560, 564–65 (Tex.App.-El Paso 2007, pet. denied). If a motion for continuance is not verified or supported by affidavit, we will presume the trial court did not abuse its discretion in denying the motion. *Villegas*, 711 S.W.2d at 626; *Garner*, 244 S.W.3d at 858.

We conclude the trial court did not abuse its discretion in denying Moreno's motion for continuance. TEX.R. CIV. P. 251; *Garner*, 244 S.W.3d at 859. We resolve Moreno's first issue against him.

Summary Judgment

Moreno contends the trial court erred in granting summary judgment in favor of Silva on the breach of the settlement agreement because "no legal foundation existed for the summary judgment at the time it was filed or at the time it was granted by the trial court." Moreno asserts he raised a genuine issue of fact in his motion for continuance by his statement ***819** that although he signed the settlement agreement, he did so under duress and later advised his attorney that he did not agree with it.

The standard for reviewing a traditional motion for summary judgment is well established. *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548–49 (Tex.1985); *Ling v. BDA & K Bus. Servs., Inc.*, 261 S.W.3d 341, 345 (Tex.App.-Dallas 2008, no pet.). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 576 (Tex.App.-Dallas 2007, no pet.). A party moving for a traditional summary judgment is charged with the burden of establishing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex.2000) (per curiam). A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex.1982). Once the movant establishes that he is entitled to judgment as a matter of law, the burden shifts to the nonmovant to present evidence which raises a genuine issue of material fact. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). A nonmovant who wishes to assert an affirmative defense must urge the defense in the response and provide enough evidence to create a fact issue on each element of the defense. *Rabe v. Dillard's, Inc.*, 214 S.W.3d 767, 768 (Tex.App.-Dallas 2007, no pet.).

Silva's motion for summary judgment was based solely on Moreno's breach of the settlement agreement entered into by the parties during mediation. To prove his claim for breach of contract, Silva was required to establish: (1) the settlement agreement was a valid contract; (2) he performed his obligations under the agreement; (3) Moreno failed to perform his obligations; and (4) he was damaged by Moreno's breach. *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Association*, 205 S.W.3d 46, 55 (Tex.App.-Dallas 2006, pet. denied). Silva's summary judgment evidence consisted of Silva's affidavit, the signed settlement agreement, and the affidavit of Silva's attorney. Silva identified the parties to the agreement, identified their signatures, and summarized the terms of the settlement agreement. Silva also described his own performance and Moreno's failure to perform. Additionally, the motion and affidavits detailed Silva's damages in the amount of $24,500, plus $5,000 in attorney's fees.

[4] Moreno did not file a response to Silva's motion. His only "summary judgment evidence" opposing Silva's summary judgment motion consisted of unsupported, conclusory statements made in the motion for continuance he filed on the day of the hearing. Moreno's motion for continuance was not competent summary judgment evidence. *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex.1995) (pleadings are not competent evidence, even if sworn or verified); *Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex.1971) (pleadings, even if sworn, are not summary judgment evidence).

[5] **[6]** Even if we were to construe Moreno's motion for continuance as summary judgment evidence, it was not filed timely. *See* TEX.R. CIV. P. 166a(c). Moreno did not seek leave of court for the late filing of his so-called evidence. Rule 166a(c) permits the late filing of summary judgment evidence but only with leave of court. *Id.; see also Benchmark Bank v.* ***820** *Crowder*, 919 S.W.2d 657, 663 (Tex.1996). Where nothing in the record indicates that late filing of summary judgment response or evidence was with leave of court, we presume the trial court did not consider the response or evidence. *See Benchmark Bank*, 919 S.W.2d at 663; *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex.1985); *Mathis v. RKL Design/Build*, 189 S.W.3d 839, 842–43 (Tex.App.-Houston [1st Dist.] 2006, no pet.). The record does not reflect the trial court signed an order granting Moreno leave to file late evidence. Thus, at the hearing on Silva's motion for summary judgment, the only summary judgment evidence before the trial court was Silva's affidavit, the signed settlement agreement, and the affidavit of Silva's attorney.

[7] After the trial court granted Silva's motion for summary judgment, Moreno filed a motion for reconsideration and a response in opposition to Silva's motion for summary judgment. Moreno's motion for reconsideration sought leave of the trial court to file a late response in opposition to Silva's motion for summary judgment. A month later, Moreno filed an affidavit in support of his motion for reconsideration. Notwithstanding its title, the affidavit restates and supplements Moreno's response in opposition to Silva's motion for summary judgment. There is nothing in the record to indicate the trial court granted leave for Moreno to file a late response and a late supporting affidavit. Therefore, we presume Moreno's response and affidavit were not properly before the trial court. *See Benchmark Bank,* 919 S.W.2d at 663; *Mathis,* 189 S.W.3d at 842–43. We will not consider as grounds for reversal any summary judgment evidence not expressly presented to the trial court by written motion, answer, or other response. *Mathis,* 189 S.W.3d at 843.

Once Silva established that he was entitled to judgment as a matter of law, the burden shifted to Moreno to present evidence which raised a genuine issue of material fact. *See Clear Creek Basin Auth.,* 589 S.W.2d at 678. Because Moreno did not present competent summary judgment evidence that raised a genuine issue of material fact, the trial court did not err when it granted summary judgment in favor of Silva. *See Rabe,* 214 S.W.3d at 768. We resolve Moreno's second issue against him.

III. CONCLUSION

The trial court did not err when it denied Moreno's motion for continuance and granted Silva's motion for summary judgment. The judgment of the trial court is affirmed.

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800 S.W.2d 637
Court of Appeals of Texas,
Dallas.

Walter E. NAYDAN, Appellant,
v.
Connie Jo NAYDAN, Appellee.

No. 05–90–00434–CV. | Nov. 20, 1990. | Rehearing Denied Dec. 20, 1990.

Ex-wife brought postdivorce action for partition of ex-husband's federal civil service retirement benefits. The 302nd Judicial District Court, Dallas County, Frances Harris, J., entered judgment in favor of ex-wife. Ex-husband appealed. The Dallas Court of Appeals, Whitham, J., held that: (1) federal law did not prohibit state court from dividing civil service retirement benefits, and (2) ex-husband's appeal was taken for delay and without sufficient cause warranting the imposition of damages.

Affirmed.

Attorneys and Law Firms

***638** Roger Turner, Dallas, for appellant.

Paul T. Fanning, John Alan Goren, Dallas, for appellee.

Before WHITHAM, ROWE and THOMAS, JJ.

Opinion

***639 OPINION**

WHITHAM, Justice.

In this post-divorce action for partition of federal civil service retirement benefits, the ex-husband-appellant, Walter E. Naydan, appeals from a judgment in favor of the ex-wife-appellee, Connie Jo Naydan. The trial court determined that Connie had a twenty-four percent interest in the benefits, rendered a money judgment against Walter for the sum of $13,586.31 as Connie's share of benefits paid to Walter prior to judgment, ordered Walter to deposit future benefits into a trust bank account and that twenty-four percent of those deposits be disbursed to Connie. In addition, the trial court awarded attorney's fees to Connie. The issues focus on (1) whether federal statutes and regulations prohibit a state court from making the division of the benefits, (2) whether the evidence conclusively proved that the benefits had a value of $11,751.00 on the date of the divorce, (3) whether the trial court awarded excessive attorney's fees and abused its discretion in awarding attorney's fees, (4) whether the trial court erred in excluding testimony, and (5) whether the trial court had jurisdiction to make the award. Because we find no merit in any of Walter's points of error, we affirm. We conclude, however, that this appeal has been taken for delay and without sufficient cause. Consequently, we assess damages against Walter pursuant to TEX.R.APP.P. 84 and render judgment in favor of Connie for the amount of those damages.

The parties were married on April 5, 1952. In August 1962, they moved to Dallas, Texas, when Walter began employment with the Veterans' Administration of the federal government. He remained continuously employed by the VA until his retirement. The parties were divorced on October 16, 1974. Thus, at the time of the divorce, Walter had twelve years of service. The divorce decree did not award Walter's civil service retirement benefits nor did it address the issue. In August 1987, Walter retired and commenced receiving civil service retirement benefits. Subsequent to Walter's retirement Connie made several demands on him to pay her share of those benefits to her. Walter, however, failed to make any such payment. At trial, Walter testified that at the time of the divorce he was not eligible to retire and receive immediate payment of any benefits, but that he was entitled to payment of benefits should he retire when he attained a certain age. Walter also testified that he had already received retirement benefit payments totalling $56,609.64, none of which he had shared with Connie.

The trial court's "Post Divorce Judgment of Partition of Retirement Benefits" ordered Walter to assign to and pay Connie twenty-four percent of each and every retirement benefit received by him after October 31, 1989, to open a separate checking account into which his retirement benefit payments are to be deposited, to direct the bank to pay twenty-four percent of each payment so deposited to Connie, and further ordered that Walter be constituted trustee of the funds for the benefit of Connie. The judgment also ordered that Connie recover $13,586.31 as twenty-four percent of the amount of retirement benefits received by Walter from the date of his retirement to October 1989.

[1] [2] [3] In his first and second points of error, Walter contends that the trial court erred in entering judgment against

him (1) because 5 U.S.C. § 8345(j) prohibits a state court from dividing civil service retirement benefits, and (2) because 5 C.F.R. 831.1704(b) and (d) defining "qualifying court orders" prohibits a state court from dividing civil service retirement benefits. Subsection (j) was added to section 8345 of the Civil Service Retirement Act on September 15, 1978. Act of Sept. 15, 1978, P.L. 95–366, 92 Stat. 600. That section reads in pertinent part:

> (j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Commission to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court ***640** order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Retirement benefits are subject to division as vested contingent community property rights even though the present right has not fully matured. *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex.1977). Generally, civil service retirement benefits earned during marriage are community property subject to division or partition in a divorce proceeding. *Hoppe v. Godeke*, 774 S.W.2d 368, 370 (Tex.App.—Austin 1989, writ denied). In the present case, we conclude that section 8345(j) does not prohibit division of civil service retirement benefits, but instead, specifically permits division.

[4] **[5]** Under 5 U.S.C. § 8345(j)(1), United States civil service retirement benefits as community property can be divided by the court in a divorce decree and required to be paid directly to the party awarded same. *Cowan v. Plsek*, 592 S.W.2d 422, 423 (Tex.Civ.App.—Waco 1979, no writ). Section 8345(j)(1) specifically permits award of a fractional portion to wife. *See Adams v. Adams*, 623 S.W.2d 500, 501 (Tex.App.—Fort Worth 1981, no writ). Indeed, the civil service amendments require the United States to recognize the community property division of civil service retirement benefits by a state court. *See Adams*, 623 S.W.2d at 501 (citing *McCarty v. McCarty*, 453 U.S. 210, 230–31, 101 S.Ct. 2728, 2740, 69 L.Ed.2d 589 (1981)). Where vested retirement benefits, as here, are not partitioned or taken into account in dividing community property in a divorce decree, the husband and wife become tenants in common or joint owners thereof, and such may be partitioned thereafter. *Cowan*, 592 S.W.2d at 423. The obvious purpose of section 8345(j) is to permit division of civil service retirement annuities if that is necessary to effectuate state marital property law. *Heisterberg v. Standridge*, 656 S.W.2d 138, 144 (Tex.App.—Austin 1983, no writ). The Federal Civil Service Retirement Act provides that retirement annuity benefits may be divided in accordance with state law. *Hoppe*, 774 S.W.2d at 371 (citing 5 U.S.C. § 8345(j)(1)). Moreover, it makes no difference that federal law did not permit division of civil service retirement benefits at the time of divorce. *See Boniface v. Boniface*, 656 S.W.2d 131, 133 (Tex.App.—Austin 1983, no writ). Indeed, section 8345(j)(1) authorizes such division and can be applied retroactively in a suit for partition. *See Boniface*, 656 S.W.2d at 134–35. Section 8345(j)(1) created no new substantive rights between the parties. It merely instituted a procedure by which the federal government was to recognize existing rights and cooperate with state courts in distributing benefits accordingly. *See Boniface*, 656 S.W.2d at 133. The legislative history of the 1978 amendment [§ 8345(j)(1)] specifically recognized the pre-existing authority of state courts to regard civil service retirement benefits as community property and to deal with them as such. *Boniface*, 656 S.W.2d at 133. The 1978 amendments did not affect the nature of civil service retirement benefits that accrued and vested during marriage. Such benefits were and are community property under the law of this state both before and after the amendments. *Boniface*, 656 S.W.2d at 134. It was only after adoption of these amendments that federal authorities could be bound by state court decisions in their future payment of benefits pursuant to the division of property incident to or arising out of a divorce. *Boniface*, 656 S.W.2d at 134. A partition judgment dividing community assets because an earlier divorce decree failed to address such property in any manner is, obviously, a court order incident to and arising out of the earlier divorce proceedings. *Boniface*, 656 S.W.2d at 134–35. We conclude, therefore, that in the present case the trial court properly granted partition to Connie of what the trial court determined was her community share of benefits previously paid to Walter, and granted partition to Connie of what the trial court found to be her community share of all future benefit payments. Hence, it follows that section 8345(j) does not prohibit a state court from dividing civil service retirement ***641** benefits. We overrule Walter's first point of error.

At oral argument, Walter conceded that if we were to decide that section 8345(j) does not prohibit a state court from dividing civil service retirement benefits, then we must overrule his second point of error. Indeed, we must. A partition judgment dividing community assets because an earlier divorce decree failed to address such property in any manner is a "qualifying court order" within the meaning of 5 C.F.R. 831.1704(b) and (d) as applicable in the present case. (In the present case, we do not deal with a survivorship annuity.) *See Boniface,* 656 S.W.2d at 134–35. We overrule Walter's second point of error.

[6] In his sixth point of error, Walter contends that the trial court erred in partitioning his retirement benefits as undivided assets because the prior trial court lacked jurisdiction to divide such property pursuant to section 3.92 of the Texas Family Code. TEX.FAM.CODE ANN. § 3.92 (Vernon Supp.1990). Walter grounds this contention on the assertion that section 3.92 did not become effective until November 1, 1987, and only applies to orders, decrees or judgments rendered after that date. (The parties were divorced October 16, 1974). For the purposes of this opinion, we assume but do not decide, that section 3.92 bears in some way upon the trial court's jurisdiction to divide Walter's civil service retirement benefits. (See above our disposition of Walter's first two points of error.) Nevertheless, we conclude that the trial court had such jurisdiction. Section 3.92 of the Family Code is found in chapter 3, subchapter F of that code. All of subchapter F was added to chapter 3 of the Family Code by section 3 of House Bill 168, passed in 1987 by the Texas Legislature. Act of July 20, 1987, 70th Leg., 2d C.S., ch. 50, § 3, 1987 TEX.GEN.LAWS 160, 161. In 1989, the Texas Legislature adopted various amendments to the Family Code, providing in pertinent part:

> SECTION 10. ....
>
> (b) *The amendment that added Subchapter F* to Chapter 3, Family Code, made by Chapter 50, Acts of the 70th Legislature, 2nd Called Session, 1987, *applies* to decrees of divorce and annulment rendered *before,* on, or after *November 1, 1987.*
>
> * * * * * *
>
> SECTION 12. *This Act* takes effect September 1, 1989, and, except as provided by Sections 9 and 10, *applies to a cause of action pending* on or brought after this date.

Act of May 26, 1989, 71st Leg., R.S., ch. 371, §§ 10 and 12, 1989 TEX.GEN.LAWS 1462, 1466 (emphasis added). Thus, the Legislature expressly gave the trial court the authority to divide retirement benefits that had not previously been awarded in the divorce decree rendered prior to November 1, 1987. That authority derives either from section 3.92, to which Walter refers, or from section 3.91, which actually does apply since the divorce court did have jurisdiction over the retirement benefits property. Regardless whether section 3.91 or 3.92 applies, both sections are found in subchapter F of chapter 3 of the Family Code. In addition, section 12 of the 1989 amendments, quoted above, provides that the amendments apply to all cases pending on the effective date of those amendments, September 1, 1989. This suit was so pending; it was tried the following month on October 5, 1989, and judgment was rendered January 16, 1990. Therefore, the trial court had an express statutory grant of authority, including the authority to divide the retirement benefits on a "just and right" basis. We conclude that the trial court had jurisdiction to divide Walter's civil service retirement benefits. We overrule Walter's sixth point of error.

[7] **[8]** In his third point of error, Walter contends that the trial court erred in awarding Connie a judgment in the sum of $13,586.31 because the undisputed evidence showed that the benefits only had a value of $11,751.00 on October 12, 1974. Walter argues that as a matter of law any valuation in excess of $11,751.00 would be due to Walter's separate efforts and labor subsequent to the divorce. Walter reasons that if he had not returned to work for the federal government after the divorce, the ***642** benefit would only have the value of $11,751.00. Nowhere in his brief does Walter tell us where we can read about or ascertain this $11,751.00 figure. Indeed, Connie tells us that the figure of $11,751.00 is never mentioned in the record. We conclude, therefore, that in the present case the references to certain facts do not contain proper references to the record where the matters complained of may be found. *Kropp v. Prather,* 526 S.W.2d 283, 288 (Tex.Civ.App.—Tyler 1975, writ ref'd n.r.e.). The burden is on appellant to show that the record supports his contentions and to point out the place in the record where the matters complained of are shown. *Kropp,* 526 S.W.2d at 288. In the present case, as in *Kropp,* we do not feel that the rules require us to read through the entire record to determine whether appellant's allegations have any validity. We conclude, as did the court in *Kropp,* that appellant has failed to meet his burden. *See Kropp,* 526 S.W.2d at 288. We conclude further, therefore, that the trial court did not err in awarding Connie

a judgment in the sum of $13,586.31. We overrule Walter's third point of error.

[9] In his fifth point of error, Walter contends that the trial court erred in refusing to allow Walter to testify regarding the details of his own retirement plan as it related to these proceedings. At trial, Walter testified that Exhibit 3 was a copy of his earnings and leave statement, dated as of August 17, 1974 (two months before the divorce), and that such document showed the amount of his contribution to his retirement plan in the amount of $11,478.54. Walter's counsel then asked him questions regarding the sum of $11,817.58. Nowhere is the $11,817.58 figure explained, but we assume it to be some alleged calculation of the contribution figure at or near the date of the divorce. (This is a wholly different figure from the $11,751.00 raised in point of error number three) Walter insists that the excluded testimony, about which Walter complains, concerned what his rights "would have been *to this $11,817.58* ... if [he] had chose [*sic*] to *quit* " his employment at the time of the parties' divorce. The trial court sustained an objection to the question. Walter insists that this testimony was very material and required by law.

Walter, however, argues only the first part of the inquiry, *i.e.*, that the trial court erred in refusing to admit the testimony. Nowhere does Walter construct for us an argument that the asserted error was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. *See* TEX.R.APP.P. 81(b)(1). Therefore, the second part of the inquiry was not briefed. Hence, Walter does not complain that trial court error led to an improper judgment. Points of error not separately briefed are waived. *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex.1984) (on motion for reh'g). A point of error that is not briefed fails to meet the minimum requirements of Rule 418, Texas Rules of Civil Procedure [now TEX.R.APP.P. 74(f)], and the appellate court considers such a point to be waived. *Schero v. Astra Bar, Inc.*, 596 S.W.2d 613, 614 (Tex.Civ.App.—Corpus Christi 1980, no writ). We conclude that Walter waived his fifth point of error by not addressing the question of the consequences of the asserted trial court error. Indeed, the court of appeals may not reverse a trial court's judgment in the absence of properly assigned error. *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex.1986). We overrule Walter's fifth point of error.

[10] In his fourth point of error, Walter contends that the trial court's award of attorney's fees in the amounts awarded is excessive and an abuse of discretion. We begin by noting that the award was not in an absolute fee amount of $25,500.00 as urged by Walter. True, the judgment awards $25,500.00. In her brief, however, Connie concedes that the trial court awarded only $6,000.00 for attorney's fees in the trial court. We express no opinion as to application of credits against the $25,500.00 affected by the appellate process. These credits total $19,500.00. We emphasize that interpretation of the trial court's judgment is not before us and we make none. Nevertheless, Walter would have us hold the award excessive and the result of an ***643** abuse of trial court discretion. We quote Walter's entire argument presented to persuade us to this holding:

> The Judgment of the Court in its post-divorce judgment of Partition of Retirement Benefits (Tr. 91 et seq.) awarded [Connie's Counsel] attorneys [*sic*] fees in the sum of $25,500. All the law this case involves is 5 U.S.C.A. 8345 and its interpretative regulation 5 CFR 831.1701 et seq.
>
> The Statement of Facts record of the trial of this cause is only 43 pages of evidence until [Connie's counsel] called himself to testify regarding attorneys fees on page 43 through page 54. [Walter] asks the Court of Appeals to take Judicial Notice of Reasonable Attorneys Fees in this cause pursuant to Section 38.004 of the Texas Civil Practices and Remedies Code. [Walter] also asks the Court of Appeals to give effect to the Texas Disciplinary Rules of Professional Conduct, enacted October 17, 1989 by the Texas Supreme Court, and Rule 1.04(6) on fees which reads as follows:
>
> > For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.
>
> [Walter] petitions the Court of Appeals to grant him a reasonable and fair REMITTITUR.

From this argument, we are not persuaded that the award is excessive and the result of an abuse of discretion. Thus, in the present case, we cannot say that the award is excessive and the result of an abuse of discretion. We overrule Walter's fourth point of error.

[11] Before closing this opinion, we address Connie's motion that we award her damages under appellate Rule 84. That rule provides:

> In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the

> court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against such appellant.

TEX.R.APP.P. 84. Hence, we must determine if Walter has taken this appeal for delay and without sufficient cause. First, we consider the question of taking the appeal without sufficient cause. In her brief, Connie relies upon the above cited cases of *Hoppe, Boniface, Heisterberg, Adams,* and *Cowan* which this court considers to control disposition of Walter's first two points of error. At oral argument, Walter's counsel was asked by the court to speak to those five cases. Walter's counsel declined to do so on the excuse that he had not studied them and was not prepared to discuss those cases. Indeed, nowhere in his brief does Walter cite any of those cases or ask that we distinguish them or refuse to follow them as incorrect statements of the law. Thus, we can only conclude that Walter has prosecuted this appeal with the deliberate purpose of ignoring existing law as propounded by our sister courts of appeals. We reach this conclusion because a non-frivolous appellant would meet these cases "head-on," distinguish them, or argue erroneous reasoning, and ask that we not follow them, thus inviting the Supreme Court to resolve the matter. We conclude, therefore, that Walter has taken this appeal without sufficient cause. Next, we consider whether Walter has taken this appeal for delay. Rule 84 derives from former Rule 438 of the Texas Rules of Civil Procedure. In addressing the "has been taken for delay" question under the former rule, we looked at the case from the point of view of the advocate and determined whether he had reasonable grounds to believe that the case would be reversed. *See Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). Assuming this to be the correct standard under Rule 84, we apply it to the present case. Hence, in considering the "has taken an appeal for delay" required finding in the present case under Rule 84, we again look at Walter's deliberate purpose of ignoring existing law as propounded by our sister courts of appeals. We conclude that such conduct reflects dilatory tactics on the part of Walter's ***644** attorney. *See Beckham,* 695 S.W.2d at 663. Consequently, we conclude that Walter's counsel, as advocate, had no reasonable grounds to believe that the case would be reversed. *See Beckham,* 695 S.W.2d at 663. We conclude, therefore, that Walter has taken this appeal for delay. The purpose of Rule 84 is to shift part of an appellee's expense and burden of defending himself in a frivolous appeal to the appellant. *Dallas County Appraisal District v. The Leaves, Inc.*, 742 S.W.2d 424, 431 (Tex.App.—Dallas 1987, writ denied). Therefore, we conclude that we must assess damages under Rule 84 of ten percent of the trial court's monetary judgment against Walter. Accordingly, we assess damages against Walter and in favor of Connie in the amount of $1,358.63.

We affirm the trial court's judgment. We render judgment in favor of Connie and against Walter in the sum of $1,358.63 together with interest at the rate of ten percent (10%) per annum from the date of this opinion. [1]

Footnotes

1 Computation of judgment rate by the consumer credit commissioner for month of November 1990, 15 Tex.Reg. 6218 (1990), pursuant to TEX.REV.CIV.STAT.ANN. art. 5069–1.05, § 2 (Vernon Supp.1990). The contents of the Texas Register are to be judicially noticed and constitute prima facie evidence of the text of the documents published in the Register and of the fact that they are in effect on and after the date of the notation. TEX.REV.CIV.STAT.ANN. art. 6252–13a, § 4(c) (Vernon Supp.1990).

2007 WL 2462005
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

Adrian PALMER, Appellant
v.
Eduardo R. CANDELARIO and
Unitrin Insurance, Appellees.

No. 03-07-00189-CV.
| Aug. 31, 2007.

From the District Court of Travis County, 53rd Judicial District No. D-1-GN-06-001420, Scott H. Jenkins, Judge Presiding.

Attorneys and Law Firms

Adrian Palmer, Waco, pro se.

Will Coates, Austin, for Appellee.

Before Chief Justice LAW, Justices PURYEAR and HENSON.

Opinion

MEMORANDUM OPINION

DIANE HENSON, Justice.

***1** Appellant Adrian Palmer filed a notice of appeal from a jury verdict in his personal injury suit against Eduardo Canedelario and Unitrin Insurance, which arose from an automobile accident. The jury determined that Palmer's negligence was 75% of the proximate cause of the accident, resulting in a judgment that Palmer take nothing.

Palmer's brief to this Court simply includes a summary of the facts of the case and a statement that "Issues presented are the jury charge or verdict." Palmer presents no assignment of error or issues for review. No clear error is discernible, as no reporter's record has been filed for this case.

An appellant's brief must "state concisely all issues or points presented for review." Tex.R.App. P. 38.1(e). Furthermore, it is well-settled law that "a pro se litigant is held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure." *Strange v. Continental Cas. Co.*, 126 S.W.3d 676, 677 (Tex.App.-Dallas 2004, pet. denied). Palmer bears the burden of discussing his assertions of error. *See Martinez v. El Paso County*, 218 S.W.3d 841, 844 (Tex.App.-El Paso 2007, pet. dism'd). Where an appellant's brief does not identify errors for review, we cannot "attempt to articulate what Appellant might have intended to raise on appeal." *Id.* at 845. Because Palmer has presented no issues for review, we affirm the trial court's judgment.

226 S.W.3d 413
Supreme Court of Texas.

Juan Manuel TELLEZ, Petitioner
v.
CITY OF SOCORRO, Respondent.

No. 05–0629. | June 1, 2007.

Synopsis

Background: Property owner petitioned for writ of certiorari and declaratory relief against city, seeking review of city zoning board of adjustment's denial of his application for non-conforming use permit. After a non-jury proceeding, the County Court at Law No. 5, El Paso County, Carlos Villa, J., affirmed the board's decision. Property owner appealed. The El Paso Court of Appeals, 164 S.W.3d 823, dismissed the appeal sua sponte and set aside the trial court's judgment. Review was granted.

Holdings: The Supreme Court held that:

[1] property owner's alleged error in naming city rather than board as defendant did not deprive trial court of subject-matter jurisdiction, and

[2] failure of property owner's petition for writ of certiorari to specify how board's decision was illegal did not deprive trial court of subject-matter jurisdiction.

Court of Appeals reversed; remanded.

Attorneys and Law Firms

***413** Justo Fernandez–Gonzalez, El Paso, for Juan Manuel Tellez.

Richard Contreras, El Paso, for City of Socorro.

Opinion

PER CURIAM.

[1] Subject-matter jurisdiction "involves a court's power to hear a case." *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *accord CSR* ***414** *Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex.1996). Because the trial court had power to hear this appeal of a zoning board's decision, we hold the court of appeals erred in dismissing it for lack of subject-matter jurisdiction.

Juan Tellez has operated an auto salvage yard in the City of Socorro in El Paso County since 1982. He alleges that six months after he purchased an adjacent lot in 1998 for the same use, the City enacted its first zoning laws and designated the lot as residential. He filed suit after the City's Zoning Board of Adjustment denied his application for a non-conforming use permit. *See* BLACK'S LAW DICTIONARY 577 (8th ed.2004) (defining "non-conforming use" as "Land use that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restrictions took effect."). The trial court affirmed the Board, and Tellez appealed again. Rather than reaching the merits, the court of appeals dismissed the suit *sua sponte* for lack of subject-matter jurisdiction. 164 S.W.3d 823, 830 (Tex.App.-El Paso 2005).

The procedures for challenging a zoning board's decision are rather unique. The Local Government Code requires such challenges to be filed within ten days after a board's decision, to be made by "verified petition stating that the decision of the board of adjustment is illegal ... and specifying the grounds of the illegality," and to be initiated by writ of certiorari directed to the board indicating when its "return" must be made. TEX. LOC. GOV'T CODEE § 211.011(a)-(c).

[2] In *Davis v. Zoning Board of Adjustment*, we rejected a claim that failing to serve the writ of certiorari required by the Code deprived the courts of subject-matter jurisdiction. 865 S.W.2d 941, 942 (Tex.1993) (per curiam). Instead, we held that service of the writ was the *procedure* by which a trial court conducts its review; *jurisdiction* exists "[o]nce a party files a petition within ten (10) days after a zoning board decision...." *Id.*

[3] **[4]** Here, the court of appeals dismissed Tellez's suit because he sued the City of Socorro rather than its Zoning Board, and because his petition did not specify how the Board's decision was illegal. The City never objected to either defect. Although subject-matter jurisdiction cannot be waived, *see Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex.2000), these procedural defects can be waived because they do not affect subject-matter jurisdiction (as we held in *Davis*).

We agree with the court of appeals that, while the Local Government Code does not specify against whom suit should be filed, its requirements suggest that zoning boards are the proper party as they must be served with the writ, file a verified answer, and pay costs if found to have acted in bad faith. *See* TEX. LOC. GOV'T CODEE § 211.011. But whether suit should be dismissed because the zoning board was not joined as a defendant is a prudential rather than jurisdictional question. *See* TEX.R. CIV. P. 39; *Brooks v. Northglen Ass'n,* 141 S.W.3d 158, 162–63 (Tex.2004); *Cooper v. Texas. Gulf Indus., Inc.,* 513 S.W.2d 200, 204 (Tex.1974). By failing to object, the City waived any complaint that the proper party was its appointed Board. TEX.R.APP. P. 33.1; *Brooks,* 141 S.W.3d at 163.

Similarly, while the Code requires specific allegations of illegality, nothing indicates the Legislature intended compliance to be jurisdictional. *See Univ. of Texas Sw. Med. Ctr. v. Loutzenhiser,* 140 S.W.3d 351, 359 (Tex.2004). If the City considered Tellez's petition deficient, it could have objected. Having failed to do so, it waived any defect, and the court of appeals ***415** erred in dismissing the appeal on this basis. *See Roark v. Allen,* 633 S.W.2d 804, 809–10 (Tex.1982).

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 59.1, we grant Tellez's petition for review, reverse the judgment of the court of appeals, and remand the case to that court for further proceedings.

Parallel Citations

50 Tex. Sup. Ct. J. 827

End of Document

410 S.W.3d 23
Court of Appeals of Texas,
San Antonio.

The TOWN OF BARTONVILLE PLANNING AND ZONING BOARD OF ADJUSTMENTS and Kristi Gilbert, Appellants
v.
BARTONVILLE WATER SUPPLY CORPORATION, Appellee.

No. 04–12–00483–CV. | June 12, 2013.

Synopsis

Background: Water supply corporation petitioned for writ of certiorari challenging decision of town's planning and zoning board of adjustments denying corporation's application for a building permit. The 393rd District Court, Denton County, Douglas M. Robison, J., reversed board's decision and issued the permit. Board appealed.

[Holding:] The Court of Appeals, Karen Angelini, J., held that town's zoning board lacked authority to determine whether Water Code trumped town's zoning ordinance as applied to water tower.

Reversed and remanded; rehearing denied.

Attorneys and Law Firms

***24** Robert Hager, Nichols, Jackson, Dillard, Hager & Smith L.L.P., Dallas, TX, Mark Burroughs, Sawko & Burroughs, P.C., Denton, TX, for Appellants.

William Wood, Sam Burke, Wood, Thacker & Weatherly, P.C., Denton, TX, for Appellee.

Sitting: KAREN ANGELINI, Justice, SANDEE BRYAN MARION, Justice, PATRICIA O. ALVAREZ, Justice.

Opinion

OPINION ON DENIAL OF APPELLEE'S MOTION FOR REHEARING

Opinion by: KAREN ANGELINI, Justice.

On March 27, 2013, we issued an opinion reversing the trial court's judgment and remanding the cause to the trial court. *See Town of Bartonville Planning & Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.*, No. 04–12–00483–CV, 2013 WL 1222939 (Tex.App.-San Antonio Mar. 27, 2013). Bartonville Water Supply Corporation ("BWSC") has filed a motion for rehearing. We deny the motion for rehearing. However, to clarify our opinion, we withdraw our prior opinion and judgment, and substitute this opinion and judgment in their place.

This is an appeal from the trial court's judgment reversing the decision by the Town of Bartonville Planning and Zoning Board of Adjustments to deny BWSC's application for a building permit for the construction of a water tower. On appeal, the Board argues that in the underlying writ of certiorari proceeding, the trial court exceeded its subject matter jurisdiction ***25** by finding that the restrictions in the Town's zoning ordinance were unenforceable against the water supply corporation and by issuing a building permit for the construction of the water tower. Because we agree that the trial court exceeded its subject matter jurisdiction, we reverse and remand.

BACKGROUND

BWSC is a water supply corporation operating under chapter 67 of the Texas Water Code. Having determined that it needed a new water tower to meet its obligation of providing a continuous and adequate supply of water pursuant to section 291.93 of the Texas Administrative Code, BWSC began constructing a water tower within the Town of Bartonville ("the Town"). BWSC then received a letter from the Town, demanding that BWSC cease construction because it had failed to obtain a building permit. [1] In response, on June 1, 2011, BWSC filed a petition for declaratory relief and writ of mandamus in the 211th Judicial District Court for Denton County, Texas. This suit for declaratory relief is not the subject of this appeal.

In response to the suit for declaratory relief, the Town filed a plea to the jurisdiction. Before the plea to the jurisdiction was heard, on December 7, 2011, BWSC decided to file an application for a building permit with the town's secretary and building official, Kristi Gilbert, for construction of

an elevated water storage facility ("the water tower") on the property in question. Thus, there were now two legal proceedings: one in district court for declaratory relief and an administrative application for a building permit filed with the Town's secretary.

On December 12, 2011, Gilbert denied BWSC's application for a building permit because the site for the proposed water tower was zoned RE–2, and the proposed water tower was not an approved use or structure within that zoning designation. The Town's zoning ordinance requires a conditional use permit for the construction of a water tower within that zoning district, and BWSC had not been issued a conditional use permit for the construction of a water tower.

BWSC appealed Gilbert's denial of the building permit application to the Town's Board of Adjustment. At a public hearing on February 2, 2012, the Board of Adjustment considered the appeal. During the hearing, BWSC argued that Gilbert erred in denying its application because she should have determined that BWSC is not subject to the Town's zoning ordinance. The Town's attorney pointed out to BWSC that Gilbert had no authority to make such a determination and that neither did the Board of Adjustment. The Town's attorney emphasized that such a question was for a court of competent jurisdiction. After considering the evidence and argument of counsel, the Board of Adjustment denied BWSC's appeal and upheld Gilbert's decision.

BWSC then filed a petition for writ of certiorari in district court, requesting review of Gilbert's and the Board of Adjustment's ***26** decision. In its petition, BWSC argued that Gilbert and the Board of Adjustment erred in applying Bartonville's zoning regulations to BWSC for two reasons:

1. "For the Town of Bartonville to regulate BWSC, Bartonville must have express authority for the regulation it seeks to impose. As will be discussed below, the Texas Water Code makes clear that Bartonville has no express authority to impose its zoning regulations on BWSC."

2. "Additionally, the Texas Water Code, in the same provisions that limit municipal authority over retail public utilities such as BWSC expressly authorizes retail public utilities, notwithstanding any other law, to extend their services and to construct the facilities necessary for that extension within the corporate limits of towns they serve for the purpose of providing adequate water services to their members. BWSC's planned elevated water storage facility will be constructed so that BWSC can provide adequate service to its members."

In its petition for writ of certiorari, BWSC concluded that "[b]ecause the Bartonville Board of Adjustment failed to analyze or apply the law properly, it has abused its discretion and the Bartonville Board of Adjustment's order upholding Ms. Gilbert's wrongful decision is illegal and should be reversed." BWSC's petition for certiorari argued that the order by the Board of Adjustment "is illegal because the law and the evidence presented at the Board of Adjustment hearing allows for only one conclusion—the zoning ordinance on which [Gilbert], the town secretary, was relying as a basis for her denial of BWSC's application for building permit does not apply to, and cannot be enforced against, BWSC." That is, the petition asserted that the Board of Adjustment "either failed to correctly analyze the law to determine whether the building permit could be denied based on the applicability of Bartonville's zoning ordinance to BWSC, a retail public utility, or arbitrarily decided to ignore the applicable law." "Whatever the reason for the Bartonville Board of Adjustment's erroneous order, when a board of adjustment clearly fails to analyze or apply the law properly, it has abused its discretion and the Board of Adjustment's resulting order is illegal."

At the hearing on the petition for writ of certiorari, the trial court expressed concern about the parallel declaratory judgment proceeding, noting that "the more serious question for this court" was whether he or the judge in the declaratory judgment proceeding should make the determination. BWSC then offered to walk over to the other court and nonsuit the declaratory judgment proceeding.[2] After BWSC nonsuited the declaratory judgment action pending in the other court, the trial court ruled that under the law, "the Water Supply Corporation does have the ability to select its own sites unfettered by restraint from the Town." The court stated, "I don't think they need to get a building permit." Counsel for BWSC then told the court, "Your Honor, the judgment before the Court overturns the decision of the building official and issues the building permit, and that's the relief we requested and that's the judgment that we have tendered to the Court and what we're requesting the court to enter." Counsel for the Board of Adjustment objected to the court "ordering ***27** the building official to order a permit you said they don't have to get." The court replied, "Rechange it. I think you can construct it without the building permit. That's my point." Counsel for BWSC stated in response, "I would agree with the Court, but I don't know that I want to, on behalf of my client,

bite off that much apple. In other words, the Town might be able to tell us what color to paint or something in that regard and I don't want to—this Court's judgment to be reversed because—" The court interrupted, "Because of aesthetics?" Counsel for BWSC replied, "Yeah, exactly, exactly." The court then stated,

> Okay. I will tell you what I'm going to do. I am—I'm going to sign the judgment as tendered. I expressed my reasons, previously. But I think it's broad enough to be not able to request a building permit but—and you brought up the point that aesthetics may apply. So taking that into account, I'm going to compel you to issue the building permit. And we'll fight the battle as to whether you can even compel aesthetics. I guess that will be the next go-round.

The trial court then signed a final judgment, which, in pertinent part, states the following:

- The Court further finds that the Town Secretary/ Building Official erred when she decided and determined that the zoning ordinance in question was enforceable against BWSC as it relates to BWSC's application and failed to issue a building permit to BWSC.
- The Court finds that the Board of Adjustment failed to properly analyze and apply the law when it considered and denied BWSC's appeal of the decision and determination of the Bartonville Town Secretary/ Building Official to deny BWSC's application and her refusal to issue a building permit in response to said application.
- The Court finds that the Bartonville Board of Adjustment abused its discretion with regard to the above factual findings and interpretations and applications of state law when it considered and denied BWSC's appeal.
- Finally, the Court finds that because the Board of Adjustment abused its discretion and failed to properly analyze and apply the law that the Board of Adjustment Order is illegal.
- It is therefore ordered, adjudged, and decreed that the Board of Adjustment Order is reversed and that BWSC's application is granted and the building permit for the elevated water storage structure that is the subject of the BWSC application is hereby issued.

The Board of Adjustment and Gilbert (collectively "the Board") appealed.

TRIAL COURT ACTING OUTSIDE ITS JURISDICTION

In its first issue, the Board argues that the trial court exceeded its subject matter jurisdiction in the petition for writ of certiorari proceeding. The Board emphasizes that a decision by the Board is subject to limited review by a district court. And, because the Board itself has limited jurisdiction, a district court's review of the Board's decision is likewise limited. In this case, the Board argues that it has no legal authority to determine whether the Water Code "trumps" the Bartonville ordinance, but only has authority to ensure that ordinances are followed. Thus, the Board argues that the trial court exceeded the scope of its limited review by determining that the Water Code, indeed, "trumped" the Bartonville ordinance and that BWSC was not subject to the Bartonville ordinance.

***28 [1]** "A board of adjustment derives its power from both the statute and the city ordinance establishing it and defining its local function and powers." *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 250 (Tex.App.-San Antonio 2006, pet. denied). Section 211.003(a) of the Texas Local Government Code, "Zoning Regulations Generally," provides that the governing body of a municipality may regulate the following:

1. the height, number of stories, and size of buildings and other structures;
2. the percentage of a lot that may be occupied;
3. the size of yards, courts, and other open spaces;
4. population density;
5. the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
6. the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.

TEX. LOC. GOV'T CODE ANN.. § 211.003(a) (West 2008). Section 211.004 requires zoning regulations to be adopted in accordance with a comprehensive plan and to be designed to:

1. lessen congestion in the streets;
2. secure safety from fire, panic, and other dangers;
3. promote health and the general welfare;
4. provide adequate light and air;
5. prevent overcrowding of land;
6. avoid undue concentration of population; or
7. facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

Id. § 211.004. Section 211.005(a) allows the governing body of a municipality to divide the municipality into districts and permits the governing body "to regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land" within each district. *Id.* § 211.005(a). "Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district." *Id.* § 211.005(b). "The regulations shall be adopted with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality." *Id.* § 211.005(b). Pursuant to these sections, the Town of Bartonville adopted its zoning ordinance, and it is undisputed that the proposed water tower and its use do not comply with the Town's zoning ordinance.

The Town of Bartonville Planning and Zoning Board of Adjustments is an entity created pursuant to section 211.008 of the Texas Local Government Code. TEX. LOC. GOV'T CODE ANN.. § 211.008 (West 2008). As noted previously, a "board of adjustment derives its power from both the statute and the city ordinance establishing it and defining its local function and powers." *El Dorado,* 195 S.W.3d at 250. Subsection (a) of Section 211.009, titled "Authority of Board," grants a board the power to do the following:

> (1) hear and decide an appeal that *alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an* ***29** *ordinance adopted under this subchapter;*
>
> (2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;
>
> (3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is one; and
>
> (4) hear and decide other matters authorized by an ordinance adopted under this subchapter.

Id. § 211.009(a) (emphasis added).

On rehearing, BWSC argues the Board had authority to make a determination in this case pursuant to Subsection (a)(1) of Section 211.009 because BWSC alleged that "an administrative official made an error in the enforcement of a zoning ordinance by applying the ordinance to BWSC." We disagree that Subsection(a)(1) granted the administrative official and thus the Board authority to determine that the Water Code "trumped" the Bartonville ordinance and thus that the Bartonville ordinance was wholly unenforceable as to BWSC.

[2] **[3]** **[4]** Subsection (b) of Section 211.009 provides that

> [i]n exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

Id. § 211.009(b). Section 211.011 allows a party to appeal a board's decision to a district court, county court, or county court at law by filing a verified petition stating that the decision of the board of adjustment is "illegal in whole or in part and specifying the grounds of the illegality." *Id.* § 211.011(a). "On the presentation of the petition, the court

may grant a writ of certiorari directed to the board to review the board's decision." *Id.* § 211.011(c). "If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed." *Id.* § 211.011(e). "The court may reverse or affirm, in whole or in part, or modify the decision that is appealed." *Id.* § 211.011(f). Thus, a "district court sits only as a court of review, and *the only question that may be raised by a petition for writ of certiorari is the legality of the board's order.*" *Sw. Paper Stock, Inc. v. Zoning Bd. of Adjustment*, 980 S.W.2d 802, 805 (Tex.App.-Fort Worth 1998, pet. denied) (emphasis added). That is, "[a]s a quasi-judicial body, the decisions of a zoning board are subject to appeal before a state district court upon application for a writ of certiorari," and "the only question before it is the legality of the zoning board's order." *City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex.2006). "To establish that an order is illegal, the party attacking the order must present a 'very clear showing of abuse of discretion.' " *Id.* (quoting *City of San Angelo v. Boehme Bakery*, 144 Tex. 281, 190 S.W.2d 67, 71 (1945)). "A zoning board abuses its discretion if it acts without reference to any guiding rules and principles or clearly fails to analyze or apply the law correctly." *Id.*

In its petition for writ of certiorari and on appeal, BWSC argued that the Board's order was illegal because the Board should ***30** have determined that its own zoning ordinances do not apply to BWSC because of provisions in the Texas Water Code. The Board replies that it had no authority to make any such determination. It only has authority to enforce the ordinance.

[5] **[6]** As a quasi-judicial body, a board of adjustment has no statutory power to legislate. *Bd. of Adjustment v. Willie*, 511 S.W.2d 591, 593 (Tex.Civ.App.-San Antonio 1974, writ ref'd n.r.e.). "It is restricted in its decisions to the powers vested in it by the legislature and city council." *Id.* "A board of adjustment must act within the strictures set by the legislature and the city council and may not stray outside its specifically granted authority." *El Dorado Amusement Co.*, 195 S.W.3d at 250. "*Any action exceeding this authority is null and void and subject to collateral attack.*" *Id.* (emphasis added).

[7] Pursuant to the Bartonville Code of Ordinances, "[a]n application for a building permit is required within the Town limits, or where authorized by a development agreement, in the Town's extraterritorial jurisdiction, prior to placement, construction or alteration of a building or structure." It requires a person to first submit an application to the building official (here Gilbert), who shall "approve, conditionally approve or deny the application for a building permit." According to the Code of Ordinances, the building official shall apply the following criteria in deciding the application for a building permit:

1. The application generally conforms to all prior approved development applications for the property and any variance petition authorizing variation from the standards otherwise applicable to the permit.

2. The location of the structure on the property is in accordance with all prior approved development applications.

3. The proposed plan for construction or alteration conforms to the Building Code and other applicable construction codes adopted by the Town.

4. All applicable fees, including impact fees, have been paid.

The Code of Ordinances provides that "[a]ny interested person may appeal the building official's decision on the building permit application to the Zoning Board of Adjustments." The Zoning Board of Adjustments "shall decide the appeal in accordance with Article 3.1 of the Town of Bartonville's Code of Ordinances." Article 3.1 of the Code of Ordinances, also known as the "town building code," sets out building codes adopted by the Town. Thus, neither the Building Official (Gilbert) nor the Board has been given authority by the Town to determine whether the Texas Water Code "trumps" the Bartonville ordinance and thus whether BWSC is subject to the ordinance. The Building Official and the Board have only been given authority to ensure the ordinances are followed. We thus find BWSC's argument is flawed—the Board abused its discretion by not determining that the ordinance should not apply to BWSC (when the Board has no authority to make such a determination). Indeed, if the Board had determined that BWSC was not subject to the ordinance, its determination would have been "null and void" as it would have been exceeding its authority. *El Dorado*, 195 S.W.3d at 250. That is, the decision by the Board would have been illegal if it had done what BWSC wanted.

And, as it is not within the Board's jurisdiction to make such a determination, it was also not within the trial court's jurisdiction in this limited petition for writ of certiorari review. *See Sw. Paper Stock*, 980 S.W.2d at 805 (explaining that a "district court sits only as a court of review, ***31** and

the only question that may be raised by a petition for writ of certiorari is the legality of the board's order).” We, therefore, agree with the Board that the trial court exceeded its subject matter jurisdiction. [3]

Because the trial court exceeded the scope of its limited review of the Board's decision, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. [4]

CONCLUSION

Footnotes

1 The record reflects that in an October 24, 2011, letter addressed to Jim Leggieri, General Manager of BWSC, Debbie Millican, the Town Administrator, advised BWSC that on two previous occasions, BWSC had sought to obtain “the required Conditional Use Permit for location of a water storage tower at the Neely Road site” and that “[o]n these two occasions, after public hearing, the Town Council voted to deny the issuance of the Conditional Use Permit.” Millican explained that in the absence of the issuance of a conditional use permit, the proposed water storage “would be, if built, an illegal use at the Neely Road site.” Thus, Millican stated that the “Town respectfully requests that such use and proposed construction cease and desist.”

2 We note that after the declaratory judgment proceeding was nonsuited, the petition for writ of certiorari in the instant case was not amended, and the petition for writ of certiorari does not plead a declaratory judgment action.

3 We note that courts have explained there is a distinction “between whether a board of adjustment has the power to act and whether it has exercised that power illegally.” *El Dorado*, 195 S.W.3d at 250; *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex.App.-El Paso 1996, no writ). In the former, a district court may make a determination notwithstanding a party not exhausting all administrative remedies. *El Dorado*, 195 S.W.3d at 250; *see also W. Tex. Water Refiners*, 915 S.W.2d at 626–27. “In the latter, the only means to challenge the board's action is through the statutory writ of certiorari proceeding.” *El Dorado*, 195 S.W.3d at 250; *see also W. Tex. Water Refiners*, 915 S.W.2d at 626. Here, BWSC is arguing the former—that the Board does not have the power to order the BWSC to comply with its ordinance. Thus, the petition for writ of certiorari was not the proper procedural vehicle.

4 Having so determined, we need not reach the Board's second issue on appeal.

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 7. Regulation of Land Use, Structures, Businesses, and Related Activities
Subtitle A. Municipal Regulatory Authority
Chapter 211. Municipal Zoning Authority (Refs & Annos)
Subchapter A. General Zoning Regulations (Refs & Annos)

V.T.C.A., Local Government Code § 211.009

§ 211.009. Authority of Board

Currentness

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and

(4) hear and decide other matters authorized by an ordinance adopted under this subchapter.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

(c) The concurring vote of 75 percent of the members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 126, § 2, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 724, § 2, eff. Aug. 28, 1995.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits as unnecessary the source law reference to the exercise of board authority "in conformity with the provisions of this Act," since the revised law is drafted to conform to the act.

Notes of Decisions (38)

V. T. C. A., Local Government Code § 211.009, TX LOCAL GOVT § 211.009
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 7. Regulation of Land Use, Structures, Businesses, and Related Activities
Subtitle A. Municipal Regulatory Authority
Chapter 211. Municipal Zoning Authority (Refs & Annos)
Subchapter A. General Zoning Regulations (Refs & Annos)

V.T.C.A., Local Government Code § 211.011

§ 211.011. Judicial Review of Board Decision

Currentness

(a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, § 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 646, § 1, eff. Aug. 30, 1999.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits as unnecessary the statement that persons may “jointly or severally” seek judicial review because other provisions adequately govern the filing of suits jointly or severally. For example, see Rule 40, Texas Rules of Civil Procedure.

Notes of Decisions (115)

V. T. C. A., Local Government Code § 211.011, TX LOCAL GOVT § 211.011
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)
Rule 34. Appellate Record (Refs & Annos)

TX Rules App.Proc., Rule 34.1

34.1. Contents

Currentness

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Even if more than one notice of appeal is filed, there should be only one appellate record in a case.

Credits
Eff. Sept. 1, 1997.

Notes of Decisions (214)

Rules App. Proc., Rule 34.1, TX R APP Rule 34.1
Current with amendments received through April 15, 2013

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