Appellate Docket Number 03-13-00580-CV

Texas Third Court of Appeals

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

Marc T. Sewell Petition for Judicial Review
under Local Government Code Sec 211

Vs.

Llano Board of Adjustment (Chairman Mikel Virdell)

Appellant and Filer of this document:

Marc T. Sewell
108 Summit
Llano, TX 78643
Pro Se

Appellee:
City of Llano
Mikel Virdell Chairman & Mayor
301 West Main
Llano, TX 78643

Appellee Attorney:
Carey L. Bovey
2251 Double Creek Drive
Round Rock, TX 78664

Oral Argument Not Required

TO THE HONORABLE THIRD COURT OF APPEALS:

I respectfully present this rebuttal to Mr. Bovey's Reply to Appellant's Response to Appellee's Motion for Damages.

From the onset, this case has been about ethics. Mr. Lewis has knowingly lied about a question of law to the Llano Planning and Zoning Commission, to the Llano City Council, and the citizens of Llano. He escalated that lie into perjury in a signed, sworn affidavit presented to this court. The city attorney, Mr. Bovey, supported and facilitated that perjury and in the process added additional ethical transgressions, as will be shown.

The specific ethics question brought forth with the damages motion is the ethics of frivolous. The preamble to Texas Disciplinary Rules of Professional Conduct ¶1[1] states "A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." They go on to instruct lawyers in Rule 3.01 not to assert or controvert frivolous issues.[2]

Thus, frivolous is an ethical question. I will assess the ethics of Mr. Bovey and me to determine who was frivolous, as well as continuing to answer Mr. Bovey's accusations.

[1] Appendix A – TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT on page 11
[2] Rule 3.01 Meritorious Claims and Contentions on page 11

Mr. Bovey's Behavior:

1. **Knowingly False Statements of Fact are Frivolous** - Texas Disciplinary Rules of Professional Conduct (TDRofPC) Rule 3.03(a)(1)[3] says a lawyer should not "make a false statement of material fact or law." Rule 3.01 Comment ¶3[3] says "A filing or contention is frivolous if it contains knowingly false statements of fact." Rule 3.03 Comment ¶2 Factual Representations by Lawyer[3] states that a lawyer is responsible for affidavits which may only be presented when the lawyer knows the assertion is true. Mr Bovey violated these rules and was frivolous by twice submitting a perjurious affidavit - on the central legal issue of this case.
2. **Fail to Disclose** - TDRofPC Rule 3.03(a)(2)[3] states "a lawyer shall not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act" [i.e. perjury]. Mr Bovey violated this rule and supported perjury by not answering the central question to my Motion for Sanctions: "usage changes are text changes and not regulation changes because _____".
3. **Disclosure of the True Facts** – TDRofPC Rule 3.03(b)[3] "If a lawyer has offered material evidence and comes to know of its falsity … the lawyer shall take reasonable remedial measures, including disclosure of the true facts." After my repeated assertions regarding zoning law *text changes*, Mr. Bovey never took any remedial measures, rather continued to support the knowingly false statement. Even Mr. Bovey's latest submission to the court contains another copy of the perjurious document.

[3] Appendix A – TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT on page 11

4. **Misleading Legal Argument** - TDRofPC Rule 3.03 Comment P3[4] "Legal argument based on a knowingly false representation of law constitutes dishonesty." Examples of that dishonesty are:

   a. Minimum Standards - Mr Bovey claims that there are "minimum standards for damages under Texas Rule of Appellate Procedure 45"[5] documented in his Appellee's Motion for Damages. This is simply incorrect. Neither his motion nor his reply to my reply contain a set of "minimum standards" for indicating frivolous. Neither does the Texas Rule of Appellate Procedure 45 as he represents. Nor do the three transgressions he espouses in his final statement[6], constitute "minimum standards." In fact in his citations, these transgressions are secondary indicators. This is a dishonest representation of law.

   b. Clearly - Mr Bovey has said "clearly has no jurisdiction" several times in his Motion for Damages and replies. I have shown that the Third Court of Appeals has jurisdiction[7] by a direct quote from the court's paper on Jurisdiction which also states that jurisdiction is a "crazy quilt" of "more exceptions than rules" and "far more complex than might be immediately apparent." Even in one of Mr. Bovey's own citations, he says that I had jurisdiction: "*jurisdiction* exists "[o]nce a party files a petition[8]". This is what I said, although not so succinctly.

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[4] Appendix A – TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT on page 11
[5] Page 2 ¶2 of APPELLEES' REPLY TO APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR DAMAGES
[6] Mr. Bovey's final summary in ¶6 on page 14 of APPELLEES' REPLY TO APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR DAMAGES
[7] Bovey #5 on page 5 of Sewell Response to Motion for Damages
[8] Appendix D - Tellez v. City of Socorro on page 20

My point here is that characterizing jurisdiction as "clear" is dishonest. It is not clear and should be resolved by the district court.

c. Will Address but Never Does – On the central legal question of the judicial review, Mr. Bovey states that "the City Manager and City Attorney contend, based on the following, that they did not violate § 10.001."[9] He promises to show that they did not commit perjury but never delivers. This is because the central question "usage changes are text changes and not regulation changes because _____" cannot be answered without admitting perjury and violating zoning laws. This attempt to deceive the court is knowingly dishonest and disrespectful.

5. **Fallacy of Incomplete Evidence** – Mr. Bovey uses a tactic of picking subordinate clauses or words from a statute while ignoring the essence of the statute in order to invalidly make a statement of law. This is a dishonest tactic and a violation of Texas Creed IV P 6. Misrepresent, mischaracterize authorities[10].

a. *Decision* – Mr. Bovey's latest attack on jurisdiction is based on the word *decision.* By extracting several uses of *decision,* he then used twisted logic to define the term "decision" as "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." Thus, only filed decisions in the board office are real decisions. He goes on to say that §211.011(g)[11] demonstrates lack of jurisdiction based on the word

[9] page 6 P5 Appellee Reply to Sewell Motion for Sanctions

[10] From THE TEXAS LAWYER'S CREED-- A MANDATE FOR PROFESSIONALISM IV 6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage on page 21

[11] Appendix C - E. Cent. Indep. Sch. Dist. v. Bd. of Adjustment for City of San Antonio on page 19

decision. Huh? I have read this numerous times and it doesn't make sense. Actually, §211.011(g) is about treating a Board of Adjustment and City Council as equal when the members are the same. Thus, the "decision" was filed in the shared City Secretary's office but that is irrelevant to jurisdiction.

Besides, Mr. Bovey's citation actually says the opposite - that "the statute does NOT define *decision*[12]." Since the statute doesn't define the word "decision" it is reasonable to use the Merriam Webster definition of "a determination arrived at after consideration" which would include decisions by a municipal body to amend an ordinance.

b. *as required by the Texas Rules of Civil Procedure*– I have described Mr. Bovey's mischaracterization in detail in my previous responses[13].

c. *Board of adjustment* - From §211.011(a)[14], Mr. Bovey keys on the phrase "of the board of adjustment" to assert jurisdiction, ignoring the qualifying statute 211.011(g)[14]. He also ignores the more essential aspect of that section and ignores the true meaning of one of his own citations - Tellez v City of Socorro[15] which describes when jurisdiction exists.

6. **Ignoring Central Issues** – The Texas Lawyer's Creed[16] requires that Mr. Bovey gives "the issues in controversy deliberate, impartial and studied analysis and consideration."

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[12] Appendix C - E. Cent. Indep. Sch. Dist. v. Bd. of Adjustment for City of San Antonio on page 19

[13] Bovey #4 on page 5 of My Response to Motion for damages and response to Appellee Motion to Dismiss ¶4-¶6 starting on page 3

[14] Appendix F - Local Government Code Sec 211.011. Judicial Review on page 22

[15] Appendix D - Tellez v. City of Socorro on page 20

[16] Appendix E – The Texas Lawyer's Creed IV 8 on page 21. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

Mr. Bovey's violation of his creed is particularly egregious since the central issues were completely ignored:

a. Judicial Review – The central issue requested for review was that of "usage changes are text changes and not regulation changes because _____." There was no attempt by Mr. Bovey to address this issue which was also the central issue in my Motion for Sanctions for perjury. No mention of or rebuttal to the 4 statutes I used in that motion; no citations; no *deliberate, impartial and studied analysis and consideration.* Just ignored completely.

b. Appeal – The only issue requested of the Third Court of Appeals was to determine if proper process and law was followed by the district court – based on zoning law procedure, was it proper to require notification. Mr Bovey did not directly address this singular issue. Nor did he give *deliberate, impartial and studied analysis and consideration.* Just ignored completely.

7. **Conflict of Interest** - Rule 1.06(b)[17] was violated when Mr. Bovey rejected my Motion to Fix Case Style. That motion was simply to fix the case style by removing some of his clients from the court record, erroneously placed there by the district court clerk. This removal obviously benefited some of his clients but eliminated Mr. Bovey's false personal jurisdiction argument. Mr Bovey objected to this motion and thus, in the interest of some of his clients, he exposed the remainder of his clients to the perpetual web documentation of being a litigant in a legal action in the appeals court.

[17] Appendix A – TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT on page 11

Mr. Bovey's Accusation of My Behavior Transgressions[18]

1. **No requests for changes to well settled law**
2. **No Jurisdiction**
3. **No citations**

Even if these transgressions were substantiated, which I have shown they were not[19], are they sufficient to assert frivolous damages?

Not a Lawyer

According to Mr. Bovey's citations in *Zeifman v. Michel* and *Chapman v. Hootman:*

> "To determine whether an appeal is frivolous, the Court looks at the record from the viewpoint of the Appellant."

My viewpoint is critically influenced by my lack of legal training which therefore is critical to the court's determination of frivolous.

Of course a pro se *taxpayer* should follow all rules and laws in pursuit of an appeal but is not required to have a law degree or to know rules hidden, to a taxpayer, in case law. Texas statute 211.011(1)(b)[20] invites *taxpayers* to participate in the process for judicial review of a zoning decision. Not all taxpayers have law degrees. The First and Fourth Amendments do not require a citizen have a law degree. It is not frivolous to lack a law degree. Foolhardy, maybe. Thus, a taxpayer should not be deemed frivolous for not referencing case law or for not being able to

[18] Mr. Bovey's final summary in ¶6 on page 14 of APPELLEES' REPLY TO APPELLANT'S RESPONSE TO APPELLEES'
MOTION FOR DAMAGES
[19] My response to Appellee's Motion for Damages
[20] Appendix F - Local Government Code Sec 211.011. Judicial Review on page 22

critically diagnose jurisdiction or for not requesting statute change recommendations to a judge. I have explained my position on these in my Response to Motion for Damages.

I have referenced statutes and rules to support my claims and assertions. I followed the Texas Rules of Appellate Procedure. I did not commit perjury. At worst, I was inept, not frivolous.

Ineptitude is not Frivolous

According to *GEORGE W. JAMES v. DONALD*:

> "Ineptitude in the presentation of an appeal is not an adequate ground for assessment of a frivolous appeal penalty."

Frivolous must be Truly Egregious

In Mr. Bovey's own citation, *Chapman v. Hootman*[21]:

> "under Rule 45, Texas Rules of Appellate Procedure, for the filing of a frivolous appeal" ... "Whether to grant sanctions is a matter of discretion, which we exercise with prudence and caution, and only after careful deliberation. ... Although imposing sanctions is within our discretion, we will do so only in circumstances that are **truly egregious**."

With the "truly egregious" criteria, I proffer that not referencing case law, not being able to critically diagnose jurisdiction, and not requesting statute change recommendations to a judge are not egregious and thus not frivolous. From my viewpoint, these ineptitudes are not egregious and do not deserve a penalty of ~$17,000 – over three years of groceries.

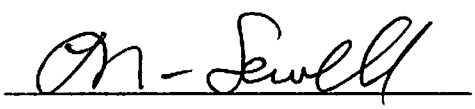
[21] Appellee Motion for Damages Appendix D

Prayer

I believe that I have shown that, by the ethical standards of his profession, Mr. Bovey has acted frivolously while I have acted within the bounds of the law and Rules of Appellate Procedure. I have refuted all of Mr. Bovey's assertions of frivolous behavior.

Had we had Oral Arguments, the appellees' answer to my pivotal question would clearly show which party was frivolous: "usage changes are text changes and not regulation changes because _____."

My prayer is that damages be assigned to Mr. Bovey and Mr. Lewis and not to the City of Llano and not to me.



Marc Sewell

108 Summit

Llano, TX 78643

Appendix A – TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Referenced rules from document linked to by Texas Supreme Court Website on Texas Bar Association website: Http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96

Preamble: A Lawyer's Responsibilities

1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent **obligation of lawyers is to maintain the highest standards of ethical conduct.**

4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and **not to harass or intimidate others**. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 1.06 Conflict of Interest: General Rule

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm;

or

(2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation roperly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

Rule 3.01 Meritorious Claims and Contentions A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is

a basis for doing so that is not frivolous.
Comment:
1. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, affects the limits within which an advocate may proceed. Likewise, these Rules impose limitations on the types of actions that a lawyer may take on behalf of his client. See Rules 3.02-3.06, 4.01-4.04, and 8.04. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
2. All judicial systems prohibit, at a minimum, the filing of frivolous or knowingly false pleadings, motions or other papers with the court or the assertion in an adjudicatory proceeding of a knowingly false claim or defense. A filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. It also is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.
3. A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail. In addition, this Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure. Likewise, a lawyer for a defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may so defend the proceeding as to require that every element of the case be established.
4. A lawyer should conform not only to this Rules prohibition of frivolous filings or assertions but also to any more stringent applicable rule of practice or procedure. For example, the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in this Rule. A lawyer must prepare all filings subject to Rule 11 in accordance with its requirements. See Rule 3. 04(c)(1).

Rule 3.03 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(5) offer or use evidence that the lawyer knows to be false.
(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Rule 4.01 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Appendix B - GEORGE W. JAMES v. DONALD HUDGINS (03/09/94)

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

decided: March 9, 1994.

GEORGE W. JAMES, APPELLANT,

v.

DONALD HUDGINS, DEBRA HUDGINS AND SONDRA JAMES, APPELLEES.

Appeal from the 142nd Judicial District Court of Midland County, Texas. (TC# A-37,758). Trial Court Judge: Pat M. Baskin. This Opinion Substituted by Court for Withdrawn Opinion of January 12, 1994.

COUNSEL

For Appellant: Hon. A. J. Pope, 6503 Sequoia, Midland, TX 79707, 915/689-6742.

For Appellees: Hon. William W. Clifton, Jr., Hon. Dick R. Holland, Boldrick, Clifton, Nelson & Holland, 1801 West Wall, Midland, TX 79701, 915/683-5656. Hon. John D. Roosa, Allen, Allen & Roosa, P. O. Box 2373, Midland, TX 79702-2373, 915/682-1066.

Before Panel No. 3, Koehler, Barajas, and Larsen, JJ.

Author: Barajas

Opinion ON MOTION FOR REHEARING

We grant Appellee's motion for rehearing, withdraw our opinion and judgment of January 12, 1994, and substitute the following opinion.

This is an appeal from a judgment on the verdict rendered against Plaintiff-Appellant, George W. James following the jury trial of a wrongful death case. In nine points of error, Appellant attacks the sufficiency of evidence supporting the verdict and judgment and the trial court's refusal to allow the deposition testimony of Appellant's expert to be read to the jury. We affirm the judgment of the trial court.

I. SUMMARY OF THE EVIDENCE

Appellant and Appellee Sondra James were the divorced parents of John James, a minor, and their divorce decree named Sondra as managing conservator of the child. While in the possession of Sondra, the child drowned in an above-ground swimming pool owned by the Hudgins, Appellees, and located at their residence. At the time of the tragic accident, Sondra was house-sitting for the Hudgins.

Appellant then brought this suit asserting various acts of negligence by Appellees, including the failure to remove or raise the ladder to the swimming pool and the failure of the Hudgins to inform Sondra of the dangers involved if such precautions were not taken. During the trial of the case, which began in early October of 1992 and lasted several days, Appellant attempted to introduce the deposition testimony of Dr. Daniel L. Levin, a medical doctor and alleged expert in the field of child drowning and swimming pool safety. Appellees objected to the entirety of this testimony, contending that Dr. Levin had not been qualified as an expert at the deposition, and as such, his opinions as to the negligence of Appellees were mere speculation. In a hearing outside the presence of the jury, the trial court overruled Appellees objections as to Dr. Levin's medical qualifications, but sustained the objections as to Dr. Levin's expertise in swimming

pool safety. The trial court also admitted into evidence the first two pages of Dr. Levin's curriculum vitae, showing his educational and employment history as a medical doctor. The remainder of the curriculum vitae, showing his qualifications as an expert in swimming pool safety, was excluded from evidence on the hearsay objection of Appellees. Appellees asserted that at the deposition, Appellant failed to lay the proper predicate for the admission of such documents, and as such, the documents did not fall within any of the recognized exceptions to the hearsay rule. Additionally, Appellant did not make any attempt at the deposition to establish the expertise of Dr. Levin regarding swimming pool safety issues. Thus, the deposition testimony regarding the medical aspects of the drowning were allowed to be read for the jury, but the testimony regarding Dr. Levin's opinions as to the negligence of Appellees was excluded.

At the conclusion of the trial, the jury, in an 11-1 verdict, found no negligence on the part of Appellees. The jury also found that Appellant suffered zero damages as a result of the accident. Appellant then filed a motion for judgment n.o.v. and a motion for new trial on October 23, 1992, asserting inter alia that the evidence at trial overwhelmingly and conclusively establishes that Appellees were negligent. The trial court rendered a take-nothing judgment on the jury's verdict on that same day.

II. DISCUSSION

In Points of Error Nos. One, Two, and Three, Appellant complains of the trial court's failure to grant the motion for judgment n.o.v. and motion for new trial, asserting that the evidence at trial was legally and factually insufficient to support the jury's verdict. Additionally, in Points of Error Nos. Five, Six, Seven, Eight, and Nine, Appellant asserts that the trial court erred in not submitting to the jury special issues and definitions regarding negligence per se, recklessness, and gross negligence, and in submitting to the jury the negligence of Sears, Roebuck & Co. and the definition of unavoidable accident. The merit of each of these points of error, by their very nature, depends upon the sufficiency of the evidence aduced at trial.

At the outset, we note that it is well established that the Texas Rules of Appellate Procedure place the burden on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal. TEX. R. APP. P. 50(d); Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); Streeter v. Thompson, 751 S.W.2d 329, 330 (Tex.App.--Fort Worth 1988, no writ). It is equally well settled that when an appellant complains of the factual or legal sufficiency of the evidence, the appellant's burden to show that the judgment is so erroneous cannot be discharged in the absence of a complete or agreed statement of facts. Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991). It is undisputed that the record before this Court on appeal contains only a partial statement of facts of the evidence adduced during the trial of the cause and not a complete or agreed statement of facts.

Without a complete or agreed statement of facts and in the absence of Appellant's compliance with TEX. R. APP. P. 53(d)*fn1 regarding reliance on a partial statement of facts, this Court must presume that the omitted portions of the evidence would support the jury findings and the trial court's judgment. Schafer, 813 S.W.2d at 155; Streeter, 751 S.W.2d at 330. Accordingly, Appellant's Points of Error Nos. One, Two, Three, Five, Six, Seven, Eight, and Nine should be overruled.

In Point of Error No. Four, Appellant asserts that the trial court erred and abused its discretion in not admitting the deposition testimony of Dr. Levin on matters concerning swimming pool safety and the ultimate issue of Appellees' negligence in that the testimony was admissible and its exclusion caused irreparable injury to the case. The trial court excluded these portions of Dr. Levin's testimony on the basis that Dr. Levin had not been sufficiently qualified as an expert on such matters. The trial court did allow the portions of Dr. Levin's testimony concerning the medical aspects of the drowning accident to be read to the jury.

Rule 702 of the Texas Rules of Civil Evidence dictates if an expert is qualified to testify.*fn2 The party offering the expert's opinion has the burden of establishing that the expert is qualified, that is, the expert possesses a higher degree of knowledge than an ordinary person or the trier of fact. ITT Commercial Fin. Corp. v. Riehn, 796 S.W.2d 248, 250 (Tex.App.--Dallas 1990, no writ). This burden may only be met by showing that the expert is trained in the science of which he or she testifies or has knowledge of the subject matter of the fact in question. Missouri Pac. R.R. Co. v. Buenrostro, 853 S.W.2d 66, 77 (Tex.App.--San Antonio 1993, n.w.h.); Rogers v. Gonzales, 654 S.W.2d 509, 512 (Tex.App.--Corpus Christi 1983, writ ref'd n.r.e.). [Emphasis added]. There are, however, no definite guidelines for making the determination of whether a witness's education, experience, skill, or training qualify the witness as an expert. This determination is left to the trial court's discretion, and the trial court's decision will not be disturbed absent a clear abuse of this discretion. ITT Commercial Fin. Corp., 796 S.W.2d at 250; Trailways, Inc. v. Clark, 794 S.W.2d 479, 483 (Tex.App.--Corpus Christi 1990, writ denied).

A careful review of the transcript of the deposition of Dr. Levin reveals that both parties agreed to reserve all objections, except for form of the question and responsiveness of the answer, until trial. Appellant, the party offering the deposition testimony at trial, asked no questions of Dr. Levin with regard to his qualifications as an expert on swimming pool safety issues. Dr. Levin did respond to questions asked by an attorney for Appellees with information about his qualifications as a medical doctor and his experience with treating child drowning and near-drowning victims. The deposition transcript reveals, however, that the attorney for Appellees did not ask Dr. Levin any questions about his qualifications or experience with regard to swimming pool safety issues, and no such information was developed during the deposition.

Appellant contends that the information supplied by Dr. Levin to the attorney for Appellees at the deposition pursuant to the notice to take oral deposition duces tecum is sufficient to establish the qualifications of Dr. Levin as an expert in swimming pool safety issues. We disagree. The notice required Dr. Levin to bring to the deposition twelve categories of documents:

1. Each and every document, item, photograph, or other tangible object supplied to you or made available to you for your investigation or inspection as an expert witness in this suit.

2. All maps, logs, depositions, statements, and any other material supplied to you or made available to you for your investigation as an expert witness in this suit.

3. All correspondence supplied to you or made available to you.

4. Each and every book, treatise, periodical, article, and/or pamphlet upon which you may rely or cite as authority for any opinions held or expressed by you pertaining to this lawsuit.

5. All papers, diagrams, drawings, illustrations, tangible objects, slides, photographs, or other documents which contain information relevant to any issue involved in this lawsuit and any preliminary report.

6. All reports, tests, test results, graphs, models, or tangible things prepared or used by you which form the basis, in whole or in part, of your opinion or testimony.

7. All work papers, notes and documents in your file dealing with this lawsuit and any preliminary report.

8. All agreements or contracts between you and Plaintiff or any attorney for Plaintiff regarding your fee as an expert witness in this lawsuit.

9. All of your time sheets, billing statements, or invoices reflecting charges for your services rendered in this lawsuit.

10. All your curriculum vitae and/or resumes.

11. List of all lawsuits in which you have testified as either an expert or fact witness.

12. List of all lawsuits in which you have given deposition testimony as an expert or factual witness.

At the deposition, the attorney for Appellees questioned Dr. Levin as to what he brought to the deposition in response to each of these twelve requests. All of the documents identified by Dr. Levin and brought to the deposition were marked as deposition exhibits and attached to the deposition transcript, but Dr. Levin was not questioned about the content or substance of any of the documents. The attorney for Appellant made no attempt during the deposition to establish the admissibility into evidence at trial of any of these documents.

The test for abuse of discretion is not whether, in the opinion of this Court, the facts present an appropriate case for the trial court's actions. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985), citing Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). Another way of stating the test is whether the act was arbitrary or unreasonable. Id. at 242, citing Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984); Landry v. Travelers Ins. Co., 458 S.W.2d 649, 651 (Tex. 1970).

Appellant had sufficient opportunity, both during the deposition itself and after the deposition but before the trial, to establish the expertise of Dr. Levin in matters of swimming pool safety, but simply failed to take any steps whatsoever to do so. The fact, as Appellant contends, that Appellees took the deposition of Dr. Levin and inquired into his opinions on the negligence of Appellees and related swimming pool safety issues does not preclude Appellees from challenging his expertise in such matters at trial. Given the above, we are of the opinion that the trial court did not abuse its discretion in determining that Appellant failed to meet its burden of establishing that Dr. Levin was qualified as an expert in swimming pool safety issues. Accordingly, we hold that the trial court did not err in excluding those portions of Dr. Levin's deposition testimony not relating to the purely medical aspects of the accident. Appellant's Point of Error No. Four is overruled.

Even if this Court is wrong on all of the above issues, Appellant still cannot prevail on this appeal. In the charge that was submitted to the jury, special issues numbers five and six inquired about the damages suffered by Appellant and the child as a result of the accident. These special issues were not conditionally submitted, and the jury properly answered the questions, finding zero damages in both special issues. In this appeal, Appellant makes no attack upon these jury findings of zero damages.

On numerous occasions, the courts of this state have held that a failure to attack a finding of no damages renders asserted error on liability issues harmless. In Easley v. Castle Manor Nursing Home, 731 S.W.2d 743, 744 (Tex.App.--Dallas 1987, no writ), the Court stated:

Since appellants failed to properly raise a point of error on the jury's finding of no damages, any error in the verdict on liability issues is harmless. M.P.I., Inc. v. Dupre, 596 S.W.2d 251, 255 (Tex.Civ.App.--Fort Worth 1980, writ ref'd n.r.e.); Roever v. Delaney, 589 S.W.2d 180, 182 (Tex.Civ.App.--Fort Worth 1979, no writ); Wooley v. West, 575 S.W.2d 659, 660 (Tex.Civ.App.--Fort Worth 1978, writ ref'd n.r.e.); Mitchell v. Chaparral Chrysler Plymouth Sales, Inc., 572 S.W.2d 359, 360-61 (Tex.Civ.App.--Fort Worth 1978, writ ref'd n.r.e.). Indeed, where findings of 'no damages' by the jury are not made subject to complaint on appeal the judgment is not to be reversed, even where there might exist reversible error in respect to the liability issues. M.P.I., Inc., 596 S.W.2d at 255. [Emphasis added].

Other cases have reached the same result. Hancock v. City of San Antonio, 800 S.W.2d 881, 885 (Tex.App.--San Antonio 1990, writ denied); Wisenbarger v. Gonzales Warm Springs Rehabilitation Hospital, Inc., 789 S.W.2d 688, 694 (Tex.App.--Corpus Christi 1990, writ denied); Canales v. National Union Fire Ins. Co., 763 S.W.2d 20, 22-23 (Tex.App.--Corpus Christi

1988, writ denied); Lewis v. Isthmian Lines, Inc., 425 S.W.2d 893, 894 (Tex.Civ.App.--Houston [14th Dist.] 1968, no writ). Accordingly, the unchallenged damage findings preclude a recovery Appellant on his cause of action and require an affirmance of the take-nothing judgment.

Appellees, by way of a single cross-point, request an award of damages against Appellant. Specifically, Appellees contend that Appellant brought this appeal for delay and without sufficient cause and request an award of damages in an amount not to exceed ten times the total taxable costs. We must now examine the record to determine whether such an award is proper under TEX. R. APP. P. 84.*fn3

Before an appellate court may assess damages under Rule 84, it must find that: (1) the appeal was taken for delay, and (2) there was no sufficient cause for the appeal. TEX. R. APP. P. 84; In re Estate of Kidd, 812 S.W.2d 356, 360 (Tex.App.--Amarillo 1991, writ denied). In making such findings, this Court must review the record from the standpoint of the advocate and determine whether he or she had reasonable grounds to believe the judgment should be reversed. Id.; Hicks v. Western Funding, Inc., 809 S.W.2d 787, 788 (Tex.App.--Houston [1st Dist.] 1991, writ denied); Daniel v. Esmaili, 761 S.W.2d 827, 830 (Tex.App.--Dallas 1988, no writ).

The courts of this State have enumerated four factors that tend to indicate an appeal was filed for delay and without sufficient cause. These factors are:

(1) the unexplained absence of a statement of facts;

(2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual insufficiency on appeal;

(3) a poorly written brief raising no arguable points of error; and

(4) the appellant's unexplained failure to appear for oral argument.

Hicks, 809 S.W.2d at 788; Daniel, 761 S.W.2d at 831. In the instant case, Appellant is challenging the factual sufficiency of evidence supporting the jury's verdict; therefore, a motion for new trial was required before appealing to this Court. The record shows that Appellant did timely file a motion for new trial. Also, Appellant appeared for oral argument before this Court.

As our original opinion indicated, eight of Appellant's nine points of error are based on the legal or factual sufficiency of the evidence, yet Appellant failed to provide this Court with a complete statement of facts. While this strategy may have doomed the appeal from the start, it is not conclusive evidence that the appeal was taken for delay or without sufficient cause. See, e.g., Hicks, 809 S.W.2d at 788. As Justice Lagarde stated in the Daniel case:

We emphasize that we do not award delay damages merely for "poor lawyering." **Ineptitude in the presentation of an appeal is not an adequate ground for assessment of a frivolous appeal penalty.** A.T. Lowry Toyota, Inc. v. Peters, 727 S.W.2d 307, 309 (Tex.App.--Houston [1st Dist.] 1987, no writ)(Dunn, J., dissenting). A court should not punish the client simply for the inadequacies of his attorney. However, upon a finding that an appeal was brought for purposes of delay and without sufficient cause, the judiciary cannot allow appellees to be injured, without compensation, by unscrupulous appellants who appeal merely to delay the satisfaction of the judgment.

Daniel, 761 S.W.2d at 831. Finally, we note that the Appellant in the instant case gains nothing by delaying execution of a take-nothing judgment, and Appellee suffers nothing beyond the normal expense of defending its success at trial. We find that this, too, is a factor we may properly consider.

We have prudently, cautiously, and carefully reviewed the instant case from the point of view of the advocate and cannot conclude that Appellant had no reasonable grounds to believe the judgment should be reversed. Accordingly, Appellees' Cross Point is overruled.

Having overruled each of Appellant's points of error, as well as Appellees' cross point, the judgment of the trial court is hereby affirmed.

March 9, 1994.

RICHARD BARAJAS, Justice

Before Panel No. 3

Koehler, Barajas, and Larsen, JJ.

Disposition

Having overruled each of Appellant's points of error, as well as Appellees' cross point, the judgment of the trial court is hereby affirmed.

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].

Appendix D - Tellez v. City of Socorro

From APPELLEES' REPLY TO APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR DAMAGES Appendix U

Tellez v. City of Socorro

226 S.W.3d 413

Supreme Court of Texas.

Juan Manuel TELLEZ, Petitioner

v.

CITY OF SOCORRO, Respondent.

No. 05–0629. | June 1, 2007.

[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...."

THE SUPREME COURT OF TEXAS
AND
THE COURT OF CRIMINAL APPEALS

THE TEXAS LAWYER'S CREED – A MANDATE FOR PROFESSIONALISM

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legal rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Appendix F - Local Government Code Sec 211.011. Judicial Review

Sec. 211.011. JUDICIAL REVIEW OF BOARD DECISION. (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.

(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.

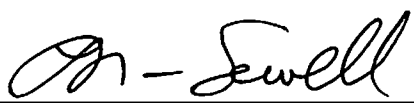
Appendix G Certificate of Service

Certificate of Service

I certify that I will serve this Response to Mr. Bovey's Response to my Motion for Sanctions for Docket Number 03-13-00580-CV on all other parties—which are listed below—on 1/27/14 as follows:

1. Llano City Attorney Carey Bovey **via email**
   Law office of Cary L. Bovey, PLLC
   2251 Double Creek Drive, Suite 204
   Round Rock, TX 78664
   (512) 904-9441
   cary@boveylaaw.com

2. Llano City Secretary Toni Milam **in person** for distribution to: Board of Adjustment Chairman/Mayor Mikel Virdell, City Attorney Carey Bovey, City Manager Brenton Lewis
   City of Llano
   301 West Main
   Llano, TX 78643
   (325) 247-4158
   tmilam@cityofllano.com



Marc T. Sewell
108 Summit
Llano, TX 78643-1127
325-247-2508
marcs@simonlabs.com

Appendix H- Certificate of Compliance

I certify that this motion was prepared with Microsoft Office Word 2007, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 2,169 words.

Marc Sewell

108 Summit

Llano, TX 78643