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' RESPONSE TO APPELLANT'S MOTION FOR SANCTIONS

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 Response to Appellant's Motion For Sanctions, and respectfully show the Court the following:

1. Appellant filed a Motion for Sanctions against City Manager Brenton Lewis and City Attorney Cary Bovey ("City Manager" and "City Attorney" respectively) for alleged violations of Texas Civil Practice and Remedies Code § 10.001, Texas Rule of Civil Procedure 13, and Texas Penal Code § 37.03.[2] City Manager and City Attorney are compelled to respond to Appellant's motion, despite the invalidity of the allegations and arguments made therein, because of Texas case law that recites a failure to respond to a motion for sanctions as a factor to be considered when imposing sanctions.[3]

2. City Manager and City Attorney contend the rules relied on by Appellant in his motion are inapplicable at the appellate level and that Texas Penal Code § 37.03 is inapplicable in a civil case generally, especially at the appellate level. However, if this Court finds that the rules and statute cited by Appellant are applicable, Appellees will show they did not violate said rules or statute, and that sanctions against the City Manager and City Attorney are not warranted.

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[2] Appellant's Mot. Sanctions 2, 5.

[3] *Bradt v. W.*, 892 S.W.2d 56, 79-80 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Tate v. E.I. Du Pont de Nemours & Co., Inc.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *Am. Paging of Texas, Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 242 (Tex. App.—El Paso 1999, pet. denied); *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App.—Dallas 2000, pet. denied).

3. Appellant asks this Court to find that the City Manager and City Attorney violated Texas Penal Code § 37.03, Aggravated Perjury, and award sanctions based on this violation. Appellant is essentially asking this Court to determine that the City Manager and City Attorney are guilty of a criminal offense, for which the penalty is a felony of the third degree, and to make this determination via a motion for sanctions in an appeal of a civil matter. The prosecution of a criminal offense and related criminal trials are governed by the Texas Code of Criminal Procedure, and criminal defendants are granted certain fundamental rights under the American and Texas constitutions.[4] By his motion for sanctions, Appellant is requesting this Court to summarily convict the City Manager and City Attorney of a criminal offense without the benefit of a jury trial, without the right to face and question their accuser, without requiring the State to prove its case beyond a reasonable doubt, or other basic legal rights afforded a criminal defendant.[5] City Manager and City Attorney contend the Third Court of Appeals is not the appropriate venue in which to initiate criminal charges; and that Appellant's attempted prosecution of an alleged violation of a criminal statute is improper.[6] The City Manager and City

[4] *See* Tex. Crim. Proc. Code Ann. art. 1.02 (West 2013).
[5] *See* Tex. Const. art. I, § 10
[6] *See* Tex. Const. art. V, § 21; *see also* Tex. Crim. Proc. Code Ann. arts. 2.01, 2.02 (West 2013) (only district and county attorneys have authority to represent the State in criminal prosecutions in district and inferior courts); *see also Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. App.—Austin 1996, no writ) (district and county attorneys have sole authority to represent State in criminal prosecutions in district and inferior courts).

Attorney further deny any and all allegations of criminal charges made by Appellant.

4. Texas Rule of Civil Procedure 2 defines the scope of the Rules of Civil Procedure. It states the "rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated."[7] Texas Rule of Appellate Procedure 1.1 defines the scope of the Rules of Appellate Procedure. It states the "rules govern procedure in appellate courts and before appellate judges and post-trial procedure in trial courts in criminal cases."[8] Therefore, the City Manager and City Attorney contend that based on the scope of the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure, as defined by each, Appellant's reliance on the Texas Rules of Civil Procedure for appellate sanctions is erroneous.

5. Appellant relies specifically on Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code § 10.001.[9] Section 10.001 states[10]:

> The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:
>
> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

[7] Tex. R. Civ. P. 2.
[8] Tex. R. App. P. 1.1.
[9] Appellant's Mot. Sanctions 5.
[10] Tex. Civ. Prac. Rem. Code Ann. § 10.001 (West 2013).

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

The language of the statute requires a pleading or motion under the Texas Rules of Civil Procedure, and the City Manager and City Attorney contend the Rules of Civil Procedure and § 10.001 do not apply during an appeal.[11] The City Manager and City Attorney recognize the Texas Supreme Court has suggested Texas Civil Practice and Remedies Code Chapter 10 might provide a basis for the imposition of appellate sanctions.[12] In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, the Supreme Court stated in its order on a motion for rehearing, "[t]he Legislature has also provided a mechanism for courts to sanction counsel who file pleadings presented for an improper purpose or to harass" citing Texas Civil Practice and Remedies Code §§ 10.001-10.005 as support for this statement.[13] The City

[11] *In re A.W.P.*, 200 S.W.3d 242, 246 (Tex. App.—Dallas 2006, no pet.) (§ 10.001 does not apply to motions filed in the appellate court or sanctions requested for the first time in appellate court).
[12] *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 733 (Tex. 1997).
[13] *Id* (citing Tex. Civ. Prac. & Rem. Code §§ 10.001-10.005).

Manager and City Attorney contend this statement is dicta and not controlling on whether § 10.001 applies to appellate sanctions. However, if this Court determines § 10.001 does apply, the City Manager and City Attorney contend, based on the following, that they did not violate § 10.001.

6. Appellant argues that statements made by Llano City Manager Brenton Lewis, in his affidavit attached to Appellees' Motion to Dismiss, were false representations of fact, groundless, contrary to evidence, and were overt and intended to deceive.[14] These accusations are based on Appellant's opinion that "[t]he proposed and actual amendments to the ordinance were actually "regulation changes" and not "text changes;" and that the City Manager used the phrase "proposed text amendments" in his affidavit, while the Planning and Zoning Committee minutes and the City Council minutes used the phrase "regarding amending the text and defining uses."[15] Appellant would have this Court believe that the difference in language between the affidavit and minutes was intentionally used to deceive this Court by falsely representing the facts and hiding information. That is simply not the case. All the documents Appellant cites as "contradictory" were attached as exhibits to the City Manager's affidavit for this Court to review. Further, these documents were specifically and expressly incorporated into the

[14] Appellant's Mot. Sanctions 2-5.
[15] *Id* at 2-4.

affidavit for all purposes.[16] When a document is incorporated into another by reference, both instruments must be read and construed together.[17] Therefore, the City Manager's statements should be read in conjunction with the incorporated documents not as separate competing documents, which is why the City Manager attached the documents as exhibits and expressly incorporated them into the affidavit. Thus, Appellant's arguments that the affidavit falsely represents the facts and is contrary to evidence are incorrect, because the exhibits which Appellant cites as evidence are a part of the affidavit for all purposes.

7. Appellant also argues that the statements in the City Manager's affidavit were for an improper purpose. Appellant states in his motion, "[t]he Appellee Motion on page 5 item 4 states that the purpose of the Brenton Lewis' Affidavit is "in support of this motion" and yet there is no claim or reference in the Motion that is supported by the false statements…Thus I believe the false statements had no valid purpose, were prejudicial, and in bad faith…."[18] Appellees' motion to dismiss is based on a lack of subject matter jurisdiction and personal jurisdiction over the Appellees; and in the alternative, on the basis that a denial of a writ of certiorari under Local Government Code § 211.011 is not an appealable order. The City Manager's affidavit describes the actions that were taken by the Llano

[16] Brenton Lewis Aff. ¶¶ 4-5.
[17] *Tribble & Stephens Co. v. RGM Constructors, L.P.*, 154 S.W.3d 639, 663 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *In re C & H News Co.*, 133 S.W.3d 642, 645–46 (Tex.App.-Corpus Christi 2003, orig. proceeding)).
[18] Appellant Mot. Sanctions 4, 5.

Planning and Zoning Commission and Llano City Council in enacting Ordinance No. 1247 which amended Ordinance Nos. 735 and 1231.[19] The affidavit further establishes that the Llano Board of Adjustment never took any action, held any meeting, or made any decision regarding the enactment of Ordinance No. 1247 by the Llano City Council.[20] These facts set out in the City Manager's affidavit directly support the Appellees' claim that the trial court lacked subject matter jurisdiction. Appellant filed a verified petition under § 211.011 Local Government challenging the actions of the Planning and Zoning Commission and City Council. However, § 211.011 only authorizes a verified petition be filed "stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality…."[21] As outlined in the City Manager's affidavit, there was never any action taken or decision made by the Llano Board of Adjustment, therefore the trial court never acquired subject matter jurisdiction. Appellant followed the wrong process from the beginning, and because of this mistake the trial court never acquired subject matter jurisdiction or personal jurisdiction over Appellees. This has been Appellees' position since this appeal was first filed by Appellant and the Appellees' position is directly supported by the facts set forth in the City Manager's affidavit. Further, Texas Government Code § 22.220 (c) states,

[19] Brenton Lewis Aff. ¶¶ 4, 5.
[20] *Id* at ¶ 6.
[21] Tex. Loc. Gov't Code § 211.011 (West 2013)

"[e]ach court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction." This is precisely what Appellees have done by submitting the City Manager's affidavit to this Court. The affidavit was not submitted for an improper purpose, it was submitted to help this Court determine the proper exercise of its jurisdiction.

8. Therefore, Appellees' motion to dismiss and the City Manager's affidavit do not violate § 10.001 because they were not presented for an improper purpose; each claim or legal contention set out in the Appellees' motion to dismiss is warranted by existing law as supported by the case, statute, and rule citations; each allegation and factual contention has evidentiary support that was properly sworn to and attached to the Appellees' motion to dismiss; and each denial of a factual contention in the motion to dismiss is warranted based on the evidence. Further, Appellees' motion to dismiss does not violate Texas Rule of Civil Procedure 13 because to the best of Appellees' knowledge, information, and belief formed after reasonable inquiry by Appellees' the motion and affidavit are not groundless and brought in bad faith, nor are they groundless and brought for the purpose of harassment. If any pleading filed in this appeal is for the purpose of harassment, it is Appellant's motion for sanctions.

9. Texas Civil Practice and Remedies Code § 10.002 (a) authorizes a party to make a motion for sanctions describing the specific conduct violating § 10.001.[22] Section 10.002 (c) states: "The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation."[23] As stated above, City Manager and City Attorney contend § 10.001 does not apply on appeal; however, if this Court determines § 10.001 does apply City Manager and City Attorney respectfully request they be awarded reasonable expenses and attorney's fees incurred in opposing this motion for sanctions. Further, based on the claims and arguments made by Appellant in his motion for sanctions, City Manager and City Attorney contend Appellant has not shown due diligence and City Manager and City Attorney should be awarded costs for inconvenience, harassment, and out-of-pocket costs incurred because of, and caused by Appellant's motion for sanctions. By filing frivolous motions without first researching the applicable law and procedures, Appellant is wasting the tax dollars of the City of Llano. City Manager and City Attorney respectfully request that this Court, under § 10.002, if

[22] Tex. Civ. Prac. & Rem. Code Ann. § 10.002 (West 2013).
[23] *Id*.

this Court finds this provision to be applicable, hold Appellant accountable for his actions.

Prayer for Relief

Therefore, Appellees respectfully request that this Court deny Appellant's motion for sanctions, and if this Court finds § 10.001 applies that pursuant to § 10.002 (c) this Court award reasonable expenses and attorney's fees to Appellees, and all costs for inconvenience, harassment, and out-of-pocket expenses incurred because of and caused by Appellant's motion for sanctions.

Respectfully submitted,

/s/ Cary L. Bovey

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State Bar No.: 02717700
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Involuntary Dismissal on Appellant, Mr. Marc Sewell, on December 5, 2013 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 2,443 words.

/s/ Cary L. Bovey

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APPENDIX

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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	*								•		•	•	•	•

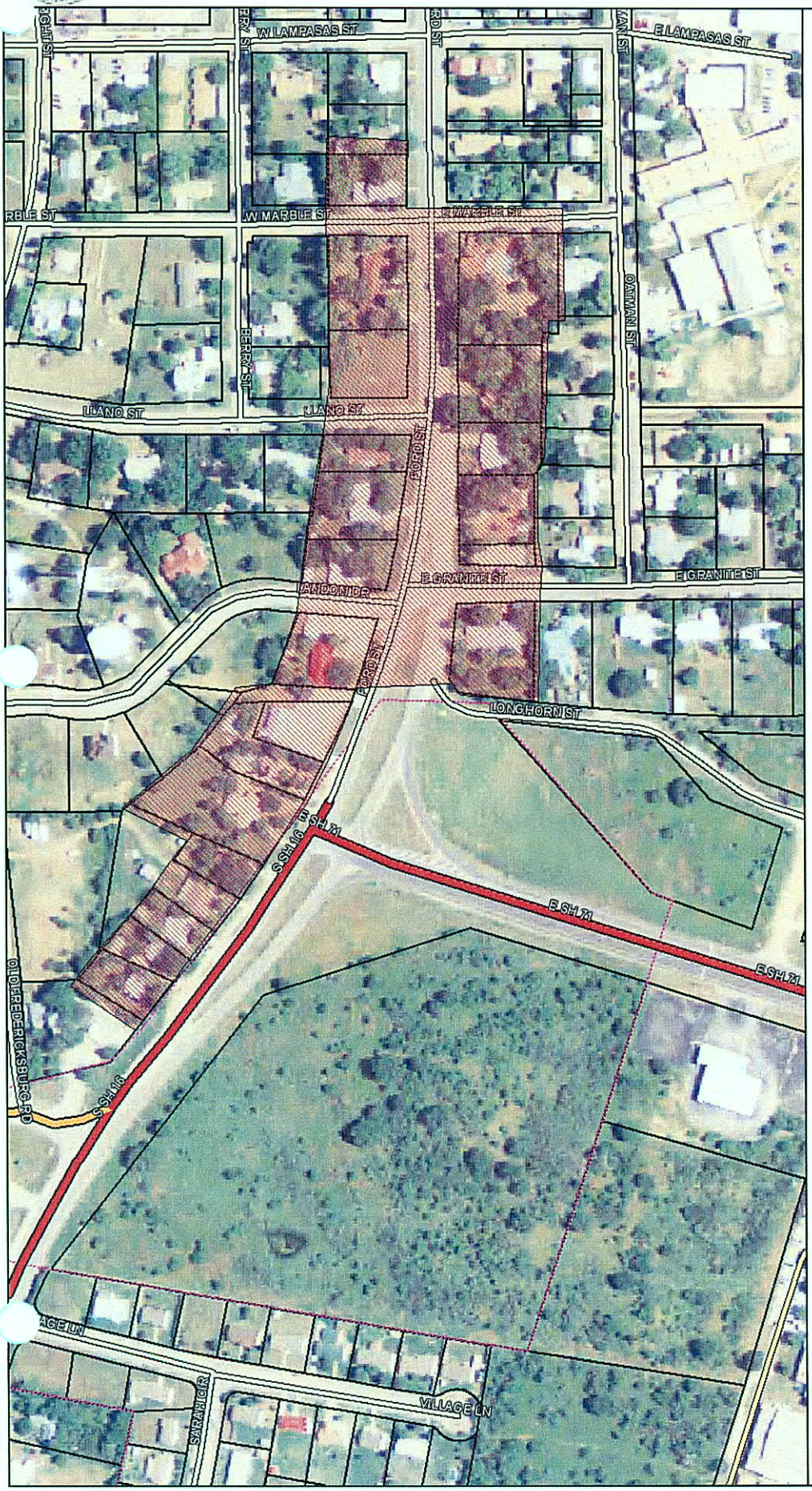
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
112			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
113	Paint 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

9 S.W.3d 237
Court of Appeals of Texas,
El Paso.

AMERICAN PAGING OF TEXAS, INC., Appellant,
v.
EL PASO PAGING, INC., Appellee.

No. 08–98–00263–CV. | Oct. 28, 1999. | Rehearing Overruled Jan. 26, 2000.

Paging business sued second paging business for breach of contract. The 65th Judicial District Court, El Paso County, Alfredo Chavez, J., entered default judgment for plaintiff, and awarded damages, attorney fees, and recovery of bond, and defendant's subsequent motion for new trial was overruled. Defendant appealed. The Court of Appeals, McClure, J., held that: (1) defendant failed to defeat presumption that it received notice of trial, and (2) sanctions were warranted for frivolous appeal.

Affirmed.

Attorneys and Law Firms

***239** Lawrence M. Jordan, Patrick A. Groves, Studdard & Melby, El Paso, for Appellant.

Mark T. Davis, El Paso, for Appellee.

Before Panel No. 1 LARSEN, McCLURE, and CHEW, JJ.

Opinion

O P I N I O N

ANN CRAWFORD McCLURE, Justice.

This is an appeal from a post-answer default judgment entered against American Paging of Texas, Incorporated (American). The sole issue presented is whether the trial court properly overruled American's motion for new trial. Because the record shows that American received proper notice of trial, and because American has failed to produce a reporter's record, we will affirm.

SUMMARY OF THE EVIDENCE

Appellee, El Paso Paging, Incorporated, (El Paso) sued American Paging for breach of contract on November 22, 1995. American timely filed an answer denying liability. On January 27, 1998, counsel for El Paso notified counsel for American by letter sent via facsimile that trial was set for May 7, 1998. On May 7, 1998, American and its attorney failed to appear for trial. After an evidentiary hearing, duly recorded by the court reporter, the trial court granted a default judgment. El Paso was granted judgment for $41,850 in actual damages, $17,750 in attorney's fees, prejudgment and postjudgment interest, and recovery of its $1,000 injunction bond. Part of the award for attorney's fees was for preparation and representation at a court-ordered mediation that American and its attorney failed to attend.

On June 4, 1998, American filed its amended motion for new trial. The trial court conducted an evidentiary hearing, which was also recorded by the court reporter. American's motion for new trial was overruled by operation of law. *See* TEX.R.CIV.P. 329b(c). On August 5, 1998, American filed its notice of appeal. No arrangements were made by American to obtain a reporter's record such that our review is limited to the clerk's record.

VALIDITY OF DEFAULT JUDGMENT

[1] In its sole issue for review, American attacks the trial court's denial of its motion for new trial. The trial court's decision is subject to review for abuse of discretion. *Cliff v. Huggins,* 724 S.W.2d 778, 778 (Tex.1987); *Strackbein v. Prewitt,* 671 S.W.2d 37, 38 (Tex.1984). We therefore review the record to determine if, based on the facts before it, the trial court abused its discretion in overruling American's motion. For the reasons set out below, we conclude that it did not.

[2] The standard for setting aside a post-answer default judgment is found in *Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939). *See Director, State Employees Workers' Compensation Div. v. Evans,* 889 S.W.2d 266, 268 (Tex.1994)(prerequisites for setting ***240** aside a no-answer default judgment apply to post-answer default judgments); *accord Cliff,* 724 S.W.2d at 779. The defendant must show that his failure to appear at trial (1) was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident; (2) provided that the motion for new trial sets up a meritorious defense; and (3) provided it is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Craddock, 133 S.W.2d at 126. If the defendant proves the *Craddock* elements, failure of the trial court to grant a new trial constitutes an abuse of discretion. *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex.1994); *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex.1992).

[3] **[4]** American contends that it conclusively established that its failure to appear at the trial was not intentional or due to conscious indifference, that it had a meritorious defense and that granting the motion would occasion no delay or otherwise injure El Paso. American first argues that it had no notice of the trial; however, in its supplemental brief, it concedes that at the hearing on the motion for new trial, El Paso "put on evidence that notice of the trial setting was sent by facsimile." Admission of evidence showing a telephonic document transfer to the recipient's current telecopier number gives rise to a presumption that notice was duly received by the addressee. *Cf. Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex.1994)(construing TEX.R.CIV.P. 21a); *accord Cliff*, 724 S.W.2d at 780. In the absence of any proof to the contrary, the presumption has the force of a rule of law. *Thomas*, 889 S.W.2d at 238. American offers this Court no proof of non-receipt, nor does it appear that it offered any such proof to the trial court. We thus presume that it received notice.

[5] **[6]** **[7]** American asserts that although there was evidence that notice was sent by facsimile, El Paso has not controverted their contention that failure to appear at trial was not intentional or due to conscious indifference. We cannot review the merits of this contention in the absence of a reporter's record. The complaining party has the burden to bring forth a record to support its contention. *Simon v. York Crane & Rigging Co., Inc.*, 739 S.W.2d 793, 795 (Tex.1987); *see also* Tex.R.App.P. 34.6(b)(1) and 35.3(b). Absent a record showing an abuse of discretion, we must presume that the evidence before the trial court was adequate to support its decision. *Simon*, 739 S.W.2d at 795. American's issue for review is overruled.

SANCTIONS

El Paso requests that we impose sanctions against American for bringing a frivolous appeal. *See* TEX.R.APP.P. 45. [1] El Paso contends that the appeal has been for the sole purpose of delay and lacks merit. It also contends that American's brief contains certain material misrepresentations of fact. We agree.

[8] **[9]** **[10]** If the court of appeals determines that an appeal is frivolous, it may award each prevailing party just damages. *See* TEX.R.APP.P. 45. Appellate sanctions will be imposed only if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith. *See City of Houston v. Morua*, 982 S.W.2d 126, 131 (Tex.App.—Houston [1st Dist.] 1998, no writ) (relying on case law interpreting former TEX.R.APP.P. 84 to construe new Rule 45). In deciding whether to impose sanctions under Rule 45, we look at the record from the viewpoint of the advocate and determine whether it had reasonable grounds to believe the judgment should be ***241** reversed. *James v. Hudgins*, 876 S.W.2d 418, 424 (Tex.App.—El Paso 1994, writ denied). The courts of appeal have recited four factors which tend to indicate that an appeal is frivolous: (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 sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear at oral argument. *See In the Interest of S.R.M.*, 888 S.W.2d 267, 269 (Tex.App.—Houston [1st Dist.] 1994, no writ); *Baw v. Baw*, 949 S.W.2d 764, 768 (Tex.App.—Dallas 1997, no writ); *James*, 876 S.W.2d at 424. Thus, we review the record to determine whether American's appeal was frivolous.

[11] We have already noted that American has failed to file a reporter's record which is necessary to a review of its contention on appeal. It complained that the trial court abused its discretion, yet did not submit a reporter's record showing whether the evidence supported the decision of the trial court. From this, we infer that the appeal lacked merit and was not pursued in good faith. *See Rodriguez v. Rubin*, 731 S.W.2d 141, 143 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(holding failure to file statement of facts raises logical inference that the appeal was taken for delay and lacked merit).

The papers filed in this Court reveal an unexplained pattern of neglect and delay by American concerning the prosecution of its appeal. On September 2, 1998, the court reporter, Rhonda McCay, filed an affidavit for extension of time to file the reporter's record. In her affidavit, she stated that she delivered a copy of the record from the default hearing to counsel for American. She did not know whether counsel intended to file the record himself, or whether he intended to designate a record with the appropriate statement of costs attached thereto. There was also a record from the hearing

on the motion for new trial which had not been prepared, nor requested by counsel. McCay telephoned counsel's office twice and sent a letter, by both facsimile and mail, asking counsel what his intentions were concerning the reporter's record. She received no response. Next, the record reflects that we requested that American advise the Court whether it intended to file a reporter's record. If the Court received no response by September 14, 1998, then the appeal would be submitted on the clerk's record. No response was received. On September 16, we notified American's counsel that the affidavit for extension of time was denied, and that the appeal was to be submitted on the clerk's record. From this evidence we find that American was fully aware of the status of the record on appeal. We also infer that American has not pursued this appeal or its correspondences with the requisite diligence.

We now confront the issue of certain omissions of material fact by American in its brief. The Texas Disciplinary Rules of Professional Conduct impose upon counsel the duty of candor toward the Court. *See* TEX. DISCIPLINARY R.PROF'L CONDUCT 3.03(a)(1). Rule 3.03(a)(1) states that "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal." The official comments to the rule explain that "[t]here are circumstances where failure to make a disclosure [of material fact] is the equivalent of an affirmative misrepresentation." *See id.* at cmt.2. El Paso contends that American sought to obtain an advantage by knowingly misrepresenting the record. In particular, El Paso argues that American failed to disclose that there had been an evidentiary hearing on American's motion for new trial, and that El Paso had introduced evidence demonstrating that notice of the trial setting for May 7, 1998 was sent by facsimile.

The clear import of American's brief summarizes the facts on appeal as: (1) a default judgment was entered against American; (2) American filed a verified motion for new trial asserting it did not ***242** receive proper notice pursuant to TEX.R.CIV.P.21a;[2] (3) El Paso neither responded to nor controverted American's motion; and (4) the motion for new trial was overruled by operation of law. Under this version of the facts, the trial court arguably abused its discretion. *See e.g.*, *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 391 (Tex.1993)(holding where defendant does not have actual notice of the trial setting, failure to appear is not intentional). This version of the facts is far from accurate.

After protest by counsel for El Paso, counsel for American submitted a two-page letter as a supplement to its original brief in which it maintained that its brief was accurate, and explained that the references to El Paso's failure to respond to or controvert its motion for new trial referred only to the fact that El Paso had not filed a response to the motion for new trial. However, this interpretation is not obvious from the plain language of the brief. Next, American admitted that a hearing was held on its motion for new trial, and it conceded that El Paso tendered evidence of proper notice. To date, American has not explained why it submitted a brief that omitted these crucial facts.

Thus, the record reveals that American had a copy of the transcript of the default hearing; knew that a copy of the record from the new trial hearing could be prepared by the court reporter; knew that the clerk's record contained a copy of its motion for new trial wherein it swore that it received no notice; and failed to disclose the facts about the new trial hearing and the evidence produced therein when it knew that this appeal was going forward on the clerk's record alone.

[12] After careful deliberation, we find that American's appeal was groundless and pursued in bad faith. Appellant has made no effort to present this matter to the court for informed decision, much less in a fashion that supports reversal. We further note that American has failed to respond in any manner whatsoever to El Paso's request for sanctions. The failure to respond to a request for sanctions is a factor we may consider in deciding whether to impose damages under Rule 45. *See e.g.*, *Bradt v. West*, 892 S.W.2d 56, 79 (Tex.App.—Houston [1st Dist.] 1994, writ denied)(construing [former] Rule 84). We conclude that American has no meritorious response.

El Paso suggests that we impose a penalty equal to 50 percent of the actual damages awarded by the trial court ($20,925), plus postjudgment simple interest at the rate of 10 percent per annum, exclusive of attorney's fees and interest previously awarded by the trial court. El Paso also requests that we tax the court costs of this appeal against American. Having heard no objection from American, we find that a 50 percent penalty ($20,925), together with court costs, will adequately compensate El Paso for the damages it has incurred in defending this appeal, and it will sufficiently penalize American for bringing a frivolous appeal. We therefore affirm the judgment of the trial court and enter sanctions.

Footnotes

1 TEX.R.APP.P. 45states: 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. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

2 The motion for new trial has attached to it an excerpt from the default judgment hearing. That excerpt contains the response of El Paso's counsel to an inquiry by the trial court concerning proper notice. El Paso's counsel responded: “I have had direct, personal contact with Studdard & Melby through ... both David Curl and Larry Jordan about the hearing today. I don't think the court directly notified, if my memory is correct. I know that my office notified them once we got notice of the hearing today. I had discussed this setting personally with Larry Jordan that it was set today.” From this excerpt, American argued improper notice under Rule 21a. The record is clear, however, that at the new trial hearing, evidence was introduced showing that notice was sent by facsimile.

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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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.

922 S.W.2d 295
Court of Appeals of Texas,
Austin.

LONE STARR MULTI THEATRES, INC., a Texas Corporation, d/b/a Cinema West, Appellant,
v.
STATE of Texas and Dan Morales, Attorney General of the State of Texas, in His Official Capacity Only, Appellees.

No. 03–95–00502–CV. | May 8, 1996.

Movie theater company sued state and Attorney General seeking declaratory judgment that obscenity statutes were unconstitutional and injunction against their enforcement. The District Court, Travis County, 345th Judicial District, John K. Dietz, J., dismissed case for lack of jurisdiction. Theater appealed. The Court of Appeals, Powers, J., held that party responsible for prosecuting violations of obscenity statutes was not named in action, depriving district court of equity jurisdiction.

Affirmed.

Attorneys and Law Firms

***296** Richard A. Anderson, Burleson, Pate & Gibson, Dallas, Tx, for Appellant.

Dan Morales, Attorney General, G. Stewart Whitehead, Assistant Attorney General, Austin, TX, for Appellees.

***297** Before POWERS, JONES and B.A. SMITH, JJ.

Opinion

POWERS, Justice.

Lone Starr Multi Theatres, Inc. appeals from a trial-court judgment that dismissed for want of jurisdiction Lone Starr's suit for declaratory and injunctive relief against the State of Texas and the Attorney General, Dan Morales. We will affirm the trial-court judgment.

THE CONTROVERSY

Lone Starr sued for a declaratory judgment that the obscenity statutes, found in sections 43.21–43.26 of the Texas Penal Code, are unconstitutional. *See* Tex.Penal Code Ann. §§ 43.21–.26 (West 1994); Uniform Declaratory Judgment Act, Tex.Civ.Prac. & Rem.Code Ann. §§ 37.001–.011 (West 1986) (the "UDJA"). In addition, Lone Starr prayed to enjoin enforcement of the statutes. *See* Tex.Civ.Prac. & Rem.Code Ann. § 65.011 (West 1986 & Supp.1996). Appellees challenged the jurisdiction of the district court on two grounds: (1) Lone Starr's pleadings did not meet the jurisdictional requirements laid down in *State v. Morales,* 869 S.W.2d 941 (Tex.1994); and (2) a declaratory judgment would not terminate the controversy between the parties as required by section 37.008 of the UDJA. The trial court denied the plea on the first ground, finding subject matter jurisdiction under *Morales,* but sustained the plea on the second ground and dismissed the cause of action.

Lone Starr contends on appeal that the trial court abused its discretion in determining that no justiciable controversy existed under the UDJA. The Attorney General contends in a cross-point that the trial court erred in determining that it had jurisdiction under *Morales.*

DISCUSSION AND HOLDINGS

[1] **[2]** A civil court, sitting in equity, does not have jurisdiction to declare a criminal statute unconstitutional and enjoin its enforcement unless:

> (1) there is evidence that the statute at issue is unconstitutionally applied by a rule, policy or other noncriminal means subject to a court's equity powers and irreparable injury to property or personal rights is threatened; *or* (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights.

Morales, 869 S.W.2d at 942 (emphasis in original); *see also Passel v. Fort Worth Indep. Sch. Dist.,* 440 S.W.2d 61, 63–64 (Tex.1969), *cert. denied,* 402 U.S. 968, 91 S.Ct. 1667, 29 L.Ed.2d 133 (1971). We believe this jurisdictional rule necessarily, albeit implicitly, imposes a requirement that the party responsible for *enforcement* of the allegedly unconstitutional statute, either by prosecution or by promulgation of a rule adopted for the purpose of implementing such statute, must be the defendant against

whom suit for declaratory or injunctive relief is brought. *See Passel*, 440 S.W.2d at 64 (finding jurisdiction in suit to enjoin school board from enforcing administrative regulation it adopted for purpose of implementing criminal statute); *City of San Antonio v. Rankin*, 905 S.W.2d 427, 429 (Tex.App.—San Antonio 1995, no writ) (finding jurisdiction in suit against City of San Antonio for declaratory and injunctive relief against enforcement of city's ethics ordinance); *cf. Crouch v. Craik*, 369 S.W.2d 311, 315 (Tex.1963) (holding trial judge could not enjoin district attorney from prosecuting violations of a penal statute that was not unconstitutional).

[3] **[4]** **[5]** A requirement that a party with authority to enforce a particular statute be named in a suit to declare the statute unconstitutional is essential to effectuate the well-settled principle that courts are without jurisdiction to render advisory opinions. In a declaratory judgment action, there must exist *between the parties* a justiciable controversy that will be determined by the judgment; otherwise the judgment amounts to no more than an advisory opinion, which a court does not have the power to give. *Southwest Airlines v. Texas High–Speed Rail Auth.*, 863 S.W.2d 123, 125 (Tex.App.—Austin 1993, writ denied); *see also State v. Margolis*, 439 S.W.2d 695, 698 (Tex.Civ.App.—Austin 1969, writ ref'd n.r.e.) (suit for declaratory relief against attorney general dismissed for want of jurisdiction because no showing attorney general had enforced anti-trust laws). Similarly, ***298** all parties against whom an injunction must run in order to be effective should be named in a suit for injunctive relief. Injunctions may not issue unless it is shown that the respondent will engage in or is engaging in the activity sought to be enjoined. *Morales*, 869 S.W.2d at 946 (citations omitted).

[6] Under these rules, the trial court in the present cause was without jurisdiction to declare the obscenity statutes unconstitutional and enjoin their enforcement because authority to enforce the statutes is constitutionally vested not in the attorney general but in district and county attorneys. *See* Tex. Const. art. V, § 21. Nothing in the statutes or constitution of the State of Texas confers upon the attorney general authority to initiate prosecutions for violations of the obscenity statutes.

[7] **[8]** **[9]** The constitution provides that the office of district attorney shall represent the State in district court and this power may be divided by the legislature between the county and district attorneys in cases of overlap. *See* Tex. Const. art. V, § 21; *Holmes v. Morales*, 906 S.W.2d 570, 574 (Tex.App.—Austin 1995, writ granted). These constitutional rules are codified in articles 2.01 and 2.02 of the Code of Criminal Procedure which give only county and district attorneys authority to represent the State in criminal prosecutions in district and inferior courts. *See* Tex.Code Crim.Proc.Ann. arts. 2.01, 2.02 (West Supp.1996); *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex.Crim.App.1994) (plurality opinion). In contrast, the attorney general has no authority to initiate criminal prosecutions but is generally limited to representing the State in civil litigation.[1] *See* Tex. Const. art. 4, § 22; Tex.Gov't Code Ann. § 402.021 (West 1990); *Pirtle*, 887 S.W.2d at 930. An assistant attorney general may, however, perform the duties of the county or district attorney or otherwise assist in criminal prosecutions on appointment of a district judge in certain circumstances or at the request of the county or district attorney. *See* Tex.Code Crim.Proc.Ann. art. 2.07 (West 1977 & Supp.1996); *see also Pirtle*, 887 S.W.2d at 930; *Davis v. State*, 840 S.W.2d 480, 487 (Tex.App.—Tyler 1992, pet. ref'd).

[10] That the attorney general must be given notice of a suit to declare a statute unconstitutional does not suggest, as Lone Starr contends, that the attorney general is the proper party to sue in an action for declaratory or injunctive relief from the enforcement of a criminal statute. *See* Tex.Civ.Prac. & Rem.Code Ann. § 37.006(b) (West 1986); *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 483 (Tex.App.—Houston [1st Dist.] 1993, writ denied).

We therefore hold the trial court lacked jurisdiction on the ground that a party responsible for prosecuting violations of the obscenity statutes, a district or county attorney, was not named in the action to declare these statutes unconstitutional and enjoin their enforcement. We need not, therefore, discuss appellees' cross point.

We affirm the trial-court judgment.

Footnotes

1 We do not agree with Lone Starr that the authority to employ and commission peace officers as investigators to assist the attorney general in "prosecution assistance and crime prevention" as provided in section 402.009 of the Government Code confers on the

attorney general power, not otherwise constitutionally or statutorily provided, to initiate criminal prosecutions. *See* Tex.Gov't Code Ann. § 402.009 (West Pamph.1996).

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953 S.W.2d 706
Supreme Court of Texas.

MERRELL DOW
PHARMACEUTICALS, INC., Petitioner,
v.
Ernest HAVNER and Marilyn Havner on Behalf
of their minor child Kelly HAVNER, Respondents.

No. 95–1036. | Argued March 19, 1996. | Decided July 9, 1997. | Order Overruling Rehearing Nov. 13, 1997.

Parents of child who suffered from limb reduction birth defect brought products liability action against manufacturer of prescription drug (Bendectin) ingested by mother during pregnancy. The 214th District Court, Nueces County, Mike Westergren, J., entered judgment on jury verdict awarding actual and exemplary damages to plaintiffs, and manufacturer appealed. After panel initially reversed and rendered judgment, rehearing en banc was granted, and on rehearing, the Corpus Christi Court of Appeals, 907 S.W.2d 535, affirmed as to actual damages, and reversed and rendered as to punitive damages. Application for writ of error was granted, and the Supreme Court, Owen, J., held that: (1) properly designed and executed epidemiological studies indicating that exposure more than doubled risk of injury may be part of evidence supporting finding of causation in toxic tort case; but (2) other factors must be considered, and plaintiff must in addition offer evidence excluding other possible causes of disease with reasonable certainty; and (3) evidence was legally insufficient to establish that child's defect was caused by exposure to drug..

Court of Appeals reversed, and judgment rendered for defendant.

Gonzalez, J., concurred and filed opinion.

Spector, J., concurred and filed opinion.

Attorneys and Law Firms

***708** John L. Hill, Austin, Russell W. Miller, Dallas, James E. Essig, Kamela Bridges, Houston, Robert L. Dickson, Hall R. Marston, George E. Berry, Santa Monica, CA, Gene M. Williams, Beaumont, Rob L. Wiley, Steven Goode, Austin, for Petitioner.

Guy H. Allison, Kevin W. Grillo, Corpus Christi, Barry J. Nace, Washington, DC, Roberrt C. Hilliard, Corpus Christi, Rebecca E. Hamilton, Rockwall, John T. Flood, Corpus Christi, for Respondents.

Opinion

OWEN, Justice, delivered the opinion of the Court in which PHILLIPS, Chief Justice, and GONZALEZ, HECHT, CORNYN, ENOCH and ABBOTT, Justices, join.

The issue in this case is whether there is any evidence that the drug Bendectin caused Kelly Havner to be born with a birth defect. We hold that the evidence offered is legally insufficient to establish causation. Accordingly, we reverse the judgment of the court of appeals. 907 S.W.2d 535.

I

Kelly Havner was born with a limb reduction birth defect. The fingers on her right hand were not formed. Kelly's mother had taken the prescription drug Bendectin in 1981 during her pregnancy to relieve nausea and other symptoms associated with morning sickness. Bendectin was formulated by Merrell Dow and its predecessors and marketed in the United States from 1957 to 1983. It was sold in other countries as well, but was called Debendox in the British Commonwealth, Ireland, and Australia and Lenotan in West Germany. The Bendectin Marilyn Havner ingested had two components: doxylamine succinate, which is an antihistamine, and pyridoxine hydrochloride, which is vitamin B–6. Prior to 1977, Bendectin had contained a third component, dicylomine hydrochloride, which is an anticholergenic. Approximately thirty million women took Bendectin in either the two- or three-ingredient form.

More than twenty years ago, questions were raised about Bendectin and its possible association with birth defects. The FDA investigated the concerns, but failed to conclude that Bendectin increased the risk of birth defects. More than thirty studies on Bendectin and birth defects have been conducted and published in peer-reviewed scientific and medical journals since questions were first raised. None of these studies concludes that children of women who took Bendectin during pregnancy had an increased risk of limb reduction birth defects. Some of these studies affirmatively conclude that there is no association between Bendectin and birth defects and that Bendectin is a safe drug. Although FDA

approval of Bendectin has never been revoked, Merrell Dow withdrew the drug from the market in 1983, a little over a year after Kelly Havner was born.

The Havners' suit is based on theories of negligence, defective design, and defective marketing. It is one of thousands brought against Merrell Dow and its predecessors for the manufacture and distribution of Bendectin. In virtually all the Bendectin litigation, the central issue has been the scientific reliability of the expert testimony offered to establish causation. Merrell Dow challenged the Havners' causation evidence at several junctures in these proceedings. It filed a motion for summary judgment, contending that there is no scientifically reliable evidence that Bendectin causes limb reduction birth defects or that it caused Kelly Havner's birth defect. Before denying the motion, the trial court held a hearing at which the scientific ***709** reliability of the Havners' summary judgment evidence was extensively aired.

Just before trial, the scientific reliability of the Havners' evidence was again raised by Merrell Dow in motions in limine that sought to exclude the testimony of certain of the Havners' experts and other causation evidence. One of these motions requested that testimony about causation be excluded until a prima facie case had been established that there was a statistically significant elevated risk that a child would be born with limb reduction birth defects if the child's mother ingested Bendectin. Another motion sought to preclude the Havners' witnesses from relying on *in vitro* and *in vivo* animal studies. Other motions sought to exclude entirely the testimony of three of the Havners' causation witnesses. The issues were fully briefed, and after a lengthy hearing, the trial court denied each of the motions.

A bifurcated jury trial ensued. In the liability phase, the Havners called five experts on the causation question. Merrell Dow objected to the admission of some, but not all, of this evidence. Merrell Dow also unsuccessfully moved for a directed verdict on the issue of causation at the close of the Havners' evidence. As can be seen from the record, the question of scientific reliability was raised repeatedly.

At the conclusion of the liability phase, the jury found in favor of the Havners and awarded $3.75 million. In the punitive damages stage, the jury awarded $30 million, but that amount was reduced by the trial court to $15 million pursuant to former TEX. CIV. PRAC. & REM.CODE § 41.007. Merrell Dow appealed.

The panel of the court of appeals that originally heard the case reversed and rendered judgment that the Havners take nothing, holding that the evidence of causation was legally insufficient. 907 S.W.2d at 548. The panel concluded that "[t]he Havners have failed to bring forward anything more than suspicion on the essential element of causation." *Id.* On rehearing en banc, a divided court disagreed. It affirmed the trial court's award of actual damages, but reversed and rendered the award of punitive damages. *Id.* at 564. We granted Merrell Dow's application for writ of error.

Merrell Dow challenges the legal sufficiency of the Havners' causation evidence and the admissibility of some of that evidence and further contends that its due process rights under the United States Constitution and its due course rights under the Texas Constitution were denied. Because of our disposition of this case, we reach only the no evidence point of error.

II

All the expert witnesses on causation have appeared in other cases in which Bendectin was claimed to have caused limb reduction birth defects. The Sixth Circuit commented that the Bendectin suits are "variations on a theme, somewhat like an orchestra which travels to different music halls, substituting musicians from time to time but playing essentially the same repertoire." *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1351 (6th Cir.1992).

The federal courts have dealt extensively with Bendectin litigation. To date, no plaintiff has ultimately prevailed in federal court. The evidence in those cases has been similar to that offered by the Havners. The federal decisions have discussed the substance of the evidence in detail, and often the testimony under scrutiny included that of Drs. Palmer, Newman, Glasser, Gross, and Swan, the Havners' witnesses. These decisions are not binding on our Court, but they do provide extensive consideration of the scientific reliability of the causation evidence.

Some federal courts have concluded that the expert evidence of causation is legally insufficient. *See Elkins v. Richardson–Merrell, Inc.*, 8 F.3d 1068 (6th Cir.1993); *Turpin*, 959 F.2d 1349; *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir.1989); *Richardson v. Richardson–Merrell, Inc.*, 857 F.2d 823 (D.C.Cir.1988); *LeBlanc v. Merrell Dow Pharms., Inc.*, 932

F.Supp. 782 (E.D.La.1996); *Hull v. Merrell Dow Pharms., Inc.*, 700 F.Supp. 28 (S.D.Fla.1988); *Monahan v. Merrell–National Labs.*, No. 83–3108–WD, 1987 WL 90269 (D.Mass. Dec.18, 1987).

***710** Other federal courts have found the expert evidence to be inadmissible. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371 (D.C.Cir.1997); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir.) (on remand), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995); *Ealy v. Richardson–Merrell, Inc.*, 897 F.2d 1159 (D.C.Cir.1990); *Lynch v. Merrell–National Labs.*, 830 F.2d 1190 (1st Cir.1987); *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F.Supp. 1042 (D.N.J.1992), *aff'd*, 6 F.3d 778 (3d Cir.1993); *Lee v. Richardson–Merrell, Inc.*, 772 F.Supp. 1027 (W.D.Tenn.1991), *aff'd*, 961 F.2d 1577 (6th Cir.1992); *Cadarian v. Merrell Dow Pharms., Inc.*, 745 F.Supp. 409 (E.D.Mich.1989); *Ambrosini v. Richardson–Merrell, Inc.*, No. 86–278, 1989 WL 298429 (D.D.C. June 30, 1989), *aff'd*, 946 F.2d 1563 (D.C.Cir.1991); *Will v. Richardson–Merrell, Inc.*, 647 F.Supp. 544 (S.D.Ga.1986).

One federal circuit court initially found the expert testimony admissible and reversed a summary judgment for Merrell Dow. *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 952–59 (3d Cir.1990). However, on remand the trial court once again found the evidence inadmissible and, after entering extensive findings of fact and conclusions of law, granted summary judgment for Merrell Dow. The Third Circuit affirmed that judgment with an unpublished opinion. *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F.Supp. 1042 (D.N.J.1992), *aff'd*, 6 F.3d 778 (3d Cir.1993).

A few federal district courts have denied summary judgment for Merrell Dow on the basis that the evidence raised a fact question. *Longmore v. Merrell Dow Pharms., Inc.*, 737 F.Supp. 1117 (D.Idaho 1990); *In re Bendectin Prods. Liab. Litig.*, 732 F.Supp. 744 (E.D.Mich.1990); *Hagen v. Richardson–Merrell, Inc.*, 697 F.Supp. 334 (N.D.Ill.1988); *see also Lanzilotti v. Merrell Dow Pharms., Inc.*, No. 82–0183, 1986 WL 7832 (E.D.Pa. July 10, 1986) (denying motion for directed verdict).

Decisions in which Merrell Dow obtained a jury verdict in its favor include *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149 (10th Cir.1990), and *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir.1988).

However, a state trial court recently entered judgment on a jury verdict against Merrell Dow that included a finding of fraud. In a written opinion, the court was highly critical of the evidence offered by Merrell Dow, concluding that there was ample evidence Merrell Dow had made misrepresentations to the FDA, including misrepresentations about its animal studies on Bendectin. *Blum v. Merrell Dow Pharm., Inc.*, No. 1027 (Pa.Ct.C.P. Dec. 13, 1996) (appeal pending).

At least one state court has granted summary disposition for Merrell Dow on the basis that the expert testimony of Drs. Newman, Palmer, and Swan was inadmissible. *DePyper v. Navarro*, No. 83–303467–NM, 1995 WL 788828 (Mich.Cir.Ct. Nov.27, 1995) (holding plaintiffs' experts' testimony inadmissible under the *Davis/Frye* rule and rendering judgment for Merrell Dow).

The only appellate decision we have found, state or federal, that has upheld a verdict in favor of a plaintiff in a Bendectin case is from the court of appeals for the District of Columbia in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C.1986) (reversing judgment notwithstanding the verdict and remanding for reinstatement of compensatory damages and determination of punitive damages). However, the subsequent history of that case is somewhat extraordinary. Upon remand to the trial court, instead of following the court of appeals' directive, the trial court granted Merrell Dow's motion for new trial and vacated the judgment. Another appeal ensued, and the case was remanded with instructions that a judgment be entered on the verdict. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330, 331, 338 (D.C.1989). Judgment was entered. Yet another appeal was taken, but the appeal was dismissed for lack of finality because the question of punitive damages remained to be tried. *Merrell Dow Pharms., Inc. v. Oxendine*, 593 A.2d 1023 (D.C.1991). Following remand, judgment was entered, but Merrell Dow sought relief from the judgment in light of post-trial developments including epidemiological studies that were not completed at the time of trial. Merrell Dow also relied on appellate decisions decided on the heels of the first appellate ***711** decision in *Oxendine* that had concluded that there was no scientifically reliable evidence of causation in the Bendectin cases. The trial court declined to set aside the judgment. *Merrell Dow Pharms., Inc. v. Oxendine*, 649 A.2d 825, 827 (D.C.1994). The fourth appeal ensued, and the appellate court remanded the case to the trial court for a determination of whether Merrell Dow could demonstrate "that the newly discovered evidence 'would probably produce a different verdict if a new trial were granted.' " *Id.* at 832.

On remand, the trial court extensively reviewed the evidence, including the testimony or affidavits of Drs. Newman, Swan, Palmer, Gross, and Glasser, and granted relief from the verdict, rendering judgment for Merrell Dow. *Oxendine v. Merrell Dow Pharms., Inc.*, No. 82–1245, 1996 WL 680992 (D.C.Super.Ct. Oct. 24, 1996) (appeal pending).

Thus, we are not the first court to wrestle with the issues presented by the Bendectin litigation.

III

As in most of the Bendectin cases, the central issue before us is not whether the plaintiffs' witnesses possessed adequate credentials, skills, or experience to testify about causation. The only witness whose qualifications have been challenged is Dr. Palmer, whose experience in identifying the cause of birth defects is questioned by Merrell Dow. *Cf. United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30–31 (Tex.1997); *Broders v. Heise*, 924 S.W.2d 148, 151–54 (Tex.1996). Indeed, the Havners' causation witnesses, including Dr. Palmer, testified in a case that reached the United States Supreme Court, and that Court deemed their credentials "impressive." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 583 & n. 2, 113 S.Ct. 2786, 2792 & n. 2, 125 L.Ed.2d 469 (1993). The issue before us, as in most of the previously cited Bendectin cases, is whether the Havners' evidence is scientifically reliable and thus some evidence to support the judgment in their favor.

[1] **[2]** **[3]** In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. *Harbin v. Seale*, 461 S.W.2d 591, 592 (Tex.1970). A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. Robert W. Calvert, "*No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L.REV. 361, 362–63 (1960). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, " 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.' " *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex.1994)).

[4] Several of the Havners' experts testified that Bendectin can cause limb reduction birth defects. Dr. Palmer testified that, to a reasonable degree of medical certainty, Kelly Havner's birth defect was caused by the Bendectin her mother ingested during pregnancy. We have held, however, that an expert's bare opinion will not suffice. *See Burroughs Wellcome*, 907 S.W.2d at 499–500; *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202–04 (Tex.1980). The substance of the testimony must be considered. *Burroughs Wellcome*, 907 S.W.2d at 499–500; *Schaefer*, 612 S.W.2d at 202.

In *Schaefer*, a workers' compensation case, the plaintiff suffered from atypical tuberculosis, some strains of which were carried by fowl. An expert testified that based on reasonable medical probability, the plaintiff's disease resulted from his employment as a plumber in which he was exposed to soil contaminated with the feces of birds. *Schaefer*, 612 S.W.2d at 202. Nevertheless, this Court looked at the testimony in its entirety, noting that to accept the expert's opinion as some evidence "simply because he used the magic words" would effectively remove the ***712** jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony. *Id.* at 202–05. After considering the record in *Schaefer*, this Court held that there was no evidence of causation because despite the "magic language" used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise. *Id.* at 204–05.

Other courts have likewise recognized that it is not so simply because "an expert says it is so." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir.1987). When the expert "br[ings] to court little more than his credentials and a subjective opinion," this is not evidence that would support a judgment. *Id.* at 421–22. The Fifth Circuit in *Viterbo* affirmed a summary judgment and the exclusion of expert testimony that was unreliable, holding that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Id.* at 422; *see also Rosen v. Ciba–Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied*, 519 U.S. 819, 117 S.Ct. 73, 136 L.Ed.2d 33 (1996); *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir.1992) (holding evidence

legally insufficient in Bendectin case when no understandable scientific basis was stated).

It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach. *See Schaefer,* 612 S.W.2d at 205; *see also Burroughs Wellcome,* 907 S.W.2d at 499–500.

[5] **[6]** Justice Gonzalez, in writing for the Court, gave rather colorful examples of unreliable scientific evidence in *E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 558 (Tex.1995), when he said that even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. In concluding that this testimony is scientifically unreliable and therefore no evidence, however, a court necessarily looks beyond what the expert said. Reliability is determined by looking at numerous factors including those set forth in *Robinson* and *Daubert.* The testimony of an expert is generally *opinion* testimony. Whether it rises to the level of *evidence* is determined under our rules of evidence, including Rule 702, which requires courts to determine if the opinion testimony will assist the jury in deciding a fact issue. [1] While Rule 702 deals with the admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value.

Similarly, to say that the expert's testimony is some evidence under our standard of review simply because the expert testified that the underlying technique or methodology supporting his or her opinion is generally accepted by the scientific community is putting the cart before the horse. As we said in *Robinson,* an expert's bald assurance of validity is not enough. 923 S.W.2d at 559 (quoting *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1316 (9th Cir.) (on remand) (holding that expert's assertion of validity is not enough; there must be objective, independent validation of the expert's methodology), *cert. denied,* 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995)).

***713** The view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely has likewise been rejected by other courts. The underlying data should be independently evaluated in determining if the opinion itself is reliable. *See, e.g., In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 747–48 (3d Cir.1994); *Richardson v. Richardson–Merrell, Inc.,* 857 F.2d 823, 829 (D.C.Cir.1988); *In re Agent Orange Liab. Litig.,* 611 F.Supp. 1223, 1245 (E.D.N.Y.1985), *aff'd,* 818 F.2d 187 (2d Cir.1987). In the wake of the Supreme Court's decision in *Daubert,* the Third Circuit overruled its prior holding in *DeLuca v. Merrell Dow Pharmaceuticals, Inc.,* 911 F.2d 941, 952 (3d Cir.1990), that an expert's averment that his or her testimony is based on the type of data on which experts reasonably rely is generally enough to survive a Federal Rule of Evidence 703 inquiry. *In re Paoli,* 35 F.3d at 747–48. The Third Circuit was persuaded by Judge Weinstein's opinion in *In re Agent Orange:* " 'If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.' " *Id.* at 748 (quoting *In re Agent Orange,* 611 F.Supp. at 1245). If the expert's scientific testimony is not reliable, it is not evidence. The threshold determination of reliability does not run afoul of our no evidence standard of review.

Indeed, the United States Supreme Court would agree that a determination of scientific reliability is appropriate in reviewing the legal sufficiency of evidence. While admissibility rather than sufficiency was the focus of the Supreme Court's decision in *Daubert,* that Court explained that when "wholesale exclusion" is inappropriate and the evidence is admitted, a review of its sufficiency is not foreclosed:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment ... and likewise to grant summary judgment.

509 U.S. at 595, 113 S.Ct. at 2798.

The Court cited two Bendectin decisions in support of this statement, *Turpin,* 959 F.2d 1349, and *Brock v. Merrell Dow Pharmaceuticals, Inc.,* 874 F.2d 307 (5th Cir.), *modified on reh'g,* 884 F.2d 166 (5th Cir.1989). In *Turpin,* the Sixth Circuit held that the scientific evidence, viewed in the light most favorable to the plaintiffs, was not sufficient to allow a jury to find that it was more probable than not that the defendant caused the injury. *Turpin,* 959 F.2d at 1350. In *Brock,* the Fifth Circuit reversed a judgment entered on a jury verdict because the evidence of causation was legally insufficient. *Brock,* 874 F.2d at 315; *see also Raynor v. Merrell Pharms. Inc.,* 104 F.3d 1371, 1376 (D.C.Cir.1997) (affirming judgment notwithstanding the verdict and noting that even if expert testimony were admissible under *Daubert,* it was "unlikely" that a jury could reasonably find it sufficient to show causation).

As already discussed, a number of other decisions in the Bendectin litigation have held that the causation evidence was legally insufficient, sometimes setting aside a jury verdict and in other cases granting summary judgment or a directed verdict. *See supra* at 709. The decision in *Richardson–Merrell* said in no uncertain terms that the trial court did not err in granting judgment notwithstanding the verdict because "[w]hether an expert's opinion has an adequate basis" is an issue "falling within the province of the court." 857 F.2d at 833.

There are many decisions outside the Bendectin litigation that have examined the reliability of scientific evidence in a review of the legal sufficiency of the evidence. *See, e.g., Conde v. Velsicol Chem. Corp.,* 24 F.3d 809, 813 (6th Cir.1994) (stating that even if evidence is admissible under *Daubert,* it can still be legally insufficient to withstand summary judgment); *Wade–Greaux v. Whitehall Labs., Inc.,* 874 F.Supp. 1441, 1485–86 (D.Vi.) (granting summary judgment in toxic tort case when evidence of causation was insufficient to sustain a jury verdict), *aff'd,* 46 F.3d 1120 (3d Cir.1994); *see also* ***714** *Vadala v. Teledyne Indus., Inc.,* 44 F.3d 36, 39 (1st Cir.1995) (noting that even if expert testimony about cause of plane crash were admitted, it would not be sufficient to permit a jury to find in plaintiffs' favor); *In re Paoli,* 35 F.3d at 750 n. 21 ("[I]f the scintilla of evidence presented is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment ... [or] to grant summary judgment."); *cf. In re Joint Eastern & Southern Dist. Asbestos Litig.,* 52 F.3d 1124, 1131–37 (2d Cir.1995) (finding evidence of causation in asbestos case legally sufficient and reversing trial court's judgment notwithstanding the verdict); *Gruca v. Alpha Therapeutic Corp.,* 51 F.3d 638, 643 (7th Cir.1995) (holding that trial court abdicated its responsibility by refusing to rule on admissibility and by instructing a verdict for the defendant in a blood bank case; assuming admissibility of the evidence, it would be legally sufficient). *But see Joiner v. General Elec. Co.,* 78 F.3d 524, 534 (11th Cir.1996) (Birch, J., concurring) (stating that the sufficiency and weight of evidence are beyond the scope of a *Daubert* analysis), *cert. granted,* 520 U.S. 1114, 117 S.Ct. 1243, 137 L.Ed.2d 325 (1997).

[7] In *Robinson,* we set forth some of the factors that courts should consider in looking beyond the bare opinion of the expert. Those factors include:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses that have been made of the theory or technique.

See Robinson, 923 S.W.2d at 557. The issue in *Robinson* was admissibility of evidence, but as we have explained the same factors may be applied in a no evidence review of scientific evidence.

[8] **[9]** **[10]** If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.

We next consider some of the difficult issues surrounding proof of causation in a toxic tort case such as this.

IV

The Havners do not contend that all limb reduction birth defects are caused by Bendectin or that Bendectin always causes limb reduction birth defects even when taken at the critical time of limb development. Experts for the Havners and Merrell Dow agreed that some limb reduction defects are genetic. These experts also agreed that the cause of a large percentage of limb reduction birth defects is unknown. Given these undisputed facts, what must a plaintiff establish to raise a fact issue on whether Bendectin caused an individual's birth defect? The question of causation in cases like this one has engendered considerable debate. Courts that have addressed the issue have not always agreed, and commentators have expressed widely divergent views on the quantum and quality of evidence necessary to sustain a recovery.

Sometimes, causation in toxic tort cases is discussed in terms of general and specific causation. *See, e.g., Raynor v. Merrell Pharms., Inc.,* 104 F.3d 1371, 1376 (D.C.Cir.1997); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases,* 46 STAN. L.REV.. 1, 14 (1993). General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury. In some cases, controlled scientific experiments ***715** can be carried out to determine if a substance is capable of causing a particular injury or condition, and there will be objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance. However, in many toxic tort cases, direct experimentation cannot be done, and there will be no reliable evidence of specific causation.

In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation. *See generally Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1320 n. 13 (9th Cir.) (on remand), *cert. denied,* 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995). The Havners rely to a considerable extent on epidemiological studies for proof of general causation. Accordingly, we consider the use of epidemiological studies and the "more likely than not" burden of proof.

A

Epidemiological studies examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition. *See, e.g.,* Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation,* 52 FORDHAM L.REV. 732, 750 (1984). However, witnesses for the Havners and commentators in this area uniformly acknowledge that epidemiological studies cannot establish that a given individual contracted a disease or condition due to exposure to a particular drug or agent. *See, e.g.,* Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause–In–Fact,* 7 HARV. ENVTL. L. REVV. 429, 431–35 (1983); Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence,* 96 YALE L.J. 376, 380 (1986). Dr. Glasser, a witness for the Havners, gave as an example a study designed to see if a given drug causes rashes. Even though a study may show that ten people who took the drug exhibited a rash, while rashes appeared on only three people who did not take the drug, Dr. Glasser explained that the study cannot tell us which of the exposed ten got the rash because of the drug. We know that things other than the drug cause rashes.

Recognizing that epidemiological studies cannot establish the actual cause of an individual's injury or condition, a difficult question for the courts is how a plaintiff faced with this conundrum can raise a fact issue on causation and meet the "more likely than not" burden of proof. Generally, more recent decisions have been willing to recognize that epidemiological studies showing an increased risk may support a recovery. Judge Weinstein, whose decision in the Agent Orange litigation has been widely discussed and followed, has observed that courts have been divided between the "strong" and "weak" versions of the preponderance rule. *In re "Agent Orange" Prod. Liab. Litig.,* 611 F.Supp.

1223, 1261 (E.D.N.Y.1985) (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L.REV.. 851, 857 (1984)). The "strong" version requires a plaintiff to offer both epidemiological evidence that the probability of causation exceeds fifty percent in the exposed population and "particularistic" proof that the substance harmed the individual. The "weak" version allows verdicts to be based solely on statistical evidence. Rosenberg, *supra*, 97 HARV. L. REVV. at 857–58. Judge Weinstein concluded that the plaintiffs in *Agent Orange* were required to offer evidence that causation was "more than 50 percent probable," 611 F.Supp. at 1262, and that the plaintiffs' experts were required to "rule out the myriad other possible causes of the veterans' afflictions," *id.* at 1263.

***716** Other courts have likewise found that the requirement of a more than 50% probability means that epidemiological evidence must show that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population. *See, e.g., Daubert*, 43 F.3d at 1320 (requiring Bendectin plaintiffs to show that mothers' ingestion of the drug more than doubled the likelihood of birth defects); *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958 (3d Cir.1990) (requiring that Bendectin plaintiffs establish relative risk of limb reduction defects arising from epidemiological data of at least 2.0, which equates to more than a doubling of the risk); *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1403 (D.Or.1996) (requiring breast-implant plaintiffs to demonstrate that exposure to breast implants more than doubled the risk of their alleged injuries, which, in epidemiological terms, requires a relative risk of more than 2.0); *Manko v. United States*, 636 F.Supp. 1419, 1434 (W.D.Mo.1986) (stating that a relative risk of 2.0 in an epidemiological study means that the disease more likely than not was caused by the event), *aff'd in relevant part*, 830 F.2d 831 (8th Cir.1987); *Marder v. G.D. Searle & Co.*, 630 F.Supp. 1087, 1092 (D.Md.1986) (stating that in IUD litigation, a showing of causation by a preponderance of the evidence, in epidemiological terms, requires a relative risk of at least 2.0), *aff'd*, 814 F.2d 655 (4th Cir.1987); *Cook v. United States*, 545 F.Supp. 306, 308 (N.D.Cal.1982) (stating that in vaccine case, when relative risk is greater than 2.0, there is a greater than 50% chance that the injury was caused by the vaccine).

Some courts have reached a contrary conclusion, holding that epidemiological evidence showing something less than a doubling of the risk may support a jury's finding of causation. In *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1134 (2d Cir.1995), the Second Circuit observed that the district court cited no authority for the "bold" assertion that standardized mortality ratios of 1.5 are statistically insignificant and cannot be relied upon by a jury. The circuit court held that it was far preferable to instruct the jury on statistical significance and to let the jury decide whether studies over the 1.0 mark have any significance. *Id.*; *see also Allen v. United States*, 588 F.Supp. 247, 418–19 (D.Utah 1984) (explicitly rejecting the greater than 50% standard of causation in connection with statistical evidence), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir.1987); *Grassis v. Johns–Manville Corp.*, 248 N.J.Super. 446, 591 A.2d 671, 674–76 (App.Div.1991) (holding that trial court erred in precluding opinion testimony based on epidemiological studies showing relative risks of less than 2.0).

The "doubling of the risk" issue in toxic tort cases has provided fertile ground for the scholarly plow. Those who advocate that something short of a doubling of the risk is adequate to support liability or who advocate that some type of proportionate liability should be imposed include Daniel A. Farber, *Toxic Causation*, 71 MINN. L.REV. 1219, 1237–51 (1987); Gold, *supra*, 96 YALE L.J. at 395–401; Khristine L. Hall & Ellen K. Silbergeld, *Reappraising Epidemiology: A Response to Mr. Dore*, 7 HARV. ENVTL. L.REV.. 441, 445–46 (1983); Rosenberg, *supra*, 97 HARV. L.REV.. at 859–60; *see also* 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 369–75 (1991) (discussing toxic tort cases and suggesting that proportionate compensation to all with the disease or disorder should be based on the attributable fractions of causation); D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L.REV. 54, 71–73 (1987).

On the other end of the spectrum is Michael Dore, who asserts that epidemiological studies cannot, standing alone, establish causation. *See* Dore, *A Commentary on the Use of Epidemiological Evidence*, *supra*, 7 HARV. ENVTL. L. REVV. at 434; *see also* Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 NW. U.L.REV. 643, 691 (1992) (concluding that in the absence of other information, a doubling of the risk would be inadequate to support a plaintiff's verdict, but advocating that a lower risk might be sufficient if other risk factors could be eliminated); Melissa Moore Thompson, *Causal Inference in Epidemiology: Implications for* ***717** *Toxic Tort Litigation,*

71 N.C. L.REV. 247, 253, 289 (1992) (arguing that a strong association requires a risk ratio greater than or equal to 8.0, although moderate association of 3.0 to 8.0 could suffice if coupled with other factors).

Some commentators have been particularly critical of attempts by the courts to meld the more than 50% probability requirement with the relative risks found in epidemiological studies in determining if the studies were admissible or were some evidence that would support an award for the claimant. But there is disagreement on how epidemiological studies should be used. Some commentators contend that the more than 50% probability requirement is too stringent, while others argue that epidemiological studies have no relation to the legal requirement of "more likely than not." *Compare* Gold, *supra*, 96 YALE L.J. at 395–97 (advocating a relaxed threshold of proof), *with* Diana B. Petitti, *Reference Guide on Epidemiology*, 36 JURIMETRICS J. 159, 167–68 (1996) (finding no support in textbooks of epidemiology or from empirical studies for the proposition that when attributable risk exceeds 50% an agent is more likely than not to be the cause of the plaintiff's disease), *and* Thompson, *supra*, 71 N.C. L.REV. at 264–65 (asserting that the use of statistical association to satisfy a more likely than not standard is "misguided"). *See also* Carl F. Cranor et al., *Judicial Boundary Drawing and the Need for Context–Sensitive Science in Toxic Torts after Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 16 VA. ENVTL. L.J. 1, 37–40 (1996) (arguing that epidemiological evidence should not be excluded simply because it reveals a relative risk less than 2.0, unless there is no other supporting evidence); Kaye, *supra*, 73 CORNELL L.REV. at 69 (arguing that it is fallacious to reason that "if the data are more probable under one hypothesis than another, then the former hypothesis is more likely to be true than the latter"); James Robins & Sander Greenland, *The Probability of Causation Under a Stochastic Model for Individual Risk*, 45 BIOMETRICS 1125, 1131 (1989) (concluding that proportional liability schemes cannot be based on epidemiological data alone).

B

[11] **[12]** Although we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case and that there is a rational basis for relating the requirement that there be more than a "doubling of the risk" to our no evidence standard of review and to the more likely than not burden of proof. *See generally DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958–59 (3d Cir.1990); Black & Lilienfeld, *supra*, 52 FORDHAM L.REV. at 767; *see also Daubert*, 43 F.3d at 1321; *Cook*, 545 F.Supp. at 308.

Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who *did* take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were responsible for any given occurrence of the disease since it occurs in six out of 1,000 individuals anyway. Six of the nine incidences would be statistically attributable to causes other than the drug, and therefore, it is not more probable that the drug caused any one incidence of disease. This would only amount to evidence that the drug *could* have caused the disease. However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be *statistically* more likely than not that a given individual's disease was caused by the drug.

This is an oversimplification of statistical evidence relating to general causation, as we discuss below, but it illustrates the thinking behind the doubling of the risk requirement. For another viewpoint in this same vein, see ROBERT P. CHARROW & DAVID E. BERNSTEIN, WASHINGTON LEGAL FOUNDATION, SCIENTIFIC EVIDENCE IN THE COURTROOM: ADMISSIBILITY AND STATISTICAL SIGNIFICANCE AFTER *DAUBERT* 28–34 (1994), who advocate that there is a mathematically demonstrable relationship between relative risk and the more likely than not standard. They contend that a relative risk of slightly more than 2.0 will rarely, if ever, satisfy the legal causation ***718** standard. From a mathematical perspective, the probability of general causation changes as the level of statistical significance changes. *Id.* at 29–31. A relative risk of 2.2 may be sufficient to show more than a 50% probability at the 0.05 level (5 chances out of 100 that result occurred by chance), but not at the 0.10 level (10 chances out of 100). With calculations that we do not attempt to set out here, these commentators offer an example in which a relative risk ratio of 2.75 results in a probability of general causation of about 52% with a statistical significance of 0.05, but only about a 43% probability of general causation with a statistical significance of 0.10. *Id.* at 31–32.

We recognize, as does the federal *Reference Manual on Scientific Evidence*, that a disease or condition either is or

is not caused by exposure to a suspected agent and that frequency data, such as the incidence of adverse effects in the general population when exposed, cannot indicate the actual cause of a given individual's disease or condition. *See* Linda A. Bailey et al., *Reference Guide on Epidemiology*, *in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 169 (1994). But the law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.

We do not hold, however, that a relative risk of more than 2.0 is a litmus test or that a single epidemiological test is legally sufficient evidence of causation. Other factors must be considered. As already noted, epidemiological studies only show an association. There may in fact be no causal relationship even if the relative risk is high. For example, studies have found that there is an association between silicone breast implants and reduced rates of breast cancer. This does not necessarily mean that breast implants caused the reduced rate of breast cancer. *See* David E. Bernstein, *The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow Pharmaceuticals, Inc., 15 CARDOZO L.REV. 2139, 2167 (1994) (citing H. Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED.. 1649 (1992)). Likewise, even if a particular study reports a low relative risk, there may in fact be a causal relationship. The strong consensus among epidemiologists is that conclusions about causation should not be drawn, if at all, until a number of criteria have been considered. One set of criteria widely used by epidemiologists was published by Sir Austin Bradford Hill in 1965.[2] Another set of criteria ***719** used by epidemiologists in studying disease is the Henle–Koch–Evans Postulates.[3] Although epidemiologists do not consider it necessary that all these criteria be met before drawing inferences about causation, they are part of sound methodology generally accepted by the current scientific community.

Sound methodology also requires that the design and execution of epidemiological studies be examined. For example, bias can dramatically affect the scientific reliability of an epidemiological study. *See, e.g.*, Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138–43; Thompson, *supra*, 71 N.C. L.REV. at 259–61. Bias can result from confounding factors, selection bias, and information bias. Thompson, *supra*, 71 N.C. L.REV. at 260. We will not undertake an extended discussion of the many ways in which bias may cause results of a study to be misleading. We note only that epidemiological studies "are subject to many biases and therefore present formidable problems in design and execution and even greater problems in interpretation." Marcia Angell, *The Interpretation of Epidemiologic Studies*, 323 NEW ENG. J. MED.. 823, 824 (1996).

We also note that some of the literature indicates that epidemiologists consider a relative risk of less than three to indicate a weak association. *See* Thompson, *supra*, 71 N.C. L.REV. at 252 (citing Ernest L. Wynder, *Guidelines to the Epidemiology of Weak Associations*, 16 PREVENTIVE MED. 139, 139 (1987)). The executive editor of the *New England Journal of Medicine*, Marcia Angell, has stated that "[a]s a general rule of thumb, we are looking for a relative risk of three or more [before accepting a paper for publication], particularly if it is biologically implausible or if it's a brand-new finding." Gary Taubes, *Epidemiology Faces Its Limits*, SCIENCE, July 14, 1995, at 168. Similarly, Robert Temple, the director of drug evaluation at the FDA, has said that "[m]y basic rule is if the relative risk isn't at least three or four, forget it." *Id.* We hasten to point out that these statements are contained in what is more akin to the popular press, not peer-reviewed scientific journals, and the context of those statements is not altogether clear. We draw no conclusions from any of the foregoing articles other than to point out that there are a number of reasons why reliance on a relative risk of 2.0 as a bright-line boundary would not be in accordance with sound scientific methodology in some cases. Careful exploration and explication of what is reliable scientific methodology in a given context is necessary.

D

A few courts that have embraced the more-than-double-the-risk standard have indicated in dicta that in some instances, epidemiological studies with relative risks of less than 2.0 might suffice if there were other evidence of causation. *See, e.g.*, *Daubert*, 43 F.3d at 1321 n. 16; *Hall*, 947 F.Supp. at 1398, 1404. We need not decide in this case whether epidemiological evidence with a relative

risk less than 2.0, coupled with other credible and reliable evidence, may be legally sufficient to support causation. We emphasize, however, that evidence of causation from whatever source must be scientifically reliable. Post hoc, speculative testimony will not suffice.

A physician, even a treating physician, or other expert who has seen a skewed data sample, such as one of a few infants who has a birth defect, is not in a position to infer causation. The scientific community would not accept as methodologically sound ***720** a "study" by such an expert reporting that the ingestion of a particular drug by the mother caused the birth defect. Similarly, an expert's assertion that a physical examination confirmed causation should not be accepted at face value. In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.1994), a treating physician testified that he knew what radiation-induced cataracts looked like because they are clinically describable and definable and "cannot be mistaken for anything else." *Id.* at 1106. Nevertheless, his opinion that exposure to radiation caused the plaintiff's cataracts was found to be inadmissible because it had no scientific basis. The literature on which the expert relied did not support his assertion that radiation-induced cataracts could be diagnosed by visual examination. *Id.* at 1106–07. For a good discussion of the evils of "evidence" of this nature, see Bernstein, *supra*, 15 CARDOZO L.REV. at 2148–49. Further, as we discuss in Part VI(A), an expert cannot dissect a study, picking and choosing data, or "reanalyze" the data to derive a higher relative risk if this process does not comport with sound scientific methodology.

The FDA has promulgated regulations that detail the requirements for clinical investigations of the safety and effectiveness of drugs. 21 C.F.R. § 314.126 (1996). These regulations state that "[i]solated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." *Id.* § 314.126(e). Courts should likewise reject such evidence because it is not scientifically reliable. As Bernstein points out, physicians following scientific methodology would not examine a patient or several patients in uncontrolled settings to determine whether a particular drug has favorable effects, nor would they rely on case reports to determine whether a substance is harmful. *See* Bernstein, *supra*, 15 CARDOZO L.REV. at 2148–49; *see also* Rosenberg, *supra*, 97 HARV. L.REV.. at 870 (arguing that anecdotal or particularized evidence accomplishes no more than a false appearance of direct and actual knowledge of a causal relationship). Expert testimony that is not scientifically reliable cannot be used to shore up epidemiological studies that fail to indicate more than a doubling of the risk.

E

To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study. *See generally* Thompson, *supra*, 71 N.C. L.REV. at 286–88. Further, if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty. *See generally* *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex.1995) (finding that the failure of the expert to rule out other causes of the damage rendered his opinion little more than speculation); *Parker v. Employers Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 47 (Tex.1969) (holding that a cause becomes "probable" only when "in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result").

In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

Finally, we are cognizant that science is constantly reevaluating conclusions and theories and that over time, not only scientific knowledge but scientific methodology in a particular field may evolve. We have strived to make our observations and holdings in light of current, generally accepted scientific ***721** methodology. However, courts should not foreclose the possibility that advances in science may require reevaluation of what is "good science" in future cases.

V

Certain conventions are used in conducting scientific studies, and statistics are used to evaluate the reliability of scientific endeavors and to determine what the results tell us. In this opinion, we consider some of the basic concepts currently used in scientific studies and statistical analyses and how those concepts mesh with our legal sufficiency standard of review. For an extended discussion of statistical methodology and its use in epidemiological studies, see *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 945–48 (3d Cir.1990). *See also Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1353 n. 1 (6th Cir.1992); Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138–43, 171–78. We do not attempt to discuss all the multifaceted aspects of the scientific method and statistics, but focus on the principles that shed light on the particular facts and issues in this case.

A

One way to study populations is by a retrospective case-control or case-comparison epidemiological study. For example, this type of study identifies individuals with a disease and a suitable control group of people without the disease and then looks back to examine postulated causes of the disease. *See* Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 136–38, 172. Another type of epidemiological study is a cohort study, or incidence study, which is a prospective study that identifies groups and observes them over time to see if one group is more likely to develop disease. *Id.* at 134–36, 173.

An "odds ratio" can be calculated for a case-control study. *Id.* at 175. For example, an odds ratio could be used to show the odds that ingestion of a drug is associated with a particular disease. The odds ratio compares the odds of having the disease when exposed to the drug versus when not exposed. If the ratio is 2.67, the odds are that a person exposed to the drug is 2.67 times more likely to develop the disease under study.

Similarly, the "relative risk" that a person who took a drug will develop a particular disease can be determined in a cohort study. *Id.* at 173, 176. The relative risk is calculated by comparing the incidence of disease in the exposed population with the incidence of the disease in the control population. If the relative risk is 1.0, the risk in exposed individuals is the same as unexposed individuals. If the relative risk is greater than 1.0, the risk in exposed individuals is greater than in those not exposed. If the relative risk is less than 1.0, the risk in exposed individuals is less than in those not exposed. For the result to indicate a doubling of the risk, the relative risk must be greater than 2.0. *See id.* at 147–48.

Perhaps the most useful measure is the attributable proportion of risk, which is the statistical measure of a factor's relationship to a disease in the population. It represents the "proportion of the disease among exposed individuals that is associated with the exposure." *Id.* at 149. In other words, it reflects the percentage of the disease or injury that could be prevented by eliminating exposure to the substance. For a more detailed discussion of the calculation and use of the attributable proportion of risk, see *id.* at 149–50; Black & Lilienfeld, *supra*, 52 FORDHAM L.REV. at 760–61. *See also* Thompson, *supra*, 71 N.C. L.REV. at 252–56.

The numeric value of an odds ratio is at least equal to the relative risk, but the odds ratio often overstates the relative risk, especially if the occurrence of the event is not rare. For an example of the difference between the mathematical calculation of the odds ratio and the relative risk, see BARBARA HAZARD MUNRO & ELLIS BATTEN PAGE, STATISTICAL METHODS FOR HEALTH CARE RESEARCH 233–35 (2d ed. 1993). In the example given by Munro and Page, the odds ratio was 3.91, while the relative risk was only 3.0 based on the same set of data. *See also* Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 149; Thompson, *supra*, 71 N.C. L.REV. at 250 n. 22.

***722** The relative risk may be expressed algebraically as:

$$RR = I_e \div I_c$$

where RR is the relative risk, I_e is the incidence of the disease in the exposed population, and I_c is the incidence of disease in the control population. A sample calculation is as follows:

- the incidence of the disease in exposed individuals (I_e) is 30 cases per 100 persons, or 0.3
- the incidence of the disease in the unexposed individuals (I_c) is 10 cases per 100 persons, or 0.1

· the relative risk is the incidence in the exposed group (0.3) divided by the incidence in the unexposed group (0.1), which equals 3.0

Using this hypothetical, can we conclude that people who are exposed are three times more likely to contract disease than those who are not? Not necessarily. The result in any given study or comparison may not be representative of the entire population. The result may have occurred by chance. The discipline of statistics has determined means of telling us how significant the results of a study may be.

B

The first step in understanding significance testing is to understand how research is often conducted. A researcher tests hypotheses and does so by testing whether the data support a particular hypothesis. The starting point is the null hypothesis, which assumes that there is no difference or no effect. If you were studying the effects of Bendectin, for example, the null hypothesis would be that it has no effect. The researcher tries to find evidence *against* the hypothesis. *See* DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 449 (2d ed. 1993); MUNRO & PAGE, *supra,* at 54. The statement that the researcher suspects may be true is stated as the alternative hypothesis. If a significant difference is found, the null hypothesis is rejected. If a significant difference is not found, the null hypothesis is accepted. MUNRO & PAGE, *supra,* at 54. This concept is important because it is the basis of the statistical test. *Id.*

A study may contain error in deciding to reject or accept a hypothesis, and this error can be one of two types. *Id.;* MOORE & MCCABE, *supra,* at 482–87. A Type I error occurs when the null hypothesis is true but has been rejected, and a Type II error occurs when the null hypothesis is false but has been accepted. MUNRO & PAGE, *supra,* at 55. An example of the two types of error given by Munro and Page is a comparison of two groups of people who have been taught statistics by different methods. *Id.* Group A scored significantly higher than Group B on a test of their knowledge of statistics. The null hypothesis is that there is no difference between the teaching methods, but because the study indicated there was a difference, the null hypothesis was rejected. Suppose, however, that Group A was composed of people with higher math ability and that in actuality the teaching method did not matter at all. The rejection of the null hypothesis is a Type I error. *Id.*

The probability of making a Type I error can be decreased by changing the level of significance, that is, the probability that the results occurred by chance. *Id.* If the level of significance had been five in one hundred (0.05), there is only a five in one hundred chance that the result occurred by chance alone. If the level of significance is one in one hundred (0.01), there is only a one in one hundred chance that the result occurred by chance alone. However, as the significance level is made more stringent (*e.g.,* from 0.05 to 0.01), it will be more difficult to find a significant result. *Id.* Altering the significance level in this manner also increases the risk of a Type II error, which is accepting a false null hypothesis. *Id.* To avoid Type II errors, the level of significance can be lowered, for example, to ten in one hundred (0.1). *Id.*

Different levels of significance may be appropriate for different types of studies depending on how much risk one is willing to accept that the conclusion reached is wrong. Again, to take examples offered by Munro and Page, assume that a test for a particular genetic defect exists and that if the defect is ***723** diagnosed at an early stage, a child with the defect can be successfully treated. If the genetic defect is not diagnosed in time, the child's development will be severely impaired. If a child is mistakenly diagnosed as having the defect and treated, there are no harmful effects. Most would agree that it would be preferable to make a Type I error rather than a Type II error under these circumstances. *Id.* A Type II error would be failing to diagnose a child that had the genetic defect.

Contrast that hypothetical with one in which a federal study is conducted to determine whether a particular method of teaching underprivileged children increases their success in school. *Id.* The cost of implementing this teaching method in a nationwide program would be very great. A Type I error would be to conclude that the program had an effect when it did not. *Id.* The significance level for this project would probably be higher than the one used to screen for genetic defects in the other hypothetical. In the genetic defects example, it is preferable to treat children even if they may not have the disease, but in the teaching method example, it is not preferable to teach children at considerable cost if it has no effect.

A confidence level can be used in epidemiological studies to establish the boundaries of the relative risk. These boundaries

are known as the confidence interval. *See id.* at 59–63; *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 376–77, 396; MOORE & MCCABE, *supra,* at 432–37. The confidence interval tells us if the results of a given study are statistically significant at a particular confidence level. *See* MOORE & MCCABE, *supra,* at 432–33. A confidence interval shows a "range of values within which the results of a study sample would be likely to fall if the study were repeated numerous times." Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 173. If, based on a confidence level of 95%, a study showed a relative risk of 2.3 and had a confidence interval of 1.3 to 3.8, we would say that, if the study were repeated, it would produce a relative risk between 1.3 and 3.8 in 95% of the repetitions. However, if the interval includes the number 1.0, the study is not statistically significant or, said another way, is inconclusive. This is because the confidence interval includes relative risk values that are both less than and greater than the null hypothesis (1.0), leaving the researcher with results that suggest both that the null hypothesis should be accepted and that it should be rejected. *See, e.g., Turpin,* 959 F.2d at 1353 n. 1; *Brock v. Merrell Dow Pharms., Inc.,* 874 F.2d 307, 312 (5th Cir.), *as modified on reh'g,* 884 F.2d 166 (5th Cir.1989); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 173. This concept was explained to the jury in this case by Dr. Glasser, one of the Havners' witnesses. Thus, a study may produce a relative risk of 2.3, meaning the risk is 2.3 times greater based on the data, but at a confidence level of 95%, the confidence interval has boundaries of 0.8 and 3.2. The results are therefore insignificant at the 95% level. If the researcher is willing to accept a greater risk of error and lowers the confidence level to 90%, the results may be statistically significant at that lower level because the range does not include the number 1.0. *See generally* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 151–55. "[T]he narrower the confidence interval, the greater the confidence in the relative risk estimate found in the study." *Id.* at 173.

The generally accepted significance level or confidence level in epidemiological studies is 95%, meaning that if the study were repeated numerous times, the confidence interval would indicate the range of relative risk values that would result 95% of the time. *See DeLuca v. Merrell Dow Pharms., Inc.,* 791 F.Supp. 1042, 1046 (D.N.J.1992), *aff'd,* 6 F.3d 778 (3d Cir.1993); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 153; Dore, *A Proposed Standard, supra* note 3, 28 HOW. L.J. at 693; Thompson, *supra,* 71 N.C. L.REV. at 256. Virtually all the published, peer-reviewed studies on Bendectin have ***724** a confidence level of at least 95%. Although one of the Havners' witnesses, Dr. Swan, advocated the use of a 90% confidence level (10 in 100 chance of error), she and other of the Havners' witnesses conceded that 95% is the generally accepted level.

Another of the Havners' witnesses, Dr. Glasser, explained that in any scientific application, the confidence interval is kept very high. He testified that you "don't ever see [confidence intervals of 50% or 60%] in a scientific study because that means we're going to miss it a lot of times and [scientists] are not willing to take that risk." One commentator advocates that the confidence level for admissibility of epidemiological studies should be higher than the generally accepted 95% and should be 99%. *See* Dore, *A Proposed Standard, supra* note 3, 28 HOW. L.J. at 693–95. *But cf. DeLuca,* 911 F.2d at 948 (discussing statistics expert Kenneth Rothman's view that the predominate choice of a 95% confidence level is an arbitrarily selected convention of his discipline); *Longmore v. Merrell Dow Pharms., Inc.,* 737 F.Supp. 1117, 1119–20 (D.Idaho 1990) (concluding that the scientific standard for determining causation is much stricter than the standard employed by the court and that confidence levels of 95%, 90%, or even 80% should not be required).

We think it unwise to depart from the methodology that is at present generally accepted among epidemiologists. *See generally* Bert Black, *The Supreme Court's View of Science: Has* Daubert *Exorcised the Certainty Demon?,* 15 CARDOZO L.REV. 2129, 2135 (1994) (stating that " '[a]lmost all thoughtful scientists would agree ... that [a significance level of five percent] is a reasonable general standard' " (quoting Amicus Curiae Brief of Professor Alvan R. Feinstein in Support of Respondent at 16, *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (No. 92–102))). Accordingly, we should not widen the boundaries at which courts will acknowledge a statistically significant association beyond the 95% level to 90% or lower values.

It must be reiterated that even if a statistically significant association is found, that association does not equate to

causation. Although there may appear to be an increased risk associated with an activity or condition, this does not mean the relationship is causal. As the original panel of the court of appeals observed in this case, there is a demonstrable association between summertime and death by drowning, but summertime does not cause drowning. 907 S.W.2d at 544 n. 8.

There are many other factors to consider in evaluating the reliability of a scientific study including, but certainly not limited to, the sample size of the study, the power of the study, confounding variables, and whether there was selection bias. These factors are not central to a resolution of this appeal, and we do no more than acknowledge that determining scientific reliability can have many facets.

VI

Armed with some of the basic principles employed by the scientific community in conducting studies, we turn to an examination of the evidence in this case measured against the *Robinson* factors. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex.1995). The evidence relied upon by the Havners' experts falls into four categories: (1) epidemiological studies; (2) *in vivo* animal studies; (3) *in vitro* animal studies; and (4) a chemical structure analysis of doxylamine succinate, the antihistamine component of Bendectin. We consider each in turn.

A

[13] Dr. J. Howard Glasser, an associate professor at the University of Texas School of Public Health at the Texas Medical Center in Houston, is an epidemiologist with a Ph.D. in experimental statistics and a Master of Science of Bio–Statistics. He gave the jury an overview of statistics. As noted earlier, he explained that statistics are used to determine if there is a significant association between two events or occurrences, but cautioned that a statistical association is not the same thing as causation.

Glasser identified a number of epidemiological studies from which he concluded that it was more likely than not that there is an ***725** association between Bendectin and birth defects, even though the authors of those studies did not find such an association. One study was done by Cordero and had a relative risk of 1.18 and a confidence interval of 0.65 to 2.13. However, the relative risk would need to exceed 2.0, and the confidence interval could not include 1.0, for the results to indicate more than a doubling of the risk and a statistically significant association between Bendectin and limb reduction birth defects. *See supra* Part V; *see also Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 (9th Cir.) (on remand) (noting that more likely than not standard requires, in terms of statistical proof, a more than doubling of the risk), *cert denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995). None of the other studies identified by Glasser showed a doubling of the risk. The McCredie study had a relative risk of 1.1 and a confidence interval of 0.8 to 1.5. The data in the Eskanzi study that considered limb reduction birth defects resulted in a relative risk of 4.18, but the confidence interval was 0.48 to 36.3, a very large interval that included 1.0. Dr. Glasser agreed that results with a confidence interval that included 1.0 or a lower number would be inconclusive and statistically insignificant.

Dr. Glasser did, however, reanalzye some data, called the Jick data, that had been included in a report to the FDA. Glasser isolated information on women who had filled two or more prescriptions of Bendectin and who were not exposed to spermicide, which resulted in a relative risk of 13.0 of limb reduction birth defects. However, the confidence level he used was 90%. Further, there is no testimony or other evidence regarding the confidence interval. The confidence interval may or may not have contained 1.0.

The Havners also point to a memorandum prepared within the FDA that was identified by Dr. Glasser. The document indicates that the relative risk of limb defects when Bendectin is given within the first three lunar months of pregnancy is 2.13. The only conclusion drawn by Dr. Glasser from this memorandum is that, taken in conjunction with the other articles he had discussed, there is an “importance of time” and an “importance of exposure with the highest relative risk coming when the exposure period one to three lunar months is counted.” The memo itself was not introduced into evidence, and there is no evidence of the confidence level at which the relative risk of 2.13 was found or of the confidence interval. The confidence interval may or may not have contained 1.0.

Finally, Glasser testified about published studies on Bendectin that did show statistically significant results, but they dealt with birth defects other than limb reduction defects. These studies cannot of course support a finding that Bendectin causes *limb reduction defects*. Further, later

studies of these other types of birth defects did not bear out an association with Bendectin.

The other expert witness for the Havners who testified about epidemiological studies was Dr. Shanna Swan. She has a doctorate in statistics and is the Chief of the Reproductive Epidemiological Program for the state of California. She also teaches epidemiology at the University of California at Berkeley.

Dr. Swan conceded that none of the published epidemiological studies found an association between Bendectin and limb reduction defects. She identified a number of these studies and confirmed that the confidence intervals in each of them included 1.0. However, Dr. Swan testified about these studies at some length and criticized the methodology. Then, relying on these same studies, she opined that Bendectin more probably than not is associated with limb reduction birth defects. Swan considered the findings of these studies in the aggregate and testified that the results fall along a curve in which the "weight of the curve" was in the direction of an increased risk. Yet, she also said that these studies were consistent with a relative risk that was between 0.7 and 1.8. That is not a doubling of the risk. It may support her opinion that it is more probable than not that there is an *association* between Bendectin and limb reduction defects, but the *magnitude* of the association she gleaned from these studies is not more than 2.0, based on her own testimony.

Dr. Swan also performed a reanalysis of data from at least two studies. One reanalysis was of raw *unpublished* data underlying ***726** the Jick study of limb reduction birth defects, the same data about which Dr. Glasser testified. Dr. Swan derived a relative risk estimate of 2.2 for women exposed to Bendectin during the first trimester. She also testified that the relative risk for women who were exposed to Bendectin but not exposed to spermicide was 8.8 and finally, that if women who were exposed to two or more Bendectin prescriptions were considered, without regard to exposure to spermicide, the relative risk was 13 with a confidence interval from 3 to 53. She did not reveal the confidence level used in obtaining these results, and there is no evidence of the confidence level in the record.

The other reanalysis by Dr. Swan was of data in the Cordero study, which was based on information collected by the Center for Disease Control in Atlanta. An abstract she prepared regarding this data was published in the *Journal for the Society of Epidemiological Research* in 1983 or 1984 and states that the original Cordero study found the odds ratio for limb reduction birth defects to be 1.2. Swan concluded, however, that when a different control group is selected, the relative risk estimates are affected. Swan's abstract stated that, "under certain assumptions," which are not identified, "the odds ratio for limb reduction defects" are "a highly significant" 2.8. There is no explanation in the abstract or in Dr. Swan's testimony of the significance level used to obtain the 2.8 result. The result may well be statistically inconclusive at a 95% confidence level. We simply do not know from this record. Without knowing the significance level or the confidence interval, there is no scientifically reliable basis for saying that the 2.8 result is an indication of anything. Further, her choice of the control group could have skewed the results. Although her abstract does not identify what control group she used, Swan testified at trial that she chose births of Downs Syndrome babies. Swan's reanalysis using Downs Syndrome babies as the control group was considered in *Lynch* and in *Richardson–Merrell*, and those courts likewise found it insufficient. *See Lynch v. Merrell–National Labs.*, 830 F.2d 1190, 1195 (1st Cir.1987), *aff'd*, 857 F.2d 823 (D.C.Cir.1988); *Richardson v. Richardson–Merrell, Inc.*, 649 F.Supp. 799, 802 n. 10 (D.D.C.1986), *aff'd*, 857 F.2d 823 (D.C.Cir.1988).

In addition to the statistical shortcomings of the Havners' epidemiological evidence, another strike against its reliability is that it has never been published or otherwise subjected to peer review, with the exception of Dr. Swan's abstract, which she acknowledges is not the equivalent of a published paper. Dr. Swan has published a number of papers in scientific journals, including a study that concluded Bendectin is not associated with cardiac birth defects. Although she has been testifying in Bendectin limb reduction birth defect cases for many years, Dr. Swan has never attempted to publish her opinions or conclusions about Bendectin and limb reduction defects. Similarly, studies by Dr. Glasser have been published in refereed journals, but none of his 32 to 33 publications mentions Bendectin or limb reduction birth defects.

As already discussed, there are over thirty published, peer-reviewed epidemiological studies on the relationship between Bendectin and birth defects. None of the findings offered by the Havners' five experts in this case have been published, studied, or replicated by the relevant scientific community. As Judge Kozinski has said, "the only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters." *Daubert*, 43

F.3d at 1318 (commenting on the same five witnesses called by the Havners). A related factor that should be considered is whether the study was prepared only for litigation. Has the study been used or relied upon outside the courtroom? Is the methodology recognized in the scientific community? Has the litigation spawned its own "community" that is not part of the purely scientific community? The opinions to which the Havners' witnesses testified have never been offered outside the confines of a courthouse.

[14] Publication and other peer review is a significant indicia of the reliability of scientific evidence when the expert's testimony is in an area in which peer review or publication would not be uncommon. Publication in ***727** reputable, established scientific journals and other forms of peer review "increases the likelihood that substantive flaws in methodology will be detected." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593, 113 S.Ct. 2786, 2797, 125 L.Ed.2d 469 (1993). One legal commentator has suggested that the ultimate test of the integrity of an expert witness in the scientific arena is "her readiness to publish and be damned." *Daubert*, 43 F.3d at 1318 (quoting PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 209 (1991)). Further, "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." *Richardson v. Richardson–Merrell, Inc.*, 857 F.2d 823, 831 n. 55 (D.C.Cir.1988) (quoting *Perry v. United States*, 755 F.2d 888, 892 (11th Cir.1985)).

We do not hold that publication is a prerequisite for scientific reliability in every case, but courts must be "especially skeptical" of scientific evidence that has not been published or subjected to peer review. *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 313 (5th Cir.), *as modified on reh'g*, 884 F.2d 166 (5th Cir.1989); *see also* Bert Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L.REV. 715, 778 (1994). Publication and peer review allow an opportunity for the relevant scientific community to comment on findings and conclusions and to attempt to replicate the reported results using different populations and different study designs.

[15] The need for the replication of results was acknowledged by the Havners' witnesses. Moreover, it must be borne in mind that the discipline of epidemiology studies associations, not "causation" per se. Particularly where, as here, direct experimentation has not been conducted, it is important that any conclusions about causation be reached only after an association is observed in studies among different groups and that the association continues to hold when the effects of other variables are taken into account. *See, e.g.*, MOORE & MCCABE, *supra*, at 202.

As we have already observed, an isolated study finding a statistically significant association between Bendectin and limb reduction defects would not be legally sufficient evidence of causation. The Havners' witnesses conceded that when a number of studies have been done, it would not be good practice to pick out one to support a conclusion. As the federal *Reference Manual on Scientific Evidence* points out, "[m]ost researchers are conservative when it comes to assessing causal relationships, often calling for stronger evidence and more research before a conclusion of causation is drawn." Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 157. For example, Dr. Swan explained that initially, some studies showed a statistically significant association between Bendectin and the birth defect pyloric stenosis. However, subsequent, much larger studies did not bear out that association, and in fact, Swan herself has published studies that failed to find an association between Bendectin and this type of birth defect.

Accordingly, if scientific methodology is followed, a single study would not be viewed as indicating that it is "more probable than not" that an association exists. *See, e.g.*, *Richardson v. Richardson–Merrell, Inc.*, 649 F.Supp. 799, 802 n. 10 (D.D.C.1986) (noting that no single study would be sufficient to exonerate or to implicate Bendectin with certainty and that studies become "conclusive" only in the aggregate), *aff'd*, 857 F.2d 823 (D.C.Cir.1988). In affirming the district court in *Richardson–Merrell*, the District of Columbia Circuit recognized that the plaintiffs' expert had recalculated epidemiological data and had obtained a statistically significant result. *See Richardson*, 857 F.2d at 831. The court nevertheless held this was not evidence that would support a verdict. *Id.* Courts should not embrace inferences that good science would not draw. *But cf. Lynch*, 830 F.2d at 1194 (asserting that a new study coming to a different conclusion and challenging the consensus would be admissible).

The argument is sometimes made that waiting until an association found in one study is confirmed by others will mean that early claimants will be denied a recovery. *See, e.g.*, Green, *supra*, ***728** 86 NW. U.L.REV. at 680–81; Wendy E. Wagner, *Trans–Science in Torts*, 96 YALE L.J. 428, 428–

29 (1986). A related argument is that history tells us that the scientific community has been slow at times to accept valid research and its results. While these observations are true, history also tells us that valid and reliable research and theories are generally accepted quickly within the scientific community when sufficient explanation is provided and empirical data are adequate. *See* Black et al., *supra*, 72 TEX. L. REV. at 779–82 (discussing Galileo, Pasteur, DNA, and continental drift).

[16] Others have argued that liability should not be allocated only on the basis of reliable proof of fault because legal rules should have the goals of "risk spreading, deterrence, allocating costs to the cheapest cost-avoider, and encouraging socially favored activities," and because " 'consumers of American justice want people compensated.' " Rochelle Cooper Dreyfuss, *Is Science a Special Case? The Admissibility of Scientific Evidence After Daubert v. Merrell Dow*, 73 TEX. L.REV. 1779, 1795–96 (1995) (quoting Kenneth R. Feinberg, *Civil Litigation in the Twentieth–First Century: A Panel Discussion*, 59 BROOK. L.REV.. 1199, 1206 (1993)). It has been contended that "[f]or some cases that very well may mean creating a compensatory mechanism even in the absence of clear scientific proof of cause and effect" and that "[d]eferring to scientific judgments about fault only obscures the core policy questions that are addressed by the laws that the court is applying." *Id.* We expressly reject these views. Our legal system requires that claimants prove their cases by a preponderance of the evidence. In keeping with this sound proposition at the heart of our jurisprudence, the law should not be hasty to impose liability when scientifically reliable evidence is unavailable. As Judge Posner has said, "[l]aw lags science; it does not lead it." *Rosen v. Ciba–Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.), *cert. denied*, 519 U.S. 819, 117 S.Ct. 73, 136 L.Ed.2d 33 (1996).

B

The Havners relied on *in vivo* animal studies to support the conclusion that Bendectin causes limb reduction birth defects in humans. This evidence was presented by Dr. Adrian Gross, a veterinarian and a veterinary pathologist who had worked at the FDA from 1964 to 1979, served as the Chief of the Toxicology Branch at the Environmental Protection Agency from 1979 to 1980, and thereafter was a Senior Science Advisor at the EPA. Dr. Gross confirmed that the FDA and EPA consider animal studies in assessing the potential human response to drugs or pesticides. He testified that what will affect an animal is likely to affect humans in the same way and that the only reason animal studies are done is to predict if the drug at issue will have an adverse effect on humans.

Dr. Gross reviewed a number of animal studies that had been conducted on Bendectin. He described studies on rabbits exposed to Bendectin in which he saw "a lot of malformed kits." Gross testified about another study of rabbits that he found statistically significant. He opined that the probability that the malformations in this study occurred by chance were six in 10,000. With respect to another animal study on rabbits, he stated that the probability that the drug was harmless was less than one per 1,000,000. He listed studies on monkeys, rats, and mice showing "highly significant deleterious harmful effects as far as birth defects are concerned." Based on these animal studies, Dr. Gross was of the opinion that Bendectin was teratogenic in humans, which means that it causes birth defects. However, he conceded that the dosage levels at which Bendectin became associated with birth defects in rats was at 100 milligrams per kilogram per day, which would be the equivalent of a daily dosage of 1200 tablets for a woman weighing 132 pounds.

The Havners assert in their briefing before this Court that the accepted technique for determining if a substance is a teratogen in humans is to look at all information, including epidemiological data, animal data, biological plausibility, and *in vitro* studies. Dr. Swan confirmed that these are the relevant sources of information in determining teratogenicity. *See also* Brent, *Comment on Comments on "Teratogen Update: Bendectin,"* ***729** TERATOLOGY 31:429–30 (1985) (stating process for determining if a substance is a teratogen: (1) consistent, reproducible findings in human epidemiological studies; (2) development of an animal model; (3) embryo toxicity that is dose related; and (4) consistency with basic, recognized concepts of embryology and fetal development). Thus, scientific methodology would not rely on animal studies, standing alone, as conclusive evidence that a substance is a teratogen in humans. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1375 (D.C.Cir.1997) (noting that the only way to test whether data from nonhuman studies can be extrapolated to humans would be to conduct human experiments or to use epidemiological data); *Elkins v. Richardson–Merrell, Inc.*, 8 F.3d 1068, 1071 (6th Cir.1993) (holding that expert opinion indicating a basis of support in animal studies is admissible but is simply inadequate to permit a jury to conclude that Bendectin more probably than not causes limb defects); *Lynch*, 830 F.2d

at 1194 (asserting that *in vivo* and *in vitro* animal studies singly or in combination do not have the capability of proving causation in human beings in the absence of any confirming epidemiological data); *see also Brock,* 874 F.2d at 313 (recognizing that animal studies are of very limited usefulness when confronted with questions of toxicity); *Allen v. Pennsylvania Eng'g Corp.,* 102 F.3d 194, 197 (5th Cir.1996) (quoting and following *Brock* in toxic tort case).

We further note that with respect to the *in vivo* studies about which Dr. Gross testified, their reliability as predictors of the effect of Bendectin in humans is questionable because of the dosage levels. Dr. Gross offered no explanation of how the very high dosages could be extrapolated to humans. Other courts have rejected animal studies that relied on high dosage levels as evidence of causation in humans. *See, e.g., Turpin v. Merrell Dow Pharms., Inc.,* 959 F.2d 1349 (6th Cir.1992) (reasoning that to eliminate drugs toxic to embryos at high dosage levels would eliminate most drugs and many useful chemicals on which modern society depends heavily) (citing James Wilson, *Current Status of Teratology, in* HANDBOOK OF TERATOLOGY 60 (1977)). Gross also failed to explain why the published studies from which he extracted his data had concluded Bendectin was not harmful.

The *in vivo* studies identified in this case cannot support the jury's verdict.

Dr. Stuart Allen Newman also relied on animal studies to support his opinion that Bendectin is a teratogen in humans. Dr. Newman holds a doctorate in chemical physics and is a professor at New York Medical College. He has published over fifty articles, although none contain the opinions or conclusions to which he testified in this case.

The studies Newman reviewed were *in vitro* studies, which are based on tests conducted on cells in a test tube or petri dish. Doxylamine succinate was placed directly on the limb bud cells of animals including chickens and mice. The development of cartilage was affected. Newman acknowledged that in these studies, the researchers who had conducted them concluded only that doxylamine succinate was potentially capable of inducing genetic damage and that it should be tested on other systems. But Newman testified that if you find an effect that prevails across a number of different species, "you can be awfully sure that the same thing will prevail in humans."

[17] Newman opined that Kelly Havner's defect was due to loss of portions of the skeleton that *could* with scientific certainty have been caused by a teratogen that affected the embryo. Similarly, he testified that the findings of one study, the Hassell/Horigan Study, indicated to him that doxylamine succinate *can* interfere with chondrogenesis, which is the process of certain cells turning into cartilage. We note that testimony to the effect that a substance "could" or "can" cause a disease or disorder is not evidence that in reasonable probability it does. *See, e.g., Parker v. Employers Mut. Liab. Ins. Co.,* 440 S.W.2d 43, 47 (Tex.1969); *Bowles v. Bourdon,* 148 Tex. 1, 219 S.W.2d 779, 785 (1949). Newman testified, however, that based on the Hassell/Horigan and other animal studies, he concluded with a reasonable degree of medical certainty that doxylamine succinate is a teratogen for cartilage development and ***730** that doxylamine succinate is a teratogen in humans. He also testified that he had reviewed the records surrounding Marilyn Havner's pregnancy and that to a reasonable certainty, she was not exposed to any teratogen other than Bendectin.

The *in vitro* studies are similar to the cell biology data at issue in *Allen v. Pennsylvania Engineering,* 102 F.3d at 198. The fact that Bendectin may have an adverse effect on limb bud cells is "the beginning, not the end of the scientific inquiry and proves nothing about causation without other scientific evidence." *Id.; see also Richardson,* 857 F.2d at 830 ("Positive results from *in vitro* studies may provide a clue signaling the need for further research, but alone do not provide a satisfactory basis for opining about causation in the human context."); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra,* at 130–31 (noting that the problem with *in vitro* studies is extrapolating the findings "from tissues in laboratories to whole human beings").

Logical support for Dr. Newman's opinions was also lacking. A number of substances, such as vitamin C, have been shown to damage animal cells when placed directly on tissue. Dr. Newman offered no explanation of how he made the logical leap from the *in vitro* studies on animal tissue to his conclusion that Bendectin causes birth defects in humans. Dr. Newman's testimony is not evidence of causation.

D

Of the five witnesses who testified on the question of causation, the only witness who opined that Bendectin was the cause of Kelly Havner's birth defect, as opposed to birth defects in general, was Dr. John Davis Palmer. Dr. Palmer is a licensed medical doctor and holds a doctorate in pharmacology. He is a professor at the University of Arizona College of Medicine and the acting head of its Pharmacology Department. His opinion was based in part on the testimony of the Havners' other witnesses.

Dr. Palmer testified that there is a critical period during gestation when the limbs of a fetus are forming. Marilyn Havner took Bendectin somewhere between the 32nd and 42nd day of gestation, depending on how the date of conception is calculated, which was within the period for the development of Kelly Havner's hand and arm. Palmer explained that the molecular structure of doxylamine succinate, one of the two components of Bendectin, permits it to cross the placenta from the mother's body and reach the fetus. Based on this fact and on *in vitro* animal studies, intact animal studies, and epidemiological information, he concluded that doxylamine succinate is a teratogen in humans. Relying on this same information and on information concerning Kelly Havner, including the date her mother ingested Bendectin, Dr. Palmer concluded that to a reasonable degree of medical certainty, Bendectin caused the birth defect seen in Kelly Havner's hand.

However, Dr. Palmer's testimony is based on epidemiological studies that conclude just the opposite. To the extent that he relied on the opinions of Drs. Swan, Glasser, Newman, or Gross, there is no scientifically reliable evidence to support their opinions, as we have seen. Palmer identified no other study or body of knowledge that would support his opinion, other than the chemical structure of doxylamine succinate and a study done on antihistamines, not Bendectin. The Sixth Circuit captured the essence of Dr. Palmer's testimony when it said, "no understandable scientific basis is stated. Personal opinion, not science, is testifying here." *Turpin*, 959 F.2d at 1360. That court further observed that Dr. Palmer's conclusions so overstated their predicate that it could not legitimately form the basis for a jury verdict. *Id.* We agree with that observation based on the record in this case.

* * * * * *

There is no scientifically reliable evidence to support the verdict in this case. Accordingly, we reverse the judgment of the court of appeals in part and render judgment for Merrell Dow.

BAKER, J., not sitting.

***731** GONZALEZ, Justice, concurring.

I join the Court's opinion and judgment. I write separately to reiterate that the guidelines we established in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex.1995), are not limited to expert testimony based on a novel scientific theory.

In *Robinson*, we held that Texas Rule of Evidence 702 requires the proponent of scientific expert testimony to show that the testimony is both relevant and reliable. *Robinson*, 923 S.W.2d at 556. In doing so, we followed the lead of the United States Supreme Court and the Texas Court of Criminal Appeals and adopted a list of non-exclusive factors for determining whether such testimony is admissible. [1] *See id.* at 554–57 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App.1992)). Here, the Court applies the *Robinson* criteria to Merrell Dow's legal sufficiency challenge and concludes that the Havners' expert testimony is no evidence of causation. 953 S.W.2d 706. I agree with this approach. But I am concerned that some litigants may misread *Robinson* to apply only to novel scientific evidence because of my later writings applying it to "junk science" cases. *See S.V. v. R.V.*, 933 S.W.2d 1, 26 (Tex.1996) (Gonzalez, J., concurring); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex.1995) (Gonzalez, J., concurring).

Recently, the Court of Criminal Appeals addressed a similar attack on *Kelly*, that court's equivalent of *Robinson*. In rejecting this argument, the court stated:

> Nowhere in *Kelly* did we limit the two-pronged standard to novel scientific evidence. The [United States] Supreme Court in *Daubert* directly addressed the issue in a footnote, stating "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specifically or exclusively to unconventional evidence." *Daubert*, 509 U.S. at 593 n. 11, 113 S.Ct. at 2796 n. 11. The Supreme Court noted that "under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589,

> 113 S.Ct. at 2795 (emphasis added). We likewise see no value in having a different standard of admissibility for novel scientific evidence. The problems presented in determining whether or not a particular type of evidence would be considered "novel" are daunting enough to reject application of a dual standard. Moreover, we observe that the factors and criteria set forth in *Kelly* as bearing upon the reliability of proffered scientific evidence are adequate measure for assuring that "novel" scientific evidence which is "junk science" is excluded. These factors "address the soundness of the underlying scientific theory and technique." *Jordan v. State*, 928 S.W.2d 550, 554 (Tex.Crim.App.1996)....

Hartman v. State, 946 S.W.2d 60, 63 (Tex.Crim.App.1997). This analysis applies equally to *Robinson.* As I have said before, we intended *Robinson* to "provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science." *S.V. v. R.V.*, 933 S.W.2d at 42 (Gonzalez, J., concurring on rehearing). We did not intend to free from *Robinson* 's grasp what might be considered routine science.

The Havners attempted to prove causation primarily through expert testimony based on epidemiological and animal studies. These foundations are by no means novel. By applying the *Robinson* factors to Merrell Dow's no-evidence challenge, the Court implicitly holds that *Robinson* applies to scientific expert testimony across the board. The trial ***732** court must only determine whether the evidence is relevant and reliable. *See Robinson*, 923 S.W.2d at 556. It need not decide whether the evidence is also novel.

SPECTOR, Justice, concurring.

The Court today fails to heed its own warning that "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." 953 S.W.2d at 727 (internal citations omitted). I agree that the Havners' expert witness testimony is not legally sufficient evidence of causation. However, as a judge, and not a scientist, I am uncomfortable with the majority's ambitious scientific analysis and its unnecessarily expansive application of the *Daubert* standard. The majority's opinion, replete with *dicta*, gives courts no practical guidance outside the context of Bendectin litigation. Accordingly, I concur only in the judgment of the Court.

ON MOTION FOR REHEARING

ORDER

The motion for rehearing filed on behalf of the Havners is overruled. However, the tenor of that motion requires that we address the conduct of Respondents' counsel.

This is not the first time in this case that the Havners' counsel have engaged in less than exemplary conduct. Following the decision of the original panel of the court of appeals, which had reversed the judgment of the trial court and rendered judgment that the Havners take nothing, Robert C. Hilliard filed two briefs with the court of appeals which that court, sitting en banc, found to be "insulting, disrespectful, and unprofessional." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 565, 566 (Tex.App.—Corpus Christi 1994) (en banc) (per curiam). The court of appeals further concluded that the briefs "evidence[d] a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness." *Id.* The court of appeals accordingly forwarded copies of those briefs to the Office of General Counsel of the State Bar of Texas pursuant to Texas Code of Judicial Conduct, Canon 3(D)(2). *Id.*

In assessing the appropriate response to the motion for rehearing that has now been filed by Hilliard and his co-counsel in this Court, we agree with another of our courts of appeals who recently found it necessary to address attacks on the integrity of that court:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.

In re Maloney, 949 S.W.2d 385, 388 (Tex.App.—San Antonio 1997, no writ) (en banc) (per curiam); *see also Johnson v. Johnson*, 948 S.W.2d 835, 840–41 (Tex.App.—San Antonio 1997, writ requested) [1] (sanctioning counsel for

disparaging remarks about the trial court and forwarding the court of appeals' opinion to the Office of General Counsel, concluding that a substantial question had been raised about counsel's honesty, trustworthiness, or fitness as a lawyer).

Courts possess inherent power to discipline an attorney's behavior. " 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence.' " *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (further observing that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex.1988); *Johnson*, 948 S.W.2d at 840–41.

The Disciplinary Rules governing the conduct of a lawyer provide:

> ***733** 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.

TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (Vernon Supp.1997) (TEX. STATE BAR R. art. X, § 9).

Rule 8.02(a) of the Disciplinary Rules specifically states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Id. Rule 8.02(a).

The Legislature has also provided a mechanism for courts to sanction counsel who file pleadings presented for an improper purpose or to harass. TEX. CIV. PRAC. & REM.CODE §§ 10.001—10.005. In addition, one of the lawyers for the Havners, Barry Nace, is a non-resident attorney. His appearance in Texas courts is subject to the Rules Governing Admission to the Bar, including Rule XIX.

The specific portions of the "Respondents' Motion for Rehearing" filed in this Court that raise particular concerns are the "Statement of the Case for Rehearing" (pages 1–5), the "Brief of the Argument" (pages 8, 14, and 16), and the "Prayer for Relief" (pages 19–20). Counsel for Respondents Robert C. Hilliard of the firm of Hilliard & Muñoz, Barry J. Nace of the firm of Paulson, Nace, Norwind & Sellinger, and Rebecca E. Hamilton of the firm of White, White & Hamilton, P.C., are hereby afforded the opportunity to respond as to why the Court should not

1) refer each of them to the appropriate disciplinary authorities;

2) prohibit attorney Nace from practicing in Texas courts; and

3) impose monetary penalties as sanctions.

Any response must be filed in this Court by 5:00 p.m., Monday, November 24, 1997.

Done at the City of Austin, this 13th day of November, 1997.

BAKER, J., not sitting.

Parallel Citations

Prod.Liab.Rep. (CCH) P 15,015, 40 Tex. Sup. Ct. J. 846

Footnotes

1 Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

TEX.R. CIV. EVID. 702.

2 The Bradford Hill criteria are summarized as follows:

> 1. Strength of association. "First upon my list I would put the strength of association. To take a very old example, by comparing the occupations of patients with scrotal cancer with the occupations of patients presenting with other diseases, Percival Pott could reach the correct conclusion because of the enormous increase of scrotal cancer in the chimney sweeps."
> 2. Consistency. "Next on my list of features to be specifically considered I would place the consistency of association. Has it been repeatedly observed by different persons, in different places, circumstances and times?"
> 3. Specificity. "If ... the association is limited to specific workers and to particular sites and types of disease and there is no association between the work and other modes of dying, then clearly that is a strong argument in favor of causation."
> 4. Temporality. "Which is the cart and which the horse?"
> 5. Biological gradient. "Fifthly, if the association is one which can reveal a biological gradient, or dose-response curve, then we should look most carefully for such evidence.... The clear-dose response curve admits of a simple explanation and obviously puts the case in a clearer light."
> 6. Plausibility. "It would be helpful if the causation we suspect is biologically plausible. But this is a feature I am convinced we cannot demand. What is biologically plausible depends on the biological knowledge of the day."
> 7. Coherence. "The cause-and-effect interpretation of our data should not seriously conflict with the generally known facts of the natural history and biology of the disease."
> 8. Experiment. "Occasionally it is possible to appeal to experimental ... evidence.... Here the strongest support for the causation hypothesis may be revealed."
> 9. Analogy. "In some circumstances it would be fair to judge by analogy. With the effects of thalidomide and rubella before us we would surely be ready to accept slighter but similar evidence with another drug or another viral disease in pregnancy."

Bernstein, *supra*, 15 CARDOZO L.REV. at 2167–68 (quoting Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295, 299 (1965)); *see also* Thompson, *supra*, 71 N.C. L.REV. at 268–74.

3 *See, e.g.*, Black & Lilienfeld, *supra*, 52 FORDHAM L.REV. at 762–63; Christopher L. Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L.J. 605, 626 (1991); Michael Dore, *A Proposed Standard For Evaluating the Use of Epidemiological Evidence in Toxic Tort and other Personal Injury Cases*, 28 HOW. L.J. 677, 691 (1985); *see also* Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 160–64.

1 These factors are:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the non-judicial uses which have been made of that theory or technique.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex.1995) (citation and footnote omitted).

1 An application for writ of error is pending in this Court, and we express no opinion on the merits of that appeal.

20 S.W.3d 176
Court of Appeals of Texas,
Dallas.

Ifeoma NJUKU and Me Okere, Appellants,
v.
Barbara G. MIDDLETON and Apex Financial Corporation, Appellees.

No. 05–98–01095–CV. | April 26, 2000.

Plaintiffs filed petitions seeking title to and possession of real property. The 302nd Judicial District Court, Dallas County, Leonard E. Hoffman, J., dismissed petition with prejudice. The Court of Appeals, James, J., held that: (1) plaintiffs lacked standing to bring action; (2) res judicata barred plaintiffs' action; and (3) appeal of dismissal was frivolous and warranted sanctions.

Affirmed.

Attorneys and Law Firms

***177** Rodney L. Hubbard, Michael R. Boling, Raul Elizondo, Dallas, for appellees.

Me Okere, Dallas, for appellants.

Before Justices OVARD, JAMES and ROACH.

Opinion

MEMORANDUM OPINION

TOM JAMES, Justice.

In this consolidated appeal we consider the res judicata effect of a judgment entered against appellants ME and Ifeoma Njuku Okere in the 302 nd District Court of Dallas County. The trial court's October 22, 1994 judgment determined appellee Apex Financial Corporation (Apex) to be the lawfully recorded owner of real property located at 2112 North Masters Drive in Dallas. The judgment also permanently enjoined appellants from filing any cause of action in any court in this state regarding the property. On appeal of that case, this Court issued an opinion and entered a judgment affirming the trial court's judgment. *See Okere v. Apex Fin. Corp.*, 930 S.W.2d 146 (Tex.App.-Dallas 1996, writ denied). [1]

April 4, 1997, appellants filed their first amended original petition against Apex in cause number 95–14017–U in the 302 nd Judicial District Court of Dallas County once again seeking title to and possession of the real property. The trial court dismissed appellants' suit with prejudice on April 3, 1998 because appellants lacked standing to claim an ownership interest in the property.

[1] **[2]** To establish standing, a person must demonstrate he maintains a personal stake in the controversy at hand. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex.1984). Essentially, standing is a component of subject matter jurisdiction. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 517 (Tex.1995). Therefore, we review the issue of standing as we would review the issue of subject matter jurisdiction—de novo. *See Mayhew v. Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998).

[3] Appellants appeal the trial court's order of dismissal based on lack of standing. The trial court found that, at the time appellants brought this suit, they had no standing because ME Okere had previously conveyed his interest in the property and Ifeoma Okere had forfeited the property in a sheriff's sale in 1991. Our review of the record supports the trial court's finding on the issue of standing. Accordingly, we affirm the trial court's April 3, 1998 order of dismissal.

***178** On November 13, 1997, appellants filed, in yet another case, an original petition against Apex and Barbara G. Middleton [2] in cause number 97–10199–L in the 193 rd Judicial District Court of Dallas County alleging Apex and Middleton wrongfully took possession of the same real property. Apex and Middleton moved for summary judgment on the grounds of res judicata which was granted by the trial court. Appellants appeal the trial court's order granting summary judgment in this cause of action.

[4] **[5]** Res judicata, or claim preclusion, forecloses relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and could have been litigated in the prior action. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex.1992). It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on

the same claims that were raised, or could have been raised, in the first action. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996).

[6] We have compared the October 22, 1994 judgment with the relevant petition, and we note (1) there exists a prior final judgment on the merits by a court of competent jurisdiction, (2) the parties are the same parties or are in privity with the original parties, and (3) the claims in the subsequent lawsuits are based on the same claims that were raised, or could have been raised, in the first action. *See Amstadt*, 919 S.W.2d at 652.

In both cases, appellees have requested this Court impose sanctions against appellants for bringing a frivolous appeal. *See* TEX.R.APP. P. 45. Appellants have failed to file any response addressing appellees' request for sanctions.

[7] **[8]** **[9]** This Court is authorized to award "just damages" if we determine "an appeal is frivolous" from consideration of "the record, briefs, or other papers filed in the court of appeals." *See* TEX.R.APP. P. 45. " '[J]ust damages' are permitted if an appeal is objectively frivolous and injures the appellee." *Mid–Continent Cas. Co. v. Safe Tire Disposal Corp.*, 2 S.W.3d 393, 397 (Tex.App.-San Antonio 1999, no pet.). An appeal is frivolous if, at the time asserted, the advocate had no reasonable grounds to believe judgment would be reversed or when an appeal is pursued in bad faith. *See Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex.App.-Houston [14 th Dist.] 1997, no pet.). Appellants' repeated attempts to relitigate issues that were decided years ago, and their repeated violations of the trial court's 1994 injunction prohibiting further lawsuits claiming title to the property, can only be viewed as bad faith attempts to encumber the title to this property through litigation. Thus, we have no hesitancy in concluding the Okeres' appeal is objectively frivolous, nor is there any doubt the Okeres' actions have injured appellees to the extent they have incurred attorney's fees in defending these appeals. Therefore, we assess $5,000 as damages against the Okeres in each case in this consolidated appeal to be divided equally among the appellees in each case.

We affirm the April 3, 1998 order of dismissal in cause number 95–14017–U, and we affirm the June 25, 1998 order granting summary judgment in cause number 97–10199–L. We also assess sanctions against appellants for filing frivolous appeals.

Footnotes

1 In our prior opinion, we found ME Okere's acts of tampering and altering the record destroyed the integrity of the record and precluded him from presenting a sufficient record for our review. *See Okere*, 930 S.W.2d at 152.

2 The record indicates Barbara Middleton was named as a defendant because she is the tenant who was leasing the property from Apex at the time the lawsuit was filed.

954 S.W.2d 872
Court of Appeals of Texas,
Houston (14th Dist.).

Leonor Ortiz TATE, Individually,
and on Behalf of the Estate of Larry
Wayne Tate, Deceased, Appellant,
v.
E.I. DU PONT de NEMOURS
& COMPANY, INC., Appellee.

No. 14–95–00993–CV. | Oct. 2, 1997.

Plaintiff brought wrongful death and survival action against defendant. The 129th District Court, Harris County, Greg Abbott, J., granted defendant's motion for summary judgment, and plaintiff's motion for new trial was overruled by operation of law. Plaintiff appealed. The Court of Appeals dismissed appeal, and writ of error was filed. The Supreme Court, 934 S.W.2d 83, reversed and remanded. The Court of Appeals, Hudson, J., held that: (1) trial court properly granted defendant's amended motion for summary judgment and for rehearing, and (2) defendant was entitled to sanction for plaintiff's filing of frivolous appeal.

Ordered accordingly.

Attorneys and Law Firms

***873** J. Norman Thomas, Corpus Christi, for appellant.

Reid Williamson, Richard A. Sheehy, Houston, for appellee.

Before YATES, HUDSON and FOWLER, JJ.

Opinion

OPINION

HUDSON, Justice.

This is an appeal from a summary judgment granted in favor of appellee, E.I. Du Pont de Nemours & Company. Appellant, Leonor Ortiz Tate, commenced a wrongful death and survival action against appellee alleging that Larry Wayne Tate died because of exposure to certain chemicals at appellee's plant. After having its first motion for summary judgment denied, appellee filed an amended motion for summary judgment and motion for rehearing. This motion urged that appellant lacks standing to prosecute this lawsuit, that appellant failed to timely commence a proceeding to prove her common law marriage to Larry Wayne Tate, and that the appellant's action is time-barred under TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(b) (Vernon 1986). The trial court awarded appellee summary judgment. In one point of error, appellant contends the trial court erred in granting appellee's amended motion for summary judgment and motion for rehearing. Appellee brings one cross-point on appeal urging this Court to impose sanctions on the appellant for pursuing a patently frivolous appeal. We affirm. [1]

The record before this Court shows that Larry Wayne Tate was employed as a security guard for V.G. International, Inc. From July 30, 1989 through July 20, 1991, Mr. Tate was assigned as a contract security guard to appellee's plant in La Porte, Texas. In late 1989, approximately four months after Tate started work at appellee's plant, he began to exhibit symptoms of illness, coughing, shortness of breath, chills, and sweats. While Tate apparently smoked between two and four packs of cigarettes per day, he and appellant nevertheless concluded that his symptoms were caused by exposure to chemicals at appellee's plant. Tate died on February 24, 1992 of pulmonary fibrosis.

Appellant commenced this action on July 19, 1993. She alleged that exposure to the chemicals at appellee's plant caused Tate's death. Appellant also claimed to be Tate's common law wife. She admitted that there had been no ceremonial marriage, but claimed that she and Tate had lived together almost continuously since 1985 and had held themselves out as being married. However, a 1989 employment application completed by Tate reports his status as “single.” Moreover, his death certificate indicates that Tate was divorced and lists “N/A” in the surviving spouse blank.

[1] On August 11, 1994, appellee filed a motion for summary judgment. The basis for this motion apparently was that this lawsuit was time barred by TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(b) (Vernon 1986) because Tate's injury became apparent in 1989, more than two years prior to his death. The precise grounds for this motion, as well as the substance of the evidence supporting ***874** it, are unknown to this Court. The motion and attached exhibits were not designated as part of the record on appeal and have not been presented to us. This first motion was denied, but on March 16, 1995, appellee filed an amended motion for summary judgment and motion for rehearing. The amended motion raised arguments regarding Tate's common

law marriage and appellant's standing to sue; the motion for rehearing renewed the limitations arguments urged in the original motion for summary judgment and asked the court to reconsider its previous ruling. In support of this motion for rehearing, appellee incorporated by reference its original motion for summary judgment and cited to exhibits on file with the court as part of the original motion. The trial court found the amended motion and motion for rehearing were meritorious and granted summary judgment in favor of appellee.

[2] **[3]** A trial court's denial of a motion for summary judgment is not a final adjudication of any matter, thus, the issues may be urged again before the trial court after a motion has been denied. *Villages of Greenbriar v. Torres*, 874 S.W.2d 259, 262 (Tex.App.—Houston [1st Dist.] 1994, writ denied). When a subsequent motion is filed, the evidence in support of the earlier motion constitutes a part of the summary judgment record even though not attached to the latter. *Whitaker v. Huffaker*, 790 S.W.2d 761, 763 (Tex.App.—El Paso 1990, writ denied). As noted above, the record presented to this Court lacks the appellee's original motion for summary judgment and the evidence attached thereto.

As the appellee points out in its first reply point, it is the appellant's burden to bring forward the summary judgment record to prove there is reversible error. TEX.R.APP. P. 50(d); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex.1990). In the absence of a complete record of the summary judgment proof considered by the trial court, the appellate presumption shall be that the omitted documents support the judgment of the trial court. *Id.; Bell v. Moores*, 832 S.W.2d 749, 755 (Tex.App.—Houston [14th Dist.] 1992, writ denied). At submission, appellant argued that though the appellate record may be "technically" incomplete, it contains sufficient summary judgment evidence to raise material issues of fact with regard to her claims. *See Gupta v. Ritter Homes, Inc.*, 633 S.W.2d 626, 628 (Tex.App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part on other grounds*, 646 S.W.2d 168 (Tex.1983) (indicating that a summary judgment need not be sustained because of an incomplete record when the trial court's ruling was made on points of law under undisputed facts). We find, however, that the trial court's consideration of the limitations issue rested upon summary judgment evidence which has been omitted from the record before us. [2]

This cause was submitted on May 29, 1997. On June 23, 1997, three weeks after submission, and 20 months after appellee filed its brief pointing out the deficiency in the record, appellant filed a request to supplement the record with the original motion for summary judgment. We granted the motion and ordered the record supplemented on or before July 21, 1997.

More than two weeks after the supplemental transcript was due, appellant filed an amended request to supplement the record on August 7, 1997. In this amended motion, appellant claimed the Harris County District Clerk's Office would not prepare a supplemental transcript in less than 30 days unless it was specifically ordered to do so by this Court. Without further explanation, appellant asked that we order the district clerk to prepare the supplemental transcript in less than 30 days. The motion asserted that "[a]ppellant's counsel has requested the necessary documents from the Harris County District Clerk's Office," but it did not state when the request was made or why the district clerk had been unable to prepare the supplemental transcript during the preceding six weeks. When we instructed the Clerk of this Court to contact the Harris County District Clerk's Office, we discovered that appellant did not request a supplemental transcript ***875** until August 1, 1997. Appellant has offered no explanation for the delay in presenting his request to the district clerk. We denied appellant's Amended Motion for Leave to File Supplemental Transcript on August 28, 1997. Accordingly, her sole point of error is overruled.

[4] **[5]** **[6]** We next consider appellee's sole cross-point of error in which it requests this Court to sanction appellant for filing a patently frivolous appeal. The rules of appellate procedure provide that when an appellant has taken an appeal for delay and without sufficient cause, the court may award each prevailing appellee an amount not to exceed ten times the total taxable costs as damages against the appellant. TEX.R.APP. P. 84. Granting a sanction under this rule is within an appellate court's discretion, but should only be applied with prudence, caution, and after careful deliberation. *Casteel–Diebolt v. Diebolt*, 912 S.W.2d 302, 306 (Tex.App.—Houston [14th Dist.] 1995, no writ). The focus of the test is whether appellant had a reasonable expectation of reversal or whether he merely pursued the appeal in bad faith. *Id.*

[7] Some of the factors we consider when deciding whether to impose such a penalty against the appellant may include the failure to present a complete record, [3] the raising of certain issues for the first time on appeal, [4] the failure to file a response to a cross-point requesting sanctions, [5] and the filing

of an inadequate appellate brief.[6] Here, as we have already mentioned, an incomplete record was presented. In addition, appellant devoted a large portion of his brief to arguing the unconstitutionality of Section 1.91 of the Texas Family Code, a matter not raised before the trial court. No response was filed to the appellee's cross-point requesting sanctions, and appellant's brief, the substance of which comprises no more than two double-spaced pages of argument and authority, lacked specific citations to the record. *See* TEX.R.APP. P. 74(f).

We find from the record before us that the appeal in this cause was taken without sufficient cause and for the purpose of delay. Accordingly, we affirm the judgment of the trial court and impose sanctions under TEX.R.APP. P. 84 by awarding damages in the amount of $1,040 to appellee which is five times the taxable costs of the appeal.

Footnotes

1 We initially dismissed this appeal for want of jurisdiction on the grounds that appellant's motion for new trial was untimely. We held that because appellant had failed to tender the required filing fee before her motion for new trial was overruled by operation of law, the appellate timetable had not been extended. The Texas Supreme Court granted writ of error and reversed, holding that the conditional filing of the motion, without tender of the filing fee, was sufficient for purposes of extending the appellate timetable. *Tate v. E.I. DuPont de Nemours & Co.*, 934 S.W.2d 83, 84 (Tex.1996). The court then remanded this case for consideration of appellant's points of error.

2 Even appellant's own brief cites to her response to the appellee's first motion for summary judgment and the documents attached thereto.

3 *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 269 (Tex.App.—Houston [14th Dist.] 1995, no writ).

4 *Bradt v. West*, 892 S.W.2d 56, 79 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

5 *Id.*

6 *See Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 551 (Tex.App.—Houston [1st Dist.] 1994, no writ).

154 S.W.3d 639
Court of Appeals of Texas,
Houston (14th Dist.).

TRIBBLE & STEPHENS CO., Appellant,
v.
RGM CONSTRUCTORS, L.P., Appellee.

No. 14–02–01062–CV. | Oct. 28, 2004. | Supplemental Opinions Overruling Rehearing Feb. 10, 2005.

Synopsis

Background: Concrete formwork subcontractor brought action against general contractor to recover unpaid balance of contract price. General contractor counterclaimed for breach of contract, breach of warranty, Deceptive Trade Practices Act violations, promissory estoppel, and indemnification. The County Civil Court at Law No. 3, Harris County, Lynn M. Bradshaw–Hull, J., granted subcontractor summary judgment, and general contractor appealed.

Holdings: On overruling of motion for rehearing, the Court of Appeals, Charles W. Seymore, J., held that:

[1] subcontractor was required by subcontract to perform to architect's satisfaction;

[2] genuine issue of material fact as to whether subcontractor performed to architect's satisfaction precluded summary judgment on subcontractor's claim for unpaid balance of contract price;

[3] genuine issue of material fact as to whether subcontract incorporated exposed-to-view concrete formwork specifications precluded summary judgment on subcontractor's claim for unpaid balance of contract price;

[4] trial court granted more relief than requested when granting subcontractor summary judgment on general contractor's reformation claim;

[5] genuine issue of material fact as to whether general contractor was represented by legal counsel when negotiating subcontract precluded summary judgment on issue of whether general contractor could bring claims under Deceptive Trade Practices Act (DTPA);

[6] genuine issue of material fact as to whether subcontractor had to submit claim for unpaid balance to general contractor as a condition precedent for bringing suit precluded summary judgment for subcontractor; and

[7] genuine issue of material fact precluded summary judgment on issue of whether general contractor waived alleged condition precedent.

Reversed and remanded.

Kem Thompson Frost, J., concurred in part and dissented in part, and filed opinion.

Edelman, J., concurred in the result only.

Attorneys and Law Firms

***646** Lynne Liberato, John S. Torigian, Murry B. Cohen, Mercy Lynn Carrasco Lowe, Houston, for appellant.

Charles Black McFarland, Houston, for appellee.

Panel consists of Justices EDELMAN, FROST and SEYMORE.

Opinion

PLURALITY OPINION

CHARLES W. SEYMORE, Justice.

In this breach of contract case, Tribble & Stephens Company ("T & S") appeals a summary judgment in favor of RGM Constructors, L.P. ("RGM") [1] on the grounds that: (1) RGM failed to comply with a contractual condition precedent to litigation; (2) there were disputed fact issues concerning RGM's performance under the ***647** contract; (3) the trial court erred in: (a) sustaining RGM's objections to T & S's summary judgment evidence, and (b) refusing to grant leave to amend that evidence; (4) the trial court granted RGM more relief than requested; and (5) the trial court erred by granting RGM's partial summary judgment motion on T & S's deceptive trade practices claims and granting sanctions under the DTPA [2] against T & S. We hold that the trial court erred in (1) granting RGM's summary judgment motion because fact issues exist as to RGM's performance under the contract;

(2) in granting summary judgment in connection with T & S's reformation claim; and (3) in granting RGM's partial summary judgment motion on T & S's DTPA claims and in granting sanctions on those claims against T & S. Further, because it is unclear whether RGM agreed to be bound by the condition precedent as argued by T & S in its summary judgment motions, a fact issue exists as to the parties' intent. We reverse the judgment of the trial court and remand. [3]

I. BACKGROUND

In 1997, T & S, as general contractor, was hired by Remington Suites Austin, L.P., as owner ("Remington"), to build an Embassy Suites hotel in Austin (the "project"). The agreement between Remington and T & S was an American Institute of Architects ("AIA") form document A101 with modifications (the "prime contract"). The prime contract incorporated by reference AIA form document A201, entitled "General Conditions of the Contract for Construction" (hereinafter "General Conditions"). On August 21, 1997, T & S entered into a subcontract with RGM (the "subcontract"), in which RGM agreed to perform the concrete formwork [4] on the floors and ceilings of the hotel. The subcontract is not a standard AIA form.

During the course of RGM's work, problems arose. As early as November 1997, T & S notified RGM its formwork may need remediation to correct offsets, fins, or other defects. [5] Specifically, by letter dated ***648** November 17, 1997, T & S's project manager, Bart Dansby, advised RGM as follows:

> Please be reminded that the bottom of the suspended slabs on level 3 through the roof will be exposed concrete. We have encouraged your field personnel to be cognizant of this condition in order to minimize the remedial work that might be necessary to correct offsets, fins or other defects in the exposed concrete surface caused by your formwork. Subsequently, T & S notified RGM that its work was unacceptable to the project architect, Stuart Campbell, because the formed concrete surfaces visible to the public in some of the guest suites and corridors exceeded the tolerances for irregularities as required in the contract documents. Although RGM attempted to rectify the problems, Campbell again rejected RGM's work during subsequent inspections.

On March 19, 1998, T & S sent a letter to RGM (the "default letter"), in accordance with the terms of the subcontract, advising RGM that Campbell had "rejected the quality of the exposed to view formed concrete surface[s]." The letter also stated that "[p]ursuant with specification section 03300–3.10B.1 we must direct your company to return and perform additional repair work...." The default letter indicated that the problem with RGM's work was primarily with form offsets. Also, as permitted in the subcontract, T & S advised RGM that if it did not begin remedial work or establish an acceptable plan to address the problems within 72 hours, T & S would be forced to hire a third party to perform the work on RGM's behalf. On March 24, T & S accepted a bid from the painting subcontractor, Coburn & Company ("Coburn"), to float the form offsets which T & S claimed were the result of RGM's work.

RGM's project engineer, Martin Morello, met with Campbell on March 31 to discuss the stage of completion for RGM's work. Campbell explained to Morello that the offsets in the concrete surfaces needed to be smooth and level, with no abrupt offsets. At the meeting, Morello did not discuss his belief that RGM had performed its work in accordance with the contract specifications.

In June 1998, RGM submitted pay requests No. 8 and No. 9, requesting final payment on the contract. [6] In September of 1998, T & S submitted invoices to RGM for work done by Coburn, advising RGM that its share of the costs for Coburn's remedial work was $12,564. In response, RGM's attorney sent a demand letter to T & S, informing T & S that RGM believed its work was performed in accordance with the contract terms and within the contract tolerances, and requesting full and final payment under the subcontract.

RGM filed suit against T & S in Travis County to recover the unpaid balance of the contract price. Upon motion to transfer filed by T & S, venue was transferred to Harris County. T & S filed counterclaims against RGM for breach of contract, breach of warranty, DTPA violations, promissory estoppel, and indemnification.

RGM filed a motion for partial summary judgment seeking dismissal of T & S's DTPA claims and the trial court granted the motion. Subsequently, the court also issued an order finding that T & S's DTPA action was groundless and granted sanctions against T & S. Meanwhile, both parties submitted competing motions for summary judgment on the additional claims. The trial court granted RGM's summary ***649** judgment motion and denied T & S's motions for summary judgment. This appeal ensued.

II. ANALYSIS

In two issues, T & S argues the trial court erred in denying its motion for summary judgment and in granting RGM's summary judgment. Specifically, in its first issue, T & S contends it was entitled to judgment as a matter of law because RGM failed to fulfill a contractual condition precedent to litigation and RGM failed to raise any viable grounds to defeat T & S's right to summary judgment. In its second issue, T & S presents five sub-issues for our review:

Did RGM establish entitlement to summary judgment as a matter of law?

Were there genuine issues of material fact precluding summary judgment for RGM?

Did the trial court err by sustaining all of RGM's objections and striking T & S's evidence without first granting T & S the right to amend its evidence as provided by Texas Rule of Civil Procedure 166a(f)?

Did the trial court err by granting RGM more relief than it requested in its motion for summary judgment?

Did the trial court err by granting RGM partial summary judgment on T & S's DTPA claims and granting sanctions against T & S on the ground that it filed its DTPA claims in bad faith?

A. Standard of Review

The propriety of a summary judgment is a question of law. Accordingly, we review the trial court's decision de novo. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex.1994); *Taub v. Aquila Southwest Pipeline Corp.*, 93 S.W.3d 451, 462 (Tex.App.-Houston [14th Dist.] 2002, no pet.). A summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and he is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a(c). We review the summary judgment evidence in the light most favorable to the nonmovant, indulging every inference and resolving all doubts in his favor. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex.1985). If the movant establishes a right to summary judgment, the burden shifts to the nonmovant to raise any issues that would preclude summary judgment. *Pennwell Corp. v. Ken Assocs., Inc.*, 123 S.W.3d 756, 760 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

When cross-motions for summary judgment are filed, a reviewing court examines all of the summary judgment evidence presented by both sides, determines all questions presented, and if reversing, renders such judgment as the trial court should have rendered. *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex.1999); *Vill. of Pheasant Run Homeowners Ass'n v. Kastor*, 47 S.W.3d 747, 749–50 (Tex.App.-Houston [14th Dist.] 2001, pet. denied). We may also remand in the interests of justice. *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 730 (Tex.App.-Houston [14th Dist.] 2003, no pet.); *W.W. Laubach Trust/The Georgetown Corp. v. The Georgetown Corp./W.W. Laubach Trust*, 80 S.W.3d 149, 155 (Tex.App.-Austin 2002, pet. denied). When both parties move for summary judgment, each party must carry its own burden and neither can prevail due to the other's failure to meet its burden. *W.H.V., Inc. v. Assocs. Hous. Fin., LLC*, 43 S.W.3d 83, 87–88 (Tex.App.-Dallas 2001, pet. denied).

B. RGM's Summary Judgment

Because resolution of T & S's first appellate issue is dependent in part on resolution of its second issue, we begin with T ***650** & S's claim that the trial court erred in granting RGM's summary judgment motion.

T & S argues that RGM failed to demonstrate it was entitled to judgment as a matter of law because there were material fact issues regarding RGM's performance under the subcontract such as the extent to which the concrete work was exposed to public view, the applicable tolerance levels for irregularities under the contract documents, and whether RGM's finished work was within those tolerance levels. Contrarily, RGM argues that when properly construed, the contract documents establish it fully performed its contractual obligations. We examine the contract documents to ascertain what performance was required and set out the contract terms pertinent to this appeal.

1. The Subcontract Terms

In paragraph 1.1 of the subcontract, RGM agreed to perform the concrete formwork “subject to the final approval of the

Architect ... in accordance with and reasonably inferable from the Contract Documents" and also agreed to perform the work as defined in those documents. Paragraph 1.2 of the subcontract, lists the "Contract Documents" as attachments A through G. Attachment A to the subcontract provides, in part:

Subcontractor's work specifically includes, but is not limited to the following:

(SPECIFICATION SECTION)	(DESCRIPTION TITLE)
.....	
Division 1	General Requirements
Division 2 Section 03100	Concrete Formwork

Attachment B to the subcontract, entitled "Current Drawings," sets out various drawings made a part of the subcontract and also includes, "Specifications/Project Manual." The Specifications from the Project Manual contain in all a listing of 16 "Divisions" and under each Division, a number of sections are listed. For example:

Division 01	*General Requirements*
015	Construction Documents
040	Coordination
050	Field Engineering & Layout
* * * *	
Division 02	*Sitework*
100	Site Preparation
160	Trench Safety
200	Earthwork
220	Excavating and Backfilling for Structure
* * * *	
Division 03	*Concrete Work*
100	Concrete Formwork [7]
200	Concrete Reinforcement
300	Cast–in–Place Concrete
* * * *	

These divisions are standard throughout the construction industry and are promulgated by the Construction Specifications Institute.

Under section 03100, the scope of RGM's work was defined as "[p]rovide formwork for cast-in-place [8] and precast ***651** concrete," as well as work defined in "[a]pplicable [s]ections of Division 3." Also, under paragraph 1.03 of section 03100, entitled "Quality Assurance," the following is set out:

A. Standards: Except as modified hereinafter, comply with applicable provisions and recommendations of ACI–347, "Guide to Formwork for Concrete" and ACI–301, Chapter 4, "Specification for Structural Concrete for Buildings." [9]

Paragraph 1.2 in the subcontract contains what is known in the construction industry as a "flow down" clause which provides:

> Subcontractor binds himself to T & S for the performance of Subcontractor's Work in the same manner as T & S is bound to Owner for such performance under T & S's contract with Owner. [10]

2. Construing the Contract Documents

[1] **[2]** **[3]** In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex.2003); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). To achieve this objective, we examine and consider the entire writing in an attempt to harmonize and give effect to all provisions of the contract so that none are rendered meaningless. *Webster*, 128 S.W.3d at 229; *Coker*, 650 S.W.2d at 393. No single provision will be given controlling effect; rather, all provisions must be considered with reference to the whole instrument. *Webster*, 128 S.W.3d at 229; *Coker*, 650 S.W.2d at 393.

[4] **[5]** **[6]** **[7]** **[8]** **[9]** We first determine whether it is possible to enforce the contract documents as written, without resort to parol evidence. *Webster*, 128 S.W.3d at 229. Determination of ambiguity in a contract is a question of law for the court. *Id.* (citing *Coker*, 650 S.W.2d at 394); *Highlands Mgmt. Co., Inc. v. First Interstate Bank of Tex., N.A.*, 956 S.W.2d 749, 752 n. 1 (Tex.App.-Houston [14th Dist.] 1997, pet. denied). A contract is unambiguous if it can be given a definite or certain legal meaning. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex.1999). If the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent. *Webster*, 128 S.W.3d at 229. A court need not embrace strained rules of construction to avoid an ambiguity at all costs. *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex.1996). Instead, we construe a contract from a utilitarian perspective, keeping in mind the particular business activity sought to be served. *Id.* Because a fact issue arises as to the intent of the parties when a contract contains an ambiguity, the granting of a summary judgment is improper. *Moncrief v. ANR Pipeline Co.*, 95 S.W.3d 544, 546–47 (Tex.App.-Houston [1st Dist.] 2002, pet. denied); *W.W. Laubach Trust*, 80 S.W.3d at 155.

[10] **[11]** To determine if a contract is ambiguous, we may examine extrinsic evidence to interpret the contractual terms used by the parties and extrinsic evidence of the circumstances surrounding execution of the contract. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex.1995); *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex.1981). However, extrinsic ***652** evidence may not contradict or vary the meaning of the explicit language of the written contract. *Nat'l Union Fire Ins.*, 907 S.W.2d at 521. We examine that evidence only to assist us in understanding the object and purpose of the contractual language. *Id.*

3. Did RGM establish its entitlement to summary judgment as a matter of law?

[12] **[13]** In its summary judgment motion, and on appeal, RGM argued that it fully complied with all of its obligations under the subcontract and, therefore, it is entitled to be paid in full. [11] As the movant on the issue of performance, RGM had the burden to establish, as a matter of law, what performance was required under the subcontract and that it fulfilled those requirements. *See Augusta Court Co–Owners' Ass'n v. Levin, Roth & Kasner*, 971 S.W.2d 119, 122 (Tex.App.-Houston [14th Dist.] 1998, pet. denied). If RGM failed to meet that burden, we must reverse the judgment and remand for further proceedings. *Id.* at 121–22.

a. Satisfaction clause

Notably, the subcontract contains a "satisfaction clause." In other words, RGM agreed to perform its work subject to the "final approval" of the project architect.

[14] **[15]** **[16]** It is well established that a contract may require performance by one party to be subject to the satisfaction of the other party, or a designated third party such as an architect or engineer. *See Delhi Pipeline Corp. v. Lewis, Inc.*, 408 S.W.2d 295, 297–98 (Tex.Civ.App.-

Corpus Christi 1966), *overruled on other grounds by Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814 (Tex.1970). Construction contracts commonly contain satisfaction clauses. *See, e.g., Tex. Dep't of Transp. v. Jones Brothers Dirt & Paving Contractors, Inc.*, 92 S.W.3d 477, 481 (Tex.2002) (listing cases addressing satisfaction clauses in construction contracts); *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80, 88–89 (Tex.1976), *overruled in part on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989) (same). Generally, a satisfaction clause will be upheld unless it is shown that the arbiter of performance under the contract decided the matter due to fraud, misconduct, or such "gross mistake" that it implies bad faith or the failure to exercise honest judgment. *See* ***653** *Westech Eng'g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 202–03 (Tex.App.-Austin 1992, no writ); *see also Jones Brothers*, 92 S.W.3d at 481 (noting the standards applicable to satisfaction clauses); *First–Wichita Nat'l Bank v. Wood*, 632 S.W.2d 210, 214 (Tex.App.-Fort Worth 1982, no pet.) (noting cases concerning an architect's authority to pass final approval on construction work). However, it must appear from the express terms of the contract that the parties intended determination by a third party to be final; such a provision may not be implied. *Delhi Pipeline*, 408 S.W.2d at 298.

[17] **[18]** If the architect's satisfaction is required, we should refrain from substituting our judgment for that of the architect. *See Jones Brothers*, 92 S.W.3d at 483. Indeed, an architect's decision cannot be set aside by proving that some other architect may have acted or decided an issue differently or "simply on a conflict of evidence as to what [ ]he ought to have decided. This must be true, because any other rule would simply leave the matter open for a court or jury to substitute its judgment and discretion for the judgment of the [architect]." *Westech Eng'g*, 835 S.W.2d at 203 (quoting *City of San Antonio v. McKenzie Constr. Co.*, 136 Tex. 315, 150 S.W.2d 989, 996 (1941)).

[19] In this case, Paragraph 1.1 of the subcontract provides that RGM agrees to perform its work "subject to the *final approval* of the Architect/Engineer ...." (emphasis added). Further, in Paragraphs 2.1 and 2.4, RGM agreed that its receipt of payment was dependent on "acceptance and approval" of its work by the project architect, and in Paragraph 2.1, RGM expressly accepted the "risk" that the "Owner may reject all or a portion of [RGM's] work." Thus, under the express language of the subcontract, RGM agreed to perform its work subject to Campbell's "final approval." However, in its motion for summary judgment, RGM failed to prove that Campbell approved its performance under the subcontract.

[20] On appeal and in its response to T & S's no-evidence summary judgment motion, in which T & S asserted that RGM was required to perform to Campbell's satisfaction, RGM argues that under Paragraph 4.4 of the General Conditions, the parties were not bound to the architect's decision because Campbell's decision was not "final and binding on the parties." RGM also distinguishes cases pertaining to an architect's satisfaction by asserting that its presentment of a claim to the architect could not be a "condition precedent under the subcontract" because the parties here had not agreed to be bound by the architect's decision. RGM's argument fails for two reasons. [12]

First, RGM has confused the architect's role in the two, separate issues raised in this appeal: (1) whether RGM established as a matter of law that it fully performed under the contract, notwithstanding the architect's rejections of its work, and (2) whether RGM agreed to present its "claims" to the architect as a condition ***654** precedent to this litigation. [13] This duality in the architect's role is not only evident from the parties' arguments, but also under the General Conditions in the contract. For example, paragraphs 4.1 and 4.2 of the General Conditions pertain to the architect's role in the administration of the contract, including his approval of the work performed. Indeed, paragraph 4.2.13 of the General Conditions provides that the architect's decisions on matters relating to "aesthetic effect" will be final. Consequently, Campbell's decisions concerning the quality of work performed are distinct from paragraphs 4.3 and 4.4 of the General Conditions, which address his role as arbiter of claims and disputes under the contract documents. As RGM interprets the subcontract, RGM was not required to satisfy Campbell because his decision concerning disputes was not "final." However, Campbell's decision regarding disputes under paragraph 4.4 of the General Conditions has no bearing on whether RGM agreed to perform the concrete formwork subject to Campbell's satisfaction.

Another problem with RGM's argument is its reliance on paragraph 4.4 of the General Conditions to support its contention that Campbell's approval of its work was not required. RGM has steadfastly argued that the General Conditions, particularly the claims and disputes provisions under paragraph 4.4, do not apply to its subcontract. RGM cannot avoid the claims procedure contained under Article 4

of the General Conditions, while asserting that it is excused from performing to Campbell's satisfaction under those same provisions. If we assume the General Conditions apply, paragraph 4.2.13, expressing that the architect's "decisions on matters relating to aesthetic effect will be final" would apply.

Furthermore, under the express terms of the subcontract, in the event of a conflict between its provisions and the contract documents, the subcontract language controls. Because Paragraph 4.4 of the General Conditions is in conflict with the express "final approval" language of the subcontract in Paragraph 1.1, the language of the subcontract controls and RGM is bound to perform its work subject to Campbell's "final approval." *Cf. Jones Brothers*, 92 S.W.3d at 482–83 (noting that all parties involved in a construction project may not necessarily be bound by the satisfaction clause); *Black Lake Pipe Line Co.*, 538 S.W.2d at 88–89 (noting that the architect's approval was not binding on the owner, but was on the contractors).

[21] Neither party directly addressed whether the finish of the formed surfaces fell within an "aesthetic effect" under the prime contract or other issues raised regarding Campbell's satisfaction in their summary judgment motions; however, as movant for summary judgment on the issue of performance under the subcontract, this omission is fatal only to RGM. *See, e.g.*, *Augusta Court*, 971 S.W.2d at 122–23 (finding that unaddressed contractual issue was fatal to summary judgment movant only). Because RGM failed to conclusively prove it performed to the architect's satisfaction as required under the express terms of the subcontract or failed to prove that Campbell's rejection was due to fraud or misconduct, RGM did not establish entitlement to judgment as a matter of law. [14] *See id.* at 123.

***655** **[22]** Also, when a contract requires performance to the satisfaction of an architect or engineer, the expert testimony of that architect or engineer may be admissible to determine if the required work was reasonably within the scope of the contract. *See Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 768 & n. 6 (Tex.App.-Dallas 1996, writ denied) (citing *Black Lake Pipe Line Co.*, 538 S.W.2d at 88–89); *see also Goode v. Ramey*, 48 S.W.2d 719, 721 (Tex.Civ.App.-El Paso 1932, writ ref'd) (admitting testimony of witness that plumbing contractor's work met contract specifications). T & S provided an affidavit from Campbell specifically stating he rejected RGM's work. RGM objected to the affidavit, claiming various statements violated the parol evidence rule, and the trial court sustained the objections. However, Campbell's deposition, reflecting he had rejected the formwork and that "it was common knowledge" RGM served as the subcontractor on the formwork, was attached to RGM's summary judgment motion. Thus, RGM's own summary judgment evidence indicated Campbell rejected RGM's work, raising a fact issue as to whether RGM's performance under the subcontract satisfied Campbell. [15]

b. Applicable specifications

[23] **[24]** Other fact issues exist concerning RGM's performance under the contract. T & S's March 19, 1998 default letter specifically referred RGM to the specifications in section 03300, paragraph 3.10(B)(1.), when requesting RGM come back and perform the remedial work. Paragraph 3.10(B)(1.) provides as follows:

> 1. Repair exposed-to-view formed concrete surfaces, where possible, that contain defects which adversely affect the appearance of the finish. Remove and replace the concrete having defective surfaces if the defects cannot be repaired to the satisfaction of the Architect. Surface defects, as such, include color and texture irregularities, cracks, spalls, air bubbles, honeycomb, rock pockets; fins and other projections on the surface; ... [16]

The parties do not dispute that the concrete surfaces at issue in this case are "formed surfaces," which according to ACI–347, relied on by RGM, equates to the "finish of exposed concrete." Further, the work rejected by Campbell consisted ***656** of the finished surfaces of the concrete formwork. However, RGM asserts that section 03300 does not apply to its work under the contract. Neither party addresses whether the subcontract is ambiguous concerning the applicable specifications. However, reading the contract as a whole, we find that it is ambiguous. [17]

Attachment A to the subcontract expressly incorporates by reference Division 1 and Division 2 of the project specifications, as follows:

(SPECIFICATION SECTION) (DESCRIPTION TITLE)

.....

Division 1 General Requirements

Division 2 Section 03100 [18] Concrete Formwork

Thus, the subcontract expressly directs RGM to the specifications found in "Division 2 Section 03100," but any reference to Division 3, covering "Concrete Formwork," is expressly omitted although it clearly applies to RGM's work. One reasonable interpretation of this omission is that the subcontract contains a typographical error and the parties actually intended to refer to "Division 3." Assuming Division 3 applies to RGM's work, the entirety of that Division, including section 03300, would apply. [19]

The conclusion that section 03300 applies to RGM's work is supported by the fact that the scope of RGM's work is defined in section 03100 as providing "formwork for cast-in-place and precast concrete." Section 03300 applies to cast-in-place concrete. Accordingly, that section applies to RGM's work. Moreover, section 03100, 1.02(B), entitled "Work of Other Sections," specifically states "Applicable Sections of Division 3," indicating other sections of Division 3 also apply. [20] Finally, as a preface to the specifications listed, the subcontract provides that RGM's work specifically includes those specifications listed, but is not limited to them. Were we to conclude that only section 03100 applies, these provisions in the subcontract would be rendered meaningless.

However, it is also reasonable to assume that the inclusion of section 03100 in the subcontract was intended as a limitation of specifications. Also, Division 1, entitled ***657** "General Requirements," contains general provisions that apply to the entire project, not just specifically to concrete formwork. Therefore, its inclusion in the specifications is logical. Assuming that Division 2 pertains to general requirements regarding the overall project, it is equally plausible that Division 2 was intended to be referenced and the omission of a reference to Division 3 was intended to limit the subcontract to only Section 03100 of that Division. [21]

In sum, we are unable to give the specifications a definite and certain legal meaning. Although RGM's work included cast-in-place concrete, the specifications applicable to that work were not expressly set out in the subcontract. It is unclear if the parties intended all the specifications under Division 3 to apply to RGM's work or only section 03100. Because the subcontract is ambiguous relative to specifications for RGM's work, a fact issue exists regarding the intent of the parties and summary judgment in RGM's favor was error. [22]

c. "Exposed concrete"

RGM argued in its summary judgment motion that section 03300 does not apply to its formwork because 03300 sets forth the repair standards for defects in "exposed-to-view" formed concrete surfaces, as opposed to "exposed concrete." RGM contends the surfaces at issue were to receive an acoustical spray-on texture because they were "exposed concrete" as that term is defined in the subcontract. Consequently, RGM contends section 03300 is inapplicable because it pertains to "exposed-to-view" concrete. However, this argument presupposes that "exposed concrete" surfaces under the subcontract could not also be "exposed-to-view" concrete surfaces, [23] and with this we disagree.

Section 03100, 1.03(B.) defines three types of concrete relative to the project as follows:

> 1. Exposed Concrete: Concrete exposed-to-view on interior and/or exterior including concrete which will receive finish materials, such as paint and wallcovering, applied directly to its surface. Not included is exposed concrete in mechanical and utility rooms.
>
> 2. Concealed Concrete: Concrete covered by structure or with finish material other than that applied directly to its surface. Included is exposed concrete in mechanical and utility rooms.
>
> 3. Architectural Concrete: Same as "exposed concrete" except special care is taken to achieve uniform shape, surface, texture and color. Architectural concrete is not to be covered with any other finish.

Thus, the subcontract expressly defines "exposed concrete" as including "exposed-to-view" concrete, including those surfaces to receive a finish. [24] Under the subcontract, ***658** the scope of RGM's work was defined as "exposed concrete," and that term expressly includes "exposed-to-view" concrete which is to receive a finish. Accordingly, we disagree with

RGM's contention that section 03300 could not apply to its work because it refers to "exposed-to-view" concrete. [25]

In sum, RGM failed to establish it fully performed under the subcontract as a matter of law because it failed to present proof it performed to Campbell's satisfaction or that his rejection of its work was unreasonable or due to fraud, misconduct, or gross mistake. Also, because we find the subcontract is ambiguous regarding the specifications applicable to RGM's work, a fact issue exists as to the intent of the parties. We sustain T & S's subissues one and two regarding RGM's performance.

4. Did the Trial Court Grant RGM More Relief than it Requested?

[25] **[26]** In its second issue, T & S also claims the trial court erred by granting RGM more relief than it requested. It is well established that a summary judgment can only be granted on the grounds addressed in the motion. *See* TEX.R. CIV. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex.1993); *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 436 (Tex.App.-Houston [14th Dist.] 2004, no pet.). A judgment granting more relief than the movant is entitled to is subject to reversal. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 200 (Tex.2001).

a. Venue

RGM initially filed suit against T & S in Travis County. However, in paragraph 10.1 of the subcontract, RGM agreed that venue for all suits involving the subcontract would be "mandatory and exclusive" in Harris County. T & S filed a motion to transfer venue, and the case was subsequently transferred to Harris County. T & S argues RGM's "breach" of the venue provision was not addressed in RGM's summary judgment motion.

[27] **[28]** However, we decline to hold that RGM's breach of the venue provision was a material breach sufficient to sustain a separate cause of action. T & S does not cite, and we have not found, any authority to support its claim that a separate cause of action exists for the breach of this venue provision. Importantly, to the extent the venue provision was breached, T & S sought specific performance of that provision by filing its motion to transfer venue, and the motion was granted. *Cf. Karagounis v. Bexar County Hosp. Dist.*, 70 S.W.3d 145, 147 (Tex.App.-San Antonio 2001, pet. denied) (citing to *Nat'l Life Co. v. Rice*, 140 Tex. 315, 167 S.W.2d 1021, 1024 (1943) and stating that specific performance was relief sought because it had the effect of carrying out the terms of the contract). Therefore, T & S received a remedy for any breach of the venue provision when the suit was transferred. [26] Accordingly, ***659** the trial court did not grant RGM more relief than requested concerning T & S's venue claim.

b. Reformation

T & S also asserts it pleaded an alternative cause of action for reformation of the subcontract based on mutual mistake that was not addressed in RGM's summary judgment motion. In its amended answer T & S pleaded that, should the trial court determine the parties to the subcontract did not incorporate the General Conditions of the prime contract, the failure to do so was a result of the mutual mistake of the parties. T & S requested the court reform the subcontract to incorporate those provisions.

RGM concedes it did not address this claim in its summary judgment motion, [27] but instead, argues that T & S asserted mutual mistake as an affirmative defense and therefore, it was not required to address the issue. *See Gulf, C. & S.F. Ry. Co. v. McBride*, 159 Tex. 442, 322 S.W.2d 492, 500 (1958).

[29] **[30]** **[31]** **[32]** Reformation may be an appropriate and equitable remedy in certain breach of contract actions. *See Nelson v. Najm*, 127 S.W.3d 170, 176–77 (Tex.App.-Houston [1st Dist.] 2003, pet. denied); *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 219 (Tex.App.-Dallas 1996, writ denied). In a claim for reformation, a party seeks to correct a mutual mistake made in preparing a written instrument so that the written contract accurately reflects the original agreement of the parties. *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex.1987). Therefore, reformation requires an original agreement and a mutual mistake, made after the original agreement, in reducing it to writing. *Id.* Mutual mistake then is a necessary element of reformation, but this does not render reformation an affirmative defense. *See id.*

[33] Because RGM did not address T & S's reformation claim in its summary judgment motion, and does not direct us to any evidence in the record which would defeat the claim as a matter of law, we conclude that the trial court's grant of summary judgment on T & S's claim for reformation was error. *See Rush v. Barrios*, 56 S.W.3d 88, 97 (Tex.App.-

Houston [14th Dist.] 2001, pet. denied) (noting to defeat counterclaim, plaintiff must prove, as a matter of law, each element of its cause of action and disprove at least one element of defendant's counterclaim); *Hobbs v. Hutson*, 733 S.W.2d 269, 271 (Tex.App.-Texarkana 1987, writ denied) (finding reformation counterclaim was not defeated by movant's summary judgment counterclaim). Therefore, we sustain T & S's subissue that the trial court granted more relief than requested.

5. Did the Trial Court Err in Granting RGM Partial Summary Judgment on T & S's DTPA Claims and in Granting Sanctions Against T & S?

In its second issue, T & S also argues the trial court erred in granting RGM's partial summary judgment motion on T & S's DTPA claims and in granting sanctions under that statute.

According to T & S's allegations, it agreed to hire RGM only if RGM hired Tony Schroen, with Access/Formwork Design, Inc., for the project. T & S asserted that without Schroen's expertise, RGM lacked experience in the form systems used in the project. T & S claimed that ***660** RGM began the project with Schroen, but withheld payments from him beginning in November 1997 and eventually fired him. T & S also claimed it was led to believe that RGM, under Schroen's guidance, understood the requirements of the project and the standards applicable to its work, and that RGM would be able to meet those requirements. Further, T & S alleged that RGM led T & S to believe it would hire Coburn to perform the remedial work and pay for those costs, and that RGM would pursue its claim through Campbell. Based on these allegations, T & S asserted claims against RGM for violations of the DTPA under seven subsections of section 17.46(b). T & S also asserted that these acts were unconscionable under section 17.45(5) and 17.50(a)(3).

RGM filed a "Motion for Partial Summary Judgment on Applicability of DTPA Section 17.49(f) Exemption," asserting that section 17.49(f) of the DTPA exempted the transaction between the parties because the total contract price was over $100,000, T & S's lawyers "stipulated that the Subcontract was reviewed and approved," and the project was not T & S's residence. In response, T & S provided deposition testimony from Bart Dansby, T & S's project manager, in which he stated he negotiated the contracts with potential subcontractors and he did not consult with an attorney during negotiations. The trial court granted RGM's partial summary judgment motion.

Section 17.49(f) provides as follows:

> Nothing in the subchapter shall apply to a claim arising out of a written contract if:
>
> (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;
>
> (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and
>
> (3) the contract does not involve the consumer's residence.

TEX. BUS. & COM.CODE ANN. § 17.49(f). On appeal, T & S argues that RGM failed to conclusively establish the second element, that T & S was represented by an attorney during negotiations of the contract. [28]

During Dansby's deposition, RGM's counsel questioned him about negotiating a subcontract and noted that "Exhibit No. 9 is a subcontract agreement," but qualified his questions as not "specifically asking about RGM's subcontract." Subsequently, RGM's counsel was questioning Dansby about Article 10 in the subcontract, the choice of law provision, and asked Dansby if he thought that provision was drafted by an attorney. T & S's attorney interrupted the questioning and asked RGM's counsel if he was trying to establish that the contract was prepared or approved by an attorney. RGM's counsel responded in the affirmative. T & S's attorney then stated, "We will stipulate that [T & S's] attorneys have reviewed and, approved Exhibit 9." In subsequent deposition testimony, not attached to the partial summary judgment motion but referred to on appeal, a witness asserted that Exhibit 9 was a copy of RGM's subcontract. Based on this testimony, RGM contends T & S's attorneys reviewed and approved the Subcontract entered into by the parties and further asserts that the statute does not require an attorney actively "negotiate" the contract.

[34] Examining the deposition testimony in a light most favorable to T & S, it appears that T & S's attorney stipulated to ***661** the fact that its attorneys had reviewed and approved the subcontract form, but not necessarily that T & S's attorneys had reviewed and approved RGM's subcontract. It

is undisputed that RGM's subcontract had been amended—as reflected in Attachment G—from the general subcontract form during the negotiations between the parties. Also, were we to accept RGM's argument on this issue, the term "negotiate" as used in the statute would have little or no meaning, recognizing the fact that most form contracts are reviewed and approved by attorneys.

Regardless, even assuming the stipulation pertained specifically to RGM's subcontract, T & S produced Dansby's deposition testimony in which he stated that he negotiated the contracts and did not consult with an attorney. At a minimum, this testimony raises a fact issue as to whether an attorney was involved in negotiating the subcontract. We hold that the trial court erred in granting RGM's motion for partial summary judgment on T & S's DTPA claims on the basis that the transaction was exempted under section 17.49(f). [29] *See Cuyler v. Minns*, 60 S.W.3d 209, 212 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) ("Summary judgments must stand on their own merits.").

[35] **[36]** T & S's claims that RGM failed to perform as required in the contract are causes of action for breach of contract. *See Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex.1996); *Munawar v. Cadle Co.*, 2 S.W.3d 12, 18 (Tex.App.-Corpus Christi 1999, pet. denied). However, T & S's DTPA claims allege conduct amounting to more than mere non-performance of the contract. *See Munawar*, 2 S.W.3d at 19. "The determination of whether a breach of contract rises to the level of a misrepresentation sufficient to trigger the DTPA is a fact-driven inquiry." *Id.* at 18. Once those facts are known, whether they constitute a DTPA misrepresentation is a question of law. *Id.*

Here, T & S claims that it was induced to enter into the subcontract due to representations by RGM that it would use Schroen on the project. *See* TEX. BUS. & COM.CODE ANN. § 17.46(b)(5) (prohibiting representations that goods or services have qualities or sponsorship which they do not have). RGM did not attack the merits of T & S's DTPA claims. Consequently, RGM failed to establish as a matter of law that T & S could not recover under this claim or that the claim is only a breach of contract claim. Because we hold the trial court erred in granting partial summary judgment to RGM on T & S's DTPA claims, we also conclude that the trial court erred in granting sanctions against T & S on its DTPA claims. We sustain T & S's sub-issue on this matter.

In conclusion, regarding T & S's second issue on appeal, we hold that the trial court erred in (1) granting RGM's summary judgment because RGM failed to establish as a matter of law that it fully performed under the subcontract and fact issues exist as to RGM's performance, (2) granting summary judgment in connection with T & S's reformation claim, and (3) granting RGM's partial summary judgment motion on T & S's DTPA claims and granting sanctions on those claims against T & S. Accordingly, we sustain T & S's second issue on appeal.

C. T & S's Summary Judgment Motions

T & S also argues that the trial court erred in denying its summary judgment ***662** motions because RGM failed to comply with a contractual condition precedent. [30] According to T & S, RGM was required under the subcontract to present its claim—that the requested remedial work was outside the scope of its work under the subcontract—to T & S, and under provisions in the prime contract, T & S would, in turn, submit the claim to the owner. T & S asserts that RGM's presentment was a condition precedent to RGM's filing the subject suit. T & S relies, in part, on the argument that the provisions at issue are standard contractual terms within the construction industry and therefore, we must construe these provisions in a manner consistent with other jurisdictions. T & S also asserts that, unlike other contracts, construction contracts contemplate change during the course of the project and change generates dispute. Therefore, according to T & S, an efficient method of handling these changes and disputes is necessarily required to convert a two-dimensional drawing into a three-dimensional building. We examine T & S's arguments.

1. Standard of Review

We previously set forth the standard of review applicable to traditional summary judgment motions. In addition, after adequate time for discovery, a party may move for summary judgment on the basis that there is no evidence of an essential element of the nonmovant's cause of action. TEX.R. CIV. P. 166a(i). The motion must state the elements for which there is no evidence. *Id.; Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex.2002). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. TEX.R. CIV. P. 166a(i) cmt.; *Southwestern Elec. Power Co. v. Grant*,

73 S.W.3d 211, 215 (Tex.2002); *Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 433 (Tex.App.-Houston [14th Dist.] 2002, pet. denied). A no-evidence summary judgment is proper if the respondent fails to adduce more than a scintilla of probative evidence in support of one or more essential elements of a claim. *See* TEX.R. CIV. P. 166a(i).

2. Contract Terms

T & S argues that RGM agreed to fulfill the same duties and remedies to T & S that T & S owed to the owner, and specifically, the "condition precedent" provision in General Conditions, paragraph 4.3.2, which provides:

> **4.3.2 Decision of Architect.** Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. *A decision by the Architect, as provided in subparagraph 4.4.4. shall be required as a condition precedent to arbitration or litigation of a Claim* between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the work has been completed.

(emphasis added). This standard AIA provision is generally accepted to be an alternative dispute resolution mechanism which is "valid, enforceable and favored as a matter of public policy." *See Zandri Constr. Corp. v. Wolfe*, 291 A.D.2d 625, 737 N.Y.S.2d 400, 402 (2002).

***663** T & S argues that RGM agreed to be bound by paragraph 4.3.2 through the "flow down" provision in the subcontract, Paragraph 1.2(b), which provides in part:

> Subcontractor binds himself to T & S for the performance of Subcontractor's Work in the same manner as T & S is bound to Owner for such performance under T & S's contract with Owner. T & S's contract with owner, excluding financial data, and all other Contract Documents listed above [31] have been made available to and read by Subcontractor. In case of conflict between this Subcontract and the other Contract Documents, Subcontractor shall be bound by [this subcontract agreement]. [32]

Contrarily, RGM argues that the flow down provision of the subcontract pertains only to the performance of its work and does not incorporate the dispute resolution provision of General Conditions; therefore, according to RGM, it was not an express condition precedent to its breach of contract action.

3. Analysis

[37] **[38]** **[39]** **[40]** In Texas, under general principles of contract law, separate agreements may be incorporated by reference into a signed contract. *See Trico Marine Servs., Inc. v. Stewart & Stevenson Technical Servs., Inc.*, 73 S.W.3d 545, 549 (Tex.App.-Houston [1st Dist.] 2002, orig. proceeding); *Ikon Office Solutions, Inc. v. Eifert*, 2 S.W.3d 688, 693 (Tex.App.-Houston [14th Dist.] 1999, no pet.). The language used to incorporate a document is not important provided the signed document plainly refers to the incorporated document. *Owen v. Hendricks*, 433 S.W.2d 164, 167 (Tex.1968); *Trico*, 73 S.W.3d at 549. However, the doctrine does not extend to documents that simply appear to relate to the same transaction. *Owen*, 433 S.W.2d at 167; *Trico*, 73 S.W.3d at 549–50 (holding that mentioning of "General Terms and Conditions of Sale" in table of contents and a heading was not sufficient reference to incorporate). When a document is incorporated into another by reference, both instruments must be read and construed together. *In re C & H News Co.*, 133 S.W.3d 642, 645–46 (Tex.App.-Corpus Christi 2003, orig. proceeding).

a. "Flow-down" provision and incorporation by reference

[41] A flow down provision is a closely related concept to incorporation by reference. *See* T. Bart Gary, *Incorporation by Reference and Flow–Down Clauses*, 10 CONSTRUCTION LAW. 1, August 1990, at *46. Both types of provisions are common in construction contracts because, generally, those contracts are characterized by the large number of documents involved. *Id.* at 44. [33]

***664** In *Guerini Stone Co. v. P J Carlin Constr. Co.*, a subcontract directed work be performed in a manner "agreeable to the drawings and specifications." 240 U.S. 264, 265, 36 S.Ct. 300, 60 L.Ed. 636 (1916). The Supreme Court held that reference to the prime contract in a subcontract for a particular purpose, makes the prime contract a part

of the subcontract only for the purpose specified. *See id.* at 277, 36 S.Ct. 300. Other courts have followed this precedent. *See, e.g., H.W. Caldwell & Son, Inc. v. United States ex rel. John H. Moon & Sons, Inc.*, 407 F.2d 21, 23 (5th Cir.1969) (same, suit involved Miller Act); *Washington Metro. Area Transit Auth. v. Norair Eng'g Corp.*, 553 F.2d 233, 235 (D.C.Cir.1977) (same, suit involved Miller Act); *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 261 (R.I.2004) (construing "to the extent of the Work to be performed by Subcontractor" as not applying to insurance requirements under the prime contract); *see also Seale v. Roy M. Mitchell Contracting Co.*, 321 S.W.2d 149, 150–51 (Tex.Civ.App.-Austin 1959, writ ref'd) (finding that phrase "pertaining to his part of the work" did not incorporate the arbitration provision in the prime contract).

[42] However, other courts examining flow down provisions have found that the administrative clauses within the prime contract, such as arbitration clauses, are incorporated into the subcontract. *See, e.g., Turner Constr. Co. v. Midwest Curtainwalls, Inc.*, 187 Ill.App.3d 417, 135 Ill.Dec. 14, 543 N.E.2d 249, 252 (1989) (finding that flow down obligations of subcontractor were not limited to the work to be performed); *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 214–15 (5th Cir.1973) (finding incorporation by reference and distinguishing contrary cases as those involving the Miller Act). In these latter cases, the contract provisions contained a specific reference to or incorporation of those obligations or documents flowing down to the subcontractor. *See, e.g., Turner Constr.*, 135 Ill.Dec. 14, 543 N.E.2d at 252 (defining "Contract Documents" as including the "general conditions" of the prime contract); *J.S. & H. Constr.*, 473 F.2d at 213–16 (finding arbitration clause applied to subcontractor because subcontract incorporated by reference the general conditions of the prime contract and contained flow down provision). Here, we find no such specific incorporation of dispute resolution provisions within the subcontract.

Paragraph 5.3.1 of the General Conditions provides the following:

> **5.3 SUBCONTRACTUAL RELATIONS**
>
> **5.3.1** By written agreement, for validity, the Contractor shall require each Subcontractor, *to the extent of the work to be performed by the Subcontractor*, to be bound to the Contractor by terms of the Contract Documents and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights....

(emphasis added). This provision is not self-executing. Instead, it puts the burden on the contractor to obtain a written agreement from the subcontractor in which the subcontractor assumes the same responsibilities towards the contractor that the contractor has assumed towards the owner. *See* ***665** *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 908–09 (Ind.2004). In *MPACT Construction Group,* the Indiana Supreme Court examined a dispute involving provisions mirroring those at issue here. *See id.* The Indiana court noted the following, which we find instructive:

> A comment from the [AIA], drafters of the General Conditions, provides some guidance. It first states, "A basic requirement of the contract is that subcontractors be bound by the terms of the contract documents. AIA Document A401 Standard Form Agreement Between Contractor and Subcontractor, so provides." But the next sentence reads, "If other subcontract forms are utilized, care must be taken to coordinate them with Subparagraph 5.3.1." This indicates that if the general contractor uses subcontract forms other than those provided by the AIA ... it must in its own contract include a provision requiring the subcontractors to assume the same responsibilities that it assumes toward the owner.

Id. at 909. Similar to the contractor in *MPACT,* although T & S may have thought its flow down provision sufficed to bind RGM to the "condition precedent" provision, because the subcontract lacks language incorporating the General Conditions of the prime contract into the subcontract, we cannot conclude that RGM was bound to the condition precedent provision. Also, paragraph 8.1 in the subcontract states: "T & S agrees to be bound to Subcontractor by all the obligations that Owner assumes to T & S under the Contract Documents and by all provisions thereof affording remedies and redress to T & S from Owner insofar as applicable to this Subcontract." However, there is no reciprocal provision within the subcontract, binding RGM to T & S. Thus, it is reasonable to conclude that the parties had not intended RGM would be bound to T & S in the same manner T & S was bound to RGM.

[43] T & S also argues that the project manual, as referenced in Attachment B to the subcontract, fully incorporates the provisions of the General Conditions. Specifically, the reference to the project manual in Attachment B states, "SPECIFICATIONS/PROJECT MANUAL." A mere reference to another document is insufficient to establish a wholesale incorporation of the referenced document. *See Trico,* 73 S.W.3d at 550. Further, because this reference identifies "specifications" in connection to the project manual, set off with a slash, a reasonable construction is that the project manual was incorporated only to the extent of the specifications. [34] This heading is, at best, ambiguous. *See id.* (noting that a "heading" within a contract may be ambiguous if it is unclear whether it is a heading or a contractual term). [35]

***666** Accordingly, because the flow down provision in the subcontract is limited to the performance of RGM's work, we cannot conclude as a matter of law that RGM agreed to be bound to the "condition precedent" provision by virtue of the flow down provision.

b. Claims for "extra compensation"

[44] Nevertheless, examining the entire subcontract, it is clear that RGM did have some obligation to submit claims to T & S in reference to the General Conditions. RGM expressly agreed to submit claims for extra compensation and extensions of time to T & S. Paragraph 4.4 of the subcontract, under "Changes in the Work," provides as follows:

> Subcontractor will make all claims for extra compensation and extensions of time to T & S promptly in accordance with this Article and consistent with the Contract Documents. Subcontractor agrees that the time listed in the Contract Documents within which notice must be given for a claim or any appeal is reduced by five (5) days for all notices submitted by Subcontractor. T & S agrees to pursue reasonable claims submitted by Subcontractor against Owner under the provisions of the Contract Documents. [36] Subcontractor shall be responsible for preparation of the claims and for all legal and other costs incurred by T & S.

Thus, RGM agreed to make any claims "for extra compensation" consistent with the prime contract. T & S also argues that the dispute resolution provision is incorporated by reference through this language. [37]

Even assuming RGM had agreed to submit claims in accordance with the General Conditions, by the plain language of the subcontract, RGM agreed to submit only those claims dealing with extra compensation. [38] Because we interpret words contained in a contract according to their plain and ordinary meaning, "extra compensation" implies compensation given beyond the contract price. *Sun Operating, Ltd. v. Holt,* 984 S.W.2d 277, 285 (Tex.App.-Amarillo 1998, pet. denied); *see Rhoads Drilling Co. v. Allred,* 123 Tex. 229, 70 S.W.2d 576, 582 (1934) (dealing ***667** with payment for *ex officio* services, finding "extra compensation" means any sum given *in addition* to the contract price or salary). Therefore, whether RGM's claim is one for "extra compensation" can only be determined in reference to the scope of RGM's work as defined in the subcontract. As we have previously determined, the subcontract is ambiguous as to the scope of RGM's work. Consequently, the question of whether RGM was required to submit this claim to T & S prior to filing suit hinges on disposition of the ambiguous language.

RGM argues that it is seeking only to be paid for the full amount of the contract and not for any payment outside the contract; therefore, RGM contends this is not a claim for extra compensation. However, we reject this distinction. Here, the subcontract clearly anticipated that the project may require adjustment or changes in the work. Indeed, the "extra compensation" clause is contained in Article 4 of the subcontract, entitled "Changes in the Work." Also, the subcontract provides that a subcontractor is to carry on any work and maintain progress during any dispute. Paragraph 4.1 of the subcontract expressly states that T & S and RGM "agree that T & S may add to or deduct from the amount of Work covered by this subcontract...." Thus, when the subcontract is read in its entirety, "extra compensation" pertains to "changes" in the work, whether adding to or deducting from the amount of work covered by the subcontract. *See Coker,* 650 S.W.2d at 393 (stating contract must be construed in its entirety); *see also Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 131–32 (Tex.App.-Houston [14th Dist.] 2000, pet. dism'd). Although RGM characterizes its claim as something other than "extra compensation," RGM is in fact contending that T & S is wrongfully holding the

contract amount due because T & S wrongfully required RGM to perform work outside the scope of the contract.

[45] However, the subcontract expressly provides that RGM is to present claims "in accordance with" the subcontract, yet merely "*consistent with* " the Contract Documents. Had the parties intended a wholesale incorporation of the "Claims and Disputes" provisions in the General Conditions, the reference to the subcontract claims provisions would be superfluous. Indeed, had the parties intended the result T & S proffers, they could have easily used the phrase: "in accordance with the Contract Documents." Moreover, the term "consistent with" implies that RGM agreed to submit its claims only in a manner that was not contrary to the contract documents; these terms do not necessarily indicate RGM agreed to the condition precedent provision. Therefore, the reference to the prime contract is ambiguous [39] and creates a fact issue concerning the parties' intent on this issue. [40]

In sum, the subcontract is, at best, unclear as to whether RGM agreed to submit its claims for extra compensation to T & S as a condition precedent to litigation. ***668** Moreover, whether RGM's claim is one for "extra compensation" can only be determined with reference to RGM's scope of work as defined in the subcontract, which we previously determined was ambiguous. In light of our conclusions relative to T & S's first issue, we remand to the trial court for further proceedings consistent with our disposition. Because we remand, our discussion of RGM's affirmative defenses concerning the condition precedent will be relatively brief. [41]

c. RGM's asserted "condition precedent" defenses

[46] After RGM filed suit, T & S filed a supplement to its original answer denying that RGM had satisfied all conditions precedent and specifically asserting RGM failed to present its claim to the architect prior to any litigation. [42] RGM claims that by delaying its assertion of the condition precedent and, during that delay, litigating the issues of RGM's performance, T & S waived the condition precedent.

[47] **[48]** Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex.2003); *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 189 (Tex.App.-Houston [14th Dist.] 2003, pet. granted). Generally, waiver is a question of fact. *Comsys Info.*, 130 S.W.3d at 190. However, if facts and circumstances are admitted or clearly established, it then becomes a question of law. *Id.*

[49] T & S did in fact defend the suit for some time prior to asserting the condition precedent; however, RGM does not cite to any authority in support of its claim that this delay amounts to waiver of the condition precedent. Civil Procedure Rule 54, which governs the pleading of conditions precedent, does not address when a condition precedent is timely asserted. *See* TEX.R. CIV. P. 54. [43] Moreover, T & S amended its answer, adding the specific denial of the condition precedent in a timely manner under Civil Procedure Rule 63, which governs the amendment of pleadings. *See* TEX.R. CIV. P. 63 (stating pleadings are amended timely if they do not operate as a surprise and, if within seven days of trial, with leave of the court). Therefore, we do not agree that T & S's delay in asserting the condition precedent evidences an intentional relinquishment of the right to assert it.

We are not concluding that a condition precedent cannot be waived because of a delay in making a specific denial. We merely conclude that, under the circumstances of this case, T & S's delay in asserting the condition precedent does not establish waiver as a matter of law. Instead, ***669** we hold that whether T & S knowingly relinquished the right is a fact question.

[50] **[51]** **[52]** This conclusion applies to RGM's claim that laches bars T & S's right to rely on the condition precedent. Laches is an equitable affirmative defense that requires proof of (1) an unreasonable delay by a party having legal or equitable rights in asserting those rights, and (2) a good faith change of position by another to his detriment because of the delay. *Lawrence v. Lawrence*, 911 S.W.2d 443, 449 (Tex.App.-Texarkana 1995, writ denied). Delay alone will not constitute laches, injury or prejudice must also be established. *Id.* Laches is a question of fact that should be determined by considering all of the circumstances in each particular case. *See Williams v. Nevelow*, 501 S.W.2d 942, 948 (Tex.Civ.App.-San Antonio 1973), *rev'd on other grounds*, 513 S.W.2d 535 (Tex.1974).

[53] RGM provided evidence of attorneys' fees incurred from November 1998 to January 2001, when T & S asserted the condition precedent. This evidence raises a fact issue as to RGM's change of position. Whether T & S's delay in asserting the condition was sufficient to constitute laches is also a fact question. [44]

In sum, even assuming RGM was bound to the condition precedent provision, fact issues exist as to the affirmative defenses raised by RGM regarding the condition precedent.

III. CONCLUSION

In conclusion, the trial court erred in granting summary judgment in RGM's favor because RGM did not provide proof that it performed to the architect's satisfaction and other fact issues exist concerning its performance under the subcontract. The trial court also erred in granting RGM more relief than requested on T & S's reformation claim. Further, the trial court erred in granting RGM's partial summary judgment on T & S's DTPA claims and in granting sanctions against T & S on those claims. We conclude the trial court properly denied T & S's motions for summary judgment because fact issues exist as to the intent of the parties to bind RGM to the condition precedent provision in the General Conditions, and to the other issues raised in connection with T & S's reliance on the condition precedent. Accordingly, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

FROST, J., concurring and dissenting.

EDELMAN, J., concurs in result only.

KEM THOMPSON FROST, Justice, concurring and dissenting.

I concur in the court's disposition of the challenges asserted by appellant Tribble & Stephens Co. (“T & S”) to the trial court's summary judgment in favor of appellee RGM Constructors, L.P. (“RGM”) on T & S's claims under the Texas Deceptive Trade Practices Act (“DTPA”) and to the trial court's order granting sanctions against T & S on the DTPA claims. In all other respects, I respectfully dissent.

The court holds that the trial court erred in (1) denying T & S's motion for summary judgment on the stated grounds that fact issues exist as to the intent of the parties to incorporate certain condition-precedent language of the General Conditions into the subcontract; (2) granting RGM's motion for summary judgment on ***670** its contract claim; and (3) striking portions of T & S's summary-judgment evidence. These rulings by the trial court should be affirmed.

T & S'S MOTION FOR SUMMARY JUDGMENT

The plurality concludes fact issues exist regarding the intent of the parties to incorporate the condition-precedent language of paragraph 4.3.2 of the General Conditions into the subcontract. The plurality's analysis is flawed because this language from the General Conditions was not incorporated into the parties' agreement. Because RGM did not agree to be bound by this alleged condition-precedent, the trial court did not err in denying T & S's motion for summary judgment.

The subcontract's “flow down” provision did not incorporate all of the terms of the General Conditions into the subcontract. The plain language of article 1.2 of the subcontract speaks only to the work to be performed by the subcontractor. It does not address the dispute-resolution clause contained in paragraph 4.3.2. Because the subcontract does not incorporate the dispute-resolution provision, this provision is not part of the parties' agreement. Although certain provisions of the subcontract cannot be construed without reference to specific provisions of the prime contract (and its General Conditions), this does not mean that the parties incorporated the entirety of that document and all of its terms and conditions into the subcontract. *See LeBlanc, Inc. v. Gulf Bitulithic Co.*, 412 S.W.2d 86, 93 (Tex.Civ.App.-Tyler 1967, writ ref'd n.r.e.) (“[T]he clear inference is that the parties did not intend to incorporate all provisions of the prime contract.”). The parties did not agree that RGM had to submit the payment claim made in this case to the architect as a condition precedent to pursuing litigation against T & S.

The plurality's analysis conflicts with controlling precedent. *See Seale v. Roy M. Mitchell Contracting Co.*, 321 S.W.2d 149, 150–51 (Tex.Civ.App.-Austin 1959, writ ref'd). When parties to a subcontract incorporate only the provisions of the principal contract that apply to the subcontractor's work, the subcontract does not incorporate any dispute-resolution provision contained in the principal contract. *See id.* at 150–51. In *Seale*, the general contractor's contract with the owner contained provisions for arbitrating disputes between the owner and the general contractor. *See id.* at 150. Arbitration was a condition precedent to litigation. *See id.* The subcontractor's contract stated that the subcontractor would “ ‘comply with all terms and conditions *pertaining to his part of the work* as contained in the contract between the general contractor and the owner.’ ” *See id.* The court held that the arbitration provision was not incorporated into the subcontract because the language of the subcontract did not

incorporate the provision. *See id.* at 151. The incorporation language related only to the performance of the work the subcontractor had contracted to do, and the arbitration provision did not fit into that classification. *See id.*

Article 1.2 of the subcontract states: "[RGM] binds [it]self to T & S for the performance of [RGM's] work in the same manner as T & S is bound to Owner for such performance under T & S's contract with Owner." The plain language of the clause speaks only about the work to be performed; it does not relate to or address the dispute-resolution clause. Under the reasoning in *Seale,* because the dispute-resolution clause from the prime contract is not incorporated into the subcontract, RGM was not required to submit its claim to the architect as a condition precedent to litigation.

***671** Article 8 of the subcontract demonstrates how the subcontract could have incorporated all the terms of the General Conditions. T & S's obligations to RGM are set forth in Article 8.1, which states:

> T & S agrees to be bound to [RGM] by *all the obligations that Owner assumes to T & S under the Contract Documents and by all provisions thereof affording remedies and redress to T & S from Owner* insofar as applicable to this Subcontract. [1]

The purpose of this language was to incorporate the referenced terms and conditions of the prime contract and General Conditions for RGM's benefit. RGM did not agree to be bound to T & S for all the obligations that T & S owed to the owner under the contract documents or by the provisions of those documents that afford remedies and redress to the owner from T & S. T & S, however, expressly agreed to be bound to RGM in this manner. Because this provision is not reciprocal, it imposes no such obligation on RGM to T & S. Simply stated, RGM is not bound by provisions of the General Conditions that are not included in the subcontract or specifically incorporated therein. Under the terms of the subcontract, RGM was bound to T & S in the same manner as T & S was bound to the owner only for RGM's performance of its part of the work under the subcontract. RGM was bound to T & S in relation to those provisions addressing the performance of the work, but it was not bound by the other provisions of the prime contract or the General Conditions, such as the dispute resolution provision.

The "flow down" provision is unambiguous with respect to whether it incorporates the dispute-resolution provision into the subcontract. Absent language in the subcontract incorporating all of the terms and conditions from the General Conditions, this provision did not become part of the parties' agreement. Because the plain language of the subcontract does not incorporate the dispute resolution provision, no ambiguity or fact issue exists as to the intent of the parties with respect to whether they intended RGM to be bound to this provision. They did not. Therefore, compliance with this provision was not a condition precedent to RGM's entitlement to payment under the subcontract.

The only condition precedent to RGM's entitlement to payment under the subcontract is found in article 2.1 of that agreement, which states that "receipt of payment from the Owner by T & S shall be an express CONDITION PRECEDENT to payment by T & S to [RGM]." T & S was paid in full by the owner, and so this condition was fully satisfied. The only issue with respect to RGM's performance under the parties' agreement relates to offsets in the formed concrete surfaces. As detailed below, RGM's summary-judgment evidence conclusively established RGM's compliance with the applicable 1/4 inch tolerance prescribed by the parties' agreement. For these reasons, the trial court properly denied T & S's motion for summary judgment, and this court should affirm that ruling.

SUMMARY JUDGMENT ON RGM'S CONTRACT CLAIM

The plurality concludes that the trial court erred in granting RGM's motion for summary judgment on its contract claim on the stated grounds that fact issues exist concerning RGM's performance under the subcontract. RGM fulfilled the unambiguous terms of the subcontract and is therefore entitled to payment in full. Accordingly, the trial court was correct in granting RGM's motion for summary judgment, and this court errs in holding otherwise.

***672** The only issue with respect to RGM's performance is related to offsets in the formed concrete surfaces. The contract documents provided for a 1/4 inch tolerance for these offsets, and RGM's summary-judgment evidence conclusively established RGM's compliance with this tolerance. T & S's summary-judgment evidence was based on inapplicable tolerances and standards of measurement and failed to rebut RGM's evidence or to raise a fact issue

concerning the level of RGM's performance under the terms of the subcontract.

Under the applicable specifications, RGM was required to correct offsets to 1/4 inch or less. RGM substantially completed the formwork, and all offsets were within 1/4 inch. Still, T & S complained about RGM's work and asked RGM to further reduce the offsets. In its "default letter" to RGM, T & S pointed RGM to the specifications in Section 03300 and requested that RGM return to the jobsite to perform remedial work as prescribed in that section. [2] This would have required RGM to further reduce the offsets to a smooth and flat surface. Section 03300, however, does not apply to RGM's work under the parties' agreement. Under the express terms of Attachment A to the subcontract, only section 03100 applies to RGM's work.

No Ambiguity as to Applicable Specifications

Although neither party asserts an ambiguity with respect to the applicable specifications, the plurality concludes that the subcontract is ambiguous on this issue. It is not. Under the terms of the subcontract, RGM agreed "to perform the following part of the Work (as defined in the Contract Documents) which T & S has contracted with Owner to provide on the Project: CONCRETE FORMWORK." Attachment A to the Subcontract directs RGM to "Specifications Section 3100 of the Contract Documents." These specifications have a definite and certain meaning and one that the parties do not dispute. These specifications mean what they say. The interpretations the plurality promotes as arguably applicable to RGM's work do not create an ambiguity. Attachment A clearly states that Section 03100, not Section 03300, applies to RGM's work.

The best indication of the parties' intent with respect to the specifications applicable to RGM's work is the parties' express reference to Section 03100 and their omission of any reference to Section 03300 in their written agreement. Because this part of the subcontract is capable of a specific and certain legal meaning, there is no need to resort to the rules of contract construction or parol evidence. We should simply interpret the parties' agreement to mean what it says and construe it accordingly.

The plurality acknowledges that the subcontract expressly directs RGM to the specifications found in Section 03100 and that the parties' agreement contains no reference to Section 03300, but nevertheless concludes that the unlisted section might apply to RGM's work. The plurality reasons that if this court were to limit the specifications to the section the parties identified as controlling (Section 03100), then other parts of the contract would be rendered meaningless. This conclusion is one which neither party has reached in ***673** more than 150 pages of briefing and ten post-submission letter briefs. The intentions of the parties can easily be defeated when a court strains to declare an ambiguity that no party has asserted or argued.

Though the parties in this case have disagreed on most things, neither has alleged this part of their agreement is ambiguous, and neither party has identified the alleged ambiguities on which the plurality's analysis is based. Although a court can conclude that a contract is ambiguous even in the absence of such a pleading by either party, [3] there is no justification for doing so in this case. The part of the agreement at issue is not ambiguous because the words the parties chose have a definite and certain legal meaning and do not support more than one reasonable interpretation. *See Columbia Gas Transmission Corp. v. New Ulm Ltd.*, 940 S.W.2d 587, 589–92 (Tex.1996). "Conflicting interpretations of a contract and even unclear or uncertain language, do not necessarily mean a contract is ambiguous." *Appleton v. Appleton*, 76 S.W.3d 78, 84 (Tex.App.-Houston [14th Dist.] 2002, no pet.). The plurality has failed to identify more than one reasonable interpretation of the parties' agreement, and there is no uncertainty in this part of their contract. The parties intended only the specifications in Section 03100 to apply to RGM's work, and the plurality errs in finding an ambiguity on this issue.

Because the subcontract is not ambiguous as to the specifications applicable to RGM's work, there is no fact issue as to the intent of the parties on this matter. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex.2003) (stating a fact issue as to the parties' intent is created if the contract is found to be ambiguous). A comparison of RGM's performance to the level of work required in the subcontract demonstrates that RGM established compliance with all of its obligations under the parties' agreement as a matter of law.

Improper Reliance on Architect's Statements

The plurality relies on the statements of the project architect, Stuart Campbell, to reverse summary judgment on RGM's contract claims. [4] The plurality errs in doing so because this evidence, whether presented by deposition or affidavit, was

improper and inadmissible and, in any event, does not create a fact issue precluding summary judgment. The trial court properly struck Campbell's statements from the summary-judgment record because they were not relevant to any alleged fact issue in this case. RGM's rights and obligations under the subcontract are determined by what the subcontract says, not by what Campbell says they mean.

T & S identified two alleged fact issues that purportedly precluded summary judgment: (1) the extent to which the concrete work was to be exposed to public view, which impacts the resulting tolerance levels for irregularities, and (2) whether RGM's finished work was within those tolerances. The parties do not dispute that the surfaces were to have received a spray-on textured surface. Under the contract documents, such surfaces are Class B surfaces, which are subject to 1/4 inch offsets. The contract documents do not specifically designate a class of surface for exposed concrete. Whether the surface was a Class A surface, as T & S contends, or a Class B surface, as RGM contends, is not a fact question but a question of law to be determined from the subcontract, not from the architect's opinion. Campbell's professional opinion of RGM's work, according to his interpretation ***674** of the contract's requirements, is immaterial. *See Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 732 (Tex.1981) ("Where the meaning of the contract is plain and unambiguous, a party's construction is immaterial."); *Nowlin v. Frost Nat'l Bank,* 908 S.W.2d 283, 286 (Tex.App.-Houston [1st Dist.] 1995, no writ) (in the absence of a finding of ambiguity, affidavit stating meaning of contractual language is "irrelevant"). If the contract does not designate the surfaces to be Class A, Campbell's opinion that they are hardly resolves the issue. Looking to the parties' agreement, the surfaces are unambiguously Class B because they were to receive a spray-on textured surface.

Campbell's affidavit testimony directly contradicts Section 03100's express incorporation of ACI–347, which sets out the applicable tolerances for abrupt irregularities such as offsets in formed concrete surfaces. Campbell's affidavit testimony as to what was required under the contract documents cannot control over the express language of the contract documents. Whether RGM fully performed under the terms of the subcontract depends only on a comparison of the work performed by RGM and the level of work required by the subcontract. Campbell's opinion as to the contract requirements is immaterial in determining if RGM performed under the parties' agreement. Likewise, Campbell's rejection of RGM's work, based on inapplicable specifications derived from his interpretation of the contract, is not germane to the legal issue presented by RGM's summary-judgment motion. Therefore, the trial court did not err in excluding Campbell's statements from T & S's summary-judgment evidence. Deposition testimony that Campbell believed RGM's work did not meet contract specifications based on his misinterpretation of the unambiguous contract does not raise a fact issue precluding summary judgment.

Because RGM established compliance with all of its obligations under the subcontract and T & S failed to raise any material fact issues, the trial court correctly entered summary judgment on RGM's contract claim. This court should affirm that ruling.

CONCLUSION

T & S's condition precedent argument fails because the "flow down" provision of the subcontract did not require RGM to submit its claim for payment to the architect. Accordingly, the trial court correctly denied T & S's motion for summary judgment. The trial court also correctly granted RGM's motion for summary judgment on its contract claim because T & S failed to rebut RGM's evidence or raise a material fact issue concerning RGM's performance under the subcontract. The trial court did not err when it excluded portions of T & S's summary-judgment evidence because the architect's statements were not relevant to the factual issues in the case. Finally, excerpts from Campbell's deposition regarding his incorrect interpretation of the parties' contract does not create a fact issue precluding summary judgment. For these reasons, this court should affirm both the trial court's denial of T & S's motion for summary judgment and the trial court's grant of RGM's motion for summary judgment on RGM's contract claim. [5]

SUPPLEMENTAL PLURALITY OPINION ON REHEARING

CHARLES W. SEYMORE, Justice.

Appellee RGM's Motion For Rehearing to this panel is overruled. We issue this ***675** supplemental opinion in order to address certain questions raised by RGM regarding preservation of error and our review of the summary judgment evidence.

A. Preservation of Error

In its motion for rehearing, RGM contends the plurality ignored procedural requirements of Rule of Civil Procedure 166a(c) and erred by reversing a summary judgment based on an argument that was not raised either in the trial court or on appeal. Specifically, RGM contends T & S did not assert that the contract is ambiguous in the trial court, nor did it argue ambiguity as grounds for reversal in its initial appellate brief. However, the record on appeal does not support RGM's contention.

First, we refer RGM to T & S's Amended Third Supplemental Answer in which T & S asserted that the subcontract is ambiguous relative to incorporation of the General Conditions. Second, we note T & S's "Reply to RGM's Response to [T & S's] Motion for Final Judgment & [T & S's] Reply to RGM's Response to [T & S's] Motion for Summary Judgment" wherein T & S argued that the subcontract is ambiguous "as to incorporation of the modified General Conditions." [1]

We further note that in its original appellate brief, T & S argued there are fact issues "concerning the extent to which the concrete work was to be exposed to public view, the resulting tolerance levels for irregularities, which varied with the level of exposure, and whether RGM's finished work was within those tolerances." The summary judgment evidence indicates that the parties had two distinct views regarding specifications for the concrete formwork in question before this suit was filed. Under this appellate record, a claim that fact issues exist regarding tolerance levels and "whether RGM's finished work was within those tolerances" is, in essence, a contention that contract language has more than one possible meaning. Consequently, this court is required to review and interpret the entire contract, not just a specific section, in order to determine the existence of fact issues precluding summary judgment. In consideration of our standard of review concerning cross-motions for summary judgment, we conclude that T & S preserved error for appellate review regarding the existence of an ambiguity in the contract. *See* TEX.R.APP. P. 38.9; *see also Tex. Worker's Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex.2004) ("[W]hen both parties move for summary judgment ... the reviewing court should review the summary judgment evidence presented by both sides and determine all questions presented").

B. Applicable Tolerance Issue

Regarding the fact issue on applicable tolerances for concrete surfaces, it is important to remember that RGM moved for summary judgment based on the contention that it had fully performed its obligations under the subcontract, seeking full payment. Therefore, RGM, as movant, had the burden to prove as a matter of law that it fully complied with the contract terms. T & S consistently disputed this fact, asserting that RGM's work did not comply with certain terms in the subcontract, including Section 03300.

In the trial court, T & S did not specifically assert that the contract was ambiguous relative to the applicable tolerances for finish of concrete surfaces. However, T & S did argue that RGM failed to comply with the correct tolerances. Indeed, whether RGM complied with the contract terms, including specifications for concrete ***676** surfaces, was the central issue in the case. Both parties argued that a different tolerance applied to RGM's work and, of course, to resolve the issue the court must interpret contract terms pertaining to tolerances. In construing a contract, we begin by determining whether the contract is enforceable as written. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex.2003). In doing so, we cannot confine our review to one section of the contract, as asserted by RGM. We must read the whole contract in an attempt to harmonize its provisions. *Id.*

RGM contends there is no fact issue relative to tolerance levels for finish of concrete formwork because T & S failed to rebut RGM's summary judgment evidence that RGM had reduced all offsets of formed surfaces to one-quarter inch tolerance. Notably, RGM submitted the testimony of Bart Dansby, T & S's project manager, as part of its summary judgment evidence and Dansby testified that the offsets were *not* within a quarter inch tolerance. Moreover, under ACI–347—essentially the only authority relied upon by RGM to assert that the subcontract required a one-quarter inch tolerance—"formed surfaces" equates to the "finish of exposed concrete." The parties do not dispute the fact that the concrete work at issue consists of formed surfaces of "exposed" or "exposed-to-view" concrete. In our plurality opinion, we acknowledged that "exposed-to-view" concrete is included in the definition of "Exposed Concrete" under Section 03100, 1.03(B) of the subcontract. We further acknowledged the application of Section 03300, which addresses repairs to exposed-to-view formed concrete surfaces containing defects affecting the aesthetic appearance and finish of formed surfaces. In the trial court, the parties disputed whether part of the work rejected by architect Campbell was a Class A, B, or C surface, as prescribed in ACI–347. If some of the surfaces

in question are Class A (exposed-to-view), a one-eighth inch tolerance is prescribed under ACI–347. RGM's contention that there is no fact issue regarding tolerance levels because RGM's concrete finish work was within one-quarter inch tolerance is not tenable. Finally, regarding Section 03300, RGM notably does not address why, although the subcontract specifically lists RGM's work as including "cast-in-place" concrete, the specifications covering cast-in-place concrete—that is, Section 03300—do not apply to its work under the subcontract.

We acknowledge that this dispute over $12,564 worth of concrete construction work has been litigated far too long by parties who seem quite willing to accept the risk of a significantly disproportionate assessment of attorney's fees and expenses. However, in reviewing the summary judgment evidence, we are guided by the supreme court's admonition that all reasonable inferences should be indulged and all doubts resolved in favor of the losing party. *Univ. of Tex. Health Sci. Ctr. v. Big Train Carpet Inc.*, 739 S.W.2d 792, 792 (Tex.1987). As stated in the plurality opinion, having reviewed the contract as a whole and all of the summary judgment evidence, the trial court's summary judgment is reversed and the case remanded for further proceedings. [2]

***677** Finally, T & S's motion for modification is denied. Our statement in footnote 1 of the plurality opinion shall not be construed as an interpretation or disposition of the rights and liabilities of the parties to the subject stipulation.

FROST, Justice, supplemental concurring and dissenting on rehearing.

I respectfully dissent from the panel's overruling of the motion for rehearing filed by appellee RGM Constructors, L.P. ("RGM"), except to the extent RGM seeks rehearing as to this court's reversal of the trial court's summary judgment and sanctions order as to the claims of appellant Tribble & Stephens Co. ("T & S") under the Texas Deceptive Trade Practices Act ("DTPA"). In all other respects, I dissent for the reasons stated in my original concurring and dissenting opinion in this case.

Another reason why this court errs in overruling RGM's motion in its entirety is the plurality's misplaced reliance on paragraph 4.4 of the subcontract and its erroneous determination that there is uncertainty as to whether RGM is making an extra-compensation claim under that paragraph. In its original opinion, the plurality first states that the plain meaning of "extra compensation" is "compensation given beyond the contract price." *Tribble & Stephens Co. v. RGM Constructors, L.P.*, No. 14–02–01062–CV, 2004 WL 2400983, at *17 (Tex.App.-Houston [14th Dist.] Oct. 28, 2004, no pet. h.). The plurality then reasons it can only determine whether RGM's claim is one for extra compensation in reference to RGM's scope of work under the subcontract. *See id.* This logic is flawed.

If, as is the case here, RGM does not seek compensation beyond the contract price, then RGM does not assert an extra-compensation claim. The plurality, however, concludes that, because it finds RGM's scope of work under the subcontract ambiguous, it cannot determine at this juncture whether RGM asserts an extra-compensation claim. *See id.* The plurality rejects RGM's argument that a claim for the contract amount is not an extra-compensation ***678** claim. *See id.* The plurality decides that, even though RGM does not characterize its claim as an extra-compensation claim and even though RGM does not seek compensation beyond the contract price, RGM still may be asserting an extra-compensation claim because RGM contends T & S has wrongfully withheld the contract amount due and wrongfully required RGM to perform work outside the scope of the contract. *See id.* The plurality concludes that because it finds RGM's scope of work ambiguous and because RGM's claims relate to the scope of work, this court cannot determine whether RGM's claims are for extra compensation until after the finder of fact determines the mutual intent of the parties as to RGM's scope of work. Presuming for the sake of argument that the subcontract is ambiguous as to RGM's scope of work, such an ambiguity would not convert RGM's claim for the full contract price into a claim for compensation beyond the contract price.

Because the plurality has erred in deciding that RGM's claims may be claims for extra compensation under paragraph 4.4 of the subcontract, and for the reasons stated in my original concurring and dissenting opinion in this case, I respectfully dissent to the court's overruling of RGM's motion for rehearing in its entirety. The only part of RGM's motion for rehearing that should be denied is the part in which RGM seeks affirmance of the trial court's granting of summary judgment in favor of RGM as to T & S's claims under the DTPA and the trial court's granting sanctions against T & S on the DTPA claims. Rehearing should be granted on all other issues.

Footnotes

1 T & S had also filed third-party claims against Fidelity & Guaranty Insurance Underwriters, Inc. ("Fidelity"), the company that issued the performance bond on RGM's work. Fidelity's liability was resolved by the parties through an agreed stipulation, and the trial court issued a take-nothing judgment against T & S in favor of Fidelity. There are no issues presented in this appeal concerning Fidelity's liability.

2 *See* TEX. BUS. & COM.CODE ANN. §§ 17.41–.506 (Vernon 2002 & Supp.2004) (hereinafter "DTPA").

3 In a supplemental brief, T & S also requests that we affirm the trial court's judgment, and reform it to reflect prejudgment interest at a rate of 5%, in compliance with House Bill 2415. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 676, § 1, sec. 304.003(c), 2003 Tex. Gen. Laws 2096, 2096–97 (amended 2003) (current version at TEX. FIN.CODE ANN. § 304.003(c) (Vernon Supp.2004)). Because we reverse and remand, we do not address T & S's request for reformation of the judgment.

4 Concrete formwork consists of pouring wet concrete into "molds" made with pieces of plywood. The concrete dries to form the particular mold.

5 For edification, an offset is an indentation in the concrete surface resulting from displaced, mismatched, or misplaced forms. A fin is a protrusion in the formwork. Both are "abrupt" changes in the concrete's surface. Notably, there are abrupt and gradual irregularities occurring in concrete formwork. Abrupt irregularities are measured where they stand. Contrarily, a gradual irregularity occurs, and is measured, over a plane surface, typically over a ten foot span. Gradual irregularities result from warping and other similar uniform variations from planeness or true curvature. They are an anticipated result in formwork, arising because no structure is said to be a truly flat, plumb, or level surface. A "tolerance" is a variation from a given dimension, location, or alignment. Gradual irregularities are subject to tolerances specified in the construction documents for a project. Abrupt irregularities may also be subject to tolerances, depending upon the needs of the particular project. Regardless of its classification as abrupt or gradual, if an irregularity in the concrete surface is within a tolerance specified in the contract documents, it is not a "defect."

6 The contract price was originally $317, 715. With approved change orders, the total contract price was $345,944.65. RGM claims the full amount owed under the contract is $24,165.50.

7 Accordingly, section 03100 referenced in Attachment A contains the specifications corresponding to "Division 03, section 100, concrete formwork" set forth in the project manual.

8 The specifications for cast-in-place concrete are found in Division 03–300; in other words, section 03300.

9 The American Concrete Institute ("ACI") publishes various specifications and guidelines for use in the construction industry.

10 Remaining provisions of the Subcontract will be set forth in full when necessary to our discussion.

11 RGM pleaded substantial performance as an alternative theory of recovery in its petition and also argued substantial performance in its motion for summary judgment. The substantial performance doctrine allows a party to bring a contract action to recover the full performance price, less the cost of remedying any defects that can be repaired. *Smith v. Smith,* 112 S.W.3d 275, 278–79 (Tex.App.-Corpus Christi 2003, pet. denied) (citing *Vance v. My Apartment Steak House, Inc.,* 677 S.W.2d 480, 482–83 (Tex.1984)). A contractor suing on a contract for substantial performance bears the burden of proving that he substantially performed, the sum owed to him under the contract, and the cost of remedying the defects due to his errors or omissions. *Weitzul Constr., Inc. v. Outdoor Environs,* 849 S.W.2d 359, 363 (Tex.App.-Dallas 1993, writ denied). RGM argued in its summary judgment motion that there was a fact issue as to the appropriate cost to remedy any alleged defects, and the trial court awarded the full remaining contract price to RGM. On appeal, RGM argues only that it fully performed under the contract and does not argue any substantial performance issues. *See Nabors Corp. Servs., Inc. v. Northfield Ins. Co.,* 132 S.W.3d 90, 100 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (concluding argument abandoned on appeal). Accordingly, we do not address the issue of whether RGM substantially performed under the subcontract. *See Provident Life & Acc. Ins. Co. v. Knott,* 128 S.W.3d 211, 216 (Tex.2003) (noting summary judgment can only be affirmed on meritorious grounds specifically presented to the trial court *and* properly preserved for appellate review).

12 In its response, RGM also argued that its claim in this case was not that Campbell wrongfully rejected its work, but that T & S wrongfully identified work outside the scope of RGM's subcontract. If, as evidenced by the language of the subcontract, RGM's work was to be performed to the satisfaction of the architect and the architect rejected RGM's work, RGM's distinction of its argument is immaterial. This is particularly true because RGM moved for summary judgment, claiming it had fully performed under the subcontract and had the burden to prove performance as a matter of law. As support for this argument, RGM included testimony from Campbell that he was not aware of the terms of the subcontractors' contracts; however, Campbell also testified that "it was common knowledge" that RGM was doing the formwork and he specifically found that the formwork was not within the contract specifications.

13 We discuss the condition precedent issue in a subsequent portion of this opinion. *See* Section C. *infra.*

14 On appeal, RGM contends that T & S waived the argument that it had to perform to the satisfaction of Campbell because T & S did not address that assertion in its initial brief. We disagree. T & S's evidence of Campbell's rejection of RGM's work was excluded by the trial court based upon RGM's objections. In its initial brief, T & S argued that this evidence had been erroneously excluded, stating:

> Mr. Campbell did not offer testimony at variance with the language of the contract. He testified from personal knowledge as to the facts surrounding his actions in his capacity as project architect. That testimony went to the heart of the parties' factual dispute and therefore, was admissible. "Contract terms are not changed when the architect decides in the course of a job what a specification means or whether one specification trumps another." In fact, this case cannot be tried without the evidence that, rightly or wrongly, Mr. Campbell rejected RGM's work, and no one is better qualified to offer that evidence than Mr. Campbell, himself.

(citations omitted). Although couched in an evidentiary context, T & S did argue that Campbell's rejection of the work was the pivotal issue in the case and could not be resolved without his testimony. Also, the quotation relied on by T & S in support of its statement comes from a Massachusetts case dealing with an architect's decisions concerning the quality of work. *See Fontaine Bros. v. City of Springfield*, 35 Mass.App.Ct. 155, 617 N.E.2d 1002, 1004 (1993).

15 Because Campbell's rejection of RGM's work was reflected in RGM's summary judgment evidence, we do not address T & S's subissue three on appeal regarding the trial court's rulings on the admissibility of Campbell's statements.

16 RGM objected to T & S's inclusion of the section 03300 specifications in its summary judgment evidence, but RGM attached these specifications to its motion for summary judgment as exhibit 35.

17 A court may conclude that a contract is ambiguous even in the absence of such a pleading by either party. *St. Paul Ins. Co. v. Tex. Dept. of Transp.*, 999 S.W.2d 881, 887 n. 5 (Tex.App.-Austin 1999, pet. denied) (citing *Sage Street Assocs. v. Northdale Const. Co.*, 863 S.W.2d 438, 445 (Tex.1993)).

18 In referring to the specifications, the dissent states "the Subcontract directs RGM to 'Specifications Section 3100 of the Contract Documents.' " However, the dissent quotes the appellee's brief and not the subcontract. The terms of the subcontract regarding the specifications are set forth above. In particular, the subcontract contains the following language pertinent to RGM's work: "specifically includes, *but is not limited to* ... " the specifications found in Division 1, entitled "General Requirements," and Division 2, Section 03100, "Concrete Formwork." As explained in this plurality opinion, Section 03100 is not found in Division 2, but rather in Division 3 of the project manual. Division 3, entitled "Concrete Work," also contains section 03300, which pertains to "Cast–in–Place Concrete." RGM's work was defined in the subcontract as providing "formwork for *cast-in-place* and precast concrete." (Emphasis added).

19 We respectfully disagree with the dissent's conclusion that only section 03100 applies to RGM's work. As noted, under the express language of the contract, RGM's work included cast-in-place concrete and the project manual specifications applicable to cast-in-place concrete are in section 03300.

20 Paragraph 16 of Attachment A also indicates that if the specifications are not sufficiently detailed, the better quality of work should apply, and section 03300 requires a higher level of finish than does section 03100.

21 Division 2 in the specifications, entitled "Sitework," may or may not address requirements of the entire project. The parties do not address the application of Division 2 to RGM's work.

22 Having found a fact issue as to the scope of RGM's work, we reject RGM's argument that T & S committed the first material breach of the subcontract by sending the March 19, 1998 letter requesting RGM to perform, what RGM characterizes as "extra work without extra compensation."

23 In some of the ACI publications in the record, there is a distinction between exposed-to-view concrete and exposed concrete. However, the definitions in section 03100 control over those publications by virtue of the language in paragraph 1.03(A.) of the subcontract.

24 We note, in his deposition testimony, Campbell also stated that the areas at issue were required to have an "architectural finish concrete" because they were "exposed to view." We do not address whether the finish was an architectural finish because the subcontract does not indicate, and T & S does not argue, that it was.

25 Section 03300, 3.06(B.)(1.) provides as follows:

> Provide as-cast smooth form finish for formed concrete surfaces that are to be exposed-to-view, or that are to be covered with a coating material *applied directly to the concrete*, or a covering material bonded to the concrete such as waterproofing, dampproofing, painting, or other similar system.

(emphasis added). In this case, the acoustical spray-on texture was to be applied directly to the undersides of the slabs. Thus, applying section 03300 to RGM's work would not be inconsistent with those definitions in section 03100.

26 The election of remedies doctrine precludes T & S from attempting to sustain a cause of action for money damages for the breach of the venue provision. *See Star Houston, Inc. v. Shevack*, 886 S.W.2d 414, 422 (Tex.App.-Houston [1st Dist.] 1994), writ denied per curiam, 907 S.W.2d 452 (Tex.1995) ("A party who seeks redress under two or more theories of recovery for a single wrong must elect, before the judgment is rendered, under which remedy he wishes the court to enter judgment.").

27 RGM states in its brief that T & S's answer adding reformation was filed after RGM had filed its summary judgment motion. RGM does not claim the pleading was untimely filed nor does the record reflect that it was.

28 The parties do not dispute that T & S purchased RGM's construction services.

29 Moreover, without addressing the propriety of RGM's incorporation of the entire record in response to T & S's motion to reconsider the trial court's order on the partial summary judgment, we do not agree with RGM's contentions that there is absolutely no support for T & S's DTPA claims in the entire record of the case.

30 T & S filed a no-evidence summary judgment motion arguing there was no genuine issue that RGM failed to present any claim to T & S or the architect within the time period required under the subcontract. T & S filed a "Motion for Final Judgment," asserting that its supplemental evidence established RGM judicially admitted that it did not file a claim. The trial court denied both motions.

31 The "Contract Documents listed above" refers to attachments to the subcontract, A through G.

32 This subcontract provision is not a standard AIA clause and the bracketed language reflects agreed upon changes to the subcontract form used, added through the language of Attachment G, "Subcontract Amendments."

33 Incorporation by reference and flow down provisions conveniently serve to incorporate a number of documents into a single contract. T. Bart Gary, *Incorporation by Reference and Flow–Down Clauses*, 10 CONSTRUCTION LAW. 1, August 1990, at *46. As well as being convenient, these provisions also "represent efforts to ensure consistency of obligations throughout the various tiers of the contracting process." *Id.* Therefore, as argued by T & S, we should strive to construe a flow down provision in a manner consistent with other jurisdictions because those provisions are commonly used in construction contracts across jurisdictions. *See also Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 522 (noting that courts construe insurance contracts consistent with other jurisdictions because the provisions are identical across jurisdictions).

34 This interpretation would be consistent with the conclusion that RGM agreed to be bound to the extent of its work to be performed.

35 T & S did argue that the administrative provisions of the General Conditions were incorporated into the subcontract through reference to "Division 01," specifically set forth in Attachment A to the subcontract. According to T & S, under Division 01, tab 1015 in the project manual, entitled "Construction Documents," there is language specifically incorporating the General Conditions. However, as noted by RGM, this specific argument has not been preserved for our review because T & S failed to raise the argument in its initial appellate brief. *See* TEX.R.APP. P. 38.1(h), 38.3; *Triad Home Renovators, Inc. v. Dickey*, 15 S.W.3d 142, 146 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (finding that argument raised in reply brief was not preserved). Moreover, the provisions within the project manual supporting T & S's incorporation by reference argument here were excluded from the summary judgment record through RGM's objections.

36 The Texas Supreme Court recently concluded that "pass-through" claims, as contemplated by this language of the subcontract, are permissible under Texas law despite a lack of privity between the subcontractor and the owner. *See Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 607 (Tex.2004). T & S cites to this decision as support for its argument that the dispute resolution provision of the General Conditions was agreed to by RGM. In *Interstate*, the contractor filed suit against the City of Dallas on behalf of a subcontractor for breach of contract and other causes of action. *Id.* at 608. The City contested the contractor's right to bring suit on behalf of the subcontractor, arguing there was no privity of contract between the City and the subcontractor. *Id.* at 610. The Texas Supreme Court noted in *Interstate* the importance of contractual privity in bringing a cause of action and confined its rationale to construction contracts, stating that "[r]ather than allowing a party to sue another with whom it has no privity, pass-through claims recognize the continued liability of a contractor to its subcontractor.... This liability gives the contractor, who is in privity of a contract with an owner, standing to assert the claims of its subcontractor." *Id.* at 618. However, in this case, there are no claims against the owner, and there is direct contractual privity between RGM and T & S. Therefore, we do not find *Interstate* controlling here.

37 There are no allegations in this case that RGM's claim was one for an extension of time, and therefore, we limit our discussion to claims for extra compensation.

38 To the extent the subcontract's definition as to which claims must be submitted conflicts with the broader "claims" definition under the prime contract, the subcontract language controls.

39 Also, in paragraph 1.2 of the subcontract, the "Contract Documents" are defined as the attachments to the subcontract, Attachments A through G. These attachments do not include the General Conditions. However, the term "Contract Documents" contained in paragraph 4.4 appears to reference the prime contract. Arguably then, the reference to "Contract Documents" in paragraph 4.4 is ambiguous.

40 Also, conditions precedent are not favored in the law, and courts tend to construe contract provisions as covenants rather than as conditions. *See Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex.1990). It is also for this reason that we hesitate to conclude that RGM agreed to the condition precedent provision in the General Conditions by reference to the prime contract.

41 We do not agree with RGM's conclusion that its pay request submitted after receipt of the default letter sufficed as a notice to T & S of its claim. The pay request did not comply with the subcontract claim provisions.

42 In its original answer, T & S generally denied that RGM had performed all conditions precedent to its right to recovery. Although T & S argues this was a sufficient assertion of the condition precedent, under Rule of Civil Procedure 54, this denial is insufficient to require that RGM prove it complied with the condition precedent. *See* TEX.R. CIV. P. 54; *Greathouse v. Charter Nat'l Bank–*

Southwest, 851 S.W.2d 173, 177 (Tex.1992); *Wade & Sons, Inc. v. Am. Standard, Inc.*, 127 S.W.3d 814, 825–26 (Tex.App.-San Antonio 2003, pet. denied).

43 Assuming the requirement under Rule 54—that a party "prove" those conditions precedent specifically denied—is an indication of timeliness under the Rule, proof would be offered at trial or as summary judgment evidence. Here, T & S specifically denied the condition precedent more than one year before submission of the summary judgment motions.

44 In addition, there is evidence in the record that RGM did advise T & S it would communicate with Campbell directly regarding his rejection of the work and T & S did argue this action by RGM amounted to estoppel. Whether RGM's statement would bar its ability to assert the equitable defense of laches also remains a fact issue.

1 Emphasis added.

2 T & S insisted that the concrete formwork needed to be "floated" in an "acceptable manner" before these surfaces could be painted and that if RGM did not commence the work within 72 hours, T & S would retain a third party to do this work. The work described in the letter—"filling and floating"—is not formwork and was not within the scope of RGM's work under the parties' agreement.

3 *See Sage Street Assocs. v. Northdale Const. Co.*, 863 S.W.2d 438, 445 (Tex.1993).

4 *See* plurality opinion, footnote 15.

5 For reasons stated in the plurality opinion, the court is correct in reversing and remanding the trial court's summary judgment in favor of RGM on T & S's DTPA claims and the trial court's order granting sanctions against T & S on T & S's DTPA claims.

1 Also, attached to RGM's Motion for Final Summary Judgment was the sworn testimony of witness Kelly LaGrone who stated: "I think these documents are ambiguous."

2 Briefly, in response to the dissent's comments regarding the logic of our extra-compensation claim analysis, unfortunately the dissent misreads our analysis and interprets it in a vacuum, much like it has the provisions of the subcontract. True, we state in the plurality opinion that "extra-compensation" implies compensation beyond the contract price. *Tribble & Stephens Co. v. RGM Constructors, L.P.*, No. 14–02–01062–CV, 2004 WL 2400983, at *17 (Tex.App.-Houston [14th Dist.] Oct. 28, 2004, no pet. h.). However, the problem with RGM's argument concerning this term is not the meaning given to it, but RGM's suggested point in time that we define it. Certainly, throughout this litigation, RGM has sought the full contract price. Nevertheless, what RGM seeks in this litigation is not determinative of what obligations RGM may or may not have had under the terms of the subcontract. When paragraph 4.4 is read in conjunction with the other provisions of the subcontract, and specifically those set out in the plurality's analysis of the issue, the characterization of the "claim" must be made with reference to the genesis of the parties' dispute. Here, the dispute between the parties arose when T & S notified RGM that Campbell had rejected its work. In its notice, T & S also advised RGM that the deficiencies were contrary to the subcontract specifications found in Section 03300. RGM subsequently met with Campbell, however, it unilaterally determined that the subcontract did not require the surface finishes requested by Campbell. RGM failed to advise either T & S or Campbell of its position and, ultimately, T & S hired another subcontractor to complete the work, invoicing RGM for that cost. RGM then demanded payment under the subcontract and filed this suit to obtain it. Thus, RGM's contention is in fact that T & S wrongfully withheld the contract price because T & S wrongfully required RGM to perform work outside the scope of the subcontract. However, as noted in the plurality opinion, the terms of the subcontract reflect the parties' anticipation that the project may require adjustments or changes in the work and, to minimize disruptions in the work, a method for handling those anticipated changes was prescribed. Whether RGM had an obligation to present its "claim," that is, its contention that it was being asked to perform work outside of the contract, can only be determined with reference to its scope of work under the subcontract. To conclude that RGM's "claim" is not for "extra-compensation" merely because RGM seeks to be paid the contract price, does not give full effect to these applicable subcontract provisions. Finally, we note that the dissent's discussion of "extra-compensation" adds nothing to the conclusion in the plurality opinion that RGM failed to establish it was entitled to judgment as a matter of law.

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle A. General Provisions
Chapter 10. Sanctions for Frivolous Pleadings and Motions (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 10.001

§ 10.001. Signing of Pleadings and Motions

Currentness

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Credits
Added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1, 1995.

Notes of Decisions (89)

V. T. C. A., Civil Practice & Remedies Code § 10.001, TX CIV PRAC & REM § 10.001
Current through the end of the 2013 Third Called Session of the 83rd Legislature

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle A. General Provisions
Chapter 10. Sanctions for Frivolous Pleadings and Motions (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 10.002

§ 10.002. Motion for Sanctions

Currentness

(a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Credits
Added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1, 1995.

Notes of Decisions (10)

V. T. C. A., Civil Practice & Remedies Code § 10.002, TX CIV PRAC & REM § 10.002
Current through the end of the 2013 Third Called Session of the 83rd Legislature

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Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 10

§ 10. Rights of accused in criminal prosecutions

Currentness

Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Credits
Amended Nov. 5, 1918.

Editors' Notes

INTERPRETIVE COMMENTARY

2007 Main Volume

The terminology here used is similar to that of the fifth and sixth amendments of the Constitution of the United States, which drew mainly from the English common law for the guarantees set forth, although in many respects the constitutional rights represent an advance upon English law pertaining to the subject matter as known at the time of the creation of the United States Constitution and its first ten amendments. Guarantees such as these have been included in all of the Constitutions of Texas, minor changes only having been made over the years. The present section is the result of an amendment in 1918.

The right of an accused in a criminal prosecution to a speedy public trial by an impartial jury was a right guaranteed by the common law from the earliest times, and is intended to prevent governmental officials from oppressing the citizen by holding criminal prosecutions suspended over him for an unreasonable length of time, and also to prevent delays and procrastinations by judicial tribunals in the administration of criminal justice. Ex parte Turman, 26 T. 708, 84 Am.Dec. 598 (1863). “A speedy trial means a reasonably speedy trial and the right to it may be secured by the writ of *habeas corpus* or mandamus.” See Rutherford v. State, 16 Tex.App. 649 (1884); State v. Bond (Moreau v. Bond, 114 T. 468, 271 S.W. 379 (1925). See also Vernon's Ann.C.C.P. art. 576.

It is also requisite that the trial be public. “Public trial” does not mean one to which the public at large is admitted. The requirement is met if a reasonable proportion of the public is permitted to attend on an impartial basis. The right is not abridged if in certain emergencies necessary to support public morals, a boisterous and insubordinate audience is expelled to protect an intimidated and embarrassed witness and to clear the court room of all but a reasonable and

respectable number of people. A public trial is designed to protect an accused by permitting the public to see that he is not unjustly condemned and to keep his triers alive to their responsibilities by the presence of spectators. See Grimmett v. State, 22 Tex.App. 36, 2 S.W. 631 (1886) and Kugadt v. State, 38 Cr.R. 681, 44 S.W. 989 (1898). And, when all the public is denied entrance to the court but the judge and his attachés, the due process clause of the fourteenth amendment of the Federal Constitution is violated. In re Oliver, 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682 (1948).

Trial by impartial jury has been considered a bulwark of Anglo-American liberties particularly in criminal cases where it operates as a protection of civil liberties. An impartial jury has been said to be one which favors neither party, which is unprejudiced, disinterested, equitable, and just; and which is composed of jurors who have not prejudged the merits of the case. See Duncan v. State, 79 Cr.R. 206, 184 S.W. 195 (1916).

The right to be informed of the nature and cause of the accusation against him is a fundamental guarantee conferred upon the accused in a criminal prosecution, and enables him to learn in advance of the trial and with reasonable certainty with what he is being charged, so that he can properly prepare his defense. Zweig v. State, 74 Cr.R. 306, 171 S.W. 747 (1914). Thus a constitutional test is here required for a valid indictment or information, and the elements of the offense and every fact or circumstance necessary to complete description thereof should be alleged therein. State v. Huston, 12 T. 245 (1845). Not only must the indictment be drawn with clarity and certainty, but since an accused must be able to understand the nature and cause of the accusation against him, the penal law creating the offense with which he is charged must be sufficiently definite to be understood, otherwise, it is violation of this section. Ex parte Meadows, 133 Cr.R. 292, 109 S.W.2d 1061, and see Note 8 Tex.L.Rev. 253 (1930).

In declaring that the accused shall not be compelled to give evidence against himself, the Constitution guarantees immunity from self-incrimination. Such immunity is granted to prevent repetition of certain inquisitorial proceedings once practiced in England. The principle is hereby established that no one shall be compelled to give testimony which may expose him to prosecution for crimes. Hence, an accused cannot be required to take the stand himself, nor can he be forced to testify. His failure to do so cannot be taken as a circumstance against him and counsel are not permitted to comment thereon. Unless he voluntarily becomes a witness, he is completely immune from inquiry. See Brown v. State, 77 Cr.R. 183, 177 S.W. 1161 (1915); Long v. State, 120 Cr.R. 373, 48 S.W.2d 632 (1931); Vernon's Ann.C.C.P. art. 710. However, the privilege against self-incrimination is not confined to an accused only, but extends to witnesses generally in any type of case, civil or criminal, or in proceedings before a grand jury. See Ex parte Muncy, 72 Cr.R. 541, 163 S.W. 29 (1914); Fleishman v. State, Civ.App., 91 S.W.2d 493 (1936); Ex parte Sanchez, 85 Cr.R. 380, 213 S.W. 271 (1919). A witness, therefore, may refuse to answer questions if his answer thereto might be used as evidence against him; and neither an accused nor a witness may be required to produce books and papers which might furnish incriminating evidence or through which might be disclosed new evidence. See Meredith v. State, 73 Cr.R. 147, 164 S.W. 1019 (1914).

The privilege against self incrimination is a personal privilege for the benefit of the witness and must be explicitly claimed by him. Ex parte Andrews, 51 Cr.R. 79, 100 S.W. 376 (1907). Refusal to answer cannot be justified by a desire to protect others from punishment. Ex parte Copeland, 91 Cr.R. 549, 240 S.W. 314 (1922). In the first instance the witness is the judge as to whether his answer will incriminate him, but in the last it is for the court to say whether his silence is justified and determine whether the witness' contention of self-incrimination is valid. Ex parte Andrews, supra; Sovereign Camp W.O.W. v. Bailey, Civ.App., 163 S.W. 683 (1914). The privilege may be waived. Ex parte Andrews, supra. Finally, if statutory immunity is granted to a witness, he may be compelled to testify. Ex parte Muncy, supra.

The right of the accused to be heard by himself, or by counsel or both is a right which an accused can under no circumstances be deprived. See Anselin v. State, 72 Cr.R. 17, 160 S.W. 713 (1913). English common law was singularly deficient in failing to give a person charged with felony the benefit of counsel for his defense, and not until 1836 was this privilege fully extended. See Cooley, Constitutional Limitations, 405-406 (6th ed. 1890). The

right is extended in order that an accused may be protected from a conviction resulting from his own ignorance of his constitutional and legal rights, and it operates to grant to him the privilege to have counsel of his own choice represent him at every stage of his case, subject of course to his right of waiver. Jackson v. State, 55 Cr.R. 79, 115 S.W. 262 (1908). The privilege also gives to a defendant the right to consult with counsel in private prior to the trial in order to prepare his defense. Turner v. State, 91 Cr.R. 627, 241 S.W. 162, 23 A.L.R. 1378 (1922).

A person charged with crime who has no counsel cannot be denied the right to be heard by himself, nor can he be denied the right to give his version of the facts to this extent in any case; and if he wishes to address the jury concerning the facts it would not be proper to deny this privilege if kept within proper limitations. Leahy v. State, 111 Cr.R. 570, 13 S.W.2d 874 (1928). If the accused is unable to employ counsel, it is the duty of the court to appoint counsel for him in capital cases by Article 494 of the Code of Criminal Procedure. In other cases, the court may appoint counsel in its discretion. Mass. v. State, Cr.App., 81 S.W. 45 (1904).

However, the due process clause of the fourteenth amendment of the Federal Constitution, has been held to place limitations upon the states with respect to counsel. In capital cases the state courts are required to assign counsel whether or not the defendant requests it. Bute v. People of State of Illinois, 68 S.Ct. 763, 333 U.S. 640, 92 L.Ed. 986 (1948). And counsel must have sufficient time in which to prepare the case. Hawk v. Olson, 66 S.Ct. 116, 326 U.S. 271, 90 L.Ed. 61 (1945). In non-capital cases, if the defendant is refused the right to have counsel of his own selection, the court will find a violation of the fourteenth amendment. House v. Mayo, 65 S.Ct. 517, 324 U.S. 42, 89 L.Ed. 739, rehearing denied 65 S.Ct. 689, 324 U.S. 886, 89 L.Ed. 1435 (1945). Otherwise the accused must be given the assistance of counsel only where there are special circumstances showing that otherwise the defendant would not enjoy a fair trial. Bute v. People of State of Illinois, supra.

The right to be confronted with the witnesses against him in criminal prosecutions has as its purpose the protection of an accused against processes of a secret and inquisitorial nature. To satisfy the guarantee, the accused must be personally present when any evidence is introduced against him, the witnesses for the state must be personally present when the accused is on trial, and they must be examined in his presence subject to cross-examination by him. Hill v. State, 54 Cr.R. 646, 114 S.W. 117 (1908); Kemper v. State, 63 Cr.R. 1, 138 S.W. 1025 (1911). The privilege generally prevents depositions or written testimony from being used against an accused, although there are exceptions. See e.g., Dent v. State, 43 Cr.R. 126, 65 S.W. 627 (1901); Patterson v. State, 17 Tex.App. 102 (1884). Too, the article itself expressly permits the taking of depositions and having the evidence admitted under laws provided by the Legislature when the witness resides out of the state, and in anti-trust prosecutions.

The constitution does not expressly confer upon an accused the right to be present at his trial, but the requirement that he shall be confronted by witnesses has that effect to the extent of requiring his presence during their examination. Cason v. State, 52 Cr.R. 220, 106 S.W. 337 (1907). See also Vernon's Ann.C.C.P. art. 580.

The United States Supreme Court has asserted that the right to be present when the defendant's presence has a reasonably substantial relation to the opportunity to be heard, and his right to be confronted by witnesses, is consonant with due process of law under the fourteenth amendment. Snyder v. Commonwealth of Massachusetts, 54 S.Ct. 330, 291 U.S. 97, 78 L.Ed. 674, 90 A.L.R. 575 (1934); In re Oliver, supra. But see, Williams v. People of State of New York, 69 S.Ct. 1079, 337 U.S. 241, 93 L.Ed. 1337, rehearing denied 69 S.Ct. 1529, 337 U.S. 961, 93 L.Ed. 1760, rehearing denied 70 S.Ct. 34, 338 U.S. 841, 94 L.Ed. 514 (1949).

At early common law, a party accused of felony was not permitted to call witnesses to contradict the evidence of the crown. As a consequence he had no opportunity to clear himself by the testimony of witnesses in his favor. This was rectified to a degree in a later period, but, at the time of the construction of the Federal Constitution, English law did not allow the privilege in ordinary capital cases. Therefore, the sixth amendment of that Constitution was a distinct improvement upon the usage of the mother country. The right as set out in Section 10 requires the court to issue

subpoenas or to send for witnesses of the accused and compel their attendance, provided they are in the state for a court cannot compel the attendance of persons outside the state. The constitutional exception recognizes this fact and permits depositions to be used when the witness resides outside the state. The defendant cannot be deprived of this right by the legislature or by the courts, and legislation creating such a deprivation or a rule of court abridging the right is void. Homan v. State, 23 Tex.App. 212, 4 S.W. 575 (1887); Bedford v. State, 91 Cr.R. 285, 238 S.W. 224 (1922).

To complete the constitutional rights of an accused in a criminal prosecution as set forth herein, no person may be held to answer for a criminal offense, unless on indictment of a grand jury except in cases in which the punishment is by fine or imprisonment (misdemeanor cases), cases of impeachment and cases arising in the army or navy, or in the militia when in actual service in time of war or public danger. This provision is substantially an affirmance of the rule of the common law. The requisite of indictment by a grand jury was designed to protect an individual against unjust prosecution without sufficient cause, said indictment informing the accused of the nature of the charges against him so that he may adequately prepare his defense. Zweig v. State, 74 Cr.R. 306, 171 S.W. 747 (1914), and see Vernon's Ann.C.C.P. art. 395. In a felony case the constitution requires an indictment presented by a grand jury and such is essential to a valid trial. Hollingsworth v. State, 87 Cr.R. 399, 221 S.W. 978 (1920). When the offense charged is a misdemeanor an information is sufficient. See Vernon's Ann.C.C.P. arts. 29 and 413.

No clause of the Federal Constitution requires a state to begin any of its criminal prosecutions by grand jury indictment, but there is no doubt that the due process clause of the fourteenth amendment does require an accused to be informed of the nature and cause of the accusation against him for such is fundamental to a fair hearing. Hurtado v. People of California, 4 S.Ct. 111, 292, 110 U.S. 516, 28 L.Ed. 232 (1884).

Notes of Decisions (6280)

Vernon's Ann. Texas Const. Art. 1, § 10, TX CONST Art. 1, § 10
Current through the end of the 2013 Third Called Session of the 83rd Legislature

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Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article V. Judicial Department

Vernon's Ann.Texas Const. Art. 5, § 21

§ 21. County attorneys; district attorneys

Currentness

Sec. 21. A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary, and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years, and until their successors have qualified.

Credits
Amended Nov. 2, 1954.

Editors' Notes

INTERPRETIVE COMMENTARY

2007 Main Volume

It was customary under the English common law, which the colonists brought with them to America, for criminal prosecutions to be conducted by a private prosecutor in the name of the king. Early in the eighteenth century, the colonies began to do away with private prosecutions and to set up public prosecutors. By the end of the century, official prosecutions by public prosecutors had become established as the American system. The three main public prosecutors found in American state government are the state attorney general, the district attorneys, and the county attorneys.

While the *sindico* of the Spanish Mexican municipality [see, Art. 5, Sec. 18] seems to have performed the functions of a county attorney, no constitutional provision was made for a similar official after Texas independence until 1866. Under the Constitutions of 1866 and 1869, a county attorney was appointed by the county board for a four-year term. With the adoption of the Constitution of 1876, the office became elective and the term was changed to two years.

The district attorney, on the other hand, was provided for in the Constitution of 1836. One district attorney was to be appointed for each judicial district. In the Constitution of 1845, the district attorney was made elective by a joint vote of both houses of the legislature and was to hold office for two years. This was amended in 1851, and the office was made elective. The Constitution of 1861 reverted back to the original wording of the Constitution of 1845 and again made the office elective by joint vote of both houses of the legislature for a two year term. The Constitutions of 1866 and 1869 made it an elective office for four years.

The present constitution appears to refer only incidentally to the district attorney, seeming to assume rather than require their existence. “The Legislature may provide for the election of district attorneys in such district, as may be deemed necessary . . .” But the constitution definitely requires the election of a county attorney for counties in which there is not a resident criminal district attorney. Some counties may constitute a criminal district, and in such counties a criminal district attorney and not a county attorney is elected. In other counties there may be several judicial districts, and it appears that in the past it has been the practice to elect a county attorney for such a county and also a district attorney for each judicial district, but in 1927, the legislature provided that in such counties, the county attorney should be the only prosecuting official chosen.

In the more sparsely settled parts of the state, one judicial district may embrace several counties, in which event both county and district attorneys are elected. When such a conflict of jurisdiction occurs, it is made the duty of the district attorney to handle all criminal cases in the district courts, and of the county attorney to prosecute all criminal cases in the courts of his county below the grade of district court.

The overwhelming importance of the offices of public prosecutors arises from the fact that upon the prosecuting attorney rests the power of determining whether prosecution in any given case shall be inaugurated, or, if inaugurated, pushed to a successful conclusion.

In November, 1954, this section was amended increasing the terms of office of County Attorneys and District Attorneys from two to four years.

Notes of Decisions (122)

Vernon's Ann. Texas Const. Art. 5, § 21, TX CONST Art. 5, § 21
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Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure of 1965
Introductory
Chapter One. General Provisions (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 1.02

Art. 1.02. Effective date

Currentness

This Code shall take effect and be in force on and after January 1, 1966. The procedure herein prescribed shall govern all criminal proceedings instituted after the effective date of this Act and all proceedings pending upon the effective date hereof insofar as are applicable.

Credits
Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Notes of Decisions (1)

Vernon's Ann. Texas C. C. P. Art. 1.02, TX CRIM PRO Art. 1.02
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Code of Criminal Procedure (Refs & Annos)
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Introductory
Chapter Two. General Duties of Officers (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 2.01

Art. 2.01. [25] [30] [31] Duties of district attorneys

Currentness

Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties. It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.

Credits

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966. Amended by Acts 1981, 67th Leg., p. 801, ch. 291, § 98, eff. Sept. 1, 1981.

Notes of Decisions (116)

Vernon's Ann. Texas C. C. P. Art. 2.01, TX CRIM PRO Art. 2.01
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Chapter Two. General Duties of Officers (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 2.02

Art. 2.02. [26] [32] [33] Duties of county attorneys

Currentness

The county attorney shall attend the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court. He shall represent the State in cases he has prosecuted which are appealed.

Credits

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966. Amended by Acts 1981, 67th Leg., p. 801, ch. 291, § 99, eff. Sept. 1, 1981.

Notes of Decisions (35)

Vernon's Ann. Texas C. C. P. Art. 2.02, TX CRIM PRO Art. 2.02
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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 One. General Provisions
Rule 1. Scope of Rules; Local Rules of Courts of Appeals (Refs & Annos)

TX Rules App.Proc., Rule 1.1

1.1. Scope

Currentness

These rules govern procedure in appellate courts and before appellate judges and post-trial procedure in trial courts in criminal cases.

Credits
Eff. Sept. 1, 1997.

Notes of Decisions (5)

Rules App. Proc., Rule 1.1, TX R APP Rule 1.1
Current with amendments received through April 15, 2013

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part I. General Rules (Refs & Annos)

TX Rules of Civil Procedure, Rule 2

Rule 2. Scope of Rules

Currentness

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

Credits

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Sept. 20, 1941, eff. Dec. 31, 1941; June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; April 10, 1986, eff. Sept. 1, 1986.

Editors' Notes

GENERAL COMMENTARY--1966

Following is an excerpt from Stayton, Analysis of Changes, 4 Texas Bar J. 667 (1941), pertaining to the 1941 Amendment.

"The Court makes it plain that the procedure in all kinds of probate proceedings in the county court, in cases of bail bond and recognizance forfeitures, and in tax suits is governed by the statutes wherever they differ from the rules."

The 1943 and 1947 amendments make clear the inapplicability of the rules to special statutory proceedings, insofar as statutory rules of procedure are specifically prescribed for such proceedings and differ from these rules. These special proceedings appear under the following titles in the Revised Civil Statutes:

"Adoption; apprentices; arbitration; assignments for creditors; election contests; eminent domain (condemnation); escheat; estates of decedents, minors, persons non compos mentis and habitual drunkards, except appeal and certiorari; exemption of homestead (determining excess); feeble-minded persons, proceedings for; fences, husband and wife (emancipation, etc., divorce); minors (removal of disabilities); name (change of); officers (removal of); lunacy proceedings; juvenile courts (custody of delinquent children); rights of married women." See Cross References.

There are also some special proceedings of a civil nature provided for in the Penal Code. See in this connection Hallum v. Texas Liquor Control Board, Civ.App.1943, 166 S.W.2d 175 (error refused).

Notes of Decisions (29)

Vernon's Ann. Texas Rules Civ. Proc., Rule 2, TX R RCP Rule 2
Current with amendments received through April 15, 2013

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