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

MOTION FOR DAMAGES

TO THE HONORABLE THIRD COURT OF APPEALS:

Pursuant to Texas Rule of Appellate Procedure 45, 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

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

and numbered appeal, through their attorney of record, file this Motion for Damages, and respectfully show this Court the following:

1. Texas Rule of Appellate Procedure 45 states in pertinent part: "If the court of appeals determines that an appeal is frivolous, it may--on motion of any party or on its own initiative, after notice and a reasonable opportunity for response--award each prevailing party just damages."[2] To determine whether an appeal is frivolous, the Court looks at the record from the viewpoint of the Appellant and decides whether he had reasonable grounds to believe the case could be reversed.[3]

2. Appellant appealed an "Order Denying Writ Of Certiorari" arguing the district judge erred by not following the procedure outlined in Local Government Code § 211.011.[4] Section 211.011 authorizes a judicial review of a board of adjustment decision, and states in part, "[a]ny of the following persons may present to a district court…a verified petition stating that the decision of the board of adjustment is illegal…."[5] Appellant has shown through his brief, motion for sanctions, and verified petition filed with the district court that he knew, or should

---

[2] Tex. R. App. P. 45.
[3] *See Zeifman v. Michels*, 03-12-00114-CV, 2013 WL 4516082 (Tex. App.—Austin Aug. 22, 2013, no pet.); *see also Hunt v. CIT Group/Consumer Fin., Inc.*, 03-09-00046-CV, 2010 WL 1508082 (Tex. App.—Austin Apr. 15, 2010, pet. denied); *see also Easter v. Providence Lloyds Ins. Co.*, 17 S.W.3d 788, 792 (Tex. App.—Austin 2000, pet. denied) (sanctions unwarranted against ultimately unsuccessful party when she had reasonable expectation of reversal and there had been no showing that she pursued appeal in bad faith).
[4] *See* Clerk's Record; *see also* Appellant's Br. 12.
[5] *See* Tex. Loc. Gov't Code § 211.011 (West 2013).

have known, there was no action taken by the Llano Board of Adjustment. The action taken, that is, the enactment of Ordinance No. 1247, was a legislative act by the Llano City Council. The Llano Board of Adjustment is not mentioned once in Appellant's verified petition that was submitted to the district court. The Appellant's verified petition states, "[petitioner] pursuant to Texas Local Government Code Section 211.011 petitions the Court for a *Judicial Review of Llano City Planning and Zoning Commission and Llano City Council*."[6] In his Motion for Sanctions, Appellant discusses the "amendments to Ordinance 1247," and in his brief Appellant states "[t]he District Judge denied my petition for judicial review of a *zoning ordinance change* saying that I did not follow proper procedure by not notifying the opposing sides."[7] Appellant incorrectly challenged the legislative act of the Llano City Council by filing a petition under Local Government Code § 211.011 which only applies to a zoning board of adjustment. Based on the plain language of § 211.011 and the statements made by Appellant in his brief and motions, it is unreasonable for Appellant to believe the denial of the writ would be overturned and thus Appellant's appeal is frivolous. Texas Courts of Appeal have also cited various other factors as demonstrating that an appeal is frivolous.

[6] *See* Clerk's Record, Appellant's Verified Pet. (emphasis added).
[7] *See* Appellant's Mot. Sanctions 2; *See also* Appellant's Br. 12 (emphasis added).

3. First, courts have cited an appellant ignoring well-settled law without making any effort to argue for change in that law as a factor to be considered in awarding damages.[8] Here, Appellant argues the district judge erred by not following the process under Local Government Code § 211.011. However, as stated above, the plain language of § 211.011 shows that it is intended to be used to challenge the decision of a zoning board of adjustment, not a legislative act of a city council. Appellant cites no case law to support his argument that § 211.011 applies to the facts of this case. For example, Appellant summarily states, "Thus: 1. Code 211.011 is the sole procedure for a zoning judicial review and is the one I requested."[9] Appellant's arguments are based on his own opinion and interpretation of Texas law. Further, Appellant has not made any policy arguments or cited any case law arguing that § 211.011 should be changed to authorize the challenge of a legislative act of a city council. Appellant's disregard of well-settled law and lack of an argument to change the law weigh in favor of this Court awarding damages to the Appellees.

4. Second, courts have held that an appeal brought when the court clearly has no jurisdiction is frivolous, particularly where the party makes no effort to assert

---

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

[9] Appellant's Br. 13.

why jurisdiction is proper.[10] Appellees, in their Motion For Involuntary Dismissal and Reply Brief, contended that this Court does not have jurisdiction because the trial court lacked subject matter jurisdiction, personal jurisdiction over the Appellees; and in the alternative, that the order appealed from, an "Order Denying Writ of Certiorari" under § 211.011 is not a final judgment and therefore is not appealable.[11] Appellees cited *Hagood v. City of Houston Zoning Board of Adjustment*, to support their contention that the denial of the writ is not a final appealable judgment. The court in *Hagood* held:

> "It does not appear to be an abuse of discretion for the district court to have denied the writ of certiorari. However, the denial of the writ does not end this case. TEX. LOC. GOV'T CODE ANN § 211.011(f) prescribes the final decisions the trial court may reach: "The court may reverse or affirm, in whole or in part, or modify the decision that is appealed." Jurisdiction of this Court is vested only in cases where a final judgment has been rendered, or where a statute specifically authorizes an interlocutory appeal. Until the district court renders a final judgment which disposes of all parties and all issues pending, this Court lacks jurisdiction to review the merits of this case. Accordingly, we dismiss this appeal for want of jurisdiction."[12]

Appellees, through counsel, conferenced with Appellant before submitting their Motion For Involuntary Dismissal, and after Appellees explained their reasoning for seeking dismissal Appellant opposed the motion. Since that time Appellant has

---

[10] *See Elm Creek Villas Homeowner Ass'n, Inc v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 155 (Tex. App.—San Antonio 1996, no writ); *see also Diana Rivera & Assoc.*, 986 S.W.2d at 799.
[11] *See* Appellees' Mot. Involuntary Dismissal; *see also* Appellees' Reply Brief.
[12] *Hagood v. City of Houston Zoning Bd. of Adjustment*, 982 S.W.2d 17, 18-19 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

continued to file motions in this appeal and has yet to provide a coherent argument, citing case law or statutory authority in support thereof, as to why this Court has jurisdiction over this appeal. Appellant did not seek to distinguish the *Hagood* case in his response to Appellees' motion, nor did he cite contradictory case law or statutes authorizing this appeal. Appellant's disregard of case law cited by Appellees which clearly shows this Court does not have jurisdiction weighs in favor of this Court awarding damages to the Appellees.

5. Third, courts have cited briefing with no citations to the record or to legal authorities, or relying on materials outside of the record as factors to be considered in awarding damages.[13] Appellant's brief contains no citations to case law.[14] While Appellant cites four statutory provisions, he interprets these based on his own opinion, rather than citing judicial opinions interpreting the statutes and their applicability. Throughout his brief, Appellant relies on materials outside the record. For example, his statement of facts is based on telephone conversations and email correspondences that are outside the record and unverified. Further, Appellant cites these email correspondences and telephone conversations as support for his arguments. Appellant has filed multiple motions in this appeal none

---

[13] *See Chapman v. Hootman*, 999 S.W.2d 118, 124-25 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Tate v. E.I. Du Pont de Nemours & Co., Inc.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *see also Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 306 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also Harris v. Schepp*, 818 S.W.2d 530, 531 (Tex. App.—Fort Worth 1991, no writ).

[14] *See* Appellant's Br. 4.

of which cite a single case supporting his positions. Appellant's entire appeal is based on his own opinion and interpretation of the law. Appellant opposes the most elementary of propositions, such as this Court having the authority to determine whether it has subject matter jurisdiction over this appeal, without citing a single case to support his argument.[15] Appellant's failure to cite legal authorities supporting his arguments and reliance on material outside the record weigh in favor of this Court awarding damages to the Appellees.

6. Fourth, this Court has held that "although bad faith is no longer dispositive or necessarily even material to deciding whether an appeal is frivolous, the presence of bad faith may be relevant to determining the amount of the sanction."[16] As shown in the paragraphs above, Appellees contend there is an absence of legal merit in Appellant's arguments. Appellant's "arguments do not have a reasonable basis in law so as to constitute an informed, good-faith challenge to a trial court judgment."[17] Therefore, Appellees contend Appellant's appeal is both frivolous and brought in bad faith.

---

[15] *See* Appellant's Response To Appellees' Mot. For Involuntary Dismissal 2, 3; *see also* Appellant's Response To Appellees' Br. 2; *see also In re United Services Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (not only may an issue of subject matter jurisdiction be raised for the first time on appeal by the parties or by the court, a court is obliged to ascertain that subject matter jurisdiction exists regardless of whether the parties questioned it).

[16] *Hunt v. CIT Group/Consumer Fin., Inc.*, 03-09-00046-CV, 2010 WL 1508082 (Tex. App.—Austin Apr. 15, 2010, pet. denied).

[17] *Id* (quoting *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (per curiam)).

7. Appellees recognize that the question of whether to grant sanctions is a matter of discretion, which this Court exercises with prudence and caution, and only after careful deliberation.[18] Appellees contend, as one Texas court of appeals has stated, "[t]here is no room at the courthouse for frivolous litigation. When a party pursues an appeal that has no merit, it places an unnecessary burden on both the appellee and the courts. More importantly, it unfairly deprives those litigants who pursue legitimate appeals of valuable judicial resources."[19] Appellant's frivolous appeal, and multiple motions, based on inaccurate and unsupported interpretations of the law has imposed unwarranted costs on the taxpayers of the City of Llano. Appellant's frivolous appeal also detrimentally affects litigants pursuing legitimate appeals by taking up this Court's valuable time. Appellees respectfully request that this Court hold Appellant accountable for his actions in filing this frivolous appeal.

Prayer for Relief

Therefore, Appellees respectfully request pursuant to Texas Rule of Appellate Procedure 45 that this Court award Appellees damages for Appellant's frivolous appeal in the amount of $13,692.25;[20] and that this Court issue any other order to which Appellees are entitled.

---

[18] *Zeifman*, 2013 WL 4516082.
[19] *Chapman*, 999 S.W.2d at 125.
[20] *See* Aff. Cary L. Bovey

Respectfully submitted,

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
State Bar No.: 02717700
Attorney for Appellees

CERTIFICATE OF CONFERENCE

I hereby certify that on December 23, 2013, in compliance with Texas Rule of Appellate Procedure 10.1(a)(5), a reasonable attempt to confer with Appellant, Mr. Marc Sewell, acting pro se in this matter, was made via telephone and email correspondence. Appellant was notified if he did not respond it would be assumed Appellant opposes the Motion.

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Bar Card: 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 23, 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

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Bar Card: 02717700
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), this motion contains 1,946 words.

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Bar Card: 02717700
Attorney for Appellees

APPENDIX

TABLE OF CONTENTS

No. 03-13-00580-CV

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

AFFIDAVIT OF CARY L. BOVEY

STATE OF TEXAS	§	
	§	
COUNTY OF WILLIAMSON	§	

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

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

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

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

Sanctions; preparation of Appellees' Response to Appellant's Motion For Sanctions; review and evaluation of letters and emails from Mr. Marc Sewell, Appellant; preparation of Appellees' Motion For Damages; legal research regarding the issues raised in Appellant's brief and motions and consultation with Appellees to provide briefings of the matters involved in the appeal and proposed responses; and other relevant legal services associated with this appeal. The amount requested reflects the number of hours spent and the amount charged by hour at a rate of $125.00 per hour, and expenses incurred, from the inception of my firm's retention with regard to this appeal through December 21, 2013. All of the time spent and expenses incurred were reasonable and necessary.

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

5. Bearing in mind the time and labor required, the skill required, the difficulty of the questions, the preclusion of other employment, the customary fees charged in such a case, the time limits, the experience, reputations and abilities of the attorneys, the nature and length of the professional relationship with the client, it is my opinion that (1) reasonable and necessary attorney's fees for legal services rendered through the date of filing of the Appellees' Motion For Damages would be the sum of $13,589.50; (2) reasonable and necessary costs and expenses to date would be the sum of $102.75.

Further Affiant sayeth not.

Signed this 21st day of December, 2013.

Cary L. Bovey

Subscribed and sworn to before me by the said Cary L. Bovey on this 21st day of December, 2013.

Notary Public of the State of Texas

My commission expires: Oct. 01, 2015

CHARLES R. CORE
MY COMMISSION EXPIRES
October 1, 2015

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.

End of Document

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

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

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

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

Affirmed.

Attorneys and Law Firms

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

Jolene Wilson-Glah, Houston, for appellee.

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

Opinion

OPINION

MURPHY, Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No. 14–98–00817–CV. | July 29, 1999.

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

Affirmed.

Attorneys and Law Firms

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

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

Panel consists of Justices YATES, FOWLER and FROST.

Opinion

O P I N I O N

KEM THOMPSON FROST, Justice.

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

Factual Background

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

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

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

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

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

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

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

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

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

Issues on Appeal

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

**122 Standard of Review for Summary Judgment*

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

Oral Testimony at the Summary Judgment Hearing

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

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

Exclusion of Summary Judgment Evidence

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

Contract Interpretation

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

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

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

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

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

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

Sanctions for Filing of Frivolous Appeal

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

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

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

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

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

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

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

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

The judgment of the trial court is affirmed.

Footnotes

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

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

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

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

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

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

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

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

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

Appeal dismissed and sanctions imposed.

Attorneys and Law Firms

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

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

Before Justices DORSEY, CHAVEZ, and RODRIGUEZ.

Opinion

OPINION

RODRIGUEZ, Justice.

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

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

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

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

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

MOTION TO DISMISS

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

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

THE ORDER DID NOT APPOINT A RECEIVER

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

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

(2) receive rents;

(3) collect and compromise demands;

(4) make transfers; and

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

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

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

THE ORDER DID NOT IMPOSE A TEMPORARY INJUNCTION

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

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

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

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

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

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

***798**

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

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

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

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

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

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

MOTION FOR SANCTIONS

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Footnotes

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

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

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

17 S.W.3d 788
Court of Appeals of Texas,
Austin.

Bonnie EASTER as next friend of M.D.E., Appellant,
v.
PROVIDENCE LLOYDS
INSURANCE COMPANY, Appellee.

No. 03–99–00426–CV. | May 4, 2000.

Mother, as foster child's next friend, brought action against foster parents' homeowners' insurer to recover judgment against the foster parents for sexual abuse. The 126th District Court, Travis County, F. Scott McCown, J., entered summary judgment in favor of insurer. Mother appealed. The Court of Appeals, Jones, J., held as a matter of first impression that: (1) child was a "resident" of the foster parents' household and was an "insured" under their policy, and (2) the household exclusion of liability coverage thus applied.

Affirmed.

Attorneys and Law Firms

***789** Kenneth Casey Goolsby, Bailey & Cooley, L.L.P., Tyler, for appellant.

Michael Sean Quinn, Sheinfeld, Maley & Kay, P.C., Austin, for appellee.

Before Justices JONES, KIDD and PATTERSON.

Opinion

J. WOODFIN JONES, Justice.

The opinion and judgment issued herein on March 9, 2000 are withdrawn, and the following opinion is substituted in lieu of the earlier one.

Appellant, Bonnie Easter as next friend of M.D.E., sued M.D.E.'s foster parents, Joseph and Grace Bossette, for injuries M.D.E. sustained while in the Bossette home. Easter obtained a default judgment against the Bossettes, then sued appellee, Providence Lloyds Insurance Company, the Bossettes' homeowners' insurer. The district court granted Providence Lloyds' motion for summary judgment. On appeal, Easter contends the trial court erred in granting Providence Lloyds' motion. Because we conclude that M.D.E. was a "resident" of the Bossette household and therefore an "insured" precluded from recovering under the Bossettes' homeowners' policy, we will affirm the district court's judgment. In addition, we deny Providence Lloyds' motion for frivolous appeal damages under Texas Rule of Appellate Procedure 45.

FACTUAL AND PROCEDURAL BACKGROUND

Bonnie Easter was having a difficult time dealing with the emotional and behavioral problems her daughter M.D.E. was exhibiting, and in February 1995 she placed M.D.E. in the care of Joseph and Grace Bossette, licensed foster parents. M.D.E. was nine years old at the time. Easter intended the placement to be for no more than six months.

Soon after M.D.E.'s arrival in the Bossettes' home, Joseph Bossette began sexually molesting her. After approximately five months, M.D.E. reported the abuse to Child Protective Services. She was removed from the Bossettes' home and returned to her mother. In February 1996, Easter brought suit on M.D.E.'s behalf against Joseph Bossette for an intentional tort for committing the abuse, and against Grace Bossette for negligence for failing to stop or report the molestation. A default judgment was rendered against the Bossettes for $300,000. Easter then brought the present action against Providence Lloyds to enforce the judgment against the Bossettes' homeowners' insurance carrier.

On appeal, Easter contends the district court erred in granting summary judgment for Providence Lloyds because genuine issues of material fact exist as to: (1) whether foster parenting is a "business pursuit" for purposes of an exclusionary clause in the Bossettes' homeowners' policy; (2) whether Grace Bossette's negligence was an activity "ordinarily incidental to a non-business pursuit" and thus excepted from the exclusion; (3) whether M.D.E. was a "resident" of the Bossette household and therefore an "insured" not eligible for recovery under the policy; and (4) whether Providence Lloyds was prejudiced by the Bossettes' alleged failure to cooperate in the defense of the underlying lawsuit. Additionally, Easter contends that the district court erred because as a matter of law: (1) the term "resident" in the insurance contract is vague and raises ***790** an issue of material fact; and (2) Grace Bossette acted negligently, not intentionally; thus, her acts were not excluded under the policy.

DISCUSSION

In her third issue on appeal, Easter contends that M.D.E. was not a "resident" of the Bossettes' household. If M.D.E. is deemed a resident, she is an "insured" under the policy; the policy excludes coverage for "bodily injuries sustained by an insured."

The standard for reviewing a trial court's grant of a motion for summary judgment is well established: (1) the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex.1985). The function of summary judgment is not to deprive litigants of the right to trial by jury, but to eliminate patently unmeritorious claims and defenses. *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex.1972).

[1] Under the Bossettes' contract for homeowners' insurance, personal liability coverage does not apply to injuries to "insureds." "Insureds" are defined as: "you and residents of your household who are: a) your relatives; or b) other persons under the age of 21 and under the care of [Joseph or Grace Bossette]." M.D.E. was undisputedly under 21 and under the care of the Bossettes; therefore, the pivotal question is whether M.D.E. was a "resident" of the Bossette household.

In general, Texas cases determining residency have relied on the child's relationship to the household, the nature of the child's stay in the home, and the intent of the parties. In*Hartford Casualty Insurance Co. v. Phillips*, 575 S.W.2d 62 (Tex.Civ.App.—Texarkana 1978, no writ), a fourteen-year old boy left some clothes at his mother's home and visited her regularly. *Id.* at 63. Even though his mother had been awarded legal custody, the boy lived primarily with his father. *See id.* Nonetheless, he was held to be a resident of his mother's home for insurance purposes. *See id.* In *Travelers Indemnity Company v. Mattox*, 345 S.W.2d 290 (Tex.Civ.App.—Texarkana 1961, writ ref'd n.r.e.), the court upheld a jury finding that a minor son living temporarily away from his father was a resident of his father's home under an auto insurance policy. *Id.* at 292. Most of the son's personal belongings were still at his father's home, and he intended to return there to live. *See id.* at 291. In each of these cases, the child had a blood relationship with others in the household despite having an insignificant presence in the home. Although the children did not regularly live in the household, attend school from there, or even regularly eat meals there, the combination of their relationship to the household and the intent of the parties to continue that relationship was enough to establish residency.

M.D.E. presents a different scenario. A foster parent/child relationship is not as close or as permanent as a normal parent/child relationship; however, M.D.E.'s presence in the Bossettes' home was much more profound than the presence of the children in either *Phillips* or *Mattox*. It is undisputed that, for a period of at least five months, M.D.E. lived in the Bossette home, ate her meals there, and shared a bedroom with other foster children over whom the Bossettes had day-to-day authority and responsibility. Her relationship to the household and the nature of her stay convince us that M.D.E. was a resident of the Bossettes' home during her five-month stay there.

***791** Easter argues that M.D.E. was still a resident of her mother's home and therefore could not *also* be a resident in the Bossettes' home. She cites several cases that indicate that one can be a member of a household even if temporarily absent, asserting "[t]he real test is whether the absence of the party of interest from the household of the alleged insured is intended to be permanent or only temporary—i.e., whether there is physical absence coupled with an intent not to return." *Southern Farm Bureau Cas. Ins. Co. v. Kimball*, 552 S.W.2d 207, 208 (Tex.Civ.App.—Waco 1977, writ ref'd n.r.e.). Although M.D.E. was physically absent from her mother's home, there is evidence to show that the absence was only temporary and that she would return after her mother "got back on her feet." Based on these facts, one could conclude that M.D.E. was a resident of her mother's household even as she was living with the Bossettes. This does not, however, preclude her from being a resident of the Bossette household at the same time. *See Hartford*, 575 S.W.2d at 63. [1]

[2] The *Hartford* court stated a person could have more than one residence, especially when that person is a minor. *See id.* We agree. Therefore, even assuming M.D.E. was still a resident in her mother's home, this does not foreclose the possibility that she was also a resident of the Bossette household. As stated above, we are satisfied that where, as

here, a child lives in a foster family home for a period of five months, the child is, as a matter of law, a resident of that household.

Whether a foster placement establishes residency for insurance purposes is a question of first impression in Texas. Accordingly, Easter urges us to look at how other jurisdictions have resolved the same issue. Easter argues that under the residency test used in several other jurisdictions, M.D.E. would not be considered a resident of the Bossette household for insurance purposes. *See Pamperin v. Milwaukee Mut. Ins. Co.*, 55 Wis.2d 27, 197 N.W.2d 783, 787 (1972). In *Pamperin*, the Wisconsin Supreme Court held the child is a resident of a home where the parties are (1) living under the same roof; (2) in a close, intimate, and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and where it is reasonable to conclude that the parties would consider the relationship "in contracting about such matters as insurance or in their conduct in reliance thereon." *Id.* at 788–89. These factors are to be considered as a whole, with no one factor predominating. *See id.* at 789. [2]

We find it unnecessary to adopt *Pamperin* in the present case but briefly note that close analysis of the *Pamperin* test and accompanying case law shows that, even under the *Pamperin* analysis, M.D.E. would be considered a resident of the Bossette household.

It is uncontroverted that M.D.E. was living under the same roof as the Bossettes; thus, only the last two factors —intimacy of the relationship and duration of stay—are disputed. Easter asserts that M.D.E. was not in a "close, intimate and ***792** informal relationship" because the Bossettes abused and threatened her. We disagree. Foster parents by nature stand in an intimate relationship of care and responsibility vis-à-vis foster children, irrespective of the quality of the care actually provided by an individual foster family. Easter's logic would mean that no child could be a resident of a household where she was abused, clearly an unreasonable result.

Regarding the third factor, the *Pamperin* court noted: "[T]he subjective or declared intent ... while a fact to be considered, is not controlling, but the intended duration oftentimes must be determined only after a thorough examination of all the relevant facts and circumstances surrounding the relationship." *Id.* at 788. In other words, merely placing the label "temporary" on a stay that would otherwise be considered substantial does not change the fundamental nature of the relationship. While all foster family relationships are necessarily temporary, some are "temporary" for several years. After five months of living in the Bossette's home and being treated as a member of the family, we believe that M.D.E. was a resident of the Bossette household. [3]

CONCLUSION

Because M.D.E. lived in the Bossette home in a family-like environment for a period of at least five months, we hold that, as a matter of law, M.D.E. was a resident of the Bossette household. She is therefore an insured under the policy and is precluded from recovering for the injuries she sustained in the Bossettes' home. Because Providence Lloyds has shown that it is entitled to judgment as a matter of law, we need not address Easter's other issues on appeal. We affirm the trial court's grant of summary judgment.

[3] Regarding Providence Lloyd's motion for frivolous-appeal damages, we conclude that Easter had a reasonable expectation of reversal and there has been no showing that she pursued this appeal in bad faith. *See In re Long*, 946 S.W.2d 97, 99 (Tex.App.—San Antonio 1997, no writ). Providence Lloyd's motion for damages under Texas Rule of Appellate Procedure 45 is denied.

Footnotes

1 Providence Lloyds asserts M.D.E. was actually with the Bossettes for a span of seven to eight months. The record is inconclusive on the actual length of M.D.E.'s stay with the Bossettes. Giving the non-movant every positive inference, we defer to Easter's evidence that M.D.E. stayed in the Bossettes' home for five months of an intended six-month stay.

2 Other jurisdictions have also adopted Wisconsin's *Pamperin* test. *See Blanchard v. Peerless Ins. Co.*, 958 F.2d 483, 489 (1st Cir.1992); *Nationwide Mut. Ins. Co. v. Budd–Baldwin*, 947 F.2d 1098, 1102 (3d Cir.1991); *State Farm Fire & Cas. v. Vaughn*, 803 F.Supp. 1446, 1450 (S.D.Ind.1992); *Dartez v. Atlas Assur. Co.*, 721 So.2d 109, 112 (La.Ct.App.1998); *Donegal Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 377 Pa.Super. 171, 546 A.2d 1212, 1216 (1988); *Allstate Ins. Co. v. Tomaszewski*, 180 Mich.App. 616, 447 N.W.2d 849, 851 (1989).

3 Applying the *Pamperin* factors to a foster child situation very similar to the present case, the Wisconsin Court of Appeals found a child to be a resident of a foster home as a matter of law. *See Waite v. Travelers Ins. Co.*, 112 Wis.2d 18, 331 N.W.2d 643, 645 (1983). The court also held that a foster family is a "close, intimate and informal" relationship by design and thus easily meets the second factor of the *Pamperin* test.

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

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

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

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

Appeals dismissed and sanctions imposed.

Attorneys and Law Firms

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

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

Before RICKHOFF, LÓPEZ and GREEN, JJ.

Opinion

OPINION

GREEN, Justice.

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

BACKGROUND

The Cast of Characters

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

The Agreements

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

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

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

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

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

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

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

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

The Dispute

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

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

DISCUSSION

Introduction

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

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

Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appellate Sanctions

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

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

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

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

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

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

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

Footnotes

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

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

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

End of Document

826 S.W.2d 124
Supreme Court of Texas.

GENERAL ELECTRIC CREDIT CORPORATION
v.
MIDLAND CENTRAL APPRAISAL DISTRICT, et al.

No. D–1170. | Oct. 16, 1991. |
Rehearing Overruled April 22, 1992.

Taxpayer filed suit against county taxing authorities seeking judicial determination of legal situs of aircraft for taxation purposes and challenging constitutionality of Tax Code. County appraisal district counterclaimed for delinquent taxes on aircraft and county intervened for delinquent taxes. The District Court, No. 142, Midland County, Pat M. Baskin, J., granted summary judgment for appraisal district and county on their counterclaim and granted summary judgment for all taxing authorities on taxpayer's legal situs and constitutional claims. On appeal, the El Paso Court of Appeals, 808 S.W.2d 169, affirmed and awarded damages to taxing authorities, and taxpayer appealed. The Supreme Court held that award of damages was not justified.

Reversed in part.

Attorneys and Law Firms

***124** Smilie Watkins, Dallas, Greg White, Waco, for appellant.

Roy L. Armstrong, Austin, Robert Mott, Houston, Mark H. Dettman, Midland, Dan Morales, Bill Kimbrough, Austin, for appellees.

Opinion

PER CURIAM.

We consider whether the court of appeals properly assessed damages against General Electric Credit Corporation under Rule 84 of the Texas Rules of Appellate Procedure. Under the circumstances present in this cause, we conclude that the damages are not justified.

Midland County and Freestone County taxing authorities [1] assessed taxes on a Lear Jet aircraft owned by General Electric Credit Corporation ("GECC"). GECC neither filed a formal tax protest with the appraisal review board of either county as required under sections 41.41–41.44 of the Texas Tax Code nor otherwise attempted to utilize the administrative hearing procedures under the Texas Tax Code. Instead, GECC filed suit against the Midland County and Freestone County taxing authorities seeking a judicial determination of the legal situs of the aircraft for taxation purposes and challenging the constitutionality of the Tax Code. Midland Central Appraisal District counterclaimed for delinquent 1987 taxes on the aircraft and Midland County intervened for delinquent 1987 taxes. The trial court granted summary judgment for Midland Central Appraisal District and Midland County on their counterclaim for delinquent 1987 taxes. The trial court also granted summary judgment for all of the taxing authorities on GECC's legal situs and constitutional claims. The court of appeals affirmed, holding that GECC's failure to exhaust the administrative procedures of the Tax Code deprived the court of jurisdiction to hear the claims. The court of appeals also awarded damages under ***125** Rule 84 of the Texas Rules of Appellate Procedure [2] to each of the taxing authorities in the amount of ten times total taxable costs. 808 S.W.2d 169.

GECC did not follow the administrative procedures set out in the Tax Code, despite a significant body of Texas law requiring a taxpayer to exhaust administrative remedies before challenging a tax assessment. *See, e.g., Webb County Appraisal Dist. v. New Laredo Hotel,* 792 S.W.2d 952, 954 (Tex.1990); *Dallas County Appraisal Dist. v. Lal,* 701 S.W.2d 44, 46 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). However, GECC had at least an arguable basis for refusing to follow the Tax Code provisions, including cases holding that a party who avails itself of the benefits of the Texas Tax Code may not challenge the constitutionality of that statute. *See, e.g., Birdville Indep. School Dist. v. First Baptist Church of Haltom City,* 788 S.W.2d 26, 30 (Tex.App.—Fort Worth 1988, writ denied); *Hurst v. Guadalupe County Appraisal Dist.,* 752 S.W.2d 231, 232–33 (Tex.App.—San Antonio 1988, no writ). GECC's brief was well-researched and raised several arguable points of error. GECC's arguments, even if unconvincing, had a reasonable basis in law and constituted an informed, good-faith challenge to a trial court judgment. As a result, under the circumstances present in this cause, an award of damages under Rule 84 was not justified.

Pursuant to Rule 170 of the Texas Rules of Appellate Procedure, a majority of the court grants General Electric Credit Corporation's application for writ of error and, without hearing oral argument, reverses that part of the judgment

of the court of appeals assessing Rule 84 damages against General Electric Credit Corporation.

Footnotes

1 The "Midland County and Freestone County taxing authorities" include the Midland Central Appraisal District and Appraisal Review Board of Midland Central Appraisal District, Freestone County Appraisal District and Appraisal Review Board of Freestone County, Midland County and Freestone County.

2 Rule 84 provides, in pertinent 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 appellee 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.

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

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

No. 01–97–00172–CV. | March 5, 1998.

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

Dismissed.

Mirabal, J., filed dissenting opinion.

Attorneys and Law Firms

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

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

Before NUCHIA, MIRABAL and O'CONNOR, JJ.

Opinion

***18 OPINION**

NUCHIA, Justice.

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

BACKGROUND

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

DISCUSSION

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

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

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

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

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

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

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

MIRABAL, J., dissenting.

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

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

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

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

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

Accordingly, I dissent.

Procedure

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

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

The Pleadings

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

VII

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

....

IX

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

WHEREFORE, PREMISES CONSIDERED, plaintiffs request that:

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

2. The cause be removed to this court;

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

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

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

....

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

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

....

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

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

Conclusion and Prayer

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

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

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

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

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

ORDERED that the Petition for Writ of Certiorari be DENIED.

(Emphasis added).

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

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

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

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

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

Footnotes

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

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

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

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

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

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

Affirmed.

Attorneys and Law Firms

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

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

Before FARRIS, LATTIMORE and DAY, JJ.

Opinion

OPINION

FARRIS, Justice.

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

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

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

The judgment of the trial court is affirmed.

End of Document

2010 WL 1508082
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

Brian Paul HUNT, Appellant
v.
CIT GROUP/CONSUMER
FINANCE, INC., Appellee.

No. 03-09-00046-CV. | April 15, 2010.

From the District Court of Travis County, 345th Judicial District, No. D-1-GN-06-003799, Stephen Yelenosky, Judge.

Attorneys and Law Firms

Brian Paul Hunt, Austin, TX, pro se.

Michael Lin, Joanne M. Ericksen, Gregory A. Balcom, Balcom Law Firm, P.C., Houston, TX, for appellee.

Before Chief Justice JONES, Justices PEMBERTON and WALDROP.

Opinion

MEMORANDUM OPINION

BOB PEMBERTON, Justice.

***1** Brian Paul Hunt appeals a district court's judgment in favor of appellee CIT Group/Consumer Finance (CIT) on claims of wrongful foreclosure and fraud. The judgment declared void a foreclosure sale of real property and a subsequent conveyance of the property, awarded CIT $58,000 in attorney's fees, and granted CIT other relief. We will affirm the judgment. Also, on motion of CIT, we will award CIT $5,000 as just damages against Hunt for filing a frivolous appeal.

BACKGROUND

The real property at issue in this case is a condominium unit on Bee Caves Road in Austin. The jury heard evidence that, in 2003, the original owners of the property, David and Jamie McKenzie, took out a home-equity loan in the amount of $608,000, executing a promissory note made payable to Finance America LLC. The note was secured by a deed of trust in the property executed by the McKenzies and Finance America and recorded in the Travis County real property records. Subsequently, Finance America sold the note and assigned its interests in the deed of trust to CIT.

The McKenzies eventually fell behind on their loan payments as well as their property taxes. In 2004, Travis County placed a tax lien on the property in the amount of $4,379.22. In June 2005, David McKenzie executed a promissory note payable to Exodus Tax Specialists for the purpose of securing funds to pay the property taxes he owed. Dessie Maria Andrews, as "trustee" for "Exodus Tax Specialists" (she would later characterize Exodus in court filings as a d/b/a of herself) paid Travis County the $4,379.22 in taxes owed on the property and obtained a tax lien deed of trust on the property. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(a)(2), (a-1), (b), 2005 Tex. Gen. Laws 3717, 3720-21 (amended 2007, 2009) (current version at Tex. Tax Code Ann. § 32.06(a)(2),(a-1)-(a-3) (West 2008 & Supp.2009)). Subsequently, asserting that David McKenzie had defaulted on his note, Exodus foreclosed on the tax lien deed of trust and appointed appellant Hunt substitute trustee to sell the property. On October 4, 2005, Hunt executed a substitute trustee's deed reflecting that "Cornerstone Limited" (which, the evidence indicated, shared the same address as both Andrews and Exodus Tax Specialists) had purchased the property for $550,000. The deed recited that: "[n]otices stating the time, place and terms of sale of the property were mailed, posted and filed, as required by law;" Cornerstone "was the highest bidder at the public auction, for the amount of sale in the manner prescribed by law;" the foreclosure sale had begun at the time stated in the Notice of Sale or within three hours thereafter, in the area of the Travis County courthouse designated for such sales; and "[a]ll matters, duties, and obligations of [Exodus] were lawfully performed ... including compliance with section 32.06 of the Texas Tax Code."

Contrary to the representations in the substitute trustee's deed that he executed, Hunt later admitted at trial that he did not comply with requirements that he serve McKenzie with notice of the sale by certified mail and did not file the foreclosure notice with the Travis County Clerk's office. *See* Act of May

29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(c)(2), 2005 Tex. Gen. Laws 3717, 3721 (amended 2007, 2009) (current version at Tex. Tax Code Ann. § 32.06(c)(2) (West 2008 & Supp.2009)); Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 14, sec. 32.065(b)(5), 2005 Tex. Gen. Laws 3717, 3722 (amended 2007, 2009) (current version at Tex. Tax Code Ann. § 32.065(b)(5) (West 2008 & Supp.2009)); Act of May 24, 2005, 79th Leg., R.S., ch. 555, § 1, sec. 51.002(b)(2)-(3), 2005 Tex. Gen. Laws 1482, 1482 (amended 2007) (current version at Tex. Prop.Code Ann. § 51.002(b)(2)-(3) (West Supp.2009)). There was also uncontroverted evidence that neither CIT nor Finance America were given notice of the foreclosure sale in the required manner. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 14, sec. 32.065(b)(6), 2005 Tex. Gen. Laws 3717, 3722 (current version at Tex. Tax Code Ann. § 32.065(b)(6) (West 2008 & Supp.2009)). Further, Hunt conceded that the amount of sale reflected in the substitute trustee's deed was incorrect and that no payment was tendered to him for the property.

***2** Later in the same month, Andrews, now acting on behalf of Cornerstone, purported to sell the property to Kerry Cairns. Cornerstone financed the entire purchase price, which Cairns was to repay not later than April 30, 2006. Cairns and Cornerstone executed a promissory note secured by a deed of trust in the property. As of the time of trial in November 2008, Cairns had not paid off the amount owed to Cornerstone, but Cornerstone had not foreclosed its lien.

CIT learned of the foreclosure and subsequent conveyance of the property to Cairns after it began foreclosing its lien on the property after the McKenzies defaulted on their loan in August 2005. After learning of these purported conveyances, CIT made redemption requests to pay the taxes so it could take back the property and foreclose. After Andrews refused, CIT sued Exodus, Cornerstone, Andrews, Hunt, and Cairns, alleging wrongful foreclosure, fraud, and civil conspiracy, and seeking declaratory judgments that CIT was entitled to redemption under tax code section 32.06 and disbursement of excess proceeds. CIT also named the McKenzies as defendants and sought an order permitting non-judicial foreclosure on the property.

The McKenzies did not answer or appear. As for the remaining defendants, the record reflects rather tumultuous proceedings below in which Hunt, Andrews/Exodus/Cornerstone, and Cairns each attempted to represent himself or herself and made numerous filings advancing arguments that were frequently not cognizable in law and sometimes consisted of inflammatory attacks on CIT or the district court. Ultimately, CIT's claims were tried to a jury. The district court submitted, and the jury found, that:

- CIT was a junior lien holder in the property;
- the foreclosure sale by Exodus to Cornerstone was not a public sale at auction; [1]
- the sale was not held between 10 a.m. and 4 p.m. on the first Tuesday of a month; [2]
- the sale did not take place at the Travis County courthouse; [3]
- notice of the sale was not posted at least 21 days before the sale date; [4]
- a copy of the sale notice was not filed with the Travis County clerk; [5]
- written notice of the sale was not served by certified mail on David McKenzie at least 21 days before the sale date; [6]
- written notice of the sale was not served by certified mail on Finance America at least 21 days before the sale date; [7]
- an irregularity occurred in the foreclosure sale of the property by Exodus to Cornerstone, and the irregularity caused a grossly inadequate price; and
    - Hunt, Andrews, Exodus, and Cornerstone committed fraud against CIT in connection with the sale of the property.

The district court also submitted the amount of CIT's attorney's fees to the jury, which awarded $58,000 in trial-level fees and a total of $35,000 in contingent appellate fees. [8]

Between the jury's verdict and the final judgment, Hunt and Andrews moved to disqualify the judge who had presided over the trial, the Hon. Stephen Yelenosky. This motion was assigned to the Hon. Paul Davis, who denied it. Judge Davis also awarded CIT $2,495 .00 in attorney's fees incurred in responding to the motion, imposed jointly and severally against Hunt and Andrews.

***3** After signing an initial version of the judgment on January 15, 2009, the district court signed an amended final judgment on February 3. The court accepted the jury's findings and made several declarations based on those findings. It declared that the Exodus-to-Cornerstone foreclosure sale was wrongful and void and set it aside. The court further declared void the substitute trustee's deed, Cornerstone's subsequent sale of the property to Cairns, and all liens and security interests held by Cornerstone against Cairns for the property. It also awarded CIT the attorney's fees the jury had found jointly and severally against Hunt, Andrews, Exodus, Cornerstone, and Cairns.

The district court made additional declarations having the effect of enforcing a right of redemption on the part of CIT. It declared that the payoff amount on Exodus's tax-lien deed of trust (which had later been transferred to Cairns) was $4,379.22 and that Hunt, Andrews, Exodus, Cornerstone, and Cairns were each entitled to a credit in that amount against the attorney's fees award, leaving each jointly and severally liable for $53,620.78 in trial-level attorney's fees, plus any appellate fees that might be incurred later. The district court also declared that the payoff amount on the tax-lien deed of trust had been paid in full and that the tax-lien deed of trust was released.

Finally, the district court rendered judgment against the McKenzies that CIT was immediately authorized to commence proceedings for non-judicial foreclosure of the property.

This appeal ensued.

ANALYSIS

Both Hunt and Andrews, his co-defendant below, have signed an appellants' brief. Before turning to the issues presented, we must first address a threshold question of our subject-matter jurisdiction. CIT has moved to dismiss any appeal that Andrews or, for that matter, Cairns [9] purports to assert on the ground that each failed to invoke this Court's subject-matter jurisdiction by filing a timely notice of appeal.

There are several notices of appeal in the clerk's record:

(1) A November 20, 2008 "Defendants' Notice of Interlocatory [sic] Appeal" on behalf of Hunt, Andrews, and Cairns, and signed by each. The file stamp on this document reflects that it was filed with the district clerk on the same day as, but after, the jury's verdict and several weeks before final judgment. This notice does not reference any specific order of the district court.

(2) A January 5, 2009 "Notice of Appeal of Temporary Restraining Order" on behalf of Hunt, and signed solely by him, appealing a temporary restraining order that the district court had issued to prevent him from attempting to sell the property again.

(3) A January 15, 2009 notice of appeal on behalf of Hunt, and signed solely by him, appealing the initial version of the final judgment that the district court signed on that same day.

(4) Two amended notices of appeal on behalf of Hunt and signed solely by him, dated February 6 and 10, that appeal the amended version of the final judgment signed on February 3, as well as Judge Davis's order on his motion to disqualify Judge Yelenosky.

***4** Thus, although Hunt timely perfected his appeal from the final judgment, *see* Tex.R.App. P. 26.1, 27.3, the sole notice of appeal that Andrews and Cairns filed was the November 20, 2008 "Notice of Interlocatory [sic] Appeal," in which Hunt also joined. This notice, which they apparently filed following the jury's verdict but well before the final judgment, does not purport to appeal from the judgment-to the contrary, it is styled an "interlocatory [sic] appeal." Under these circumstances, we hold that Andrews and Cairns have each failed to timely perfect an appeal from the district court's final judgment.

On the other hand, rule of appellate procedure 27.1 provides that a "premature" notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for filing the appeal. *See id.* R. 27.1. However, for several reasons, we conclude that the November 20, 2008 notice did not invoke our jurisdiction over the final judgment or any interlocutory order that was ultimately merged into that judgment. In addition to the fact that the November 20, 2008 notice does not purport to appeal from the district court's judgment, it does not identify any interlocutory order that is being appealed and, thus, did not invoke our jurisdiction over any such order. *Id.* R. 25.1(d) ("The notice of appeal must ... (2) state the date of the judgment or order appealed from...."). [10] Andrews and Cairns have not argued otherwise; indeed, they have not responded to CIT's motion to dismiss. Finally, we observe that Hunt has filed subsequent notices of

appeal addressed to the final judgment, yet neither Andrews nor Cairns has joined in these notices or timely filed their own notices of appeal from the final judgment. In these circumstances, we cannot conclude that Andrews or Cairns has perfected an appeal from the final judgment by virtue of their November 20, 2008 "Notice of Interlocatory [sic] Appeal" and rule 27.1. *See Gee v. Mirwis*, No. 01-04-00883-CV, 2006 WL 859286, at *4 n. 4 (Tex.App.-Houston [1st Dist.] Mar. 30, 2006, order) (mem.op.) (holding earlier notice of appeal purporting to be from interlocutory order was not a prematurely filed notice of appeal that could be considered to have perfected appeal when appellate court determined subsequent notice of appeal filed after final judgment was signed was untimely).

Consequently, we lack subject-matter jurisdiction to grant Andrews and Cairns appellate relief. Tex.R.App. P. 2, 25.1(b), 26 .3; *Gee*, 2006 WL 859286, at *2 ("The time for filing a notice of appeal is jurisdictional in nature, and absent a timely filed notice of appeal or extension request, we must dismiss an appeal for lack of jurisdiction."). We grant CIT's motion to dismiss any purported "appeal" of Andrews and Cairns for want of subject-matter jurisdiction. *See* Tex.R.App. P. 42.3(a). We note, however, that even if Andrews or Cairns had invoked our jurisdiction, our rejection of the arguments advanced by Hunt (discussed below) would foreclose their entitlement to relief as well.

***5** We now turn to the issues Hunt raises on appeal. Hunt presents eleven issues, which we will address in turn. [11]

In his first issue, Hunt complains that he was denied "equality under the law" and "denied access to the law resulting in outlawry ." The substance of Hunt's complaint appears to relate to a ruling by the district court granting a motion in limine filed by CIT addressed to the offering of evidence or comments regarding the applicability, contents, and effective dates of any law. Hunt misunderstands the effect of a ruling on a motion in limine. A trial court's ruling on a motion in limine is not a ruling that excludes or admits evidence. *Fort Worth Hotel L.P. v. Enserch Corp.*, 977 S.W.2d 746, 757 (Tex.App.-Fort Worth 1998, no pet.). The purpose of a motion in limine is to obtain a tentative ruling that prevents a party from offering certain evidence or referring to certain matters in front of the jury without first approaching the bench for a ruling. *Id.* Consequently, a trial court's ruling on a motion in limine in itself "is never reversible error," *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex.1963), and it "preserves nothing for review." *Kaufman v. Commission for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex.App.-Corpus Christi 2006, pet. denied). Even if a trial court makes an erroneous ruling on a motion in limine, there is no reversible error unless the court erroneously admits or excludes evidence over a proper objection at trial. *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex.1984).

Hunt fails to provide any citation to the record demonstrating that he or any other defendant attempted to offer evidence and obtained an adverse ruling from the court. *See* Tex.R.App. P. 33.1(a); *Kaufman*, 197 S.W.3d at 874. He has presented nothing for review. We overrule Hunt's first issue.

In his second issue, Hunt argues that the district court lacked subject-matter jurisdiction because CIT lacked standing to assert its claims-an assertion that Hunt and other defendants repeatedly raised unsuccessfully in the district court. [12] Hunt bases this standing challenge on his view that CIT was required to prove that it was a record owner of the property before Exodus sold the property to Cornerstone. As CIT observes, Hunt presents no authority in support of this notion, and it is without merit. The general test for standing in Texas courts is whether there is a "real" (i.e., justiciable) controversy between the parties that actually will be determined by the judicial declaration sought. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993). CIT's pleadings and proof at trial demonstrate that CIT, as a lienholder in the property, had a justiciable interest sufficient to invoke the district court's subject-matter jurisdiction over its claims. We overrule Hunt's second issue.

In his third issue, Hunt contends that CIT's suit was challenging the validity of a "tax sale" and fails because CIT did not pay the property taxes into the registry of the court before commencing suit and "lacks consideration." Similarly, in his tenth issue, Hunt complains that "CIT never paid taxes into the registry of the court" and that this "invalidates the suit." As CIT points out, this case does not involve the validity of a tax sale, which is governed by chapter 34 of the tax code, but instead concerns a tax-lien transfer, which is governed by chapter 32 of the tax code. *Compare* Tex. Tax Code Ann. ch. 32 (West 2008 & Supp.2009) *with* Tex. Tax Code Ann. ch. 34 (West 2008 & Supp.2009). Consequently, the procedural requirements Hunt references are inapposite. We overrule Hunt's third and tenth issues.

***6** In his fourth issue, Hunt complains that Judge Yelenosky "struck" a November 6, 2008 order signed by the Hon. Gisela D. Triana-Doyal, a prior order by the Hon. Lora Livingston,

and a subpoena for document production issued by defendants to CIT. Hunt contends that Judge Yelenosky "struck" the orders and subpoena by granting CIT's entire motion in limine, and in particular, the motion prohibiting defendants from making requests before the jury for information from CIT's counsel's file. Hunt characterizes the November 6, 2008 order as "a sanction against [CIT's counsel] for his behavior," but CIT points out that the order in fact relates to CIT's motion for continuance and that a motion for sanctions that Andrews had filed was actually denied by the court on November 12, 2008. CIT primarily contends that Hunt has waived this issue because of his failure to cite the record or authority or provide substantive analysis.

We agree that Hunt's briefing on these points presents nothing for this Court's review. Hunt fails to show where he raised these issues before the trial court and to explain how they resulted in reversible error. *See* Tex.R.App. P. 33.1, 44.1. Hunt fails to explain how the grant of CIT's motion in limine negated the effect of the court's prior orders regarding the production of documents, or how CIT's supposed failure to produce documents harmed the defendants. Hunt never describes the documents CIT had been ordered to produce, and his brief does not cite to any discovery requests, objections, or motions that were made. Only one of the orders regarding discovery to which Hunt refers appears in the record. That order, the November 6, 2008 order signed by Judge Triana-Doyal, continues the trial and orders that "at the first hearing" CIT is to provide "all original documents which Judge Livingston previously ordered to be produced to defendants." There is no order signed by Judge Livingston in the record. We overrule Hunt's fourth issue. *See id.* R. 33.1, 44.1.

In his fifth, sixth, and eighth issues, Hunt, in substance, claims error in the jury charge. He complains of numerous asserted "irregularities" in the jury charge, including misinterpretations of the law and immaterial questions. During the charge conference, Hunt objected to one proposed question-the use of the words "fraud" and "misrepresentation" in the jury question submitting CIT's fraud claim-and his objection was overruled. The charge used these words to explain to the jury the legal definitions of fraud and misrepresentation. Hunt provides no substantive analysis to explain why the use of these words caused reversible error. *See id.* R. 44.1. We overrule these issues.

In his seventh issue, Hunt argues that "[n]one of the evidence that was before the jury could substantiate the findings." We construe this issue as a challenge to the legal and/or factual sufficiency of the evidence supporting the jury's findings. Hunt failed to preserve either type of sufficiency challenge. In a jury trial, challenges to the legal sufficiency of the evidence are preserved by "(1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue or (5) a motion for new trial." *Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex.1991). Complaints of the factual insufficiency of the evidence supporting a jury finding or that a jury finding is against the overwhelming weight of the evidence must be raised in a motion for new trial. Tex.R. Civ. P. 324(b)(2)-(3). Neither Hunt nor any other defendant made any such motion or objection. Therefore, Hunt has failed to present anything for review. Moreover, Hunt fails to present argument, authorities, record citations, or other explanation why the evidence at trial fails to support any specific findings. We overrule Hunt's sufficiency challenge.

***7** Also, within both his fifth and seventh issues, Hunt complains, in substance, of improper jury argument. Hunt asserts that the district court erred in permitting CIT's counsel to make improper jury arguments to "vilify the defendants" in violation of the court's obligation under Texas Rule of Civil Procedure 269 "to stop the defamation" without prompting, citing *Texas Employers' Ins. Co. v. Guerrero*, 800 S.W.2d 859, 867 (Tex.App.-San Antonio 1990, writ denied). Hunt argues that "[t]here was no evidence of fraud, no evidence of improper behavior," but the defamation by CIT's counsel "so inflamed the jury that the jury ignored the evidence, which were the only facts before it, and found in favor of the rhetoric." He concludes that this is one of the "rare instances of incurable harm from improper argument," citing *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex.1979).

CIT responds that Hunt has waived this issue on appeal because he has failed to cite to the record or any facts supporting his assertion and he has not met his burden under *Reese* of showing that improper jury argument occurred. *See id.* We agree. To show improper jury argument, Hunt must prove (1) an error, (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge, and (5) that the argument constituted reversibly harmful error by its nature, degree, and extent. *Id.* All of the evidence must be closely examined to determine (6) the argument's probable

effect on a material finding, and (7) a reversal must come from an evaluation of the whole case from voir dire to closing argument. *Id.* at 840. Hunt fails to meet this burden because he has not provided record citations showing which statements are the allegedly improper argument or that he preserved error by making a proper objection and asking for a ruling. Tex.R.App. P. 33.1, 38.1(i). He also fails to offer any substantive analysis regarding whether the allegedly improper argument was unsupported by the evidence or was incurable by instruction or other remedy. *Id.* R. 38.1(i); *Reese,* 584 S.W.2d at 839; *see also Phillips v. Bramlett,* 288 S.W.3d 876, 883 (Tex.2009) (noting that cases finding incurable harm typically involve *unsubstantiated* attacks "on the integrity or veracity of a party or counsel, appeals to racial prejudice, or the like"). Hunt has presented nothing for review. We overrule his fifth and seventh issues.

In addition to his jury-charge complaints within his eighth issue-which posits, "Does the final order in the case reflect the remedy prayed for?"-Hunt asserts, "Although no construction permit was applied for, the only thing missing from Judge Yelenowsky's [sic] order is the kitchen sink. It is presumed that it was too heavy to attach to the document." Hunt does not explain why or how these assertions demonstrate any reversible error. We overrule Hunt's eighth issue.

***8** In Hunt's ninth issue, he posits, "Were the property taxes, at all time [sic] since 2004, paid by Cornerstone or Cairns?" In support of this issue, Hunt asserts that "[i]t is the inviolate rule in Texas that he who pays the property tax gets the property," but he cites no authority for this proposition and provides no analysis to explain its relevance to the case. We overrule Hunt's ninth issue.

Finally, in his eleventh issue, Hunt complains of "judicial misconduct resulting in gross error." In support, Hunt revisits various complaints about the merits of the district court's judgment and then launches into a series of attacks on the integrity and fairness of the presiding judge. Hunt demonstrates no reversible error.[13] We overrule Hunt's eleventh issue.

Having overruled all of Hunt's issues, we affirm the district court's judgment.

In addition to its arguments for affirming the district court's judgment, CIT requests us to sanction Hunt under Texas Rule of Appellate Procedure 45 and award $25,000 in damages. CIT contends that Hunt's appeal is frivolous. Hunt has had notice of CIT's request for sanctions for more than three months, but has not filed a response.

Under rule 45, "[i]f the court of appeals determines that an appeal is frivolous, it may-on motion of any party or on its own initiative, after notice and a reasonable opportunity for response-award each prevailing party just damages." Tex.R.App. P. 45. To determine whether an appeal is frivolous, we apply an objective test. *Smith v. Brown,* 51 S.W.3d 376, 381 (Tex.App.-Houston [1st Dist.] 2001, pet. denied). We review the record from the advocate's viewpoint and decide whether he had reasonable grounds to believe the judgment could be reversed. *Id.* Although bad faith is no longer dispositive or necessarily even material to deciding whether an appeal is frivolous, the presence of bad faith may be relevant to determining the amount of the sanction.[14] *Id.* In addition, the fact that no response is filed to a request for sanctions is itself a factor to consider in determining whether an appeal is frivolous. *Chapman v. Hootman,* 999 S.W.2d 118, 124 (Tex.App.-Houston [14th Dist.] 1999, no pet.).

After reviewing the record and briefing filed in this Court, we agree with CIT that Hunt had no reasonable grounds to believe the judgment could be reversed. Our reasons include Hunt's unsupported factual statements (and misstatements), repeated failures to preserve error for appeal, and the absence of legal merit in his arguments. His arguments do not have "a reasonable basis in law" so as to "constitute[ ] an informed, good-faith challenge to a trial court judgment." *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.,* 826 S.W.2d 124, 125 (Tex.1991) (per curiam). We also find Hunt's unsubstantiated attacks on the presiding judge indicative of bad faith. Furthermore, Hunt has not challenged CIT's claim for sanctions under rule 45, despite notice and an opportunity to do so. *See id.* We hold that Hunt's appeal is objectively frivolous.

***9** We may award "just damages" if the appeal is objectively frivolous and injured CIT. *Njuku v. Middleton,* 20 S.W.3d 176, 178 (Tex.App.-Dallas 2000, pet. denied). Hunt's filing of this appeal has caused CIT to expend time, money, effort and other resources to defend the appeal. CIT has requested an award of $25,000. Courts awarding sanctions for a frivolous appeal under rule 45 typically award attorney's fees for the appeal. *See, e.g., Smith,* 51 S.W.3d at 382 ($5,000); *Chapman,* 999 S.W.2d at 125 ($5,000); *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.,* 2 S.W.3d 393, 397 (Tex.App.-San Antonio 1999, no pet.) ($5,000); *Diana Rivera & Assocs., P.C. v. Calvillo,* 986 S.W.2d 795 (Tex.App.-Corpus Christi

1999, pet. denied) ($8,800). Proof by affidavit is a proper method of establishing the appropriate sanction for the filing of a frivolous appeal, *Smith*, 51 S.W.3d at 382, although some courts have awarded damages even when the appellee provided no evidence of damages, *see Lee v. Aurora Loan Servs., L.L.C.*, No. 06-08-00077-CV, 2009 WL 167067, at *3 (Tex.App.-Texarkana Jan.27, 2009, no pet.) (mem.op.) ($7,500); *Njuku*, 20 S.W.3d at 178 ($5,000); *Salley v. Houston Lighting & Power Co.*, 801 S.W.2d 230, 232 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (awarding $6,000 when trial court's judgment was non-monetary).

CIT asks us to award $25,000 without providing any basis for this amount. The judgment below has already awarded CIT $20,000 in attorney's fees for an appeal to this Court. Nevertheless, considering the nature of Hunt's conduct in this appeal, including Hunt's unsupported attacks on the district court, we award CIT an additional $5,000 against Hunt as just damages for this frivolous appeal.

Footnotes

1 *See* Act of May 19, 1987, 70th Leg., R.S., ch. 540, § 1, sec. 51.002(a), 1987 Tex. Gen. Laws 2174, 2174 (current version at Tex. Prop.Code Ann. § 51.002(a) (West 2007 & Supp.2009)) (“A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month.”).

2 *See id.*

3 *See id.* (“[T]he sale must take place at the county courthouse in the county in which the land is located....”).

4 *See* Act of May 24, 2005, 79th Leg., R.S., ch. 555, § 1, sec. 51.002(b), 2005 Tex. Gen. Laws 1482, 1482 (amended 2007) (“Notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by: (1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold....”).

5 *See* Act of May 24, 2005, 79th Leg., R.S., ch. 555, § 1, sec. 51.002(b)(2), 2005 Tex. Gen. Laws 1482, 1482 (amended 2007) (“Notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by: ... (2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1)....”).

6 *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 14, sec. 32.065(b)(5), 2005 Tex. Gen. Laws 3717, 3722 (amended 2007, 2009) (“Notwithstanding any agreement to the contrary, a contract entered into under Subsection (a) between a transferee and the property owner under Section 32.06 that is secured by a priority lien on the property shall provide for a power of sale and foreclosure under Chapter 51, Property Code, and: ... (5) requiring the transferee to serve foreclosure notices on the property owner at the property owner's last known address in the manner required by Sections 51.002(b), (d), and (e), Property Code, or by a commercially reasonable delivery service that maintains verifiable records of deliveries for at least five years from the date of delivery....”); Act of May 24, 2005, 79th Leg., R.S., ch. 555, § 1, sec. 51.002(b)(3), 2005 Tex. Gen. Laws 1482, 1482 (amended 2007) (“Notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by: ... (3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt is obligated to pay the debt.”).

7 *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 14, sec. 32.065(b)(6), 2005 Tex. Gen. Laws 3717, 3722 (“Notwithstanding any agreement to the contrary, a contract entered into under Subsection (a) between a transferee and the property owner under Section 32.06 that is secured by a priority lien on the property shall provide for a power of sale and foreclosure under Chapter 51, Property Code, and: ... (6) requiring, at the time the foreclosure notices required by Subdivision (5) are served on the property owner, the transferee to serve a copy of the notice of sale in the same manner on the mortgage servicer or the holder of all recorded real property liens encumbering the property that includes on the first page, in 14-point boldfaced type or 14-point uppercase typewritten letters, a statement that reads substantially as follows: ‘PURSUANT TO TEXAS TAX CODE SECTION 32.06, THE FORECLOSURE SALE REFERRED TO IN THIS DOCUMENT IS A SUPERIOR TRANSFER TAX LIEN SUBJECT TO RIGHT OF REDEMPTION UNDER CERTAIN CONDITIONS. THE FORECLOSURE IS SCHEDULED TO OCCUR ON THE (DATE).’ ”).

8 While the jury was deliberating, it sent out a question inquiring, “Can the jury award more fees than [CIT's] attorney requested? And, is there a limit?”

9 Although Cairns has not signed the brief and is not identified as one of its authors or participants, the brief does identify him as a party to the appeal.

10 Also, the record does not reflect that Andrews, Cairns, or Hunt ever took further action, beyond filing the November 20, 2008 notice, to prosecute an interlocutory appeal, including forwarding a copy of their notice to this Court, *see* Tex.R.App. P. 25.1(e), and no such appeal was ever docketed here.

11 As in the district court, Hunt is acting pro se on appeal. We have attempted to fairly construe Hunt's issues and the substance of his arguments. *See* Tex.R.App. P. 38.9; *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 863 (Tex.2005) (per curiam). Nonetheless, it remains that pro se litigants are held to the same procedural and substantive standards as other litigants. *See Mansfield State Bank v. Cohn*, 573 S.W.3d 181, 184-85 (Tex.1978) ("There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves.").

12 Hunt also asserts in the "Summary of Argument" portion of his brief that CIT lacked "capacity." He does not return to capacity elsewhere in his brief. Leaving aside the fact that lack of capacity is not a jurisdictional limitation, *see Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005) (contrasting capacity and standing), CIT correctly observes that Hunt has waived this argument by failing to raise it in a verified pleading. *See* Tex.R. Civ. P. 93(1)-(2); *Lovato*, 171 S.W.3d at 849.

13 We observe that while Hunt's notice of appeal challenges Judge Davis's order denying his motion to disqualify Judge Yelenosky, he has not presented an issue, argument, or authorities that would demonstrate reversible error in that ruling.

14 Rule 45 took effect on September 1, 1997. It replaced former rule 84 and broadened appellate courts' ability to award sanctions by omitting language in the former rule authorizing the award of "damages 'for delay' only if we found 'that an appellant ha[d] taken an appeal for delay and *without sufficient cause*.' " *Smith v. Brown*, 51 S.W.3d 376, 380 (Tex.App.-Houston [1st Dist .] 2001, pet. denied). Courts construed this language to require a finding that the appeal was taken in bad faith. *Id.* Most courts that have considered the issue have concluded that a showing of bad faith is no longer required. *Texas State Taekwondo Ass'n v. Lone Star State Taekwondo Ass'n*, No. 08-01-00403-CV, 2002 WL 1874852, at *2 (Tex.App.-El Paso Aug.15, 2002, no pet.) (not designated for publication) (collecting cases and holding sanctions appropriate under either standard in case involving enforceable Rule 11 agreement waiving parties' right to appeal outcome of binding summary jury trial).

End of Document

307 S.W.3d 299
Supreme Court of Texas.

In re UNITED SERVICES AUTOMOBILE ASSOCIATION, Relator.

No. 07–0871. | Argued Dec. 9, 2008. | Decided March 26, 2010. | Rehearing Denied May 7, 2010.

Synopsis

Background: Former employee brought action against employer under Texas Commission on Human Rights Act (TCHRA) alleging illegal discrimination based on his age. The County Court at Law No. 7, Bexar County, Timothy F. Johnson, J., denied employer's plea to the jurisdiction, and later entered judgment on jury's verdict awarding employee $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney fees, and prejudgment interest. Employer appealed. The San Antonio Court of Appeals, 161 S.W.3d 566, affirmed. Review was granted. The Supreme Court, 215 S.W.3d 400, reversed, concluding that the amount in controversy exceeded limit for jurisdiction in county court at law. After employee refiled his claim in the 150th Judicial District Court, Bexar County, Janet Littlejohn, J., employer filed a plea to the jurisdiction and a motion for summary judgment. The District Court, Bexar County, Gloria Saldana, J., denied the plea and the motion. Employer petitioned for writ of mandamus. The San Antonio Court of Appeals, 2007 WL 3003131, denied the petition. Employer petitioned for writ of mandamus.

Holdings: The Supreme Court, Jefferson, C.J., held that:

[1] two-year period in Texas Commission on Human Rights Act for filing suit is mandatory but not jurisdictional, overruling *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483;

[2] TCHRA's two-year statute of limitations is tolled for those cases falling within the tolling statute's savings provision for refiling of actions originally filed in the wrong court;

[3] as a matter of first impression, once an adverse party has moved for relief under the "intentional disregard" provision of the tolling statute, the nonmovant has the burden of producing information showing that he did not intentionally disregard proper jurisdiction when filing the case;

[4] former employee acted with intentional disregard of proper jurisdiction in filing the action in a county court at law; and

[5] extraordinary circumstances warranted mandamus relief.

Writ conditionally granted.

Attorneys and Law Firms

***302** Lacey L. Gourley, Bracewell & Giuliani, L.L.P., Pamela Stanton Baron, Thomas R. Phillips, Baker Botts L.L.P., Austin, TX, Mario A. Barrera, Bracewell & Giuliani LLP, San Antonio, TX, William H. Ford, Ford & Massey, P.C., San Antonio, TX, for Relator.

Jeffrey D. Small, Law Office of Jeff Small, Jeffrey Alan Goldberg, Cynthia A. Cano, Law Offices of Jeffrey A. Goldberg, San Antonio, TX, for Real Party in Interest.

Charles C. High Jr., Kemp Smith P.C., El Paso, TX, for Amicus Curiae Texas Association of Business.

Vanetta Loraine Christ, Vinson & Elkins LLP, Houston, TX, for Amicus Curiae Texas Employment Law Council.

Daniel L. Geyser, Asst. Solicitor General, James C. Ho, Solicitor General of Texas, David S. Morales, Office of the Attorney General of Texas, Clarence Andrew Weber, First Assistant Attorney General, Greg W. Abbott, Attorney General of Texas, Austin, TX, for Amicus Curiae State of Texas.

Opinion

Chief Justice JEFFERSON delivered the opinion of the Court.

[1] [2] [3] Texas has some 3,241 trial courts [1] within its 268,580 square miles. [2] Jurisdiction is limited in many of the courts; it is general in others. *Compare* TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), *with* ***303** *id.* § 24.007–.008 (outlining district court jurisdiction); *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex.2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts, [3] although that number does

not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS *passim* (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*;[4] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977). Statutory county courts (of which county courts at law are one type)[5] usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not, *see, e.g.*, TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942(a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew*, 178 S.W.3d 747, 756 (Tex.2005) (Hecht, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same courtroom presides over two distinct courts. *See, e.g.*, *Sultan*, 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable); *see also id.* at 754–55 (Hecht, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases).[6] Consider the five-step process involved in determining the jurisdiction of any particular trial court:

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular ***304** court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).
>
> OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1.

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; *see also Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex.1996) (voicing "concern[ ] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan*, 178 S.W.3d at 753 (Hecht, J., dissenting) (noting that Texas courts' "jurisdictional scheme ... has gone from elaborate ... to Byzantine"); *Camacho v. Samaniego*, 831 S.W.2d 804, 807 n. 4, 811 (Tex.1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), *available at http://www. courts.state.tx.us/tjc/TJC Reports/Final Report.pdf* (observing that " 'the Texas trial court system, complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society' " (quoting CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS—INTO THE TWENTY–FIRST CENTURY 17 (1993))).

Proposals to modernize this antiquated jurisdictional patchwork have failed,[7] but the Legislature has attempted to address one of its most worrisome aspects. In 1931, the Legislature passed "[a]n act to extend the period of limitation of any action in the wrong court." Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064. This statute tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. TEX. CIV. PRAC. & REM.CODE § 16.064(a). The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." *Id.* § 16.064(b). We must decide today whether the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County. Because we conclude that he did, in a way that cannot be cured by ordinary appellate review, we conditionally grant relief.

I. Background

James Steven Brite sued USAA, his former employer, alleging that it had illegally discriminated against him based on his age, violating the Texas Commission on Human Rights Act (TCHRA). *See generally United Servs. Auto. Ass'n v.*

Brite, 215 S.W.3d 400 (Tex.2007) ("*Brite I*"). He filed suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive ***305** damages and penalties, and attorney's fees and costs, as alleged on the face of the petition...." TEX. GOV'T CODE § 25.0003(c)(1). Brite asserted in his original petition that his damages exceeded the $500 statutory minimum, but he did not plead that his damages were below the $100,000 maximum. *Brite I*, 215 S.W.3d at 401. He pleaded that "[i]n all reasonable probability, [his] loss of income and benefits will continue into the future, if not for the balance of [his] natural life" and sought "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay), "the present value of unaccrued wage payments" (front pay), punitive damages, and attorney's fees. *Id.*

Before limitations expired, USAA filed a plea to the jurisdiction, contending that Brite's damage claims exceeded the $100,000 jurisdictional limit of the statutory county court, excluding interest, statutory or punitive damages, and attorney's fees and costs. USAA argued that because Brite's annual salary was almost $74,000 when he was terminated, his front pay and back pay allegations alone exceeded the county court's jurisdictional maximum. Brite opposed, and the trial court twice denied, USAA's jurisdictional plea. Shortly thereafter, Brite amended his petition to seek damages of $1.6 million, and subsequently claimed in discovery responses that " 'his lost wages and benefits in the future, until age 65, total approximately $1,000,000.00.' " *Brite I*, 215 S.W.3d at 401 (quoting discovery responses). After a jury trial, the trial court awarded Brite $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest. *Id.*

A divided court of appeals affirmed the trial court's judgment. *See United Servs. Auto. Ass'n v. Brite*, 161 S.W.3d 566, 579 (Tex.App.-San Antonio 2005, pet. granted). We reversed, concluding that the amount in controversy at the time Brite filed suit exceeded $100,000, depriving the county court at law of jurisdiction over the matter. *Brite I*, 215 S.W.3d at 402. We dismissed the underlying suit for want of jurisdiction. *Id.* at 403.

Within sixty days of our judgment dismissing the county court case, Brite refiled his claim in Bexar County district court. USAA filed a plea to the jurisdiction and moved for summary judgment asserting, among other things, that the trial court lacked subject matter jurisdiction because Brite failed to file suit within TCHRA's two-year time limit; that the tolling provision in section 16.064 of the Civil Practice and Remedies Code did not apply to TCHRA claims; and that even if it did, Brite's original suit was filed with "intentional disregard of proper jurisdiction," depriving him of that provision's protection. The trial court denied the plea and motion. The court of appeals denied relief, concluding that USAA had not established that its appellate remedy was inadequate. 2007 WL 3003131, at *1, 2007 Tex.App. LEXIS 8206, at *1–*2. USAA now petitions this Court for mandamus relief.

II. Is TCHRA's two-year period for filing suit jurisdictional?

USAA argues that TCHRA's two year deadline for filing suit is jurisdictional, precluding application of the tolling statute. But " '[j]urisdiction,' " as the United States Supreme Court has observed, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)). Nineteen years ago, in a footnote, we observed that the time period for filing a TCHRA lawsuit was "mandatory and jurisdictional." *Schroeder v. Texas Iron* ***306** *Works, Inc.*, 813 S.W.2d 483, 487 n. 10 (1991).[8] In support, we cited *Green v. Aluminum Co. of America*, 760 S.W.2d 378, 380 (Tex.App.-Austin 1988, no writ), which in turn relied on our decision in *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084 (1926). *Mingus* held that the requirements of the Workmen's Compensation Act were jurisdictional, and that "[t]he general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Mingus*, 285 S.W. at 1087.

[4] **[5]** But we, like the U.S. Supreme Court,[9] have recognized that our sometimes intemperate use of the term "jurisdictional" has caused problems. Characterizing a statutory requirement as jurisdictional means that the trial court does not have-and never had-power to decide the case. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex.2004) ("The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law."). Thus, "[n]ot only *may* an issue of subject matter jurisdiction 'be raised for the first time

on appeal by the parties or by the court', a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties questioned it." *Id.* at 358 (footnote omitted).

[6] In *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 76 (Tex.2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b. at 118 (1982)), we observed that " '[t]he classification of a matter as one of jurisdiction ... opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.' " Thus, "[a]lthough *Mingus* represented the dominant approach when it was decided, 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.' " *Dubai,* 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTSS § 11 cmt. e. at 113). We overruled *Mingus* "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional." *Id.* Instead, we held that " '[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.' " *Id.* at 76–77 (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)).

Since *Dubai,* we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." *City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex.2009). We have held that the Payday Law's 180–day period for filing a wage claim, though "a mandatory condition to pursuing the administrative cause ***307** of action," was "not ... a bar to ... [the] exercise of jurisdiction"; that the Tort Claims Act's notice provision was "a complete defense to suit but [did] not deprive the court of subject matter jurisdiction"; that the failure to comply with dismissal dates in parental rights termination cases did not deprive trial courts of jurisdiction; that the noncompliance with a mandatory notice requirement in the Fire Fighter and Police Officer Civil Service Act did not divest a hearing examiner of jurisdiction over an appeal; and that the statutory requirement that a condemnor and a property owner be "unable to agree" on damages was not jurisdictional but that a failure to satisfy the requirement would result in abatement. *City of DeSoto,* 288 S.W.3d at 398; *In re Dep't of Family & Protective Servs.,* 273 S.W.3d 637, 644 (Tex.2009); *Igal v. Brightstar Info. Tech. Group, Inc.,* 250 S.W.3d 78, 86 (Tex.2008); *Loutzenhiser,* 140 S.W.3d at 354; *Hubenak v. San Jacinto Gas Transmission Co.,* 141 S.W.3d 172, 191 (Tex.2004).

[7] **[8]** **[9]** We have been careful to emphasize, however, that a statutory requirement commanding action, even if not jurisdictional, remains mandatory. *Loutzenhiser,* 140 S.W.3d at 359 ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). And some requirements, such as a timely notice of appeal, remain jurisdictional. *See In the Interest of K.A.F.,* 160 S.W.3d 923, 928 (Tex.2005); *accord Bowles v. Russell,* 551 U.S. 205, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (concluding that party's "failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction"). Moreover, when elements of a statutory claim involve "the jurisdictional inquiry of sovereign immunity from suit," those elements can be relevant to both jurisdiction and liability. *State v. Lueck,* 290 S.W.3d 876, 883 (Tex.2009).

But we have never revisited our statement in *Schroeder,* even though courts have questioned whether *Schroeder* remains the law after *Dubai. See, e.g., Ramirez v. DRC Distribs., Ltd.,* 216 S.W.3d 917, 921 n. 8 (Tex.App.-Corpus Christi 2007, pet. denied) (noting that "[a]lthough the Texas Supreme Court held in *Schroeder v. Texas Iron Works* ... that exhaustion of the TCHRA's administrative remedies is mandatory and jurisdictional, several courts of appeals have questioned whether its decision in *Dubai Petroleum Co. v. Kazi* indicated a retreat from this position") (collecting cases). Most recently, although we observed that "in the past we have described a statutory time limitation in the Commission on Human Rights Act as 'mandatory and jurisdictional,' " we stated only that "those cases predate *Dubai* and dealt with a different statutory scheme than presented here." *Igal,* 250 S.W.3d at 83 n. 5 (quoting *Schroeder,* 813 S.W.2d at 486).

[10] **[11]** Today we reexamine whether section 21.256's time limit is jurisdictional. We begin with the statutory language, presuming "that the Legislature did not intend to make the [provision] jurisdictional; a presumption overcome only by clear legislative intent to the contrary." *City of DeSoto,* 288 S.W.3d at 394. The statute provides that an action "may not be brought ... later than the second anniversary of the date the complaint relating to the action is filed." TEX. LAB. CODE § 21.256. The Legislature titled the provision "Statute of Limitations," *id.,* and while such a heading cannot limit or expand the statute's meaning, TEX. GOV'T CODE § 311.024, the heading "gives some indication of the Legislature's intent," ***308** *Loutzenhiser,* 140 S.W.3d

at 361; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (noting that legislative history indicated that Title VII filing deadline was intended to operate as a statute of limitations rather than jurisdictional requirement). We too have characterized the deadline as a statute of limitations, calling it a "limitation period" and noting that "[t]he statute of limitations for such action runs from the date of filing the complaint with the Commission." *Schroeder*, 813 S.W.2d at 487 n. 10. In *Schroeder*, a case that dealt primarily with "whether exhaustion of administrative remedies is a prerequisite to bringing a civil action for age discrimination in employment," the legal character of the section 21.256 deadline was not at issue. *Schroeder*, 813 S.W.2d at 484; *accord Zipes*, 455 U.S. at 395, 102 S.Ct. 1127 (stating that "[a]lthough our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute"). While the phrase "may not be brought" makes the provision mandatory, *see* TEX. GOV'T CODE § 311.016(5), the statute does not indicate that the provision is jurisdictional or that the consequence of noncompliance is dismissal. *City of DeSoto*, 288 S.W.3d at 396 (observing that statute did not contain explicit language indicating that requirement was jurisdictional nor did it provide a consequence for noncompliance); *accord Igal*, 250 S.W.3d at 84 (noting that statutory language did not indicate that statute was intended to address jurisdiction, as it merely "establish[ed] a procedural bar similar to a statute of limitations and does not prescribe the boundaries of jurisdiction"); *see also Zipes*, 455 U.S. at 394, 102 S.Ct. 1127 (noting that statutory time period for filing EEOC claim under Title VII "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts").

[12] **[13]** Our procedural rules, which have the force and effect of statutes, and our cases classify limitations as an affirmative defense. TEX.R. CIV. P. 94; *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex.2001); *see also Day v. McDonough*, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) ("A statute of limitations defense ... is not 'jurisdictional,' hence courts are under no obligation to raise the time bar sua sponte."). While the Legislature could make the Labor Code filing deadlines jurisdictional, as it has in cases involving statutory requirements relating to governmental entities, *see* TEX. GOV'T CODE § 311.034 (providing that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity"), it has not done so here.

[14] We also consider the statute's purpose. *See Loutzenhiser*, 140 S.W.3d at 360; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex.2001). The TCHRA was enacted to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). It is "modeled after federal civil rights law," *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex.1999), and "[o]ne of the primary goals of the statute is to coordinate state law with federal law in the area of employment discrimination," *Vielma v. Eureka Co.*, 218 F.3d 458, 462 (5th Cir.2000). Thus, "analogous federal statutes and the cases interpreting them guide our reading of the TCHRA." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex.2001)

The United States Supreme Court has consistently construed Title VII's requirements as mandatory but not jurisdictional. ***309** *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Zipes*, 455 U.S. at 393, 102 S.Ct. 1127; *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (holding that equitable tolling applied to Title VII suit against federal employer); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 n. 3, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (rejecting argument that time period was jurisdictional and holding that filing of class action tolled limitations under Title VII). In *Zipes*, 455 U.S. at 393, 102 S.Ct. 1127, the Court held that the timely filing of an employment discrimination complaint with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit under Title VII, a conclusion compelled by "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [the Court's] cases." In a later case, the Court decided that Title VII's 15–employee minimum was an element of the claim, rather than a jurisdictional prerequisite. *Arbaugh*, 546 U.S. at 516, 126 S.Ct. 1235. In reaching that conclusion, the Court adopted a "readily administrable bright line" rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.... But when Congress does not rank a statutory limitation on coverage

> as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515–16, 126 S.Ct. 1235 (footnote omitted). This is not unlike our own post-Dubai approach: we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." City of DeSoto, 288 S.W.3d at 393.

Although the Supreme Court has not addressed whether the time period for filing suit under Title VII is jurisdictional, every federal circuit that has considered the issue has held that it is not. *See Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239–40 (3d Cir.1999); *Smith–Haynie v. D.C.*, 155 F.3d 575, 579 (D.C.Cir.1998); *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir.1998) ("Although *Zipes* dealt only with the time limit for filing charges of discrimination with the EEOC, its logic has been extended to the ninety-day time limit for filing suit in the district court after receipt of a right-to-sue letter.") (citations omitted); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir.1993); *Scheerer v. Rose State Coll.*, 950 F.2d 661, 665 (10th Cir.1991); *Hill v. John Chezik Imps.*, 869 F.2d 1122, 1124 (8th Cir.1989); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir.1986) (concluding that Supreme Court precedent "firmly establish[es] that the 90–day filing period is a statute of limitations subject to equitable tolling in appropriate circumstances"); *Espinoza v. Mo. Pac. R.R. Co.*, 754 F.2d 1247, 1248 n. 1 (5th Cir.1985); *Brown v. J.I. Case Co.*, 756 F.2d 48, 50 (7th Cir.1985); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir.1984) (noting that "[t]he Supreme Court ... has evinced a policy of treating Title VII time limits not as jurisdictional predicates, but as limitations periods subject to equitable tolling"); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151–52, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (holding that plaintiff had not shown herself entitled to equitable tolling of filing deadline, but not rejecting equitable tolling as inapplicable to that deadline).

[15] We also consider the consequences that result from each interpretation. *Helena Chem.*, 47 S.W.3d at 495. A judgment is void if rendered by a court without subject matter jurisdiction. *Mapco,* ***310** *Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990). If TCHRA's limitations period were jurisdictional, trial courts that have denied summary judgment motions based on the failure to satisfy that requirement would forever have their judgments open to reconsideration. Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm the judgments. *See, e.g., Vu v. ExxonMobil Corp.*, 98 S.W.3d 318, 321 (Tex.App.–Houston [1st Dist.] 2003, pet. denied) (affirming summary judgment because TCHRA suit not filed until more than two years after charge of discrimination); *see also Zipes*, 455 U.S. at 397, 102 S.Ct. 1127 (observing that, if the timely filing requirement were jurisdictional, "the District Courts in *Franks* [*v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976),] and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority," but "[w]e did not so hold"). It is preferable to "avoid a result that leaves the decisions and judgments of [a tribunal] in limbo and subject to future attack, unless that was the Legislature's clear intent." *City of DeSoto*, 288 S.W.3d at 394.

[16] In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.

II. Does the tolling statute, Tex. Civ. Prac. & Rem.Code § 16.064, apply to a TCHRA claim?

In pertinent part, section 16.064 provides:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM.CODE § 16.064(a).

USAA contends that, even if the limitations period is not jurisdictional, the tolling statute does not apply, citing a string of cases holding generally that section 16.064 does not apply to special statutory proceedings. *See, e.g., Heart Hosp. IV, L.P. v. King*, 116 S.W.3d 831, 836 (Tex.App.-Austin 2003, pet. denied); *Argonaut Sw. Ins. Co. v. Walker*,

64 S.W.3d 654, 657 (Tex.App.-Texarkana 2001, pet. denied); *Gutierrez v. Lee*, 812 S.W.2d 388, 392 (Tex.App.-Austin 1991, writ denied); *Castillo v. Allied Ins. Co.*, 537 S.W.2d 486, 487 (Tex.Civ.App.-Amarillo 1976, writ ref'd n.r.e.); *Pan Am. Fire & Cas. Co. v. Rowlett*, 479 S.W.2d 782, 783 (Tex.Civ.App.-Eastland 1972, writ ref'd n.r.e.); *Braden v. Transp. Ins. Co.*, 307 S.W.2d 655, 656 (Tex.Civ.App.-Dallas 1957, no writ); *Leadon v. Truck Ins. Exch.*, 253 S.W.2d 903, 905 (Tex.Civ.App.-Galveston 1952, no writ); *Bear v. Donna Indep. School Dist.*, 85 S.W.2d 797, 799 (Tex.Civ.App.-San Antonio 1935, writ dism'd w.o.j.).

But there are at least three problems with this approach. First, we have never ***311** endorsed the theory that section 16.064 is inapplicable to causes of action created by statute. All of those decisions were from our courts of appeals, and most predate *Dubai.* Second, those cases are based on the *Mingus* rationale, overruled in *Dubai,* that a "dichotomy [exists] between common-law and statutory actions," with mandatory statutory provisions also being jurisdictional. *Dubai,* 12 S.W.3d at 76. Post-*Dubai,* we have rejected such a distinction, adopting instead "an approach to jurisdictional questions designed to strengthen finality and reduce the possibility of delayed attacks on judgments, *regardless of whether the claim was anchored in common law or was a specially-created statutory action."* *City of DeSoto,* 288 S.W.3d at 394 (emphasis added).

[17] **[18]** Third, the argument conflates equitable tolling with statutory tolling. The former is a court-created doctrine, *see e.g., Taliani v. Chrans,* 189 F.3d 597, 597 (7th Cir.1999) (noting that "equitable tolling [is] the judge-made doctrine ... that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time"), that may not apply if a statutory requirement is deemed jurisdictional, *see Zipes,* 455 U.S. at 393, 102 S.Ct. 1127 (holding that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit, ... but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). The latter is a legislative dictate that limitations be tolled for "*any* action" filed in the wrong court. *See* Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064 (emphasis added).

[19] Here we must construe two statutes—one that creates a limitations period and a second that tolls it. There is no reason, absent clear legislative intent, that we should not harmonize the two. *See La Sara Grain Co. v. First Nat'l Bank,* 673 S.W.2d 558, 565 (Tex.1984) ("Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible."). Had the Legislature wanted to prohibit statutory tolling, it could have done so, but TCHRA is devoid of any such indication. *Cf.* TEX. CIV. PRAC. & REM.CODE § 74.251(a) (creating limitations period that applies "[n]otwithstanding any other law"); *Liggett v. Blocher,* 849 S.W.2d 846, 850 (Tex.App.-Houston [1st Dist.] 1993, no writ) (holding that "notwithstanding any other law" meant that statutory tolling provision did not apply to health care liability claims). Thus, absent language indicating that section 16.064 was not intended to apply to TCHRA claims, the statute of limitations is tolled for those cases falling within section 16.064's savings provision.

IV. Was Brite's first suit filed with "intentional disregard of proper jurisdiction"?

Section 16.064 will not save a later-filed claim if the first action was filed "with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). USAA contends that is what happened here, while Brite asserts that a jury must decide whether he intended to evade jurisdiction, given that he vigorously denies doing so. We agree with USAA.

Noting "[t]he importance of simplifying Court procedure," the Texas Judicial Council in 1930 drafted the tolling statute. *See* SECOND ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT, Bill No. 6, at 10–12 (1930). The Legislature made a single change—extending the refiling period from thirty to sixty days—and passed the bill. *See* Act approved Apr. 27, 1931, 42d ***312** Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064; *see also Burford v. Sun Oil Co.,* 186 S.W.2d 306, 310 (Tex.Civ.App.-Austin 1944, writ ref'd w.o.m.). In its recommendation accompanying the bill, the Council noted

> [t]hat the wrong court is frequently and in good faith chosen by capable lawyers, [as] evidenced by the hundreds of cases cited in the annotations upon the subject given in Vernon's Annotated Texas Statutes,—9 pages upon Justice Court, 17 pages

> upon county court and 29 pages upon district court jurisdiction.

SECOND ANNUAL REPORT, at 11. The Council explained that the Texas bill was based on a Kentucky statute that tolled limitations for actions "commenced in due time and in good faith" in a court that lacked jurisdiction. *Id.* (citing CARROLL'S KY. STAT. § 2545 (1922)). The Council stated that its bill was "like that of Kentucky in substance, but ... a definition of 'good faith' [is] supplied." *Id.* at 11–12. It is that definition that is at issue here.

[20] As we noted in *Brite I,* "[t]he jurisdictional statute for county courts at law values the matter in controversy on the amount of damages 'alleged' by the plaintiff...." *Brite I,* 215 S.W.3d at 402–03 (quoting TEX. GOV'T CODE § 25.0003(c)(1)). Here, Brite's petition omitted the statement required by our rules—that the "damages sought are within the jurisdictional limits of the court," TEX.R. CIV. P. 47(b)—and instead pleaded only that his damages exceeded $500. Brite has never contended that he was unaware of or confused about the county court's jurisdictional limitation. *See, e.g., Clary Corp. v. Smith,* 949 S.W.2d 452, 461 (Tex.App.-Fort Worth 1997, pet. denied) (noting that 16.064 did not apply because "there [was] no evidence of mistake here," as plaintiffs "have neither alleged nor presented evidence that they were unaware of the trial court's amount in controversy limits"). While such confusion would be understandable, as other statutory county courts (even those in one county adjacent to Bexar County) [10] have no such restriction, he instead argued that "the amount in controversy should not be calculated by the damages originally sued for, but instead by the amount of damages that, more likely than not, the plaintiff would recover." *Brite I,* 215 S.W.3d at 402. We rejected that argument, concluding that "[t]he amount in controversy in this case exceeded $100,000 at the time Brite filed suit." *Id.* at 403.

The parties disagree about the proper standard for intentional disregard under the tolling statute, which requires that USAA "show[ ] in abatement that the first filing was made with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). Brite contends that intent is always a fact issue, inappropriate for resolution on summary judgment, while USAA asserts it has met its burden through circumstantial evidence of Brite's intent and that Brite is charged with knowledge of the law. We have never before addressed this issue.

[21] We agree, in part, with USAA. Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it. *Cf.* ***313** *Brown v. Shores,* 77 S.W.3d 884, 889 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (Brister, J., concurring) (noting that, because "diligent-service question focuses almost entirely on the efforts and thoughts of plaintiff's counsel, so the initial burden of presenting evidence should rest there, too"; "[o]therwise, every one of these numerous cases will begin with the defendant sending a notice to depose plaintiff's counsel and a subpoena for all files").

[22] We disagree, however, that a plaintiff's mistake about the court's jurisdiction would never satisfy the requirement. Section 16.064's intent standard is similar to that required for setting aside a default judgment, *see Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (requiring new trial if defendant proves three elements, the first of which is that default was neither intentional nor due to conscious indifference), and we have held that a mistake of law may be a sufficient excuse, *Bank One, Tex., N.A. v. Moody,* 830 S.W.2d 81, 84 (Tex.1992). Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts. *See* SECOND ANNUAL REPORT, at 11; *see also* CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS–INTO THE TWENTY–FIRST CENTURY, at 17 (1993) ("No one person understands or can hope to understand all the nuances and intricacies of Texas' thousands of trial courts.").

[23] But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court—which is what happened here. *Hotvedt v. Schlumberger, Ltd. (N.V.),* 942 F.2d 294, 297 (5th Cir.1991) (refusing to apply section 16.064 because "[i]t is clear ... that errors in [an attorney's] tactical decisions were not meant to be remedied by the savings statute"); *Clary,* 949 S.W.2d at 461 (holding that "[s]ection 16.064 was not intended to remedy ... tactical decisions"); *see also Brite I,* 161 S.W.3d at 586 (Duncan, J., dissenting) (noting that "the record, taken as a whole, establishes that Brite's trial attorney filed the Original Petition with full knowledge that Brite sought far more than $100,000 in actual damages and purposefully drafted the Original Petition to conceal that fact

by omitting the statement required by Rule 47(b)"). Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two year statute, is therefore barred.

V. Is USAA entitled to mandamus relief?

[24] Finally, we must decide whether mandamus relief is appropriate. Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that—rather than categorical determinations—"the adequacy of an appeal depends on the facts involved in each case." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex.2008); *In re The Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136–37 (Tex.2004).

In *CSR Ltd. v. Link*, 925 S.W.2d 591, 596–97 (Tex.1996), we conditionally granted mandamus relief ordering the trial court to grant CSR's special appearance in a toxic tort case. We held that "extraordinary circumstances" (namely the enormous number of potential claimants and the most efficient use of the state's judicial resources) warranted extraordinary relief, even though it was typically unavailable for the denial of a special appearance. ***314** *CSR*, 925 S.W.2d at 596; *see also Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 308–09 (Tex.1994).

[25] **[26]** And although "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," that rule is based in part on the fact that "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice"—a justification not applicable here. *In re McAllen Med. Ctr.*, 275 S.W.3d at 465–66. USAA has already endured one trial in a forum that lacked jurisdiction (and then a subsequent appeal to the court of appeals and this Court) and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not "[t]he most efficient use of the state's judicial resources." *CSR*, 925 S.W.2d at 596; *cf. In re McAllen Med. Ctr.*, 275 S.W.3d at 466. Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[ ] by a too-strict application of our own procedural devices." *In re McAllen Med. Ctr.*, 275 S.W.3d at 467.

Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment. We are confident the trial court will comply, and our writ will issue only if it does not.

Justice JOHNSON did not participate in the decision.

Parallel Citations

108 Fair Empl.Prac.Cas. (BNA) 1626, 53 Tex. Sup. Ct. J. 485

Footnotes

1 Texas Courts Online Home Page, *http://www.courts.state.tx.us/* (all Internet materials as visited March 24, 2010 and copy available in Clerk of Court's file). This figure includes municipal courts, whose jurisdiction is generally limited to criminal matters, although they may also hear certain civil cases involving dangerous dogs. *See* TEX. HEALTH & SAFETY CODE § 822.0421. It also includes statutory probate courts.

2 TEXAS ALMANAC 2010–1160 (Elizabeth Cruce Alvarez ed., Texas State Historical Association 65th ed. 2010), *available at http://www. texasalmanac.com/environment/*.

3 Those courts include district courts, criminal district courts, constitutional county courts, statutory county courts, justice of the peace courts, small claims courts, statutory probate courts, and municipal courts. They also include family district courts which, although they are district courts of general jurisdiction, have primary responsibility for handling family law matters. OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS 1, 3–18 (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*.

4 In a page-and-a-half, this report explains the subject matter jurisdiction of our appellate courts. OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1–2. The remainder of the eighteen-page, dual column, single-spaced document identifies, in painstaking detail, the various jurisdictional schemes governing our trial courts. *Id.* at 3–18.

5 TEX. GOV'T CODE § 21.009(2) (" 'Statutory county court' means a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code.").

6 Section 28.053 of the Government Code, at issue in *Sultan,* was recently amended to allow appeals to the court of appeals from de novo trials in county court on claims originating in small claims court. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, section 8, 2009 Tex. Gen. Laws 4274, 4274.

7 *See, e.g.*, Tex. S.B. 1204, 80th Leg., R.S. (2007) ("AN ACT relating to the reorganization and administration of, and procedures relating to, courts in this state, including procedures for appeals."); Tex. H.B. 2906, 80th Leg., R.S. (2007) (same).

8 In 1993, the limitations period was changed from one to two years. Act of May 14, 1993, 73rd Leg. R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291 (amending TEX.REV.CIV. STAT. art. 5221k, § 7.01(a)) (now codified at TEX. LAB.CODE § 21.256).

9 *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (noting that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term"); *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (observing that "[c]ourts, including this Court, it is true, have been less than meticulous" in their use of the term).

10 *See* TEX. GOV'T CODE § 25.1322(a) (providing that county courts at law in Kendall County have concurrent jurisdiction with the district court); *see also* TEXAS ALMANAC 2010–11, at 221, 306.

800 S.W.2d 637
Court of Appeals of Texas,
Dallas.

Walter E. NAYDAN, Appellant,
v.
Connie Jo NAYDAN, Appellee.

No. 05–90–00434–CV. | Nov. 20, 1990. | Rehearing Denied Dec. 20, 1990.

Ex-wife brought postdivorce action for partition of ex-husband's federal civil service retirement benefits. The 302nd Judicial District Court, Dallas County, Frances Harris, J., entered judgment in favor of ex-wife. Ex-husband appealed. The Dallas Court of Appeals, Whitham, J., held that: (1) federal law did not prohibit state court from dividing civil service retirement benefits, and (2) ex-husband's appeal was taken for delay and without sufficient cause warranting the imposition of damages.

Affirmed.

Attorneys and Law Firms

***638** Roger Turner, Dallas, for appellant.

Paul T. Fanning, John Alan Goren, Dallas, for appellee.

Before WHITHAM, ROWE and THOMAS, JJ.

Opinion

***639 OPINION**

WHITHAM, Justice.

In this post-divorce action for partition of federal civil service retirement benefits, the ex-husband-appellant, Walter E. Naydan, appeals from a judgment in favor of the ex-wife-appellee, Connie Jo Naydan. The trial court determined that Connie had a twenty-four percent interest in the benefits, rendered a money judgment against Walter for the sum of $13,586.31 as Connie's share of benefits paid to Walter prior to judgment, ordered Walter to deposit future benefits into a trust bank account and that twenty-four percent of those deposits be disbursed to Connie. In addition, the trial court awarded attorney's fees to Connie. The issues focus on (1) whether federal statutes and regulations prohibit a state court from making the division of the benefits, (2) whether the evidence conclusively proved that the benefits had a value of $11,751.00 on the date of the divorce, (3) whether the trial court awarded excessive attorney's fees and abused its discretion in awarding attorney's fees, (4) whether the trial court erred in excluding testimony, and (5) whether the trial court had jurisdiction to make the award. Because we find no merit in any of Walter's points of error, we affirm. We conclude, however, that this appeal has been taken for delay and without sufficient cause. Consequently, we assess damages against Walter pursuant to TEX.R.APP.P. 84 and render judgment in favor of Connie for the amount of those damages.

The parties were married on April 5, 1952. In August 1962, they moved to Dallas, Texas, when Walter began employment with the Veterans' Administration of the federal government. He remained continuously employed by the VA until his retirement. The parties were divorced on October 16, 1974. Thus, at the time of the divorce, Walter had twelve years of service. The divorce decree did not award Walter's civil service retirement benefits nor did it address the issue. In August 1987, Walter retired and commenced receiving civil service retirement benefits. Subsequent to Walter's retirement Connie made several demands on him to pay her share of those benefits to her. Walter, however, failed to make any such payment. At trial, Walter testified that at the time of the divorce he was not eligible to retire and receive immediate payment of any benefits, but that he was entitled to payment of benefits should he retire when he attained a certain age. Walter also testified that he had already received retirement benefit payments totalling $56,609.64, none of which he had shared with Connie.

The trial court's "Post Divorce Judgment of Partition of Retirement Benefits" ordered Walter to assign to and pay Connie twenty-four percent of each and every retirement benefit received by him after October 31, 1989, to open a separate checking account into which his retirement benefit payments are to be deposited, to direct the bank to pay twenty-four percent of each payment so deposited to Connie, and further ordered that Walter be constituted trustee of the funds for the benefit of Connie. The judgment also ordered that Connie recover $13,586.31 as twenty-four percent of the amount of retirement benefits received by Walter from the date of his retirement to October 1989.

[1] [2] [3] In his first and second points of error, Walter contends that the trial court erred in entering judgment against

him (1) because 5 U.S.C. § 8345(j) prohibits a state court from dividing civil service retirement benefits, and (2) because 5 C.F.R. 831.1704(b) and (d) defining "qualifying court orders" prohibits a state court from dividing civil service retirement benefits. Subsection (j) was added to section 8345 of the Civil Service Retirement Act on September 15, 1978. Act of Sept. 15, 1978, P.L. 95–366, 92 Stat. 600. That section reads in pertinent part:

> (j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Commission to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court ***640** order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Retirement benefits are subject to division as vested contingent community property rights even though the present right has not fully matured. *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex.1977). Generally, civil service retirement benefits earned during marriage are community property subject to division or partition in a divorce proceeding. *Hoppe v. Godeke*, 774 S.W.2d 368, 370 (Tex.App.—Austin 1989, writ denied). In the present case, we conclude that section 8345(j) does not prohibit division of civil service retirement benefits, but instead, specifically permits division.

[4] **[5]** Under 5 U.S.C. § 8345(j)(1), United States civil service retirement benefits as community property can be divided by the court in a divorce decree and required to be paid directly to the party awarded same. *Cowan v. Plsek*, 592 S.W.2d 422, 423 (Tex.Civ.App.—Waco 1979, no writ). Section 8345(j)(1) specifically permits award of a fractional portion to wife. *See Adams v. Adams*, 623 S.W.2d 500, 501 (Tex.App.—Fort Worth 1981, no writ). Indeed, the civil service amendments require the United States to recognize the community property division of civil service retirement benefits by a state court. *See Adams*, 623 S.W.2d at 501 (citing *McCarty v. McCarty*, 453 U.S. 210, 230–31, 101 S.Ct. 2728, 2740, 69 L.Ed.2d 589 (1981)). Where vested retirement benefits, as here, are not partitioned or taken into account in dividing community property in a divorce decree, the husband and wife become tenants in common or joint owners thereof, and such may be partitioned thereafter. *Cowan*, 592 S.W.2d at 423. The obvious purpose of section 8345(j) is to permit division of civil service retirement annuities if that is necessary to effectuate state marital property law. *Heisterberg v. Standridge*, 656 S.W.2d 138, 144 (Tex.App.—Austin 1983, no writ). The Federal Civil Service Retirement Act provides that retirement annuity benefits may be divided in accordance with state law. *Hoppe*, 774 S.W.2d at 371 (citing 5 U.S.C. § 8345(j)(1)). Moreover, it makes no difference that federal law did not permit division of civil service retirement benefits at the time of divorce. *See Boniface v. Boniface*, 656 S.W.2d 131, 133 (Tex.App.—Austin 1983, no writ). Indeed, section 8345(j)(1) authorizes such division and can be applied retroactively in a suit for partition. *See Boniface*, 656 S.W.2d at 134–35. Section 8345(j)(1) created no new substantive rights between the parties. It merely instituted a procedure by which the federal government was to recognize existing rights and cooperate with state courts in distributing benefits accordingly. *See Boniface*, 656 S.W.2d at 133. The legislative history of the 1978 amendment [§ 8345(j)(1)] specifically recognized the pre-existing authority of state courts to regard civil service retirement benefits as community property and to deal with them as such. *Boniface*, 656 S.W.2d at 133. The 1978 amendments did not affect the nature of civil service retirement benefits that accrued and vested during marriage. Such benefits were and are community property under the law of this state both before and after the amendments. *Boniface*, 656 S.W.2d at 134. It was only after adoption of these amendments that federal authorities could be bound by state court decisions in their future payment of benefits pursuant to the division of property incident to or arising out of a divorce. *Boniface*, 656 S.W.2d at 134. A partition judgment dividing community assets because an earlier divorce decree failed to address such property in any manner is, obviously, a court order incident to and arising out of the earlier divorce proceedings. *Boniface*, 656 S.W.2d at 134–35. We conclude, therefore, that in the present case the trial court properly granted partition to Connie of what the trial court determined was her community share of benefits previously paid to Walter, and granted partition to Connie of what the trial court found to be her community share of all future benefit payments. Hence, it follows that section 8345(j) does not prohibit a state court from dividing civil service retirement ***641** benefits. We overrule Walter's first point of error.

At oral argument, Walter conceded that if we were to decide that section 8345(j) does not prohibit a state court from dividing civil service retirement benefits, then we must overrule his second point of error. Indeed, we must. A partition judgment dividing community assets because an earlier divorce decree failed to address such property in any manner is a "qualifying court order" within the meaning of 5 C.F.R. 831.1704(b) and (d) as applicable in the present case. (In the present case, we do not deal with a survivorship annuity.) *See Boniface,* 656 S.W.2d at 134–35. We overrule Walter's second point of error.

[6] In his sixth point of error, Walter contends that the trial court erred in partitioning his retirement benefits as undivided assets because the prior trial court lacked jurisdiction to divide such property pursuant to section 3.92 of the Texas Family Code. TEX.FAM.CODE ANN. § 3.92 (Vernon Supp.1990). Walter grounds this contention on the assertion that section 3.92 did not become effective until November 1, 1987, and only applies to orders, decrees or judgments rendered after that date. (The parties were divorced October 16, 1974). For the purposes of this opinion, we assume but do not decide, that section 3.92 bears in some way upon the trial court's jurisdiction to divide Walter's civil service retirement benefits. (See above our disposition of Walter's first two points of error.) Nevertheless, we conclude that the trial court had such jurisdiction. Section 3.92 of the Family Code is found in chapter 3, subchapter F of that code. All of subchapter F was added to chapter 3 of the Family Code by section 3 of House Bill 168, passed in 1987 by the Texas Legislature. Act of July 20, 1987, 70th Leg., 2d C.S., ch. 50, § 3, 1987 TEX.GEN.LAWS 160, 161. In 1989, the Texas Legislature adopted various amendments to the Family Code, providing in pertinent part:

> SECTION 10. ....
>
> (b) *The amendment that added Subchapter F* to Chapter 3, Family Code, made by Chapter 50, Acts of the 70th Legislature, 2nd Called Session, 1987, *applies* to decrees of divorce and annulment rendered *before,* on, or after *November 1, 1987.*
>
> * * * * * *
>
> SECTION 12. *This Act* takes effect September 1, 1989, and, except as provided by Sections 9 and 10, *applies to a cause of action pending* on or brought after this date.

Act of May 26, 1989, 71st Leg., R.S., ch. 371, §§ 10 and 12, 1989 TEX.GEN.LAWS 1462, 1466 (emphasis added). Thus, the Legislature expressly gave the trial court the authority to divide retirement benefits that had not previously been awarded in the divorce decree rendered prior to November 1, 1987. That authority derives either from section 3.92, to which Walter refers, or from section 3.91, which actually does apply since the divorce court did have jurisdiction over the retirement benefits property. Regardless whether section 3.91 or 3.92 applies, both sections are found in subchapter F of chapter 3 of the Family Code. In addition, section 12 of the 1989 amendments, quoted above, provides that the amendments apply to all cases pending on the effective date of those amendments, September 1, 1989. This suit was so pending; it was tried the following month on October 5, 1989, and judgment was rendered January 16, 1990. Therefore, the trial court had an express statutory grant of authority, including the authority to divide the retirement benefits on a "just and right" basis. We conclude that the trial court had jurisdiction to divide Walter's civil service retirement benefits. We overrule Walter's sixth point of error.

[7] **[8]** In his third point of error, Walter contends that the trial court erred in awarding Connie a judgment in the sum of $13,586.31 because the undisputed evidence showed that the benefits only had a value of $11,751.00 on October 12, 1974. Walter argues that as a matter of law any valuation in excess of $11,751.00 would be due to Walter's separate efforts and labor subsequent to the divorce. Walter reasons that if he had not returned to work for the federal government after the divorce, the ***642** benefit would only have the value of $11,751.00. Nowhere in his brief does Walter tell us where we can read about or ascertain this $11,751.00 figure. Indeed, Connie tells us that the figure of $11,751.00 is never mentioned in the record. We conclude, therefore, that in the present case the references to certain facts do not contain proper references to the record where the matters complained of may be found. *Kropp v. Prather,* 526 S.W.2d 283, 288 (Tex.Civ.App.—Tyler 1975, writ ref'd n.r.e.). The burden is on appellant to show that the record supports his contentions and to point out the place in the record where the matters complained of are shown. *Kropp,* 526 S.W.2d at 288. In the present case, as in *Kropp,* we do not feel that the rules require us to read through the entire record to determine whether appellant's allegations have any validity. We conclude, as did the court in *Kropp,* that appellant has failed to meet his burden. *See Kropp,* 526 S.W.2d at 288. We conclude further, therefore, that the trial court did not err in awarding Connie

a judgment in the sum of $13,586.31. We overrule Walter's third point of error.

[9] In his fifth point of error, Walter contends that the trial court erred in refusing to allow Walter to testify regarding the details of his own retirement plan as it related to these proceedings. At trial, Walter testified that Exhibit 3 was a copy of his earnings and leave statement, dated as of August 17, 1974 (two months before the divorce), and that such document showed the amount of his contribution to his retirement plan in the amount of $11,478.54. Walter's counsel then asked him questions regarding the sum of $11,817.58. Nowhere is the $11,817.58 figure explained, but we assume it to be some alleged calculation of the contribution figure at or near the date of the divorce. (This is a wholly different figure from the $11,751.00 raised in point of error number three) Walter insists that the excluded testimony, about which Walter complains, concerned what his rights "would have been *to this $11,817.58* ... if [he] had chose [*sic*] to *quit* " his employment at the time of the parties' divorce. The trial court sustained an objection to the question. Walter insists that this testimony was very material and required by law.

Walter, however, argues only the first part of the inquiry, *i.e.*, that the trial court erred in refusing to admit the testimony. Nowhere does Walter construct for us an argument that the asserted error was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. *See* TEX.R.APP.P. 81(b)(1). Therefore, the second part of the inquiry was not briefed. Hence, Walter does not complain that trial court error led to an improper judgment. Points of error not separately briefed are waived. *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex.1984) (on motion for reh'g). A point of error that is not briefed fails to meet the minimum requirements of Rule 418, Texas Rules of Civil Procedure [now TEX.R.APP.P. 74(f)], and the appellate court considers such a point to be waived. *Schero v. Astra Bar, Inc.*, 596 S.W.2d 613, 614 (Tex.Civ.App.—Corpus Christi 1980, no writ). We conclude that Walter waived his fifth point of error by not addressing the question of the consequences of the asserted trial court error. Indeed, the court of appeals may not reverse a trial court's judgment in the absence of properly assigned error. *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex.1986). We overrule Walter's fifth point of error.

[10] In his fourth point of error, Walter contends that the trial court's award of attorney's fees in the amounts awarded is excessive and an abuse of discretion. We begin by noting that the award was not in an absolute fee amount of $25,500.00 as urged by Walter. True, the judgment awards $25,500.00. In her brief, however, Connie concedes that the trial court awarded only $6,000.00 for attorney's fees in the trial court. We express no opinion as to application of credits against the $25,500.00 affected by the appellate process. These credits total $19,500.00. We emphasize that interpretation of the trial court's judgment is not before us and we make none. Nevertheless, Walter would have us hold the award excessive and the result of an ***643** abuse of trial court discretion. We quote Walter's entire argument presented to persuade us to this holding:

> The Judgment of the Court in its post-divorce judgment of Partition of Retirement Benefits (Tr. 91 et seq.) awarded [Connie's Counsel] attorneys [*sic*] fees in the sum of $25,500. All the law this case involves is 5 U.S.C.A. 8345 and its interpretative regulation 5 CFR 831.1701 et seq.
>
> The Statement of Facts record of the trial of this cause is only 43 pages of evidence until [Connie's counsel] called himself to testify regarding attorneys fees on page 43 through page 54. [Walter] asks the Court of Appeals to take Judicial Notice of Reasonable Attorneys Fees in this cause pursuant to Section 38.004 of the Texas Civil Practices and Remedies Code. [Walter] also asks the Court of Appeals to give effect to the Texas Disciplinary Rules of Professional Conduct, enacted October 17, 1989 by the Texas Supreme Court, and Rule 1.04(6) on fees which reads as follows:
>
> > For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.
>
> [Walter] petitions the Court of Appeals to grant him a reasonable and fair REMITTITUR.

From this argument, we are not persuaded that the award is excessive and the result of an abuse of discretion. Thus, in the present case, we cannot say that the award is excessive and the result of an abuse of discretion. We overrule Walter's fourth point of error.

[11] Before closing this opinion, we address Connie's motion that we award her damages under appellate Rule 84. That rule provides:

> In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the

> court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against such appellant.

TEX.R.APP.P. 84. Hence, we must determine if Walter has taken this appeal for delay and without sufficient cause. First, we consider the question of taking the appeal without sufficient cause. In her brief, Connie relies upon the above cited cases of *Hoppe, Boniface, Heisterberg, Adams,* and *Cowan* which this court considers to control disposition of Walter's first two points of error. At oral argument, Walter's counsel was asked by the court to speak to those five cases. Walter's counsel declined to do so on the excuse that he had not studied them and was not prepared to discuss those cases. Indeed, nowhere in his brief does Walter cite any of those cases or ask that we distinguish them or refuse to follow them as incorrect statements of the law. Thus, we can only conclude that Walter has prosecuted this appeal with the deliberate purpose of ignoring existing law as propounded by our sister courts of appeals. We reach this conclusion because a non-frivolous appellant would meet these cases "head-on," distinguish them, or argue erroneous reasoning, and ask that we not follow them, thus inviting the Supreme Court to resolve the matter. We conclude, therefore, that Walter has taken this appeal without sufficient cause. Next, we consider whether Walter has taken this appeal for delay. Rule 84 derives from former Rule 438 of the Texas Rules of Civil Procedure. In addressing the "has been taken for delay" question under the former rule, we looked at the case from the point of view of the advocate and determined whether he had reasonable grounds to believe that the case would be reversed. *See Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). Assuming this to be the correct standard under Rule 84, we apply it to the present case. Hence, in considering the "has taken an appeal for delay" required finding in the present case under Rule 84, we again look at Walter's deliberate purpose of ignoring existing law as propounded by our sister courts of appeals. We conclude that such conduct reflects dilatory tactics on the part of Walter's ***644** attorney. *See Beckham,* 695 S.W.2d at 663. Consequently, we conclude that Walter's counsel, as advocate, had no reasonable grounds to believe that the case would be reversed. *See Beckham,* 695 S.W.2d at 663. We conclude, therefore, that Walter has taken this appeal for delay. The purpose of Rule 84 is to shift part of an appellee's expense and burden of defending himself in a frivolous appeal to the appellant. *Dallas County Appraisal District v. The Leaves, Inc.*, 742 S.W.2d 424, 431 (Tex.App.—Dallas 1987, writ denied). Therefore, we conclude that we must assess damages under Rule 84 of ten percent of the trial court's monetary judgment against Walter. Accordingly, we assess damages against Walter and in favor of Connie in the amount of $1,358.63.

We affirm the trial court's judgment. We render judgment in favor of Connie and against Walter in the sum of $1,358.63 together with interest at the rate of ten percent (10%) per annum from the date of this opinion. [1]

Footnotes

1 Computation of judgment rate by the consumer credit commissioner for month of November 1990, 15 Tex.Reg. 6218 (1990), pursuant to TEX.REV.CIV.STAT.ANN. art. 5069–1.05, § 2 (Vernon Supp.1990). The contents of the Texas Register are to be judicially noticed and constitute prima facie evidence of the text of the documents published in the Register and of the fact that they are in effect on and after the date of the notation. TEX.REV.CIV.STAT.ANN. art. 6252–13a, § 4(c) (Vernon Supp.1990).

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).

2013 WL 4516082
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

Clifford ZEIFMAN, Appellant
v.
Sheryl Diane MICHELS, Karl E.
Hays, and John Barrett, Appellees.

No. 03–12–00114–CV. | Aug. 22, 2013.

From the District Court of Travis County, 353rd Judicial District No. D–1–GN–06–002930; Rhonda Hurley, Judge Presiding.

Attorneys and Law Firms

Brian W. Bishop, The Law Offices of Brian W. Bishop, Geoffrey D. Weisbart, Sara E. Janes, Weisbart, Springer, Hayes, L.L.P., Austin, TX, for Appellee.

Bronwyn Massey Scharar, Geffrey W. Anderson, Anderson, Riddle & Kuehler, L.L.P., Fort Worth, TX, for Appellant.

John Barrett, Law Office of John Barrett, Austin, TX, pro se Appellee.

Before Justices PURYEAR, PEMBERTON, and FIELD.

Opinion

MEMORANDUM OPINION

BOB PEMBERTON, Justice.

***1** Clifford Zeifman appeals an order denying his motion for sanctions against appellees Sheryl Diane Michels, Karl E. Hays, and John Barrett, and awarding each appellee $10,000 for attorney's fees incurred in defending against Zeifman's motion. We will affirm the district court's judgment.

BACKGROUND

This appeal is the latest to arise from a series of legal battles involving Zeifman and Michels that has spanned almost ten years, cost them hundreds of thousands of dollars of legal fees, and generated no less than five previous opinions from this court.[1] As remarkable as it seems now, Zeifman and Michels once got along well enough to get married, as they did in 1992, and they even had two children together: G.L., a son, born in 1994, and A.A., a daughter, born in 1997. But Zeifman and Michels divorced in 1998, and G.L. and A.A. have since spent their formative years in the shadow of "extensive and acrimonious litigation" between their parents that is ostensibly aimed at advancing each parent's perception of the children's welfare. *See Zeifman v. Michels*, 229 S.W.3d 460, 461–62 (Tex.App.-Austin 2007, pet. denied).

The final divorce decree was based on an irrevocable mediated settlement agreement filed with the district court and incorporated into the decree. *See* Tex. Fam.Code § 6.602. The decree named both parents as joint managing conservators and, of relevance here, incorporated the following negotiated agreement regarding their young children's education:

> The Court finds that the parties have agreed and IT IS THEREFORE ORDERED that the children shall attend the University of Texas Lab School until such a time as the children are of the age to attend elementary school. The Court finds that the parties have agreed and IT IS THEREFORE ORDERED that, at that time, the children shall attend the public school in the following order of priority for elementary school: (1) Bryker Woods; or (2) Casis; provided, however, that if neither party lives in a residential area eligible to attend either Bryker Woods or Casis, then the children shall attend elementary school which the children are eligible to attend, at the highest rated school, the highest rating being determined by the annual TAAS testing, using the previous year's rankings, or shall attend another elementary school to which the parties agree in writing. The Court finds that the parties have agreed and IT IS THEREFORE ORDERED

> that for middle school, the children shall attend the middle school into which the children's elementary school feeds. The Court finds that the parties have agreed and IT IS THEREFORE ORDERED that for high school, the children shall attend the high school into which the children's middle school feeds.

The decree anticipated that the parents might have disagreements regarding educational decisions for their children that they could not resolve, and provided the following mechanism in that event:

> The Court finds that the parties have agreed and IT IS THEREFORE ORDERED that if the parties cannot agree on educational decisions for a child, the parties shall follow the recommendations of the person that is the child's teacher at the time of the decision.

***2** Pursuant to the decree, A.A., the youngest child, spent her first-grade year at Bryker Woods Elementary, which is a public school in the Austin Independent School District (AISD). In April 2004, toward the end of that school year, Michels applied for her admission to St. Andrew's Episcopal School—a private school—for the next school year. She did not notify Zeifman of the application until after A.A. had been placed on St. Andrew's waiting list. In June 2004, A.A. was accepted for admission. Zeifman objected to the change of schools and insisted that the parties follow the decree. Pursuant to the decree, Michels consulted with A.A.'s first-grade teacher at Bryker Woods, who advised Michels that she thought it would be best if A.A. stayed at Bryker Woods.

On July 19, 2004, Michels filed a petition to modify the parent-child relationship. After a hearing, the district court modified the decree to provide that Michels have the sole right to make educational decisions for A.A. Zeifman appealed the district court's decision to this Court. On August 4, 2006, we reversed the district court's modification order, concluding that there was legally insufficient evidence to support the district court's finding that the circumstances of the child or of either conservator had materially and substantially changed so as to warrant the modification of the decree. *See Zeifman v. Michels*, 212 S.W.3d 582, 596 (Tex.App.-Austin 2006, pet. denied). We held that the district court abused its discretion in modifying the decree and rendered judgment in favor of Zeifman.

On August 9, 2006, after we released our opinion, but before mandate issued, Zeifman wrote Michels a letter indicating his understanding of our opinion to be that "the joint custody and decision making agreed in the decree is fully restored and the school [A.A.] attends is stipulated by the same court order." Accordingly, Zeifman wrote that he had "informed Brykerwoods of [A .A.]'s re-enrollment and completed the necessary paperwork."

On the next day, one of Michels's attorneys, appellee Karl Hays, sent a letter to Zeifman's attorney at the time, Jimmy Vaught, indicating Michels's belief that this Court's opinion was "not effective or enforceable" until the mandate issued and that the May 25 order was still in effect, leaving Zeifman without authority to re-enroll A.A. at Bryker Woods. To the extent Zeifman contended that the parties were subject to the divorce decree's terms, Hays gave notice that Michels did not consent to A.A.'s enrollment at Bryker Woods. Hays also stated that if Zeifman insisted that the divorce decree was in effect, they would need to arrange to obtain a recommendation from her current teacher "as soon as possible in light of the impending start of the academic year." Vaught responded the same day expressing disagreement with Michels's position and asserting that the teacher recommendation made in 2004 that A.A. remain at Bryker Woods was still effective. Vaught took the position that, "[b]y enrolling [A.A.] in Bryker Woods, Mr. Zeifman is adhering to the recommendation" of her teacher "which Ms. Michels disregarded."

***3** On the same day, Hays sent a letter to the principal of Bryker Woods requesting that the school deny A.A.'s re-enrollment based on the district court's May 25, 2005 order granting Michels the exclusive right to make educational decisions for A.A. (the order that this Court had reversed several days before). The letter enclosed a copy of the May 25 order as well as a copy of the "Travis County Standing Order Regarding Children, Property and Conduct of the Parties," which provides that children of parties to a pending family law case must not be withdrawn from the school where they are enrolled without the consent of both parents. Hays stated that he was providing the school with these orders because it was his understanding that Zeifman was "attempting to register [A.A .] at Bryker Woods," but Zeifman "has no authority" to do so and Michels "objects to any effort" by

Zeifman to enroll A.A. at Bryker Woods. Hays did not mention this Court's opinion reversing the May 25 order.

On August 14, 2006, the day before the Bryker Woods's school year began, Michels sued AISD seeking injunctive relief to prevent the district from permitting A.A. to be enrolled at Bryker Woods or any other AISD school as the 2006 school year began. Michels alleged that permitting such enrollment would (1) violate Michels's exclusive parental rights (at least until the mandate issued) to make educational decisions on behalf of A.A. and (2) "actively assist [ ] ... and aid[ ] and abet[ ] Clifford Zeifman in the violation of a valid court order," the Travis County standing order it had previously provided to Bryker Wood's principal.[2] Michels did not name Zeifman as a party to this action, nor did she provide notice to him or his attorney on the day the action was filed.

On August 14, Michels obtained an ex parte temporary restraining order against AISD.[3] Four days later, on August 18, Zeifman filed a petition in intervention, motion to dismiss, and motion for sanctions. Zeifman pleaded that he had a justiciable interest in Michels's new lawsuit as A.A.'s father and co-managing conservator, and as respondent and counter-petitioner in the ongoing litigation. Zeifman moved to dismiss Michels's suit as an improper attempt to circumvent the district court's jurisdiction over the divorce decree and this Court's jurisdiction over "the issue of [A.A.'s] education ."

Zeifman also sought sanctions under rule 13 of the Texas Rules of Civil Procedure, chapters 9 and 10 of the Civil Practice and Remedies Code, and the district court's inherent power. He complained chiefly that Michels had filed a "frivolous and groundless" separate suit against AISD, rather than seeking relief in the divorce and custody case, to circumvent the jurisdiction of the district court and this Court, and in a manner deliberately calculated to avoid his knowledge or participation for a short, but critical, period of time.

A hearing on Zeifman's intervention, motion to dismiss, and motion for sanctions was set on the third business day thereafter, Wednesday, August 23. On Monday, August 21, Michels filed a rule 11 agreement with AISD, dated August 18, whereby AISD agreed not to permit A.A. to be enrolled at or attend Bryker Woods "until such time as [AISD] is presented with a final, non-appealable order expressly authorizing such enrollment and attendance," in return for Michels's agreement to dismiss her pending suit. Michels filed a notice of non-suit on August 22 and, on the day of the hearing, filed a motion to strike Zeifman's intervention. After a hearing in which only argument was presented, the district court signed an "Order Confirming Nonsuit" and, by separate order, granted Michels's motion to strike Zeifman's intervention, dismissed as moot his motion to dismiss, and denied his motion for sanctions.

***4** Zeifman appealed that order to this Court. *See Zeifman*, 229 S.W.3d at 468. In a ruling handed down during the summer of 2007, we concluded that the district court abused its discretion in striking his intervention. *Id.* Additionally, because this erroneous ruling had been a predicate for the district court's ruling on Zeifman's sanctions motion, we remanded the sanctions motion for further proceedings and instructed the district court to "carefully consider the facts known by Michels at the time she filed suit against AISD when determining whether sanctions are appropriate." *Id.* However, it would be several years before Zeifman would return to his pending sanction motion.

On August 21, 2006, around the same time Michels's injunction action was being litigated in the district court, Zeifman had filed in the remanded modification suit a "Motion to Implement Third Court of Appeals Judgment and Opinion Concerning Educational Decisions for A.A.," requesting that our opinion in that case "be immediately implemented and that [he] be authorized to re-enroll [A.A.] at Bryker Woods Elementary School...." The district court set aside the modification order, but otherwise denied Zeifman's requested relief, effectively returning the parties to the terms of the original divorce decree. Wanting more, Zeifman then filed a petition for writ of mandamus in this Court. We denied Zeifman's petition, explaining that our order vacating the prior modification order left "the parties to resolve any disputes concerning A.A.'s education according to their agreed-upon mechanisms in their original divorce decree." *In re Zeifman*, No. 03–06–00601–CV, 2006 Tex.App. LEXIS 11340, at *2 (Tex.App.-Austin Nov. 22, 2006, orig. proceeding) (mem.op.).

Shortly before we handed down our opinion in the injunction action, on June 8, 2007, Zeifman and Michels signed agreed temporary orders in the modification suit providing that A.A. "shall continue to be enrolled in and attend exclusively St. Andrew's ..., until and through the time final trial of this case has been concluded." The parties further stipulated "that regardless of any ruling" in Zeifman's appeal of the order striking his intervention in the AISD injunction suit, A.A.

"shall continue to be enrolled in and attend exclusively St. Andrew's ... during the pendency of this suit ...."

Zeifman then filed a separate lawsuit against Michels, Hays, and two other lawyers who had represented Michels in the litigation against him, Becky Beaver and appellee John Barrett, seeking damages based on their involvement in the injunction action. On the defendants' motions, the district court granted summary judgment against all of Zeifman's claims. Zeifman appealed that order to this Court, and we affirmed. *See Michels v. Zeifman*, No. 03–08–00287–CV, 2009 Tex.App. LEXIS 1017, at *2, 2009 WL 349167 (Tex.App.-Austin Feb. 12, 2009, pet. denied) (mem.op.). Zeifman also filed grievances against the attorneys with the State Bar of Texas, which were summarily dismissed. He also filed suit against an amicus attorney, alleging "fraud" and "gross negligence" in connection with her representation of his other child in the divorce proceedings. The district court granted summary judgment against Zeifman and sanctioned him for filing a frivolous lawsuit. Zeifman appealed this order as well, and we once again affirmed. *See Zeifman v. Nowlin*, 322 S.W.3d 804, 812 (Tex.App.-Austin 2010, no pet.).

***5** On September 1, 2010, more than three years after this Court's opinion remanding his sanction claims in the injunction suit, Zeifman pursued those claims again. An evidentiary hearing was held. Eventually, the district court signed an order denying Zeifman's sanctions motion and instead awarding $10,000 each to Hays, Barrett, and Michels for their attorney's fees incurred in defending the motion. Zeifman appealed that order.

ANALYSIS

In two issues, Zeifman asserts that the district court abused its discretion in denying his motion for sanctions, urging that he was entitled to sanctions under, respectively, Rule of Civil Procedure 13 and chapter 10 of the Civil Practice and Remedies Code. *See* Tex.R. Civ. P. 13, 215; Tex. Civ. Prac. & Rem.Code §§ 10.001–.005. In a third issue, he argues that the district court abused its discretion in awarding the appellees attorney's fees against him. The appellees all counter that the district court acted within its discretion in denying Zeifman's motion and awarding them attorney's fees. Barrett and Hays also contend that Zeifman lacked standing to assert his motion for sanctions. Finally, in a cross-point, Hays requests that we impose attorney's fees against Zeifman for filing a frivolous appeal.

Standing

Before we reach the merits, we consider the contention of Barrett and Hays that Zeifman lacked standing to seek sanctions against them. Standing is a component of subject-matter jurisdiction, and is reviewed de novo. *Ford Motor Co. v. Butnaru*, 157 S.W.3d 142, 147 (Tex.App.-Austin 2005, no pet.). In response to Zeifman's motion for sanctions, Barrett and Hays have each interposed pleas to the jurisdiction asserting that Zeifman had not been a party to the injunction lawsuit and that AISD has been the sole defendant when the pleadings that form the basis of his sanctions motion were filed and the TRO was obtained. Because rule 13 of the Rules of Civil Procedure and chapter 10 of the Civil Practice and Remedies Code concern appropriate punishment for "parties" that file lawsuits without merit, *see* Tex.R. Civ. P. 13, 215; Tex. Civ. Prac. & Rem.Code § 10.001, Barrett and Hays argue that only the party against whom suit is brought may seek sanctions. They further maintain that no Texas court has recognized the right of a third-party to intervene in a case and seek sanctions for pleadings that were not filed against the intervenor and conduct that occurred prior to the intervenor's appearance. Hays likens Zeifman's efforts to obtain sanctions to intervening in a suit and thereafter asserting a claim for malicious prosecution. [4]

Zeifman responds that a claim for malicious prosecution requires proof of "the institution or continuation of civil proceedings against the plaintiff," while rule 13 and chapter 10 sanctions do not contain similar, specific requirements entitling only particular parties to relief. *See* Tex.R. Civ. P. 13 ("If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction."), 215; Tex. Civ. Prac. & Rem.Code § 10.002 ("A party may make a motion for sanctions, describing the specific conduct violating Section 10.001."); *see also Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex.1996) (stating elements of malicious prosecution). Zeifman notes that this Court already determined that he "had a justiciable interest, was a proper party to the suit," and therefore, could seek sanctions. *See Zeifman*, 229 S.W.3d at 468 ("Zeifman, as we have determined, was a proper party. Michels's non-suit thus could not defeat or render moot his claims for sanctions and for attorney's fees ...."). Because we have previously ruled that Zeifman was a proper party to the suit, and because nothing in the language of rule 13 or chapter 10 indicates that intervenors may not seek relief under those

provisions, we conclude that Zeifman had standing to pursue his motion for sanctions. *See id.*

Standard of review

***6** We review a trial court's award or denial of sanctions for an abuse of discretion. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex.2007). In matters committed to a district court's discretion, the test is whether the ruling was unreasonable or arbitrary or whether the court acted without reference to any guiding rules or principles. *Lake Travis Indep. Sch. Dist. v. Lovelace*, 243 S.W.3d 244, 249 (Tex.App.-Austin 2007, no pet.). In deciding whether the denial of sanctions constitutes an abuse of discretion, we examine the entire record, including the findings of fact and conclusions of law, if any were made, reviewing the conflicting evidence in the light most favorable to the trial court's ruling and drawing all reasonable inferences in favor of the court's judgment. *Id.* at 249–50 (citing *In re C.Z.B.*, 151 S.W.3d 627, 636 (Tex.App.-San Antonio 2004, no pet.)). The party seeking sanctions has the burden of showing his right to relief. *GTE Commc'n Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex.1993).

Sanctions under rule 13

Zeifman sought sanctions against Hays and Barrett under rule 13 for filing suit for injunctive relief against AISD and for doing so without providing notice to Zeifman. Under rule 13, "[t]he signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." Tex.R. Civ. P. 13. "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215–2b, upon the person who signed it, a represented party, or both." *Id.* Under rule 13, courts may "impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by reimbursing the costs incurred in responding to baseless pleadings." *Lovelace*, 243 S.W.3d at 254 (citing *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596–97 (Tex.1996) (per curiam)).

Groundlessness

In order to establish that Michels's lawsuit against AISD was "groundless," Zeifman had the burden of showing that the suit had "no basis in law or fact and [was] not warranted by good faith argument for the extension, modification, or reversal of existing law." Tex.R. Civ. P. 13; *see Lovelace*, 243 S.W.3d at 254. To determine if a pleading was groundless, the trial court must objectively ask whether the party and counsel made a reasonable inquiry into the legal and factual basis of the claim at the time the suit was filed. *See Loeffler v. Lytle Indep. Sch. Dist.*, 211 S.W.3d 331, 348 (Tex.App.-San Antonio 2006, pet. denied). Groundlessness is thus more than an ultimate determination that the claim is not a winner. *See Emmons v. Purser*, 973 S.W.2d 696, 700 (Tex.App.-Austin 1998, no pet.).

***7** Zeifman has argued that Michels's suit against AISD was groundless because this Court had already issued an opinion reversing the district court's modification order giving Michels sole control over educational decisions. Our opinion, Zeifman asserts, reinstated the original divorce decree and terminated the effect of the Travis County standing order relied upon by Michels in seeking the injunction.[5] Zeifman contends that Michels's sole purpose in suing AISD for injunctive relief was to "evade the unfavorable judgment handed down by the Third Court of Appeals."

Appellees respond that, at the time of filing, Michels's attorneys believed, based on their research of then-existing case law, that an appellate court judgment was not effective or enforceable until the appellate process concludes and mandate has issued, thus leaving them a window of time in which they could advance Michels's interests under the modified decree. *See Edwards Aquifer Auth. v. Chemical Lime Ltd.*, 212 S.W.3d 683, 695–96 (Tex.App.-Austin 2006), *rev'd*, 291 S.W.3d 392 (Tex.2009) ("An appellate court judgment is not enforceable in the lower court before mandate issues." (citing *In re Long*, 984 S.W.2d 623, 625–26 (Tex.1999) (per curiam))). Hays described his research and conclusions on this issue during the hearing. We are compelled to agree that, especially given the state of the case law existing at the time, this position regarding the effect of our opinion and judgment was not objectively unsupported in law or fact or a good-faith argument for such an application or extension of then-existing law.

In contending otherwise, Zeifman claims that "Hays agreed that even if the mandate had not issued, the appellate court's decision reinstated the original order." However, Zeifman overlooks or mischaracterizes Hays's testimony from the sanctions hearing, which included the following exchange:

> Q: And was that your position on that date of August 10th that the agreed final decree of divorce in that provision governed or that the order that had been overturned by the Court of Appeals on May 25th, 2005, governed?
>
> Hays: It was actually—that was the fall-back position. I firmly believe that the mandate did not—because a mandate had not issued, Judge Meuerer's order was still in effect.

As for a legal or factual basis to seek an injunction against AISD in particular, Zeifman points to Hays's testimony regarding the research he conducted prior to seeking an injunction against AISD:

> I performed the research to see whether there was legal authority for being able to file a lawsuit against a third party to prevent them from aiding and abetting another party from violating a court order. And I found that there was authority that says you can file a lawsuit against a third party to prevent them from aiding and abetting. And once I saw that, that was the authority I was looking for. And that was the justification for filing this suit against AISD.

***8** Although Zeifman questions the validity of Hays's conclusions and suggests that he should have done more research, he points to no cases that would persuade us that appellees lacked a good faith legal or factual basis for seeking relief against AISD. *See Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 191 n. 15 (Tex.App.-Texarkana 2011, no pet.) (sanctions movant's argument that non-movant "failed to introduce evidence sufficient to support his claims ... or to establish the merit of the underlying claim ... misapprehends the parties' relative burdens"). Based on the circumstances known to the appellees at the time of the filing, and given our deferential review of acts committed to the district court's discretion, we cannot conclude that the court abused its discretion in concluding that the lawsuit was not groundless.

Bad faith or purpose of harassment

Even if the district court had concluded that the AISD lawsuit was groundless, Zeifman would also have to establish that Hays and Barrett brought the suit in bad faith or for the purpose of harassment. Under rule 13, "bad faith" requires the conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose. *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex.App.-Austin 2008, pet. denied). In deciding whether a pleading was filed in bad faith or for the purpose of harassment, the trial court must consider the acts or omissions of the represented party or counsel, not merely the legal merit of a pleading or motion. *Parker v. Walton*, 233 S.W.3d 535, 540 (Tex.App.-Houston [14th Dist.] 2007, no pet.). The party moving for sanctions must prove the pleading party's subjective state of mind. *Thielemann v. Kethan*, 371 S.W.3d 286, 294 (Tex.App.-Houston [1st Dist.] 2012, pet. denied). Bad faith does not exist when a party merely exercises bad judgment or is negligent. *Id.* A party acts in bad faith if he has been put on notice that his understanding of the facts may be incorrect and he does not make reasonable inquiry before pursuing the claim further. *Robson*, 267 S.W.3d at 407. "Harass" is used in a variety of legal contexts to describe words, gestures, and actions that tend to annoy, alarm, and verbally abuse another person. *Thielemann*, 371 S.W.3d at 294 (citing *Elkins v. Stotts–Brown*, 103 S.W.3d 664, 669 (Tex.App.-Dallas 2003, no pet.)).

Courts presume that pleadings, motions, and other papers are filed in good faith, and the party moving for sanctions has the burden of overcoming this presumption. *See* Tex.R. Civ. P. 13, 215; *Lovelace*, 243 S.W.3d at 256 (citing *Tanner*, 856 S.W.2d at 731). However, direct evidence of a sanctioned person's subjective intent is not required to rebut the presumption. *See Keith v. Solls*, 256 S.W.3d 912, 919 (Tex.App.-Dallas 2008, no pet .) (citing *Schexnider v. Scott & White Mem'l Hosp.*, 953 S.W.2d 439, 441 (Tex.App.-Austin 1997, no pet.)). Intent may be shown by circumstantial evidence as well as direct evidence. *Keith*, 256 S.W.3d at 919. Under an abuse of discretion standard, the trial court judges the credibility of the witnesses and may resolve any conflicting testimony. *Id.; Keever v. Finlan*, 988 S.W.2d 300, 313–14 (Tex.App.-Dallas 1999, pet. dism'd) ("The trial court's choices among merely conflicting pieces of evidence cannot be an abuse of discretion.").

***9** Zeifman contends that the record supported a finding that the appellees "chose to file a lawsuit against AISD with the improper motive of controlling Zeifman's actions and to restrict his participation in his daughter's education decisions ..., circumventing the ruling of the appellate court instead of seeking relief with the family law court or working within the confines of the original divorce decree." Zeifman further argues that the decision to file suit to enjoin AISD, instead of working with Zeifman to resolve

the parties' disagreement pursuant to the divorce decree reveals a "malicious, dishonest and discriminatory purpose constituting bad faith."

Hays testified that he did not file the AISD lawsuit with the intent to frustrate, annoy, or harm Zeifman. Instead, he explained, "[t]he intent was to prevent Mr. Zeifman from removing [A.A.]. It was to keep [A.A.] in the school that she had been in for the previous two years and not to disrupt her life. The focus was on keeping [A.A.] in school and not —the focus wasn't on Mr. Zeifman." Hays further testified that, based on the evidence available to him, he "had a clear indication" that Zeifman was planning to withdraw A.A. from her current school and that his attorney would not stop Zeifman from acting. Zeifman admits that he was "prepared to enroll A.A. in Bryker Woods," but asserts that as of August 14, he had not actually done so, nor had he "shown any signs of self-help other than instigating a letter-writing battle between attorneys." In a letter to Michels, however, Zeifman stated that he had "informed Brykerwoods of [A.A.'s] re-enrollment and completed the necessary paperwork."

Regarding Zeifman's complaint that the appellees were attempting to circumvent this Court's ruling, the appellees maintain that they believed Zeifman lacked authority to unilaterally enroll A.A. in Bryker Woods for at least three reasons: (1) the mandate on this Court's decision reversing the modification order had not yet issued; (2) the Travis County standing order prohibited Zeifman from withdrawing A.A. from her current school without Michels's agreement or a court order; and (3) if the divorce decree were again in effect, which they did not believe was the case, it would still require Zeifman and Michels to follow the recommendation of her then-current teacher at St. Andrew's. Thus, they argue that the injunction merely preserved the status quo. They also note that we later rejected Zeifman's belief that he was entitled to enroll [A.A.] in Bryker Woods over Michels's objection. *See In re Zeifman*, 2006 Tex.App. LEXIS 11340, at *2. Additionally, they point out that they fully disclosed this Court's opinion in their petition for injunctive relief and explained to the district court why they believed the opinion was not yet enforceable.

Zeifman also complains that the appellees failed to provide notice to him as required under the original divorce decree. However, at the time, the parties did not agree about whether or not the original divorce decree was in effect, and therefore whether or not notice pursuant to that decree would have been required. Hays further testified that he did not believe any of his actions violated the divorce decree:

***10** Q: In your opinion, does seeking a temporary injunction and not giving the other parent notice, as you did in this case, violate the agreed decree of divorce and notice provisions contained in it.

Hays: No, it does not.

Zeifman also complains that the appellees filed suit with knowledge that his attorneys would be out of town. Specifically, Zeifman's attorney had notified Michels's attorney that he would be out of town from August 14–17, 2006 to attend a family law conference. However, Michels's attorneys obtained a TRO against AISD on August 14, 2006. The appellees point out that Zeifman notified Michels less than a week before the new school year was set to start on August 15 that he had "informed Brykerwoods of [A.A.'s] re-enrollment and completed the necessary paperwork." Accordingly, the appellees argue that the district court could reasonably have concluded that the appellees acted when they did, not to evade a challenge by Zeifman's attorneys, but because the school year was about to begin.

Although a different original fact-finder might have reached a different outcome on this record, that is not the standard under which this Court is required to review the district court's decision. Viewing the evidence in the light most favorable to the district court's ruling and drawing all reasonable inferences in favor of that ruling, as we must, we cannot conclude that the district court abused its discretion in its determination of appellees' subjective state of mind, concluding the injunction action was not filed in bad faith or with the intent to harass Zeifman. We overrule Zeifman's first issue. *See Lovelace*, 243 S.W.3d at 254–55 (finding no abuse of discretion in failing to award sanctions even though suit was statutorily barred); *see also Manning v. Enbridge Pipelines (East Tex.) L.P.*, 345 S.W.3d 718, 729 (Tex.App.-Beaumont 2011, pet. denied) (finding no abuse of discretion in trial court's refusal to impose sanctions and noting that "[c]onsidering the trial proceedings, the trial court is in a better position than this Court to decide whether to impose sanctions").

Sanctions under chapter 10

Zeifman also sought sanctions for the same conduct under chapter 10 of the Civil Practice and Remedies Code. *See*

Tex. Civ. Prac. & Rem.Code §§ 10.001–.005. That chapter provides as follows:

> 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;
>
> ***11** (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.

Id. § 10.001. Awards of attorney's fees under the Civil Practice and Remedies Code require essentially the same findings as does rule 13. *Lovelace,* 243 S.W.3d at 256. Although rule 13 requires a party to have filed a groundless pleading brought in bad faith or a groundless pleading for harassment, sanctions under chapter 10 can be awarded if the suit was filed for an improper purpose, even if the suit was not frivolous. *See Alpert v. Crain, Caton & James, P.C.,* 178 S.W.3d 398, 411–12 (Tex.App.-Houston [1st Dist.] 2005, pet. denied). However, having already decided that the district court did not abuse its discretion in concluding that the lawsuit against AISD was not groundless, frivolous, brought in bad faith, or brought for the purpose of harassment, we similarly hold that the district court did not abuse its discretion in refusing to award sanctions under this provision of the Civil Practice and Remedies Code.[6] *See Lovelace,* 243 S.W.3d at 257 (holding trial court did not abuse its discretion in refusing to award sanctions under chapter 10 after concluding that suit was not "groundless, frivolous, brought in bad faith or brought for the purpose of harassment" for purpose of sanctions under rule 13). We overrule Zeifman's second issue.

Award of attorney's fees

In a third issue,[7] Zeifman argues that the district court erred in awarding $10,000 to each of the appellees in attorney's fees for successfully defending against his motion for sanctions pursuant to chapter 10 of the Civil Practice and Remedies Code, which provides as follows:

> 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.

Tex. Civ. Prac. & Rem.Code § 10.002(c).

Zeifman does not challenge the amount of attorney's fees the district court awarded—in fact, he stipulated below that $10,000 was a reasonable and necessary amount of attorney's fees for each of the appellees—but instead asserts that the district court abused its discretion in awarding the appellees attorney's fees at all. Other than complaining that the district court's award was predicated on an erroneous denial of his sanctions motion against appellees, an assertion we have rejected above,[8] Zeifman's central complaint is that the district court's award penalized him for taking the exact actions which he believes this Court instructed him to do. Zeifman points to the following statement in our opinion overturning the district court's ruling striking his petition in intervention:

> ***12** In light of our observation that Michels's conduct as alleged by Zeifman "is indeed disturbing," the district court on remand should carefully consider the facts known by Michels at the time she filed suit against AISD when determining whether sanctions are appropriate.

Zeifman, 229 S.W.3d at 468. Because this Court specifically instructed the district court to "carefully consider the facts known by Michels," Zeifman maintains that an award of Michels's attorney's fees would be particularly inappropriate.

As the appellees point out, this Court's statement did not refer to Michels's conduct, but rather to Michels's conduct *as alleged by Zeifman.* The merits of Zeifman's sanction motion were not before this Court at that time. This Court did not render judgment on the sanctions issue, but instead remanded and instructed the district court to carefully consider the

matter. The district court did so and concluded that the evidence did not support the imposition of sanctions.

Though the term "prevailing party" is not explicitly defined in chapter 10, we conclude that by successfully defending against Zeifman's sanctions motion, each of the appellees were "prevailing parties." *See TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex.2011) ("Undefined terms in a statute are typically given their ordinary meaning ...."). Zeifman does not dispute that the appellees were prevailing parties within the meaning of the statute and he previously stipulated that their requested fees were reasonable and necessary. Accordingly, we conclude the district court did not abuse its discretion in awarding attorney's fees to the appellees for successfully opposing Zeifman's motion for sanctions. We overrule his third issue.

Hays's cross-point

In a cross-point, Hays requests that we impose damages against Zeifman under rule 45 of our appellate procedure rules for filing a frivolous appeal. *See* Tex.R.App. P. 45 ("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."). "The question of whether to grant sanctions is a matter of discretion, which we exercise with prudence and caution, and only after careful deliberation." *Jackson v. Hoffman*, 312 S.W.3d 146, 156 (Tex.App.-Houston [14th Dist.] 2010, no pet.). We will impose sanctions only in circumstances that are truly egregious. *Jackson*, 312 S.W.3d at 156. To determine whether an appeal is frivolous, we "look at the record from the viewpoint of the advocate and decide whether he had reasonable grounds to believe the case could be reversed." *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex.App.-Houston [1st Dist.] 2001, pet. denied).

While Zeifman was ultimately unsuccessful in this appeal, we conclude that sanctions are not appropriate here. *See Easter v. Providence Lloyds Ins. Co.*, 17 S.W.3d 788, 792 (Tex.App.-Austin 2000, pet. denied) (sanctions unwarranted against ultimately unsuccessful party when she had reasonable expectation of reversal and there had been no showing that she pursued appeal in bad faith). We deny Hays's motion.

CONCLUSION

***13** Having overruled each of issues presented, we affirm the district court's judgment.

Footnotes

1 *See Michels v. Zeifman*, No. 03–08–00287–CV, 2009 Tex.App. LEXIS 1017, 2009 WL 349167 (Tex.App.-Austin Feb. 12, 2009, pet. denied) (mem.op.); *Zeifman v. Michels*, 229 S.W.3d 460 (Tex.App.-Austin 2007, pet. denied); *In re Zeifman*, No. 03–06–00601–CV, 2006 Tex.App. LEXIS 11340 (Tex.App.-Austin Nov. 22, 2006, orig. proceeding) (mem.op.); *Zeifman v. Michels*, 212 S.W.3d 582 (Tex.App.-Austin 2006, pet. denied); *see also Zeifman v. Nowlin*, 322 S.W.3d 804 (Tex.App.-Austin 2010, no pet.).

2 This standing order, applicable to "every divorce suit and every suit affecting the parent-child relationship filed in Travis County" after January 1, 2005, prohibits parties, "while the lawsuit is pending before the court," from actions including "[d]isrupting or withdrawing the children from the school or day-care facility where the children are presently enrolled, without the written agreement of both parents or an order of this Court." *See* Travis Co. Standing Order Regarding Children, Property and Conduct of the Parties (Travis Co. Dist. Clerk's File No. 121,012 (Local Rules and Orders)) (effective Jan. 1, 2005). Although the parties' 1997 divorce decree predated the standing order, Michels alleged that Zeifman had made himself subject to the order by filing a cross-petition in a second modification proceeding she had initiated in 2005 concerning their other child.

3 The temporary restraining order restrained AISD from:

1. Permitting [A.A.] to be enrolled at Bryker Woods Elementary School.
2. Permitting [A.A.] to attend classes at Bryker Woods Elementary School.
3. Taking any action which would facilitate or permit [A.A.'s] attendance at Bryker Woods Elementary School.

4 In fact, Zeifman did assert a claim of malicious prosecution against Hays, Barrett, and Michels in separate proceedings. *See Michels*, 2009 Tex.App. LEXIS 1017, at *15–19, 2009 WL 349167 (holding that Zeifman failed to establish first element of malicious prosecution claim).

5 The standing order provided that "[t]his entire order will terminate and will no longer be effective once the court signs a final order." Because a final order was signed in the original divorce decree, Zeifman reasons, our opinion reversing the modification order reinstated the prior final order and terminated the standing order.

6 Zeifman relies on *Law Offices of Wendell Turley, P.C. v. French* to support his claim for sanctions under chapter 10. 164 S.W.3d 487, 491–92 (Tex.App.-Dallas 2005, no pet.). In the case, the Dallas Court of Appeals affirmed a trial court's order imposing sanctions against an attorney that filed duplicative proceedings in two separate courts. *Id.* at 489. The Dallas Court concluded that the trial court "*could have* determined appellants filed the Dallas lawsuit not to protect their legal interests, but to improperly circumvent an imminent ruling from the Tarrant County trial court poised to finally dispose of the same legal issues." *Id.* at 492 (emphasis added). By the same token, after a review of the evidence before it, we have concluded that the district court could have concluded that the appellees did not file the AISD lawsuit for an improper purpose.

7 Michels and Hays suggest that Zeifman may have waived this issue because he did not list it as a separate "issue presented" in his brief and, they assert, he provided insufficient legal authority to support his argument. *See* Tex.R.App. P. 38.1(i). As Zeifman notes, "[t]he statement of an issue or point will be treated as covering every subsidiary question that is fairly included." *See id.* R. 38.1(f). We conclude that Zeifman sufficiently briefed this issue.

8 By the same token, Zeifman contends that the district court erred in not awarding him his reasonable and necessary attorney's fees incurred in connection with "responding to baseless proceedings" and to "deter similar conduct in the future." Because we have concluded that the district court did not abuse its discretion in denying his motion for sanctions, it similarly did not err in refusing to award him attorney's fees.

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 7. Regulation of Land Use, Structures, Businesses, and Related Activities
Subtitle A. Municipal Regulatory Authority
Chapter 211. Municipal Zoning Authority (Refs & Annos)
Subchapter A. General Zoning Regulations (Refs & Annos)

V.T.C.A., Local Government Code § 211.011

§ 211.011. Judicial Review of Board Decision

Currentness

(a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, § 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 646, § 1, eff. Aug. 30, 1999.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits as unnecessary the statement that persons may “jointly or severally” seek judicial review because other provisions adequately govern the filing of suits jointly or severally. For example, see Rule 40, Texas Rules of Civil Procedure.

Notes of Decisions (115)

V. T. C. A., Local Government Code § 211.011, TX LOCAL GOVT § 211.011
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)

TX Rules App.Proc., Rule 45

Rule 45. Damages for Frivolous Appeals in Civil Cases

Currentness

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.

Credits
Eff. Sept. 1, 1997.

Editors' Notes

NOTES AND COMMENTS

Comment to 1997 change: This is former Rule 84. The limit on the amount of the sanction that may be imposed is repealed. A requirement of notice and opportunity to respond is added.

Notes of Decisions (291)

Rules App. Proc., Rule 45, TX R APP Rule 45
Current with amendments received through April 15, 2013

End of Document