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December 17, 2021

Hon. Glen Harrison
District Court Judge for the
32nd Judicial District
Nolan County Court House
100 East Third, Suite 204
Sweetwater, Texas 79556

***Via E-Mail***

Re: *Tiburon Land and Cattle, LP et al. v. Chester Carroll et al.*, Cause No. DC-2013-0016, in the 32nd Judicial District Court, Fisher County, Texas, including related Cause Nos. DC-2013-0016A ("Severed Cause") and DC-2016-0027 ("Garnishment Proceeding").

Judge Harrison,

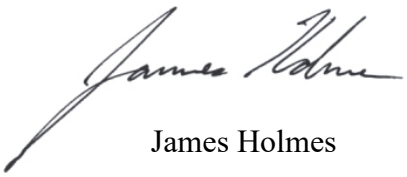
Counsel for Plaintiffs today provided a letter to the Court on the recusal issue. Although he has both of the following filings from the bankruptcy court, he failed to include with his letter (A) the Brief in Support of Application for Order Authorizing Employment of John G. Browning (to which his October 13, 2021 Brief was responding) and (B) the Response to Brief on Recusal (which directly replies to Mr. Stahl's October 13, 2021 Brief). In order that the Court may be fully informed, my clients respectfully request the Court to consider these two filings, attached as Exhibits A and B, while it considers Mr. Stahl's October 13, 2021 Brief.

Further, because he never requested the transcript, counsel for Plaintiffs lacks expert John Browning's testimony given in bankruptcy court on November 15, 2021. I did request that transcript and will supplement this letter with it on or before December 22, 2021, the date by which it must be prepared.

Counsel for Plaintiffs has no viable argument under Rule of Civil Procedure 18a(b)(1) that my clients or Chester Carroll have waived their recusal arguments as to the subject matter of Robert Wagstaff's and my December 16, 2021 letters to the Court. Also, he has no viable argument under Texas case law to that Rule that my clients or Mr. Carroll have waived the same recusal arguments. In his letter, naturally he cites neither the Rule nor any case law on waiver.

Again, my clients and I would request the Court's decision on voluntary recusal on or before year end. If the Court decides in favor of voluntary recusal, my office, working with Mr. Wagstaff, will prepare the necessary orders pursuant to the Rules of Civil Procedure and Government Code. *See* TEX. R. CIV. P. 18a(f)(1)(A), (g)(7); TEX. GOV'T CODE § 74.059(c)(3).

Sincerely,



James Holmes

Enclosures

cc: ***Via E-Mail***
Frank L. Branson
Eric T. Stahl
Darrell Cook
Michael K. Hurst and Jonathan Childers
Jordyn J. Christian-Gingras
Michael Hall
Robert Wagstaff
Alan Carmichael
Joe Drennan
David Keltner and Jody Sanders

# Exhibit A

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SPECIAL LITIGATION COUNSEL FOR
KERWIN BURL STEPHENS DEBTOR
AND DEBTOR-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **In re:** | § | **Chapter 11 (V)** |
| | § | |
| **KERWIN BURL STEPHENS,** | § | **Case No.: 21-40817-elm-11** |
| | § | |
| **THUNDERBIRD OIL & GAS, LLC,** | § | **Case No.: 21-41010-elm-11** |
| | § | |
| **THUNDERBIRD RESOURCES, LLC,** | § | **Case No.: 21-41011-elm-11** |
| | § | |
| **Debtors.** | § | **Jointly Administered Under** |
| | § | **Case No. 21-40817-elm-11** |
| | § | |

**BRIEF IN SUPPORT OF**
**DEBTOR'S APPLICATION FOR ORDER PURSUANT TO**
**11 U.S.C. § 327(a) AND BANKRUPTCY RULE 2014 AUTHORIZING**
**THE EMPLOYMENT OF JOHN G. BROWNING AS EXPERT WITNESS**

TO THE HONORABLE EDWARD LEE MORRIS, UNITED STATES BANKRUPTCY JUDGE:

Kerwin Burl Stephens (the "Debtor"), as debtor-in-possession, provides this brief in support of his July 8, 2021 application (the "Application," Document No. 132) pursuant to section 327 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for entry of order authorizing the employment of John G. Browning ("Mr. Browning") as an expert witness on behalf of the Debtor. The Debtor respectfully shows the Court as follows:

## SUMMARY OF ARGUMENT

1. Plaintiffs[1] have been seeking a return to the state trial court for months, by way of various motions to lift bankruptcy stays and motions to remand. If they return to state court, Plaintiffs hope to obtain another multi-million dollar judgment against Debtor Stephens, which would result in another appeal through the Texas appellate system. Plaintiffs' various arguments for returning these proceedings to state court rest heavily upon two faulty premises:

(1) that the trial judge in the 32nd Judicial District of Texas (Hon. Glen Harrison, presiding) is better suited to administer Plaintiffs' claims than other judges, including the present bankruptcy judge, because of his historical involvement in the state court litigation that caused Debtor's bankruptcy; and

(2) that this trial judge will be presiding over state-court proceedings in order to administer Plaintiff's claims.

For responding to Plaintiffs' arguments (particularly, in their recent remand motion and lift-stay motion[2]), Debtor Stephens seeks to employ expert John G. Browning. Mr. Browning's testimony that Judge Harrison ought to recuse himself from any further proceedings involving the Debtor Kerwin B. Stephens, or ought to be forced to do so, entirely undermines and vanquishes both faulty premises. If any part of the current proceedings returns to state court, Judge Harrison should not (and in all likelihood will not) preside over it.

2. Remarkable and voluminous evidence supports Mr. Browning's testimony in favor of recusing Judge Harrison. During the bizarre trial leading to Debtor's financial troubles – and especially during the critical post-verdict and pre-appeal litigation following that trial – Judge Harrison routinely engaged in highly inappropriate social media behavior; he had numerous Twitter interactions with legal counsel opposed to Debtor Stephens and openly

[1] As the Court knows, Plaintiffs are Tiburon Land and Cattle, LP (project investor Collen Clark's entity) and Trek Resources, Inc. (project investor Michael E. Montgomery's entity), both based in Dallas, and represented by attorneys Eric Stahl and John Dee Spicer.

[2] Namely, "State Court Plaintiffs' Motion to Remand" filed July 28, 2021, and "State Court Plaintiffs' Second Motion to Lift Automatic Stay" filed July 29, 2021.

demonstrated his bias and prejudice against Stephens and his partiality for Stephens's opposition (the Intervenors and Plaintiffs). Judge Harrison's Twitter interaction with opposing counsel is voluminous and canvasses various topics: some personal, some playful, but – of greatest concern – some pertaining to the very merits of the case against Debtor Stephens, such as Stephens's personal demeanor/conduct and the noteworthiness of a $90 million+ verdict against him. Efforts have been made to take down much of this Twitter activity and to prevent the general public from viewing it. *See generally* **Exhibits 1-8** to Browning Affidavit (**Exhibit A**), much of which can no longer be viewed at https://twitter.com.

3. Judge Harrison endorsed (by "liking" on Twitter) opposing counsel's negative view of Stephens and his conduct in the underlying business transaction. Concurrently from the bench Judge Harrison (a) would deny *all* arguments by Stephens for relief JNOV or for new trial (most of which subsequently succeeded on appeal) and (b) would hinder Stephens's ability to supersede the $50 million+ judgment he had imposed (until the court of appeals ruled in 2017 that Stephens had a right to supersede the judgment and that Judge Harrison had abused his discretion by disallowing supersedeas).

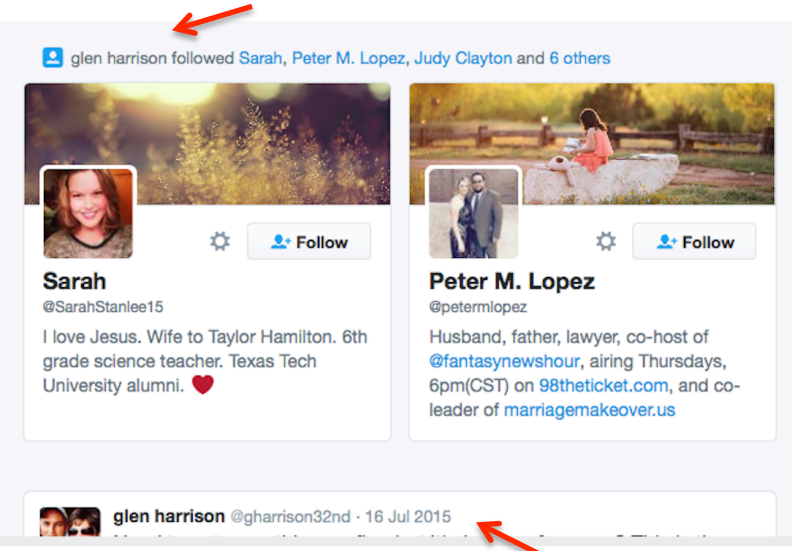
4. Fortunately, the standards for judicial recusal speak to this troubling situation. The Texas Rules of Civil Procedure allow for Debtor Stephens to move for Judge Harrison's recusal because his "impartiality might reasonably be questioned" and he "has a personal bias or prejudice concerning the subject matter [namely, the bizarre jury trial] or a party [namely, Kerwin B. Stephens]." *See* TEX. R. CIV. P. 18b(b)(1)-(2); *see generally id.* 18a-18b. Stephens would need to prove the state trial judge's partiality, bias and prejudice with factual "detail and particularity" (*see id.* 18a(a)(4)) – thus making appropriate the substantial evidentiary and timeline review appearing in this Brief and in the Browning affidavit (**Exhibit A**).

5. Debtor Stephens and his counsel are convinced – and respectfully submit to this Court – that no efficiency gains or administration-of-justice gains will result from returning all or part of these proceedings to state court. If remand occurred, the trial judge who oversaw the

trial and post-verdict litigation will not be presiding any longer over matters involving Debtor Stephens. If that judge were allowed to do so, Texas would be perpetuating a years-long grave injustice against a small Texan businessman.

## BACKGROUND

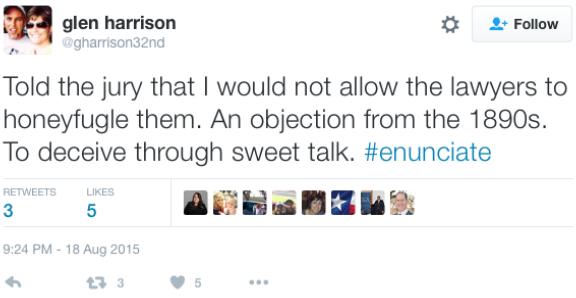
6. As of at least July 16, 2015, on Twitter the state trial judge was following Jordyn Gingras ("@JordynJGingras") and Michael Hurst ("@MichaelTrialLaw") *during* the trial (lasting from July 29, 2015 to August 19, 2015), as shown by images here:




[Hitting "6 others" in the foregoing image then results in:]


*See* **Exhibit B.1**.

7. While following plaintiffs' counsel Gingras and Hurst during the trial, the state trial judge tweeted about happenings during the trial. Thus, an observer (including, potentially, a juror) viewing his Twitter handle @gharrison32nd could have learned that Judge Harrison or the 32nd Judicial District Court were following plaintiffs' counsel, but not any of defendants' counsel, while that judge was making various trial observations. Here are some of those during-trial tweets:


*See* **Exhibit B.2**.

8. On August 20, 2015, a single day after the conclusion of the trial, the state trial judge liked Jordyn Gingras's tweet that "The truth doesn't cost you anything, but a lie could cost you everything" (and her tweet contained her related Instagram post with the trial-related

hashtags "#rumbleinroby," "#sweetwaterproud," and "proudlawyermoment"):


*See* **Exhibit 1** to Browning Affidavit (**Ex. A**).

9. On November 16, 2015, the state trial judge liked Jordyn Gingras's tweet about her CLE presentation at the Dallas Bar Association titled "Landman or Lawyer? $70MM+ Reasons Why You Should Care" (and "Landman or Lawyer" in this context necessarily means Kerwin B. Stephens):


*See* **Exhibit 4** to Browning Affidavit (**Ex. A**).

10. On May 13, 2016, the state trial judge liked a tweet by another member of the Intervenors' trial team (Christina Mullen, "@mullencm") about obtaining the "#15 verdict in the nation for [her] first trial with" Michael Hurst and Jonathan Childers:


*See* **Exhibit 5** to Browning Affidavit (**Ex. A**).

11. On May 24, 2016, the state trial judge like Jordyn Gingras's tweet about the "power couple," meaning Plaintiffs' trial counsel Frank Branson and his wife:


*See* **Exhibit 6** to Browning Affidavit (**Ex. A**).

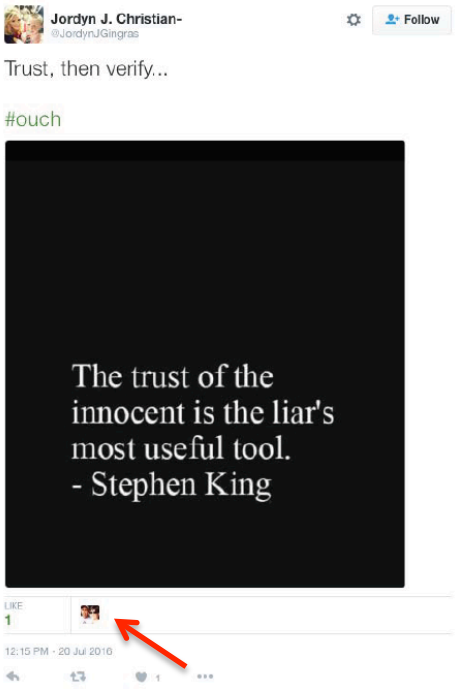
12. The foregoing Twitter activity occurred shortly before and shortly after the state trial judge on March 30, 2016 had rendered a judgment exceeding $50 million against Kerwin B. Stephens and his co-defendants. Also, the activity occurred contemporaneously with the judge's consideration of Stephens's substantial post-judgment motions: Motions for JNOV, Motion for New Trial and Motion to Modify the Judgment (all Motions' arguments being unsuccessful before Judge Harrison, but mostly successful before the Eastland Court of Appeals, *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687 (Tex. App.— Eastland 2019, no pet.)).

13. In summer and fall of 2016, the state trial judge engaged in almost daily Twitter interaction with plaintiffs' counsel Jordyn Gingras, over a variety of personal and professional topics. *See* **Exhibit 8** to Browning Affidavit (**Ex. A**). This activity is particularly troubling because it coincided with Debtor Kerwin Stephens's lengthy and costly efforts to supersede the multi-million dollar March 30, 2016 judgment, a matter on which the Eastland Court of Appeals in early 2017 reversed the trial judge's ruling that was preventing Stephens from superseding the judgment. *See generally Stephens v. Three Finger Black Shale P'ship*, No. 11-16-00177-CV, 2017 Tex. App. LEXIS 2579, 2017 WL 3495390 (Tex. App. – Eastland Mar. 23, 2017, no pet.) (holding that the 32nd Judicial District Court abused its discretion in refusing the request by Kerwin Stephens to subordinate judgment liens to security interests of the Oklahoma bank willing to provide a letter of credit for a supersedeas bond).

14. Not including tens of thousands in attorney's fees necessary for forcing the state trial judge to allow for supersedeas (*see* 2017 Tex. App. LEXIS 2579, 2017 WL 3495390), Debtor Stephens spent $1.1 million from 2017 through 2020 in order to supersede the $50 million+ judgment rendered by the state trial judge. On April 23, 2020, that trial judge signed an order denying Debtor Stephens's request for lowered supersedeas obligations – thereby forcing Stephens to liquidate IRA savings accounts in order to pay the yearly $285,000.00 in supersedeas-bond costs. (Because Mr. Stephens was forced to liquidate the IRA accounts for

this purpose, divorce-related litigation between Gail Stephens and Kerwin Stephens will focus on that decision.)

15. During the midst of the lengthy supersedeas-related litigation, the state trial judge liked the following tweet about "trust" by counsel Jordyn Gingras, just days before he had ruled[3] that Stephens could not supersede the multi-million dollar judgment:

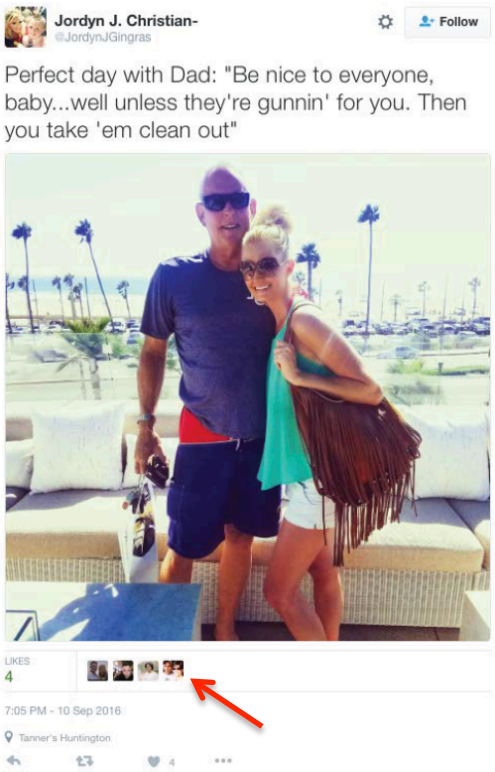



*See* **Exhibit 8** to Browning Affidavit (**Ex. A**).

16. Likewise the state trial judge liked the following tweet by counsel Gingras, just

[3] Judge Harrison's August 3, 2016 ruling on Debtor Stephens's efforts to supersede the multi-million dollar judgment: "But, despite the characterization that repeated and diligent efforts have been made to get the bond or the Letter of Credit, *based on the testimony presented, the demeanor, and the credibility of the witnesses, I don't find that sufficient efforts have been made to get that* when you go to a bank that couldn't have given the Letter of Credit even if they wanted to and then certainly try to bring in somebody else and then a friend, also. I really don't find that there's – the Defendants have made sufficient efforts to show me that a bond could not be obtained. And, therefore, Defendants' Motion for an Order for Alternate Security is denied." **Exhibit C.1**, Supp. Reporter's Record, Vol. 2, at 377 (emphasis added).

days before he ruled[4] a second time that Stephens could not supersede the multi-million dollar judgment:




*See* **Exhibit 8** to Browning Affidavit (**Ex. A**).

17. There is a body of daily or weekly tweets between Judge Glen Harrison and opposing counsel (particularly Jordyn Gingras) in the months preceding the third time he ruled[5]

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[4] Judge Harrison's September 12, 2016 ruling on Debtor Stephens's efforts to supersede the multi-million dollar judgment: "*But, I do feel like we're kind of in the same song, second verse, a little bit faster, a little bit worse. I'm still hearing things like 'hopefully,' 'typically,' and 'for some amount.'* I'm not – still not impressed with the Defendants' efforts to secure either a sale or this bond. And so Defendants' Motion for Alternate Security and Motion to Release Abstracts to Specific Properties is denied." **Exhibit C.2**, Supp. Reporter's Record, Vol. 3, at 83 (emphasis added).

[5] Judge Harrison's January 29, 2017 ruling on Debtor Stephens's efforts to supersede the multi-million dollar judgment: "[to James Holmes, Stephens's counsel:] You're telling me, essentially, we've got competing essential rights. They [*i.e.*, Plaintiffs and Intervernors] have a right to execute on their judgment, you've got a right to make a supersedeas bond. You want me to stop them from proceeding on their right so you can proceed on yours? . . . I think you've kind of seen my thought process here today. *I haven't been trying to hide the ball as to the*

that Stephens could not supersede the multi-million dollar judgment and, indeed, that Plaintiffs and Intervenors could begin levy sales of Stephens's land and other assets.

18. Even as of today, Judge Harrison continues to follow Jordyn Gingras ("@JCGLegalGroup") and Michael Hurst ("@MichaelTrialLaw"). He has never followed any Twitter account associated with any of defendants' counsel, even assuming it is proper for a judge to "follow" any counsel on Twitter while they work on a case in his court.

19. The quantity of Judge Harrison's Twitter activity with opposing counsel is staggering. **Exhibits 1-8** to the Browning Affidavit (**Exhibit A**) contain a mere sampling of tweets to/from Judge Harrison, which Twitter-active people (who have been following this case) have shared with legal counsel for Debtor Stephens.

## ARGUMENT

20. In responding to Plaintiffs' remand and lift-stay motions, particularly those filed July 28-29, 2021, Debtor Stephens intends to use Mr. Browning's testimony and opinions on judicial recusal. By seeking to employ John Browning as expert for this purpose, Debtor Stephens does not seek to convince this Court that Judge Harrison's recusal is inevitable, but rather that the parties will engage in substantial recusal-related litigation if they are returned, even in part, to state court. That litigation, or the threat of such litigation, will likely cause Judge Harrison's voluntary or involuntary recusal. The relevant administrative judge (namely, Hon. Dean Rucker, Presiding Judge of Texas's Seventh Administrative Judicial Region) will have to find a new state trial judge to consider Plaintiffs' varied and tenuous arguments for a post-remand judgment. *See* TEX. R. CIV. P. 18a(g)(7) ("If the [recusal] motion is granted, the regional presiding judge must transfer the case to another court or assign another judge to the case.")

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*direction I was leaning and hit a hurdle that I don't believe I was prepared to even try to attempt with these levies*." **Exhibit C.3**, Supp. Reporter's Record, Vol. 6, at 64 & 116 (emphasis added).

21. Given its substantial review of the underlying business transaction to date, this Court is far better suited to consider Plaintiffs' arguments for judgment than a newly appointed state judge. And, this Court can administer Plaintiffs' arguments for judgment far more quickly and efficiently than the state-court process of having trial-court rulings leading to appellate review.

22. Texas Rule of Civil Procedure 18b(b)(1) provides that a trial judge "must recuse" when "the judge's impartiality might reasonably be questioned." As to the impartiality factor, "[t]he movant bears the burden of proving recusal is warranted. . . . The test for recusal is 'whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial.'" *Drake v. Walker*, 529 S.W.3d 516, 528 (Tex. App. – Dallas 2017, no pet.); all relevant cases appear behind **Exhibit D**. Any thinking member of the general public would not hesitate to doubt Judge Harrison's impartiality over Debtor Stephens; rather, any thinking person would readily conclude that Judge Harrison would act in favor of Stephens's opponents and against Stephens. Judge Harrison should recuse or should be forced to recuse under Rule 18b(b)(1). *See* Browning Affidavit at ¶ 12 (**Ex. A**).

23. Texas Rule of Civil Procedure 18b(b)(2) provides that a trial judge "must recuse" when "the judge has a personal bias or prejudice concerning the subject matter or a party." Because a trial judge rarely confesses to bias or prejudice against a litigant, proving such bias or prejudice usually depends on a totality-of-circumstances analysis. *See, e.g.*, *Youkers v. State*, 400 S.W.3d 200, 206-07 (Tex. App. – Dallas 2013, pet. ref'd); *In re Slaughter*, 480 S.W.3d 842, 853-54 (Tex. Spec. Ct. Rev. 2015) (per curiam) (both evaluating a trial judge's potential bias based upon factual circumstances and context); *see* **Exhibit D**. A totality-of-circumstances test would promptly result in the recusal of Judge Harrison. He maintained active Twitter interaction with lawyers opposed to Debtor Stephens from late 2015 through at least late 2016; endorsed (by "liking") negative views of Stephens as tweeted by opposing

counsel; and – all the while – denied post-verdict relief sought by Stephens (*i.e.*, Motions JNOV, MNT) while rendering a multi-million dollar judgment against Stephens and preventing him from superseding that judgment. (The Eastland Court of Appeals first corrected Judge Harrison's error in disallowing supersedeas and then granted most of the post-verdict relief Stephens had been requesting. *See generally Stephens v. Three Finger Black Shale P'ship*, No. 11-16-00177-CV, 2017 Tex. App. LEXIS 2579, 2017 WL 3495390 (Tex. App. – Eastland Mar. 23, 2017, no pet.); *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687 (Tex. App.—Eastland 2019, no pet.).)

24. Debtor Stephens can prove the existence of actual and active partiality, bias and prejudice against him before Judge Harrison. However, many Texas appellate courts have urged recusal even when a trial judge only *appears* to have bias or prejudice, without actual proof of bias or prejudice. *See Slaughter*, 480 S.W.3d at 853 ("Sometimes the judge may need to recuse herself, or be recused, even though she has no actual bias and would do her very best to weigh the scales of justice equally between contending parties. . . . The judiciary must strive to not only give all parties a fair trial, but also maintain a high level of public trust and confidence." (citing *Keene Corp. v. Rogers*, 863 S.W.2d 168, 180 (Tex. App.—Texarkana 1993, no writ) & *Indemnity Ins. Co. v. McGee*, 356 S.W.2d 666, 668 (Tex. 1962)). These courts adhere to the decades-old directive from the Texas Supreme Court that "[t]he judiciary must not only attempt to give all parties a fair trial, but it must also try to maintain the trust and confidence of the public at a high level [and] it is of great importance that the courts should be free from reproach or the suspicion of unfairness." *Indemnity Insurance Co.*, 356 S.W.2d at 668. An appearance of partiality, bias or prejudice test would promptly result in the recusal of Judge Harrison. His behavior (described in the preceding paragraph and elsewhere in this Brief) destroys "the trust and confidence of the public" in the Texas judiciary and subjects that judiciary to "reproach [and] the suspicion of unfairness." *See* Browning Affidavit at ¶ 12 (**Ex. A**) ("Such Twitter activity [by Judge Harrison] does not promote confidence in the integrity and impartiality

of the judiciary; on the contrary, it undermines it.").

25. By his Application, the Debtor seeks Court approval, pursuant to section 327(a) of the Bankruptcy Code and Rule 2014(a) of the Bankruptcy Rules, to employ and retain Mr. Browning as an expert witness, effective as of June 8, 2021, in the area of legal and judicial ethics. No party has opposed this Application. In order to counter Plaintiffs' arguments for returning these proceedings to state court, the Debtor expects that Mr. Browning will render expert opinions as to the recusal of the Honorable Glen Harrison from any further state-court proceedings involving Kerwin B. Stephens or his companies. The Debtor further expects that Mr. Browning will render expert opinions as to recusal-related litigation in the event Judge Harrison does not voluntarily recuse.

**CONCLUSION AND REQUESTED RETENTION OF JOHN G. BROWNING**

26. Mr. Browning is highly qualified to render these expected opinions. He is a partner at Spencer Fane, LLP in Plano, Texas; a former Justice on the Dallas Court of Appeals; and a sought-after commentator on legal and judicial ethics, including ethics in the area of technology and social media.

27. The Debtor submits that his employment of Mr. Browning would be in the best interests of the Debtor, his estate, and his creditors.

28. In support of the Application, the Browning Declaration has been executed in accordance with the provisions of section 327 of the Bankruptcy Code, Bankruptcy Rule 2014, N.D. Tex. L.B.R. 2014-1, and U.S. Trustee Guidelines. The Debtor's knowledge, information and belief regarding the matters set forth herein are based and made in reliance upon the Browning Declaration.

WHEREFORE the Debtor respectfully requests that the Court grant the application and other relief as to which the Debtor is justly entitled.

Dated: August 9, 2021

Respectfully submitted,

*/s/ James Holmes*

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**ATTORNEYS FOR DEBTOR**
**KERWIN BURL STEPHENS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served upon the parties listed below via email or via ECF electronic Notice, if available, on August 9, 2021.

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*/s/ James Holmes*
James Holmes

# Exhibit A

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SPECIAL LITIGATION COUNSEL FOR
KERWIN BURL STEPHENS DEBTOR
AND DEBTOR-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| **In re:** | § | **Chapter 11 (V)** |
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| **KERWIN BURL STEPHENS,** | § | **Case No.: 21-40817-elm-11** |
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| | § | |
| **Debtors.** | § | **Jointly Administered Under** |
| | § | **Case No. 21-40817-elm-11** |
| | § | |

## AFFIDAVIT OF JOHN G. BROWNING

STATE OF TEXAS §
§
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, on this day personally appeared John G. Browning, who, being by me duly sworn, on oath testifies as follows:

1. "My name is John G. Browning. I am above the age of eighteen (18) years old, have never been convicted of a crime, and am otherwise competent to make this Affidavit. I have personal knowledge of the facts set forth herein, and they are true and correct. I am a partner in the law firm of Spencer Fane, LLP, and my office address is 5700 Granite Parkway, Suite 650, Plano, Texas, 75024.

2. I am licensed to practice law in Texas, and have been so licensed since November 1989. In addition to being an attorney, I am a former Justice on the Fifth District Court of Appeals in Dallas. I am the author of four books on social media and the law, including *Legal Ethics and Social Media: A Practitioner's Handbook* (ABA Publishing, 2017; co-authored with Prof. Jan Jacobowitz). I am also the author of approximately 40 academic articles, and hundreds of other legal articles. I am an adjunct law professor at SMU Dedman School of Law, and I have held adjunct appointments at Texas A&M University School of Law and Texas Tech University School of Law as well. I frequently guest lecture and present at legal symposia at law schools all over the country. In addition, I am a widely-recognized authority on judicial ethics. I have served on the faculty for the Federal Judicial Center, the National Center for State Courts, the Appellate Judges Educational Institute, and the Texas Center for the Judiciary, and I have also given judicial ethics presentations for specific courts including the Supreme Court of Texas, the Fifth District Court of Appeals, and the Southern District of Texas. As both a lawyer and a jurist, I have presented as a panelist at multiple judicial conferences in other states, such as Wisconsin and Arkansas. My work has been cited as authority by courts in Texas, California, New York, Florida, Maryland, Tennessee, Washington, D.C., and Puerto Rico. Most recently, on April 28, 2021, my work was cited as authority by the California Supreme Court Committee on Judicial Ethics Opinions in its Expedited Opinion 2021-042, which advises judges to be "mindful of how the public may perceive social media activity" and to "refrain from any online statements or communications that call into question the impartiality of the judiciary."

3. From November 24, 2015 until August 20, 2019, I worked as counsel for Kerwin Stephens in a disciplinary proceeding by the Texas State Bar styled *Commission for Lawyer Discipline v. Kerwin B. Stephens*, No. 201506240, Evidentiary Panel of District 14, Grievance

Committee. Although I no longer serve as counsel in this matter, I understand that the State Bar has suspended proceedings at this time.

4. I am very familiar—as an attorney, a judge, and as a legal ethics scholar—with the standards and procedure for judicial recusal in Texas, and with the Canons of the Texas Code of Judicial Conduct. In the Preamble to the Code of Judicial Conduct, judges are admonished to "strive to enhance and maintain confidence in our legal system." Canon 2A mandates that "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B admonishes that "A judge shall not allow any relationship to influence judicial conduct or judgment…nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." In addition, Canon 3B(5) requires a judge to perform his judicial duties "without bias or prejudice."

5. As judicial governing bodies and ethics authorities throughout the United States have recognized, while there are certainly benefits to judges using social media platforms, judges must also be mindful of ethical risks posed by social media use, such as ex parte communications or the appearance of impropriety. Here in Texas, the only two reported cases dealing with judicial use of social media have echoed that concern. In *Youkers v. State*, the Fifth District Court of Appeals noted that social media use by judges presents concerns "unique to the role of the judiciary in our justice system," and that in using such platforms "judges must be mindful of their responsibilities under applicable judicial codes of conduct." *Youkers*, 400 S.W.3d 200 at 205 (Tex. App.—Dallas 2013, pet. ref'd). In *In re Honorable Michelle Slaughter*, a Special Court of Review appointed by the Texas Supreme Court observed that while the social media activity of the judge at issue (who had been recused in connection with Facebook posts about the

case before her) did not warrant judicial discipline, judges should nevertheless be aware that their conduct on social media is subject to existing rules of judicial conduct and that such online behavior by judges about their own proceedings "create the very real possibility of a recusal (or even a mistrial) and may detract from the public trust and confidence in the administration of justice." 480 S.W.3d 842 (Tex. Spec. Rev. Ct. 2015).

6. Activity by a judge on Twitter, including following someone connected to the case before him, retweeting, or "liking" the tweets of others, is a type of social media activity that has resulted in judges facing recusal motions or even being recused. In December 2016, Judge Staci Williams of the 101st Judicial District Court in Dallas County recused herself after a motion to recuse was filed in Cause No. DC-15-04484, *State Fair of Texas v. Riggs & Ray, P.C.* In that matter, pursuant to Tex. R. Civ. P. 18b(b), the movant pointed to Judge Williams' activity on Twitter as grounds for a claim that the judge's impartiality might reasonably be questioned. Judge Williams had retweeted a tweet by a local political commentator about the case, which linked to a newspaper opinion piece supporting one side of the dispute. On a different day, the judge had "liked" a tweet from a local political official which linked to another article by the same newspaper columnist in support of one of the sides in the case. In light of her publicly posted approval of tweets linked to two articles highly critical of one party's position in the case, one could reasonably question the judge's impartiality; at the very least, the judge's Twitter activity created the appearance of bias or impropriety.

7. In the 2015 Denton County case of *Texas Ethics Commission v. Michael Quinn Sullivan*, No. 02-15-00103-CV, 2015 Tex. App. LEXIS 11518, 2015 WL 6759306 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied) (mem. op.), involving Cause No. 14-06508-16 in the 158th Judicial District Court, a judge was recused for even more tenuous Twitter activity. In that case,

Judge Steve Burgess had previously dismissed the Texas Ethic Commission's earlier ruling against conservative political activist Michael Quinn Sullivan. After learning that Judge Burgess followed Mr. Sullivan on Twitter, the TEC moved to recuse based on at least the appearance of impropriety and partiality on the part of the judge, while also raising (without any evidence) the issue of possible ex parte communications between the judge and Sullivan via Twitter. A visiting judge granted the recusal motion, and the case was assigned to a different judge.

8. And in a case that nearly reached the U.S. Supreme Court, a federal judge in California was nearly recused because of his Twitter activity. In the 2017 case of *U.S. v. Sierra Pacific Industries, Inc.*, U.S. District Court Judge William B. Shubb was presiding over a case arising out of a 2007 wildfire that had devastated nearly 65,000 acres in California. 862 F.3d 1157 (9th Cir. 2017). The federal government, which blamed lumber producer Sierra Pacific for the wildfire, reached a settlement that the lumber company sought to vacate. Judge Shubb denied Sierra Pacific's motion. It appealed, pointing out that not only was Judge Shubb a Twitter follower of the federal prosecutors on the case—and had received tweets about the merits of the case from the prosecutors' Twitter account—but also that he himself had tweeted about the case from his then-public Twitter account (@Nostalgist1). Shubb allegedly tweeted "Sierra Pacific still liable for Moonlight Fire damages," and linked to a news article about the case. All of this was done while the case was still pending. As Sierra Pacific's lawyers pointed out, the tweet was not only inaccurate (no finding of liability was ever made), it also increased the appearance of bias and prejudiced the defendants in their appeal.

9. In July 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's ruling and declined to require Judge Shubb's recusal on procedural grounds. However, the Court recognized the significance of the issues arising out of the judge's Twitter activity,

saying "[T]his case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance of propriety both on and off the bench." Undaunted, Sierra Pacific filed a petition for writ of certiorari to the U.S. Supreme Court. The question presented asked whether a district court judge's impartiality might reasonably be questioned "when he not only follows the prosecution on social media, but also, just hours after denying relief to the opposing party, tweets a headline and link to a news article concerning the proceedings pending before him." Despite the questions raised, however, in June 2018, the U.S. Supreme Court denied the petition for writ of certiorari.

10. I have reviewed Judge Harrison's activity on Twitter relevant to the Kerwin Stephens case. Through his Twitter account and using the Twitter handle @gharrison32nd (which he named after the 32nd District Court of Texas), Judge Harrison engaged in the following activity on Twitter after following one or more of the plaintiffs' lawyers, including Jordyn Gingras and Michael Hurst:

- On August 20, 2015, a single day after the conclusion of the trial, Judge Harrison likes Jordyn Gingras' tweet about "The truth doesn't cost you anything, but a lie could cost you everything" (and this tweet contained the hashtags "#rumbleinroby," "#sweetwaterproud," and "proudlawyermoment"), Exhibit 1 to this Affidavit;

- On August 20, 2015, a single day after the conclusion of the trial, Judge Harrison likes Jordyn Gingras' tweet about "new friends" in Sweetwater and Roby (and this tweet contained a hyperlink to Jordyn Gingras' Instagram post with the Stephens trial-related hashtags "#wefilledthebucket," "#sweetwaterproud," "#rumbleinroby," and "proudlawyermoment"), Exhibit 2;

- On August 22, 2015, mere days after the trial ends, Judge Harrison likes Jordyn Gingras' tweet thanking her paralegal, Amber Schrandt, Exhibit 3;

- On November 16, 2015, Judge Harrison likes Jordyn Gingras' tweet about her CLE presentation at the Dallas Bar Association titled "Landman or Lawyer? $70MM+ Reasons Why You Should Care" (and "Landman or Lawyer in this context necessarily means Kerwin Stephens), Exhibit 4;

- On May 13, 2016, Judge Harrison likes a tweet by another member of the intervenors' trial team, Christina Mullen, about obtaining the #15 verdict in the country, Exhibit 5;
- On May 24, 2016, Judge Harrison likes Jordyn Gingras' tweet about the "power couple," counsel for the plaintiffs Frank Branson and his wife, Exhibit 6; and
- On June 29, 2016, Judge Harrison likes Jordyn Gingras' tweet about receiving "top billing" on the 2015 Top Texas Verdicts and Settlement Report, Exhibit 7.

11. Judge Harrison engaged with plaintiffs' counsel on Twitter substantially more than the foregoing instances. Attached as Exhibit 8 are further samples of this Twitter interaction between Judge Harrison and plaintiffs' counsel. Indeed, he still actively follows Twitter accounts associated with Jordyn Gingras and Michael Hurst.

12. Collectively, all of this Twitter activity, along with the fact that Judge Harrison followed and commented (in the form of likes) on tweets by one side of the litigants in a matter before him, indicates at the very least the appearance of partiality and prejudgment against Kerwin Stephens and his Thunderbird entities. Although judicial rulings are rarely enough by themselves to demonstrate bias sufficient to warrant recusal, the fact that the presiding judge made rulings that were incorrect—at least three times out of five, according to the Eastland Court of Appeals—and in favor of the side of the case he followed and commented on via Twitter reinforces Kerwin Stephens', and a reasonable person's, concerns about impartiality. Making no judgment about actual bias or prejudice, it is clear in my opinion that recusal of the presiding judge from this case is required. Judges in Texas have been recused for less, and certainly for more innocuous activity on social media platforms like Twitter. In order to avoid creating even the appearance of partiality and impropriety, Judge Harrison either never should have followed a lawyer from only one side of the case, or should have followed lawyers from both sides. Moreover, his likes of tweets from and referencing lawyers on only one side of what was a high

stakes and contentious piece of litigation (including tweets referencing the size and newsworthiness of the verdict) cannot help but foster objectively reasonable doubts as to Judge Harrison's impartiality. Such Twitter activity does not promote confidence in the integrity and impartiality of the judiciary; on the contrary, it undermines it. In addition, liking/commenting on the tweets of counsel for one particular side in a dispute can, even inadvertently, convey the impression that side's lawyers are in a special position to influence the judge or may receive special favor from the judge, in violation of Canons 2A, 2B and 3B(5) of the Texas Code of Judicial Conduct. For all of these reasons, it is my opinion that recusal of Judge Harrison is warranted.

Further affiant sayeth not."

John G. Browning

STATE OF TEXAS §
COUNTY OF ~~COLLIN~~ Dallas §

SUBSCRIBED AND SWORN BEFORE ME by the said John G. Browning on the 9 day of August 2021, to certify which witness my hand and official seal.

MCCLARAN H HAYES
Notary ID #132292749
My Commission Expires
December 23, 2023

Notary Public, State of Texas

# Exhibit 1

**Jordyn J. Christian-**
@JordynJGingras

Follow

The truth doesn't cost you anything, but a lie could cost you everything.

#rumbleinroby
#sweetwaterstrong
#proudlawyermoment

LIKES
3

1:25 AM - 20 Aug 2015

3

# Exhibit 2

**Jordyn J. Christian-**
@JordynJGingras

Follow

Thinking of all the new friends we made in Sweetwater & Roby. You will be missed, and we will see you… instagram.com/p/6nOt0wsiQc/

LIKE
1

12:06 PM - 20 Aug 2015

1

jordynjanee Follow

14 likes 42w

jordynjanee Thinking of all the new friends we made in Sweetwater & Roby. You will be missed, and we will see you again!!
#wefilledthebucket
#rumbleinroby
#sweetwaterstrong
#proudlawyermoment

cjbasinger Cue the song from the Lion King, "Be Prepaaaaared!"
#NantsingonyamabagithiBaba

jordynjanee Hahahahaaaa!!

Add a comment... ...

# Exhibit 3

**Jordyn J. Christian-**
@JordynJGingras

Follow

In every big victory there are people who don't receive the recognition they deserve. This woman… instagram.com/p/6sfM3sMiXC/

LIKES
2

1:07 PM - 22 Aug 2015

2

jordynjanee Follow

16 likes 41w

jordynjanee In every big victory there are people who don't receive the recognition they deserve. This woman spent months with me staying up past 2am to make the case a success. She poured her heart and soul into the courtroom seeking justice for our clients and their families.
Amber Schrandt, THANK YOU & I LOVE YOU!! #beckmenlaw
#lovewhatyoudo

amberdwn Thank you!!!!!!

Add a comment...

# Exhibit 4

**Jordyn J. Christian-**
@JordynJGingras

Follow

Excited to present this Wednesday at the DBA Energy monthly CLE luncheon: "Landman or Lawyer? $70MM+ Reasons Why You Should Care"
#DontMiss

LIKE
1

1:43 PM - 16 Nov 2015

1

# Exhibit 5

**Christina Mullen**

Follow

#15 verdict in the nation for my first trial with @MichaelTrialLaw & Jonathan Childers! #LPCH


RETWEET 1 LIKES 4

12:11 PM - 13 May 2016

1 4

# Exhibit 6

Jordyn J. Christian

@JordynJGingras

Follow

Old article but they reminded me today what "power couple" really means Great article & so much truth!!
#respect

flbranson.com/wp-content/upl…

LIKE
1

5:06 PM - 24 May 2016

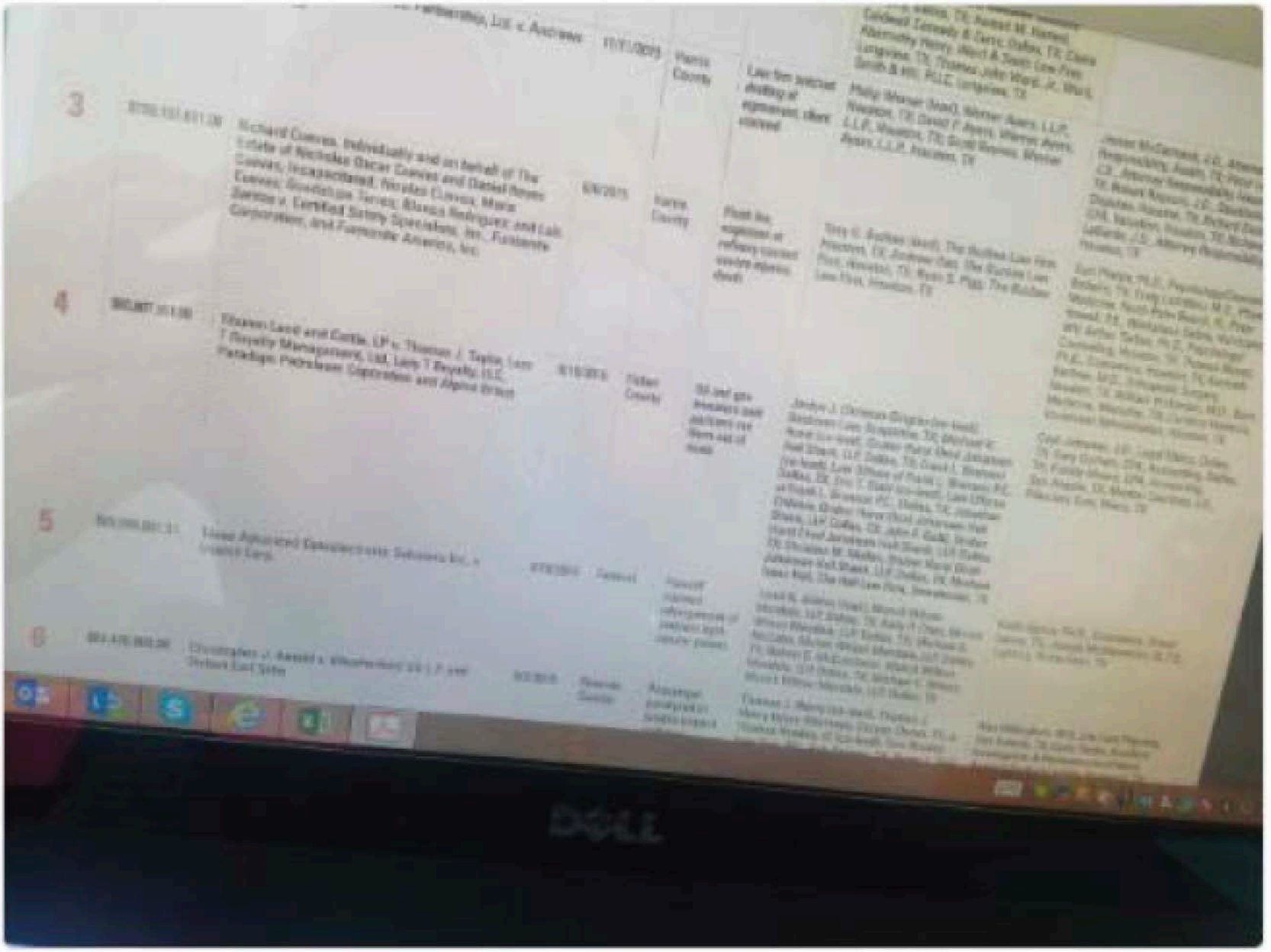
1

# Exhibit 7

**Jordyn J. Christian-**
@JordynJGingras

Follow

Not allergic to "top billing" on the 2015 Top TX Verdicts & Settlements Report!!
#ilovelawyering #whosnext #winning



LIKE
1

6:50 PM - 29 Jun 2016

1

# Exhibit 8

**glen harrison**
@gharrison32nd

Follow

After 6 mos.....shoulder injury and surgery.....IM BACK. Goodbye beard, hello training wheels.


LIKES
9

3:16 PM - 12 May 2016

9

**Jordyn J. Christian-**
@JordynJGingras

Follow

BEFORE...


LIKES
2

10:01 PM - 19 Jun 2016

Denver, CO

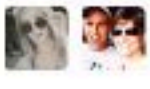
2

**Jordyn J. Christian-**
@JordynJGingras

Follow

AFTER...


LIKES
3



10:04 PM - 19 Jun 2016

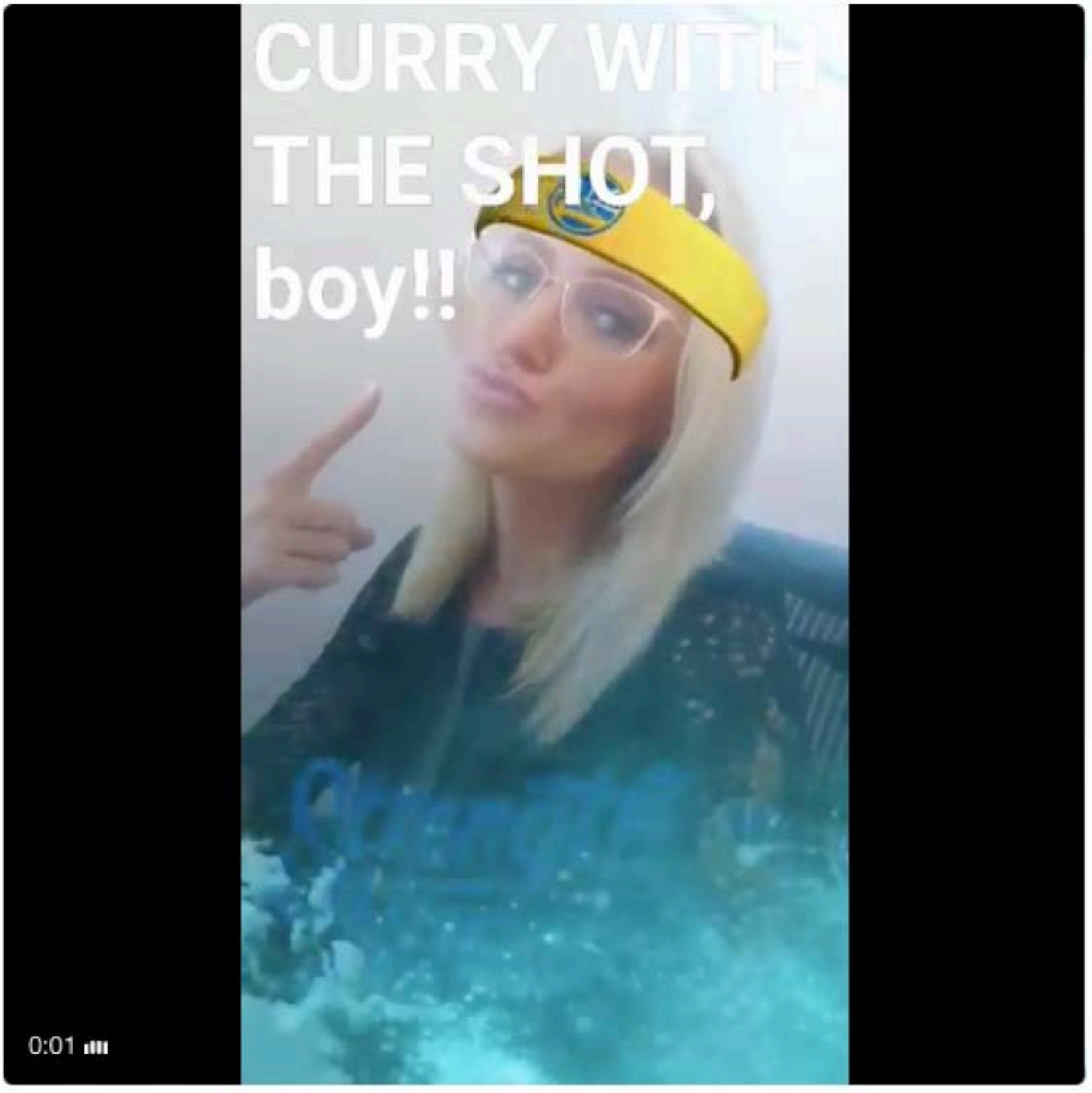
Denver, CO

3

**Jordyn J. Christian-**
@JordynJGingras

Follow

This is ALL MY FAULT for not posting my support earlier!!!
😭😭😭




LIKES
5

10:44 PM - 16 Jun 2016

**Jordyn J. Christian-**
@JordynJGingras

Follow

HAPPY 4TH!!

#bucketlist
#GoBigOrGoHome
#Merica
#GetToThaChoppa
#blackhawkUP
#hiGranbury

LIKES
2

6:38 PM - 3 Jul 2016

Granbury, TX

2

glen harrison
@gharrison32nd

Follow

"Uncle Glen" wishes you  a Happy 4th of July!
#IndependenceDay

LIKES
7

7:46 AM - 4 Jul 2016

7

Jordyn J. Christian-
@JordynJGingras

Follow

HAPPY 4TH, Y'ALL!!
❤️💣💥🔥😎👊❤️

#MERICA
#FourthofJuly
#truelove
#Granbury
#hometown4thofJuly
#myhappyplace

LIKES
4

4:59 PM - 4 Jul 2016

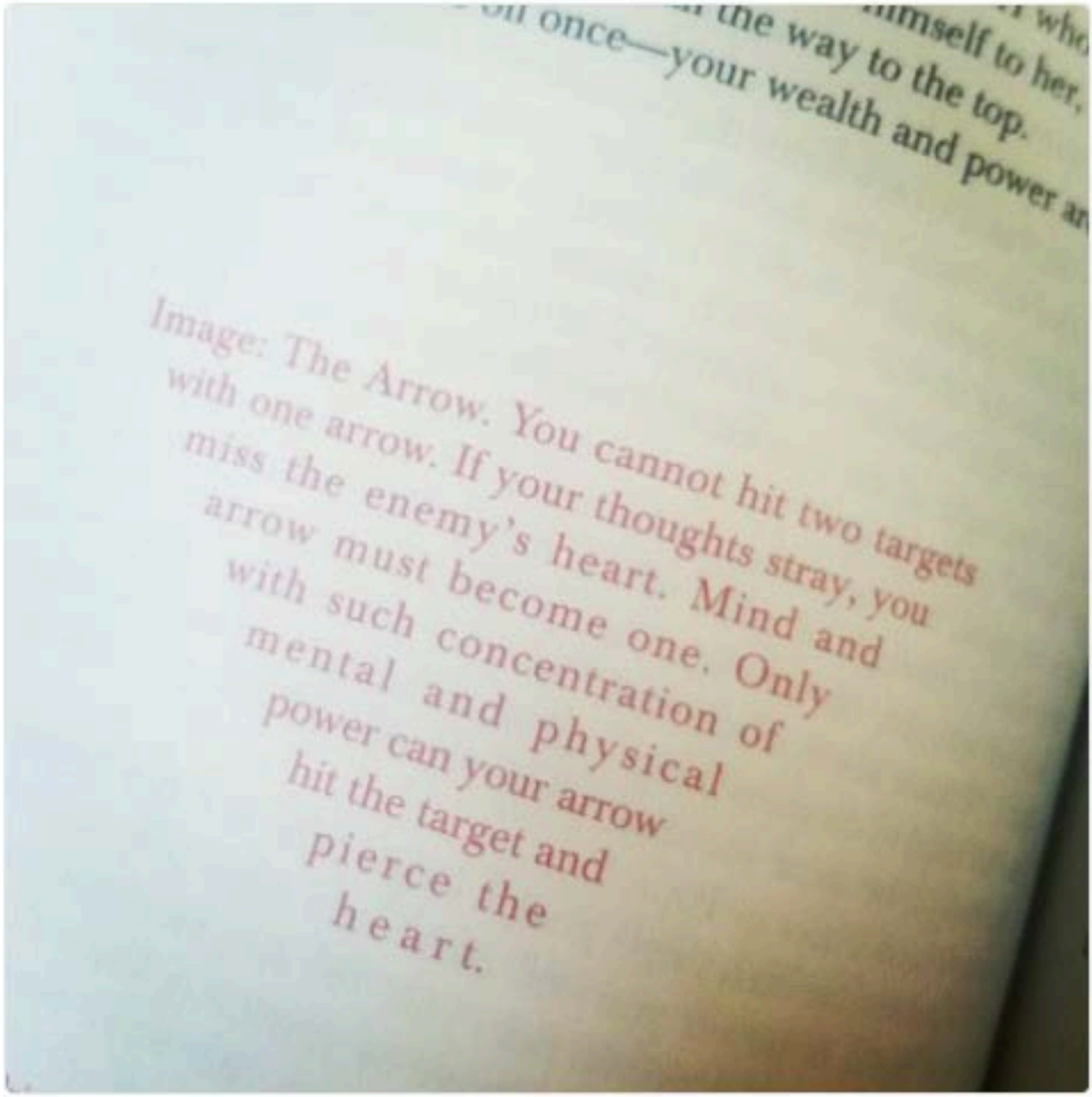
Granbury, TX

**Jordyn J. Christian-**
@JordynJGingras

Follow

Monday-est Tuesday EVER!!

#arrows #discipline #strategy #target #aimhigh #SLAY #winning #lawyerlife @RobertGreene




LIKES
2

1:46 PM - 5 Jul 2016

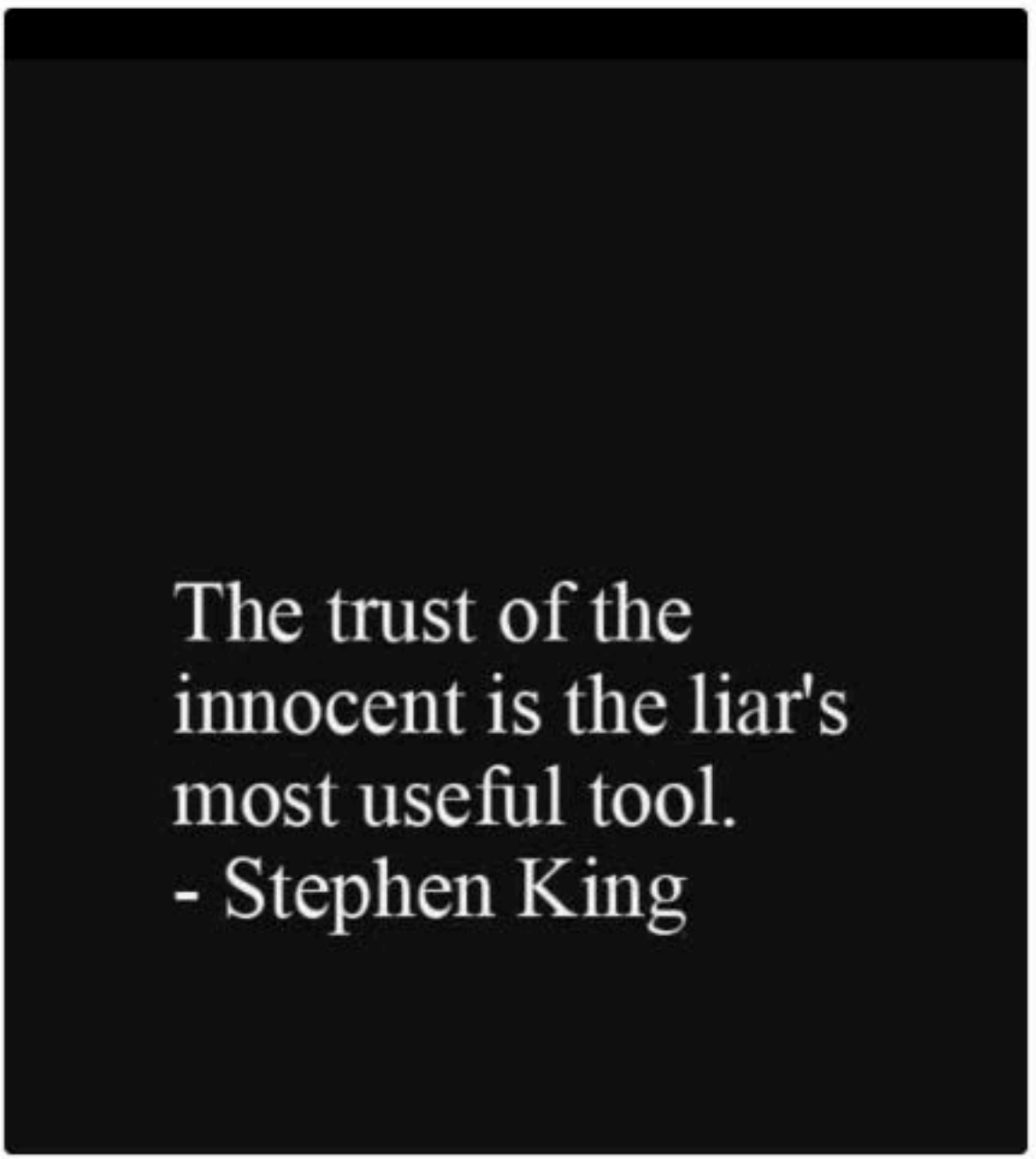
2

**Jordyn J. Christian-**
@JordynJGingras

Follow

Trust, then verify...

#ouch




LIKE
1

12:15 PM - 20 Jul 2016

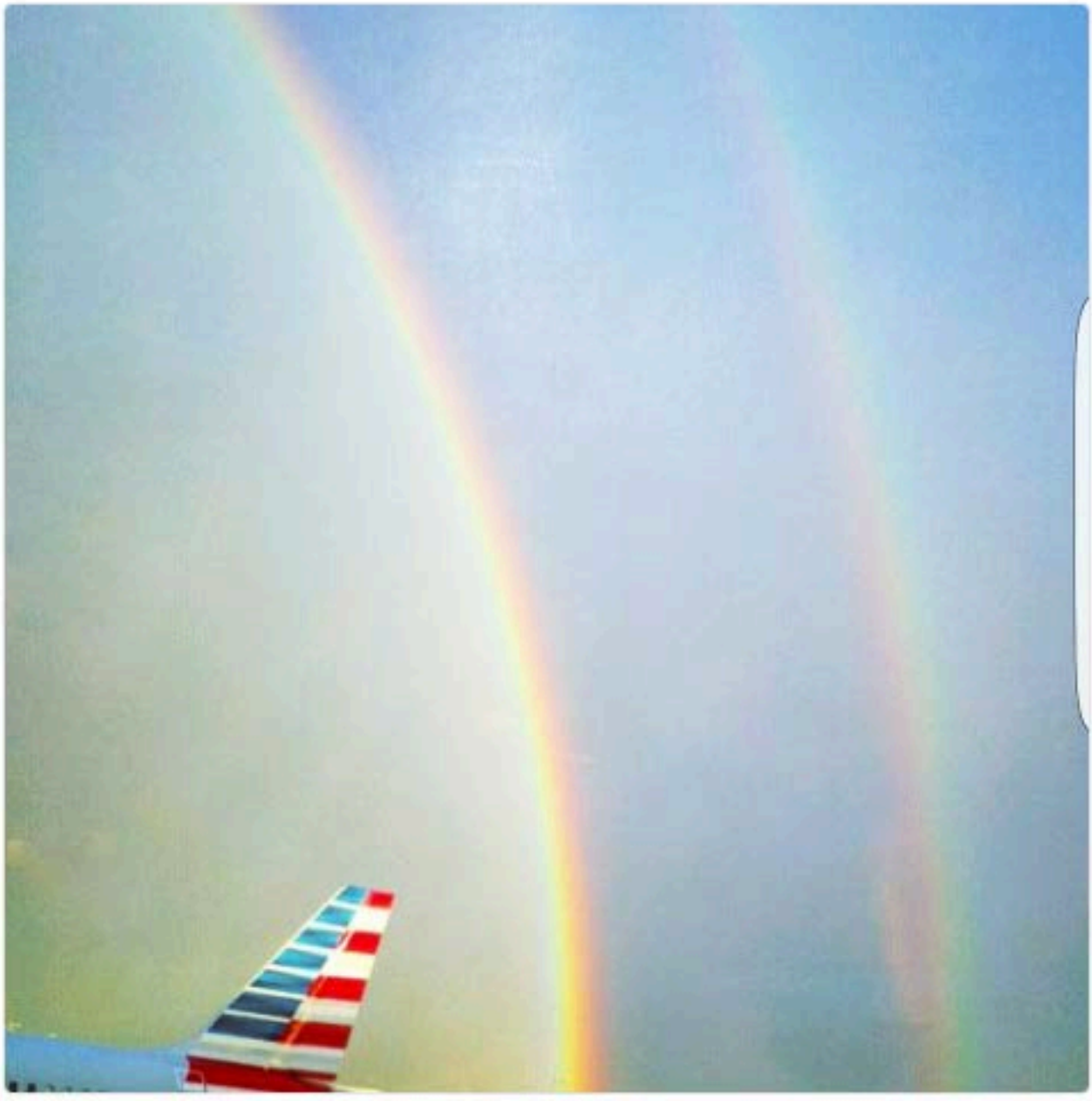
1

**Jordyn J. Christian-**
@JordynJGingras

Follow

This picture does NO JUSTICE to this double rainbow!!! The whole airport is in complete awe!!

#DENVER
#summerlovin

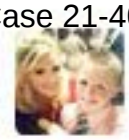


LIKES
2

9:17 PM - 23 Jul 2016

Colorado, USA

2



**Jordyn J. Christian-**
@JordynJGingras

Follow

Love this!!

#perception
#mondaymotivation
#nofear
#SLAY


RETWEETS 2 LIKES 6

7:19 AM - 25 Jul 2016

Highland Village, TX

2 6

**Jordyn J. Christian-**
@JordynJGingras

Follow

Lunching to discuss new venture COMING SOON!!
Stay tuned!

#master
#newbeginnings
@CapitalGrille
@PlainsCapital


RETWEET 1 LIKES 2

4:04 PM - 17 Aug 2016

1 2

**Jordyn J. Christian-**
@JordynJGingras

Follow

It was a great day at the YARD!!

#nevereverquit
#MyTexasRangers
#hellowincolumn
#WORLDSERIESBOUND
@Rangers


LIKES
2

9:53 PM - 28 Aug 2016

Highland Village, TX

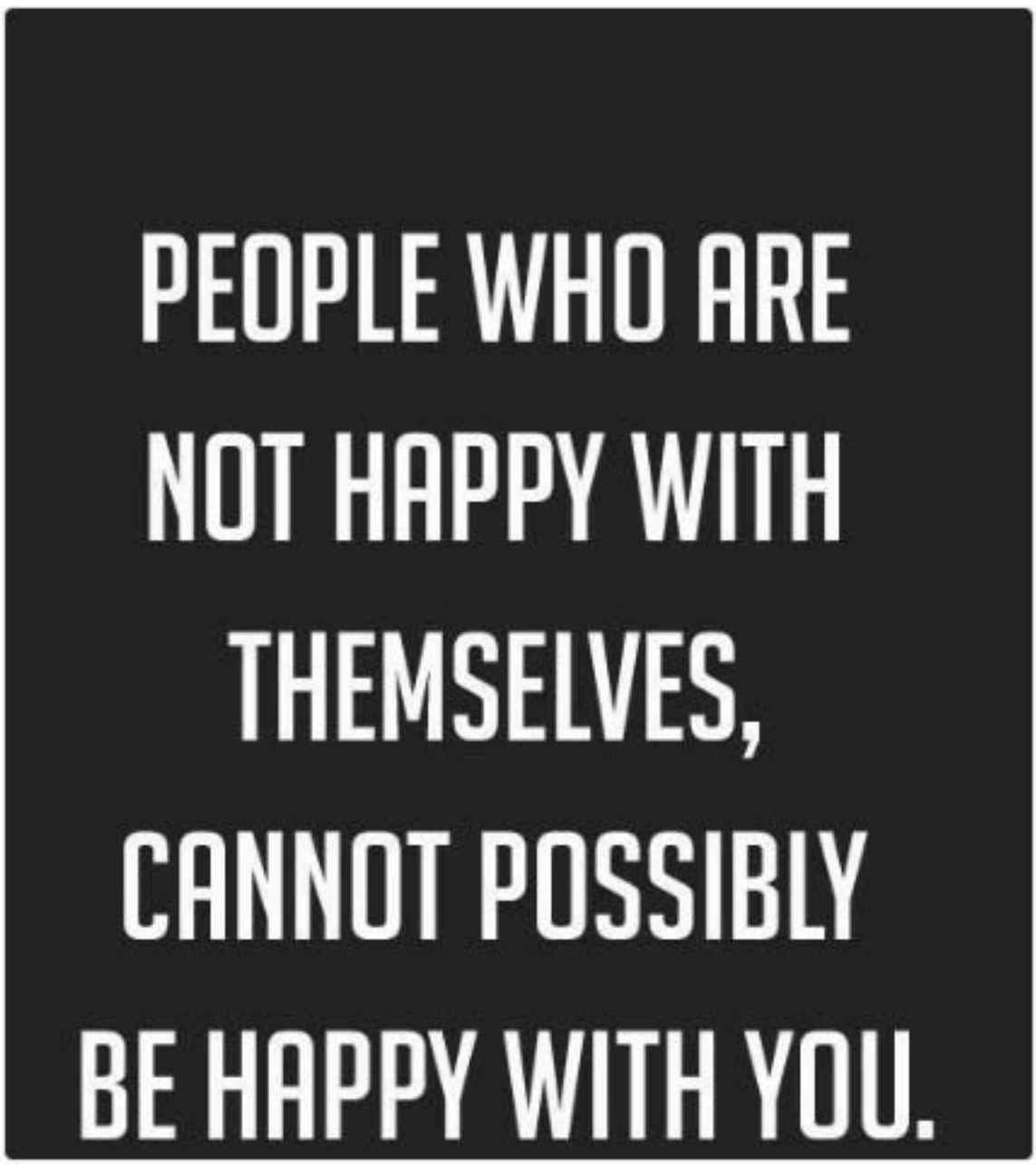
2

**Jordyn J. Christian-**
@JordynJGingras

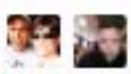
Follow

My Monday morning 2 cents...

Wish more of my girl friends would grasp this concept!!
#doyou
#yourbestisgoodenough




LIKES
3



11:04 AM - 29 Aug 2016

Highland Village, TX

3

**Jordyn J. Christian-**
@JordynJGingras

Follow

msn.com/en-us/sports/n … Salty 4 the WIN!!
"Until there's significant change": When will he decide he's satisfied with our nation's progress?

LIKE
1

11:49 AM - 30 Aug 2016

1

**Jordyn J. Christian-** @JordynJGingras · Aug 30
@gharrison32nd I literally LOL'd when I read: "However Monday, Tavarres' agent said his client would be standing during the anthem Thursday"

1

**Jordyn J. Christian-** @JordynJGingras · Aug 30
@gharrison32nd "Oh, no you don't, you little punk. WE NOT DOIN' THAT."

1

**glen harrison** @gharrison32nd · Aug 30
@JordynJGingras Hahahaha.....you are on a tear!!

1

**Jordyn J. Christian-** @JordynJGingras · Aug 30
@gharrison32nd - It's too easy on this point. The amount of people not even in the right ballpark with their commentary is frightening.

1

**Jordyn J. Christian-**
@JordynJGingras

Follow

"Sisters or mother/daughter? When you walked in I thought WOW they're almost identical!" #twinning @lifetimefitness


LIKES
2

4:25 PM - 4 Sep 2016

Highland Village, TX

2

**glen harrison**
@gharrison32nd

Follow

Are the guys at Buffalo Wild Wings controlling this game?? #NDvsTex

LIKE
1

10:31 PM - 4 Sep 2016

1

**Jordyn J. Christian-** @JordynJGingras · Sep 4

@gharrison32nd #1 & #3 most valuable teams in college football in 2OT...everybody wins!! $$$$$
#NDvsTex

1

**Jordyn J. Christian-**
@JordynJGingras

Follow

A-MEN!!
1 of my fav pieces of advice: Identify your weaknesses & work on making them your strengths!

#nowgoslay


LIKES
2

3:41 PM - 5 Sep 2016

Highland Village, TX

2

**Jordyn J. Christian-**
@JordynJGingras

Follow

And this: DO IT FOR YOU & nobody else!!Life generally...
#loveYOU1st
#trustmeonthisone
#HAPPYMONDAY
#startitoffright


LIKES
2

4:05 PM - 5 Sep 2016

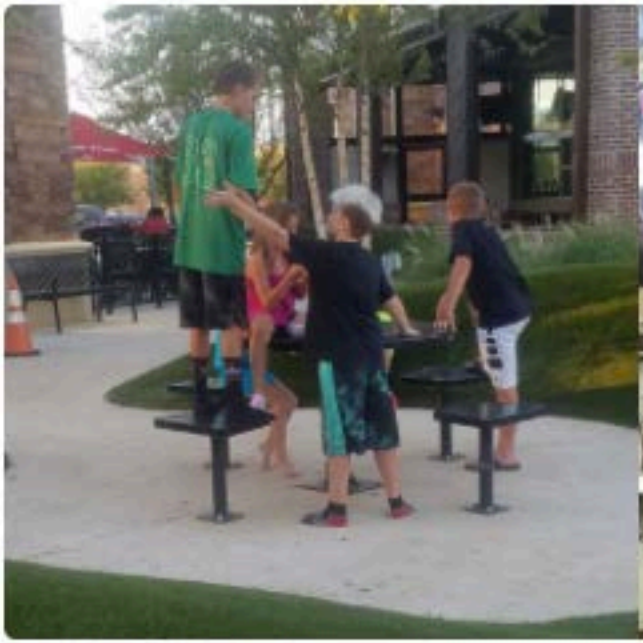
Highland Village, TX

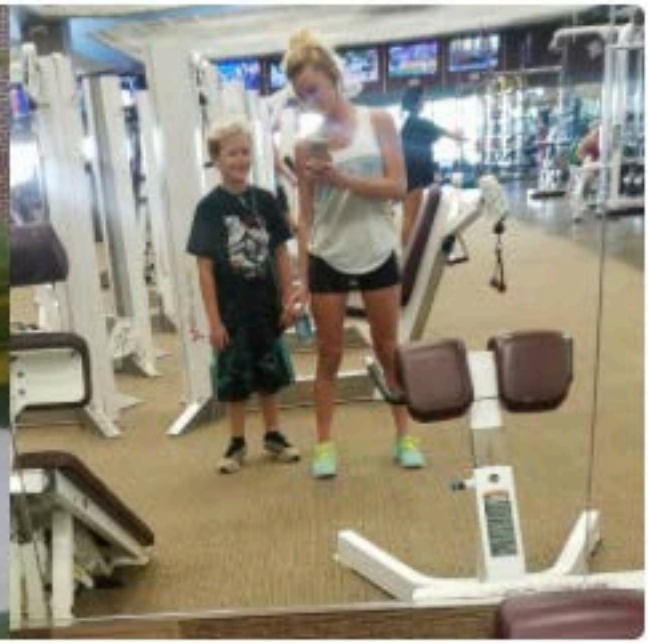
2

**Jordyn J. Christian-**
@JordynJGingras

Follow

We go HARD & then shamelessly sip wine (& Diet Coke) on the patio b4 playing football with friends ❤️🏈❤️ #truelove

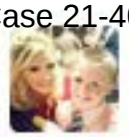




LIKES
3

7:43 PM - 5 Sep 2016

3



**Jordyn J. Christian-**
@JordynJGingras

Follow

Sometimes selfish is a good thing...

#WednesdayWisdom
#momlife


LIKES
5

10:40 AM - 7 Sep 2016

Flower Mound, TX

5

**Jordyn J. Christian-**
@JordynJGingras

Follow

7 Texas QBs starting in Week 1 - Most of any state...DUH!!!
Dalton, Griffin, Stafford, Luck, Keenum, Tannehill, Brees
#TexasPride

LIKES
5

6:12 PM - 8 Sep 2016

5

**Jordyn J. Christian-**
@JordynJGingras

Follow

Perfect day with Dad: "Be nice to everyone, baby...well unless they're gunnin' for you. Then you take 'em clean out"

LIKES
4

7:05 PM - 10 Sep 2016

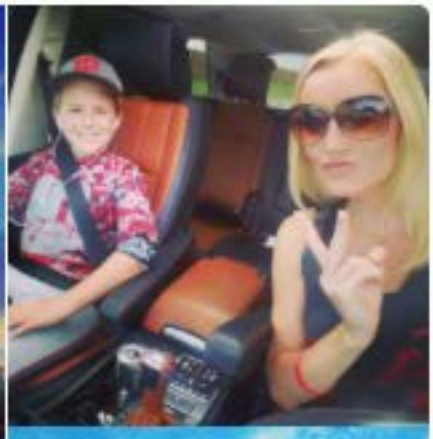
Tanner's Huntington

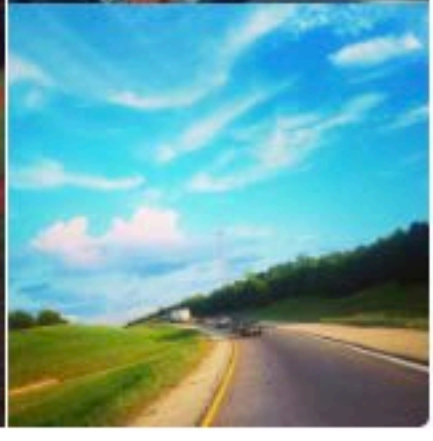
4

**Jordyn J. Christian-**
@JordynJGingras

Follow

That time of year when it's football & baseball season, weather is perfect & sunsets are breathtaking!!
#doworkbaby





LIKES
2

8:14 PM - 13 Sep 2016

Harrington Baseball Field

2

**Jordyn J. Christian-**
@JordynJGingras

Follow

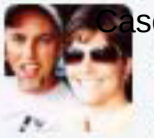
DAYDREAMING NOW about these waters...nothing beats the perfectly smooth, almost glass like FL moments in @30a

**30A** @30a
RT @Yoloboard: Yes please! @jesse.foy ift.tt/2ct2a7v

LIKES
2

8:24 AM - 15 Sep 2016

2



You can love your job, but it won't love you back. Go home and spend time with your family. #weekend

1 6

**Jordyn J. Christian-**
@JordynJGingras

Follow

@gharrison32nd Oh, AMEN, YOUR HONOR!! 🙌🙌🙌
#preach

RETWEET
1

2:57 PM - 16 Sep 2016

Highland Village, TX

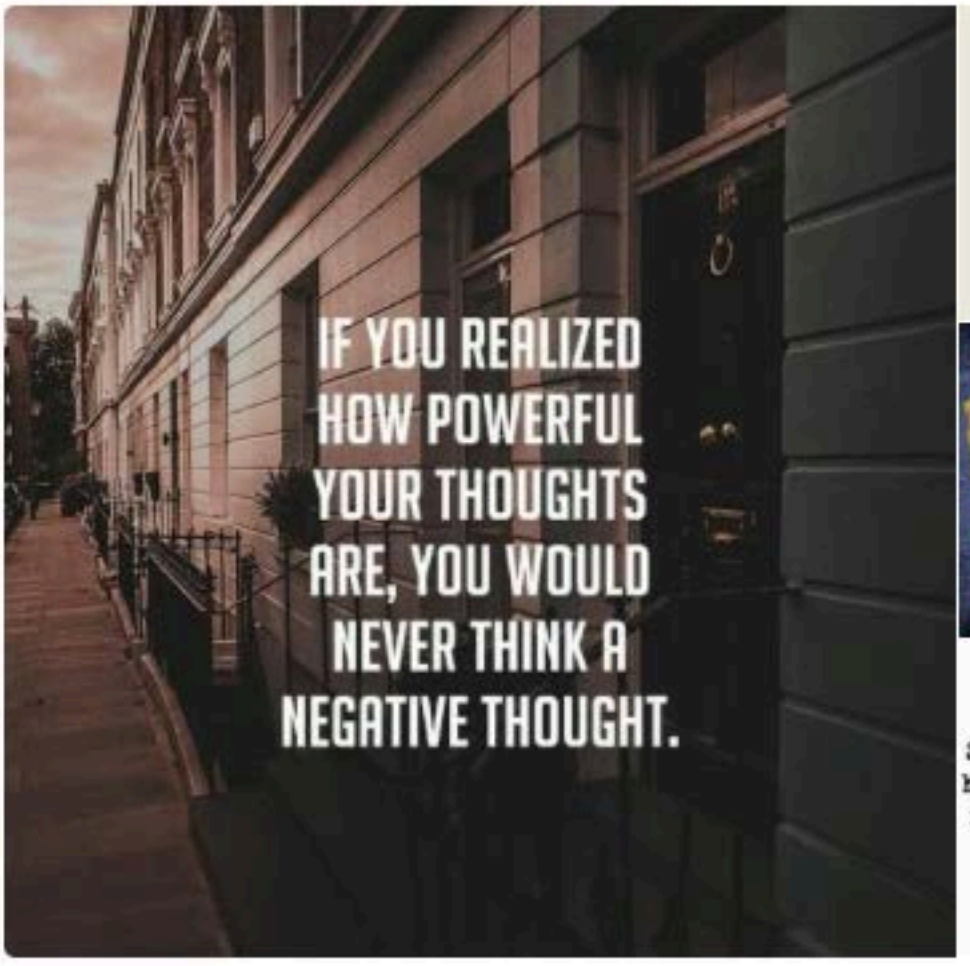
1

**Jordyn J. Christian-**
@JordynJGingras

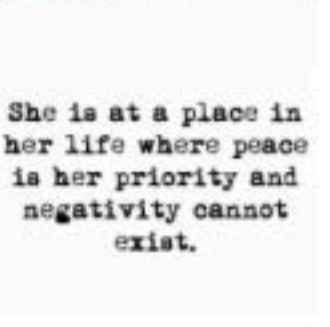
Follow

Happy FRIDAY!!!
Yours truly,
TEXAS TWITTER

#keepitreal
#bealight
#staystrong
#staypositive
#staybeautiful
#power






LIKE
1

3:03 PM - 16 Sep 2016

Highland Village, TX

1

**Jordyn J. Christian-**
@JordynJGingras

Follow

FROGS WIN - AGAIN!!!
🐸💜🐸💜🐸

"If you feelin' froggy...JUMP, SON!!"

#TCU #homecoming #ProtectTheCarter
#GameDay


**TCU Football** @TCUFootball
Three TCU running backs have carries ... all three have TD 👊!

Frogs driving again now early in 4Q

LIKES
3

2:55 PM - 17 Sep 2016

3

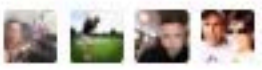
**Jordyn J. Christian-**
@JordynJGingras

Follow

We see you, #4!!!

#howyoulikedak @dallascowboys @15_DakP @NFL #DALvsWAS #wedemboyz #ouryear #wecomin4you #weready


LIKES
4



4:54 PM - 18 Sep 2016

Highland Village, TX

4

**Jordyn J. Christian-**
@JordynJGingras

Follow

To anybody that's ever dated or been married to a lawyer...I'm praying for you!!
😂😂😂
Bless your hearts!
#InternationalPeaceDay #YOUdarealMVP

| RETWEET | LIKES |
| --- | --- |
| 1 | 3 |

1:46 PM - 21 Sep 2016

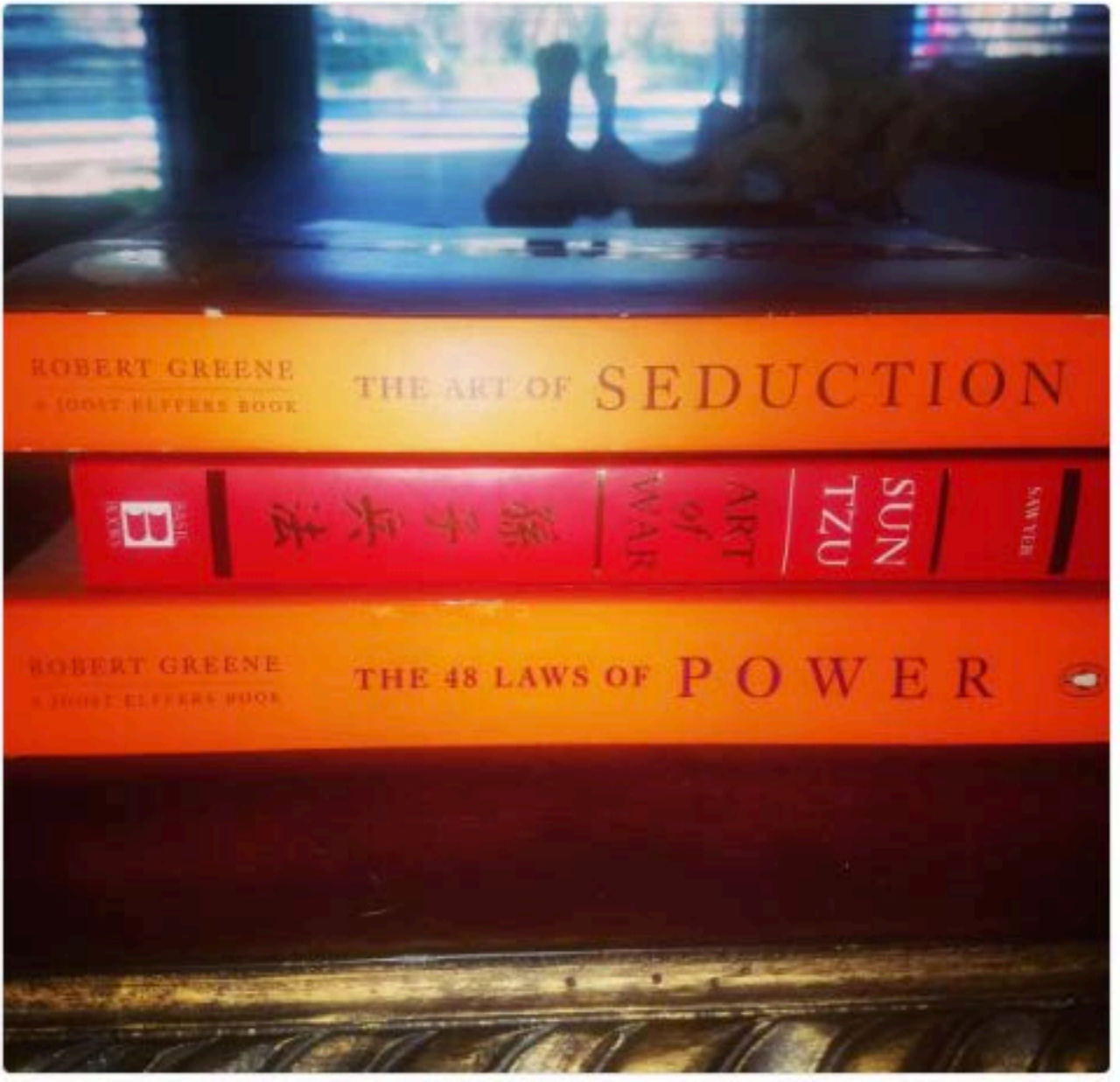
Flower Mound, TX

1 3

**Jordyn J. Christian-**
@JordynJGingras

Follow

Leave these out for the grown woman's version of your Dad cleaning his guns when your date picks you up...
#urwelcomeladies #artofwar #power




LIKE
1

1:32 PM - 22 Sep 2016

1

**Jordyn J. Christian-**
@JordynJGingras

Follow

"Love her, but leave her wild."

HAPPY FRIDAY, LOVERS!!
XOXO

#juicejunkie #wildatheart #lovehard #SMILEBIG


LIKES
2

8:51 AM - 23 Sep 2016

Highland Village, TX

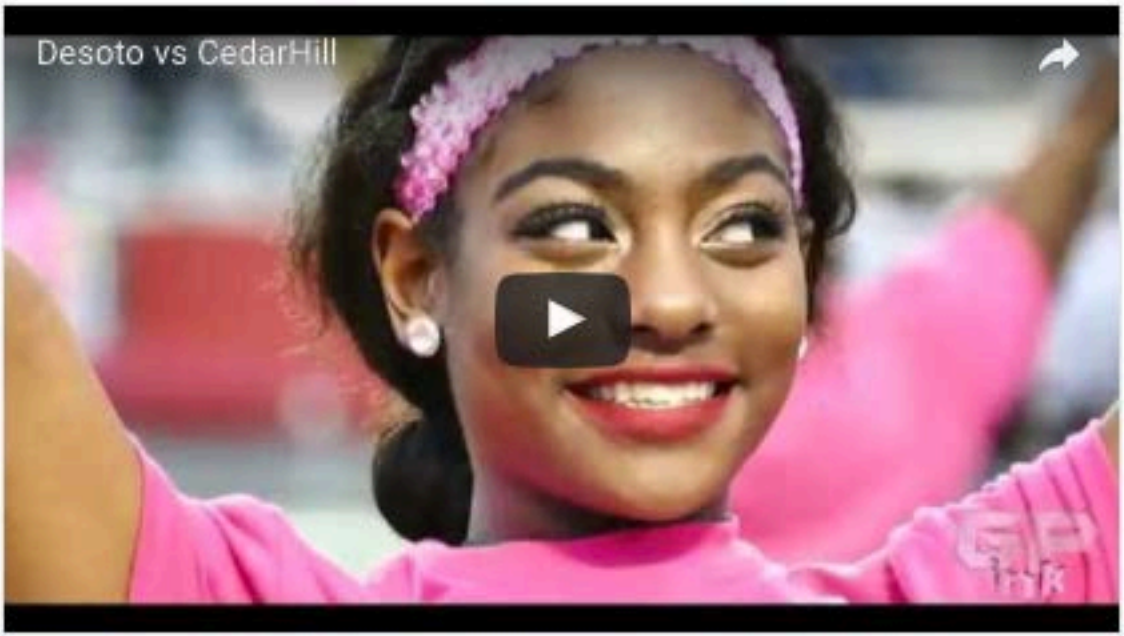
2

**Jordyn J. Christian-**
@JordynJGingras

Follow

So excited 4 Maddox 2 feel the Friday Night Lights for the 1st time w his best bud!!
😍😍😍

@CHLonghorns @UAFootball




**Desoto vs CedarHill**
Typical epic match up, then add the pouring rain and you get Friday Night Football gold. Watch all the happenings of this game from Cheerleaders to fan...
youtube.com

LIKE
1

4:37 PM - 23 Sep 2016

Texas, USA

1

**Jordyn J. Christian-**
@JordynJGingras

Follow

Good thing he doesn't have Twitter or Snapchat!!

#meanmommy
#classic
@LINEDRIVEBOYZ
#gohard
@MarcusBaseball
@baseball @BaseballRealest


LIKES
3

2:42 PM - 24 Sep 2016

Highland Village, TX

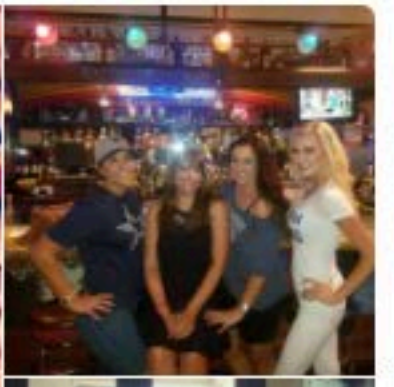
3

**Jordyn J. Christian-**
@JordynJGingras

Follow

Representin'!!!

#wedemboyz @dallascowboys @NFL
#everythingisbetterinTexas #southerngirls



LIKES
2

8:12 PM - 25 Sep 2016

2

**Jordyn J. Christian-**
@JordynJGingras

Follow

Ummm, can I just vote NO?

#debatenight #Debates2016
#PresidentialDebate #HELP

RETWEETS 2 LIKE 1

9:52 PM - 26 Sep 2016

Highland Village, TX

2 1

**Jordyn J. Christian-**
@JordynJGingras

Follow

I love this man.


**Texas Rangers** @Rangers
Pattycake, pattycake, Beltre's having fun. 😂

LIKE
1

9:34 PM - 28 Sep 2016

1

glen harrison
@gharrison32nd

Harrison has made it to Texas and is ready for game day! #GoRed


RETWEET 1 LIKES 8

8:47 AM - 30 Sep 2016

1 8

**Jordyn J. Christian-** @JordynJGingras · Sep 30
@gharrison32nd He needs a picture in the courtroom!!

**glen harrison** @gharrison32nd · Sep 30
@JordynJGingras He's coming to the Court House today. #ShowAndTell

1

**Jordyn J. Christian-** @JordynJGingras · Sep 30
@gharrison32nd YESSSSS!!!

**Jordyn J. Christian-** @JordynJGingras · Sep 30
@gharrison32nd 😍😍😍😍😍

1

**glen harrison**
@gharrison32nd

Follow

Nothing puts a judge in a good mood like visit from a grandson! #HarrisonJudeTaylor


RETWEETS 2 LIKES 7

12:03 PM - 30 Sep 2016

2 7

Jordyn J. Christian
@JordynJGingras

Follow

See you soon, Toronto!!!

#WildCard ⚾ @Rangers #madeforOctober #BringIt #OurYear #DontMessWithTexas


RETWEET 1 LIKES 2

10:39 PM - 4 Oct 2016

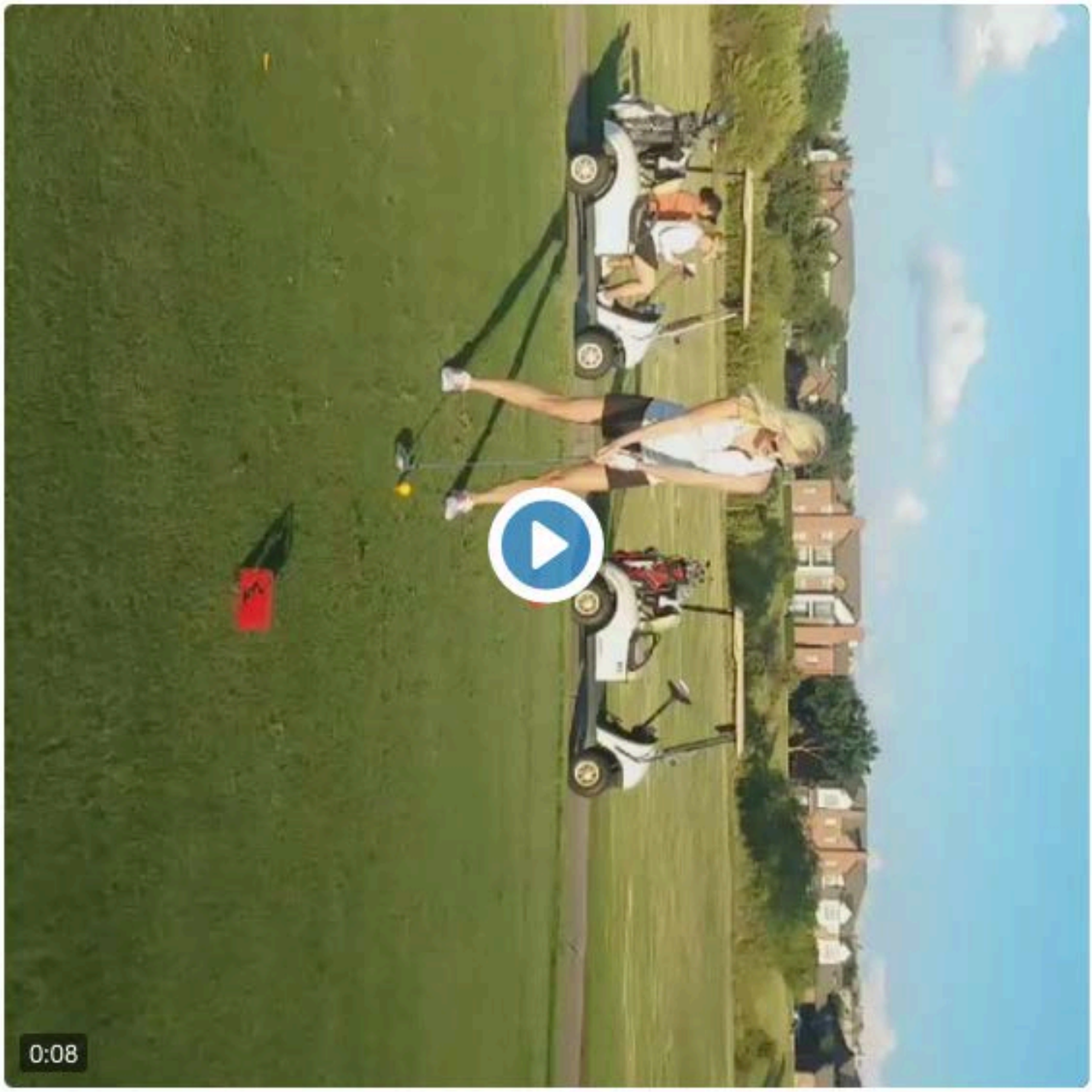
1 2

**Jordyn J. Christian-**
@JordynJGingras

Follow

Welp - Rangers didn't show up today but we did! 3 under & had a blast!!

#backtheblue #arlingtonpolicefoundation #MASTER #girlswholovesports




LIKES
2

6:49 PM - 6 Oct 2016

**Jordyn J. Christian-**
@JordynJGingras

Follow

& ZEEEEEEEKKKKEEEE!!!
😍😍😍😍😍

@dallascowboys @EzekielElliott #runbabyrun #wedemboyz
👏👏👏👏👏

LIKES
2

5:08 PM - 9 Oct 2016

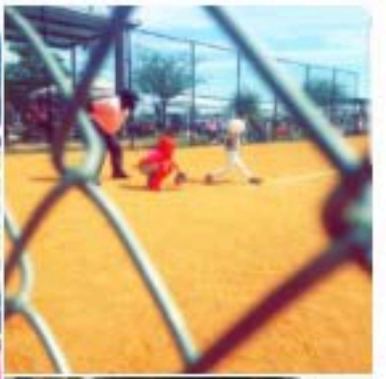
2

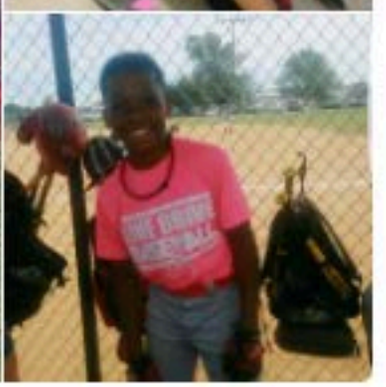
**Jordyn J. Christian-**
@JordynJGingras

Follow

Tough loss by 1 today for the @LINEDRIVEBOYZ with tying run on 3rd...but we'll be back stronger & better to get the next W!!

#baseballboys

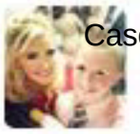





LIKES
3

6:29 PM - 9 Oct 2016

3



**Jordyn J. Christian-**
@JordynJGingras

Follow

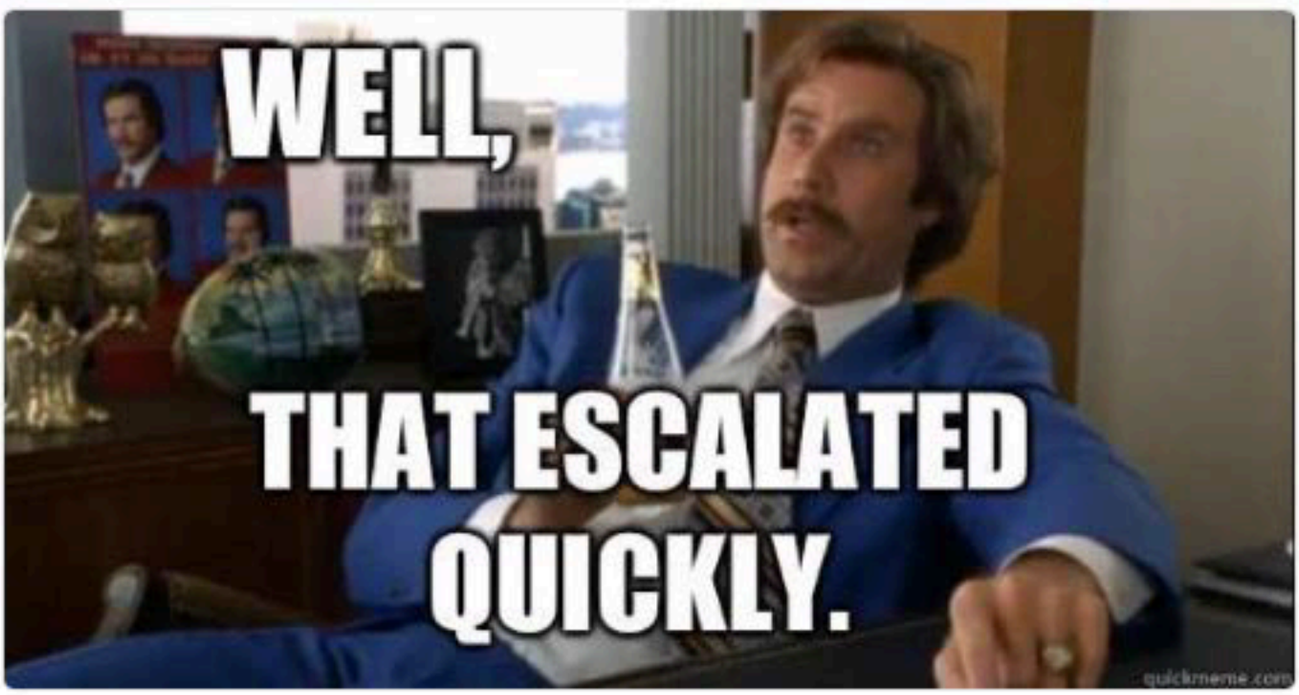
MADDOX(angrily): "Well - yeah! You can't throw him a slider RIGHT DOWN the freaking MIDDLE!!"
#Rangers #Game3 #wth
#wellthatescalatedquickly

LIKE
1

7:01 PM - 9 Oct 2016

1

**glen harrison** @gharrison32nd · Oct 9
@JordynJGingras Hahaha.....call it like you see it!




1

**Jordyn J. Christian-** @JordynJGingras · Oct 9
@gharrison32nd - He's very important. He has many leather-bound books and smells of rich mahogany!

**Jordyn J. Christian-**
@JordynJGingras

Follow

😭😭😭😭😭

**glen harrison** @gharrison32nd
Adios Big Papi. You will be missed by RedSoxNation and all of MLB (except the yankees). #FutureHOF

9:05 PM - 10 Oct 2016

**Jordyn J. Christian-**
@JordynJGingras

Follow

Because the time & energy to do so never outweighed my subsequent motivation to rise above & dominate life...& them #WhyWomenDontReport

LIKES
5

1:27 AM - 14 Oct 2016

5

**Jordyn J. Christian-**
@JordynJGingras

Follow

Ya don't say...
#runtheworldinheels #suckitupbuttercup
#becarefulwhatyouwishforboys

**Men Love Smart Women in Theory**
You can't win.
nymag.com

LIKE
1

6:17 PM - 24 Oct 2016

1

**glen harrison**
@gharrison32nd

Follow

The 32nd District(Fisher, Mitchell and Nolan Counties) is setting early voting records. The people are very excited, or scared!? #motivated

LIKES
2

11:17 AM - 25 Oct 2016

2

Home
Explore
Notifications
Messages
Bookmarks
Lists
Profile
More
Tweet

## glen harrison
@gharrison32nd

Followers | Following

@RevSHenderson
Husband, Father, Reformed, Evangelical, Conservative, Presbyterian, Pastor @SierraViewPCA

**michelle higgins**
@AfroRising
Follow
Pastor of St. John's Church, Co-host of Truth's Table. Cheerleader for Action St. Louis and Electoral Justice for Black Lives.

**Shai Linne**
@ShaiLinne
Follow
The best thing about me is that I'm accepted by God through the death and resurrection of His Beloved Son. I exist to know Jesus Christ and make Him known.

**Peter Sagan**
@petosagan
Follow
Official Twitter account of Peter Sagan, Three-time Cycling World Champion. Business inquiries: marketing@petersagan.com

**JCG Legal Group PLLC**
@jcglegalgroup
Follow

**Robert**
@Robert443198031
Follow
Golf College Football MLB NFL Sports News

Search Twitter

**Revenera**
@GetRevenera
Follow
Promoted

**Bill Siegel**
@bsiegel...
Follows you
Follow

**600 Commerce**
@600Co...
Follows you
Follow

Show more

### Topics to follow

**Viral Tweets**
Popular right now
Follow

**Funny Tweets**
Tweets making people laugh
Follow

**Sports**
All about sports
Follow

**NBA**
Basketball league
Follow

Today | Notifications

Tuesday, June 8

CALENDAR
No Events

WEATHER
9:50 AM
Dallas
75°

STOCKS

| | | |
|---|---|---|
| DOW J | 34,586.62 | − 0.13% |
| S&P 500 | 4,225.03 | − 0.04% |
| AAPL | 127.33 | + 1.14% |
| BA | 255.65 | + 1.18% |
| BRK-B | 287.89 | − 0.54% |

Show More...

TOMORROW
You have no events scheduled for tomorrow.

Home
Explore
Notifications
Messages
Bookmarks
Lists
Profile
More
Tweet

## glen harrison
@gharrison32nd

Followers | Following

**Thom Rainer** ✓
@ThomRainer
CEO of Church Answers. Husband to Nellie Jo. Dad to Sam, Art, Jess. Granddad to Canon Maggie Nathaniel Will Harper Bren Joshua Collins Joel Dominic James.
Follow

**Phil Miller**
@TXB_Phil
Follow

**Michael K. Hurst**
@MichaelTrialLaw
Empowering clients with important and large cases often through trial for over 28 years. 2018 DBA President
Follow

**Judge Emily Miskel**
@emilymiskel
470th District Court, Collin County, TX. Stanford Mech Eng, Harvard Law School. Double Board Certified. Political advertising by Emily Miskel.
Follow

**Richie Whitt** ✓
@richiewhitt
Writing ✍ Radio 📻 TV 📺 DFW sports media dork since 1986
CowboysSI.com ★ DallasBasketball.com ★ @FanNation ★ @TheCrossover ★ @Dallas_Observer ★ @onairmediaco
Follow

**Judge Victor Villarreal**
@JudgeVillarreal
Husband, father, and judge of Webb County Court-at-Law II. The Court was designated a Judicial Center of Excellence by the Texas Judicial Council on November 15
Follow

Search Twitter

**Revenera**
@GetRevenera
Promoted
Follow

**Bill Siegel**
@bsiegel... Follows you
Follow

**600 Commerce**
@600Co... Follows you
Follow

Show more

### Topics to follow

**Viral Tweets**
Popular right now
Follow

**Funny Tweets**
Tweets making people laugh
Follow

**Sports**
All about sports
Follow

**NBA**
Basketball league
Follow

**Rap**
Music genre
Follow

Show more

Today | Notifications

Tuesday, June 8

CALENDAR
No Events

WEATHER
9:49 AM Dallas
75°

STOCKS

| | | |
|---|---|---|
| DOW J | 34,586.62 | − 0.13% |
| S&P 500 | 4,224.80 | − 0.04% |
| AAPL | 127.35 | + 1.15% |
| BA | 255.70 | + 1.20% |
| BRK-B | 287.82 | − 0.57% |

Show More...

TOMORROW
You have no events scheduled for tomorrow.

Weather information provided by The Weather Channel, LLC
Stock information provided by YAHOO!

# Exhibit B.1

glen harrison followed Sarah, Peter M. Lopez, Judy Clayton and 6 others

Follow

**Sarah**

@SarahStanlee15

I love Jesus. Wife to Taylor Hamilton. 6th grade science teacher. Texas Tech University alumni.

Follow

**Peter M. Lopez**

@petermlopez

Husband, father, lawyer, co-host of @fantasynewshour, airing Thursdays, 6pm(CST) on 98theticket.com, and co-leader of marriagemakeover.us

**glen harrison** @gharrison32nd · 16 Jul 2015

glen harrison followed

**Judy Clayton** @judyclayton73
Retired Physician. Mother of three. Grandmother of four. Christ follower. Blessed.

Follow

**Taylor** @ProudTechsan
Follower and lover of Jesus Christ. Loving Sarah, Friends, and Family. Texas Tech grad. Middle school math.

Follow

**Jordyn J. Christian-** @JordynJGingras
Baseball MOM - Attorney - Sports Fanatic - Lover of laughing with my squad, WINE, food & FIREWORKS...preferably over the ocean

Follow

**Michael K. Hurst** @MichaelTrialLaw
Empowering clients with important and large cases for over 25 years

Follow

**Carola Martin** @L3cmartin
Instructional Technology Specialist for SISD and Varsity Girls Golf Coach.

Follow

**David Richards** @humblekanye

Follow

**TJ Wilson** @tarrell20

Follow

# Exhibit B.2

**glen harrison**
@gharrison32nd

Follow

Told the jury that I would not allow the lawyers to honeyfugle them. An objection from the 1890s. To deceive through sweet talk. #enunciate

RETWEETS 3 LIKES 5

9:24 PM - 18 Aug 2015

3 5

**glen harrison**
@gharrison32nd

Follow

Late night Charge Conference has become early morning Charge Conference. #CivilLitigation #MidnightInRoby

12:43 AM - 18 Aug 2015

# Exhibit C

J. Robert Forshey
State Bar No. 07264200
Lynda L. Lankford
State Bar No. 11935020
**FORSHEY & PROSTOK LLP**
777 Main St., Suite 1550
Fort Worth, Texas 76102
(817) 877-8855 Tel.
(817) 877-4151 Fax
bforshey@forsheyprostok.com
llankford@forsheyprostok.com

ATTORNEYS FOR
KERWIN BURL STEPHENS DEBTOR
AND DEBTOR-IN-POSSESSION

James Holmes
State Bar No. 00795424
Andrea Seldowitz
State Bar No. 24088389
**HOMES PLLC**
2001 Bryan St., Suite 2125
Dallas, Texas 75201
(214) 520-8292 Tel.
holmes@holmeslawpllc.com
seldowitz@holmeslawpllc.com

SPECIAL LITIGATION COUNSEL FOR
KERWIN BURL STEPHENS DEBTOR
AND DEBTOR-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **In re:** | § | **Chapter 11 (V)** |
| | § | |
| **KERWIN BURL STEPHENS,** | § | **Case No.: 21-40817-elm-11** |
| | § | |
| **THUNDERBIRD OIL & GAS, LLC,** | § | **Case No.: 21-41010-elm-11** |
| | § | |
| **THUNDERBIRD RESOURCES, LLC,** | § | **Case No.: 21-41011-elm-11** |
| | § | |
| **Debtors.** | § | **Jointly Administered Under** |
| | § | **Case No. 21-40817-elm-11** |
| | § | |

## AFFIDAVIT AUTHENTICATING TRANSCRIPT EXCERPTS

James Holmes, being duly sworn, states as follows:

1. "My name is James Holmes. I am over the age of 18, of sound mind, have never been convicted of a felony, and am fully competent to make this affidavit. The facts stated herein are within my personal knowledge and are true and correct.

2. I am counsel of record for the Debtor Kerwin B. Stephens in the above bankruptcy cases and have knowledge of the contents of Exhibits 1 to 3 to this Affidavit, the authenticity of which should be undisputed as they are portions of a state-court trial record called a Reporter's Record under Texas practice.

3. Attached hereto and incorporated herein are true and correct copies of the following hearing transcripts from the Reporter's Record in the state-court litigation leading to these bankruptcy proceedings:

**Exhibit 1**: Pages 1 to 7 and pages 373 to 379 of the Supplemental Reporter's Record, Vol. 2, including the following passage:

"But, despite the characterization that repeated and diligent efforts have been made to get the bond or the Letter of Credit, based on the testimony presented, the demeanor, and the credibility of the witnesses, I don't find that sufficient efforts have been made to get that when you go to a bank that couldn't have given the Letter of Credit even if they wanted to and then certainly try to bring in somebody else and then a friend, also. I really don't find that there's – the Defendants have made sufficient efforts to show me that a bond could not be obtained. And, therefore, Defendants' Motion for an Order for Alternate Security is denied." [Page 377.]

**Exhibit 2**: Pages 1 to 7 and pages 81 to 85 of the Supplemental Reporter's Record, Vol. 3, including the following passage:

"But, I do feel like we're kind of in the same song, second verse, a little bit faster, a little bit worse. I'm still hearing things like 'hopefully,' 'typically,' and 'for some amount.' I'm not – still not impressed with the Defendants' efforts to secure either a sale or this bond. And so Defendants' Motion for Alternate Security and Motion to Release Abstracts to Specific Properties is denied." [Page 83.]

**Exhibit 3**: Pages 1 to 9, pages 62 to 65, pages 115 to 117, and pages 157 to 160 of the Supplemental Reporter's Record, Vol. 6, including the following passages:

"You're telling me, essentially, we've got competing essential rights. They have a right to execute on their judgment, you've got a right to make a supersedeas bond. You want me to stop them from proceeding on their right so you can proceed on yours? . . . I think you've kind of seen my thought process here today. I haven't been trying to hide the ball as to the direction I was leaning and hit a hurdle that I don't believe I was prepared to even try to attempt with these levies." [Pages 64 & 116.]

4. Further affiant sayeth not."

James Holmes

Sworn to before me this 9th day of August, 2021, to certify which witness my hand and official seal.

ROBIN MCCORMACK
My Notary ID # 124581522
Expires June 5, 2023

Robin McCormack
Notary Public, State of Texas

My commission expires: June 5, 2023

# Exhibit C.1

SUPPLEMENTAL REPORTER'S RECORD
VOLUME 2 OF 5 VOLUME
APPELLATE CASE NO. 11-16-00177-CV
TRIAL COURT CAUSE NO. DC2013-0016

| | | |
|---|---|---|
| TIBURON LAND AND CATTLE, LP AND TREK RESOURCES, INC., Plaintiffs, VS. THOMAS J. TAYLOR, LAZY T ROYALTY MANAGEMENT, LTD.; CHESTER CARROLL, PARADIGM PETROLEUM CORP., KERWIN STEPHENS, THUNDERBIRD OIL & GAS, LLC, ET AL, ALPINE PETROLEUM, AND STEPHENS & MYERS, LLP, Defendants. L. W. HUNT RESOURCES, LLC AND RICHARD RAUGHTON, Intervenors | ) | IN THE DISTRICT COURT<br>FISHER COUNTY, TEXAS<br>32ND JUDICIAL DISTRICT |

THUNDERBIRD DEFENDANTS' MOTION TO ORDER ALTERNATE SECURITY; MOTION FOR PROTECTIVE ORDER

On the 3rd day of August, 2016, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Glen Harrison, Judge presiding, held in Roby, Fisher County, Texas;

Proceedings reported by machine shorthand.

A P P E A R A N C E S

FOR THE PLAINTIFFS:
MR. DARRELL W. COOK
DARRELL W. COOK & ASSOCIATES
5005 GREENVILLE AVE, SUITE 200
DALLAS, TEXAS 75206
SBOT NO. 00787279

MR. FRANK BRANSON
SBOT NO. 02899000
MR. ERIC STAHL
SBOT NO. 00794685
LAW OFFICES OF FRANK L. BRANSON
81TH FLOOR, HIGHLAND PARK PLACE
4514 COLE AVENUE
DALLAS, TEXAS 75205-4185

FOR THE DEFENDANTS:
MR. DAVID KELTNER
MR. JODY SANDERS
KELLY HART
201 MAIN STREET, SUITE 2500
FORT WORTH, TEXAS 76102

MR. JAMES HOLMES
HOLMES PLLC
3012 FAIRMOUNT STREET
DALLAS, TEXAS 75201
SBOT NO. 00795424

MR. ALAN CARMICHAEL
WETZEL AND CARMICHAEL
P. O. BOX 78
SWEETWATER, TEXAS 79556
SBOT NO. 16934100

FOR THE INTERVENORS:
MR. JONATHAN CHILDERS
LYNN PINKER COX & HURST
2100 ROSS AVENUE, SUITE 2700
DALLAS, TEXAS 75201

MR. MICHAEL HALL
HALL LAW FIRM
314 E. 3RD
SWEETWATER, TX 79556
SBOT NO. 24057881

INDEX

EXHIBIT INDEX

**AUGUST 3, 2016**

| NO. | DESCRIPTION | M | O | A | VOL |
|---|---|---|---|---|---|
| I-1 | Deed of Trust (375) | | 79 | 79 | 2 |
| I-2 | Mortgage, Deed of Trust, Assignment, Security Agreement Financing Statement (376) | | 82 | 83 | 2 |
| I-3 | Mortgage, Deed of Trust, Assignment, Security Agreement Financing Statement (6539) | | 128 | 128 | 2 |
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THE COURT: Let's go on the record in Cause No. DC2013-0016 on, I believe, Defendants' Motion for Alternate Security.

What says the Defendant?

MR. KELTNER: We're ready to go, Your Honor.

THE COURT: Plaintiffs?

MR. COOK: Yes, Your Honor.

THE COURT: Okay. And Intervenors?

MR. CHILDERS: Ready, Your Honor.

THE COURT: Okay. Let's go ahead and get into it. Looks like y'all are --

MR. BRANSON: Can we invoke the rule?

THE COURT: Do we have witnesses in the courtroom?

MR. KELTNER: We do, Your Honor. We have a number.

THE COURT: Identify them and have them stand, please.

MR. HOLMES: Your Honor, James Holmes for Defendants. Presently, we have Kerwin Stephens' party and we have expert witness, Scott Barnes. There are witnesses out in the hallway. I can call them in and have them sworn in.

THE COURT: If you can instruct them if

they're not here. That's fine.

The Plaintiffs have any witnesses?

MR. STAHL: No, Your Honor.

THE COURT: Intervenors have any witnesses?

MR. CHILDERS: No, Your Honor. But, we may call someone depending on who they call or don't call.

THE COURT: Okay. Well, they're going to be under the rule. So, if you think that they're here in the courtroom, you will need to get them out at this time. Do you understand that?

MR. CHILDERS: I do, Your Honor.

THE COURT: Okay. I believe rule having been invoked, if you're a witness in this matter, I believe they've been identified, you will not be allowed to remain in the courtroom during the testimony that is presented. You're not to discuss your testimony or that of any other witness with anyone except for the attorneys involved in this case. Do not allow it to be discussed in your presence. And people who are found to have violated this rule could be excluded from testifying, could be subject to a contempt finding of the Court.

Other than the party, Mr. Stephens, obviously, may stay. If you're a designated the witness, unless you're the first one called, you're

excused at this time.

MR. HOLMES: Your Honor, Mr. Barnes was going to be our first witness. I can have him wait in the hallway while Mr. Keltner addresses the Court or he can just stay here with Mr. Keltner's address.

THE COURT: That's fine. Go ahead and stay during the address.

MR. KELTNER: Your Honor, we have taken care of a number of matters that are on the docket but don't need to be considered.

First is our Motion for Protective Order. The parties have agreed to a protective order that I'm going to hand you and ask you on behalf of all parties to sign.

THE COURT: No objection from the Plaintiffs or Intervenors?

MR. CHILDERS: Correct, Your Honor, no objection.

MR. COOK: No objection, Your Honor.

THE COURT: Okay.

MR. KELTNER: Your Honor -- I'll wait till you do that.

Your Honor, there was one other thing, Motion to Stay. The Motion to Stay was a cap holder for execution pending the time of this hearing, so we don't

discretion lies with you. And I'm not arguing otherwise.

It does require an order. I've never suggested that it does not. It doesn't require substantial economic harm, and the Supreme Court tells you that, despite what Mr. Childers argues. That can't be right. Don't be misled.

THE COURT: Does it require the lack of liquidity assets to come in and to get the bond?

MR. KELTNER: That is not clear, but I would suspect yes. But, to that, let me answer --

THE COURT: You're not in that category, are you?

MR. KELTNER: Yes, because the assets I have, or Mr. Stephens has can't get a Letter of Credit.

Let me answer one additional thing that came up for the first time on the response from the Intervenors, and that is the homestead. The homesteads are listed in the net worth, so that's really not an issue. The homestead stuff we're talking about is within the net worth. The posting of what we have suggested with the appraiser goes past that amount in any event. So, I don't think that's an issue.

Let me get to -- return to the question you just asked me, and that is liquidity. And remember,

liquidity is completely different than assets. You may have assets worth so much, but the liquidity necessary to get a Letter of Credit is a completely different issue.

The only testimony you've heard today, the only testimony is we can't do that. They suggest maybe if you'd ask somebody else. That's where I think the rubber meets the road in this case. And if that's what they're saying -- I mean we've got this. I think that this is -- this was a long trial well tried by you with good lawyers on both sides. We raised what I think are important legal issues, especially on the Intervenors' claim, and some of the Plaintiffs' claims as well.

The Supreme Court in In re Longview and In re Nalle both, two Chief Justices, both unanimous opinions, says, "the right to an appeal is important." And that's what the Legislature is trying to get. And if you balance the equities, the Supreme Court does give guidance. And it says you balance them in favor of doing that without dissipating assets. That's all we're after.

If there's another way to do this -- and I'm making this offer because the appeal hangs in the balance. If there's another way to do this, we're open to it. If there's another way to put this together, we

will work through that. I think you've seen us be willing to do that.

So, those are the -- that is what I think guides your decision. Please don't misunderstand me, and I don't want to be misunderstood by my friends on the other side. It requires an order. There's no doubt about that. It is -- I don't know that it's equitable so much. I know what the Supreme Court says the equities are, and they are towards a meaningful appeal without dissipating assets. That's what we're after.

And we contest all the stuff that Frank has argued about what happened at the trial, the veracity of the witnesses, and all that. That's probably not where our appeal is going. It's going to the legal basis for their claims. And that's what we want to try to bring. We'll let the Court decide it. Again, well tried by you, well tried by them. I do think their issues in the right of appeal is what we're trying to protect.

And, Your Honor, that's it. Happy to answer any questions. And you've been very patient, by the way.

MR. CARMICHAEL: Or we could dance.

THE COURT: I think y'all have been dancing a little bit here.

MR. BRANSON: I've got just a short

response.

THE COURT: Might as well.

MR. BRANSON: I've got to thank the Court. We've tried a lot of lawsuits. Our clients have gotten an absolute fair trial, so did Kerwin Stephens. I've been in some trials where both sides couldn't say that.

When you're considering the equities, as David called them, any time I've been in court and dealt with equities, part of what is considered is clean hands. And I haven't seen any clean hands on Mr. Stephens' side of this case. He's made his bed and now he doesn't want to lie in it. And I just submit the Court to consider that when you make your decision.

Having said that, I think the Court knows we'll work with the Court whatever the Court's decision, and it's totally discretionary. Thank you.

THE COURT: Promise you the final word. Want to --

MR. KELTNER: That's fine. Everybody deserves the right to go home, too.

THE COURT: Well, I really do like the idea of alternate security. And I think this case needs to be appealed. And while I'm tempted to put this -- work out something else and delay, try to figure something else out, Defendants have brought this to me today to

decide on the evidence that's presented here and brought the evidence before me today that causes me to make a decision today and not try to fashion some remedy on out in the future to do something else.

But, despite the characterization that repeated and diligent efforts have been made to get the bond or the Letter of Credit, based on the testimony presented, the demeanor, and the credibility of the witnesses, I don't find that sufficient efforts have been made to get that when you go to a bank that couldn't have given the Letter of Credit even if they wanted to and then certainly try to bring in somebody else and then a friend, also. I really don't find that there's -- the Defendants have made sufficient efforts to show me that a bond could not be obtained.

And, therefore, Defendants Motion for an Order for Alternate Security is denied.

MR. KELTNER: Your Honor, may I ask one question? I'm certainly never going to argue the ruling.

THE COURT: Certainly.

MR. KELTNER: We will go back and still attempt and see what we can do. The issue for a stay now becomes important because I'm dealing with an abstract of judgment now. And on top of that, if they

start collection efforts, I'll never be able to get any additional stuff. Will Your Honor consider a stay for, let's say, 45 days or 60 days for us to attempt to do that?

MR. BRANSON: Your Honor, this is the second time we've had this hearing. It's been a year since the case was tried.

THE COURT: I think this case needs to be appealed and I hope you can get there. I'll grant a stay of this for 30 days, a protective order to see if you can go about getting a bond written and sufficient exploration of that.

MR. KELTNER: We will send you an order on this, and I'll circulate it.

MR. BRANSON: Can we agree, Your Honor, if they don't post a bond in 30 days, the order that the Court has entered, it will be enforced?

THE COURT: We won't have to have another hearing. 30 days from today's date, or let's just pick a date. That will be September 4th.

MR. CHILDERS: Please the Court, I think we can hammer this out in five minutes and we can sign it.

THE COURT: Put that together.

We're off the record.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS )
COUNTY OF FISHER )

I, Mary Margaret Sparks-Cox, Official Court Reporter in and for the 32nd District Court of Fisher County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 12th day of September, 2016.

/s/ Mary Margaret Sparks-Cox
Mary Margaret Sparks-Cox
Texas CSR 1946
Expiration Date: 12/31/17
Official Court Reporter
32nd District Court
P. O. Box 28
Colorado City, Texas 79512
235-235-3133

# Exhibit C.2

SUPPLEMENTAL REPORTER'S RECORD
VOLUME 3 OF 5 VOLUME
APPELLATE CASE NO. 11-16-00177-CV
TRIAL COURT CAUSE NO. DC2013-0016

| | |
|---|---|
| TIBURON LAND AND CATTLE, LP AND TREK RESOURCES, INC., Plaintiffs, VS. KERWIN STEPHENS, THUNDERBIRD LAND SERVICES, ET AL, AND CHESTER CARROLL, ET AL, Defendants, L. W. HUNT RESOURCES, LLC, AND RICHARD RAUGHTON, Intervenors | IN THE DISTRICT COURT<br>FISHER COUNTY, TEXAS<br>32ND JUDICIAL DISTRICT |

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THUNDERBIRD DEFENDANTS' SUPPLEMENTAL MOTION FOR ALTERNATE SECURITY
AND MOTION TO RELEASE ABSTRACTS TO SPECIFIC PROPERTIES

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On the 12th day of September, 2016, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Glen Harrison, Judge presiding, held in Sweetwater, Nolan County, Texas;

Proceedings reported by machine shorthand.

A P P E A R A N C E S

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**SEPTEMBER 12, 2016**

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THE COURT: On the record in Cause -- Fisher County case Cause No. DC2013-0016 on the Thunderbird Defendants' Motion for Alternate -- Supplemental Motion for Alternate Security and Motion to Release Abstracts as to specific properties.

Defendants ready to proceed on your motion?

MR. KELTNER: Yes, Your Honor.

THE COURT: Okay. And the Plaintiffs ready?

MR. COOK: Plaintiffs are ready, Your Honor.

THE COURT: And Intervenors?

MR. CHILDERS: Intervenors are ready, Your Honor.

THE COURT: Okay. Anyone else that wants to play here today?

MR. KELTNER: I think Mr. Strange is here for --

MR. STRANGE: Yes, sir. Rick Strange for the Gail Stephens.

THE COURT: Thank you very much.

You may proceed.

MR. KELTNER: Your Honor, this is going to be real quick given our previous hearings. And I very much appreciate you giving us this hearing today.

Let me give a brief introduction to what has changed since the last time we were here. We filed the supplemental motion, which I know you've seen. There's a slight change in net worth. We have a proposed sale of the property. We also have the possibility of a bond. Let me explain.

At the end of the last hearing, Your Honor candidly stated on the record that you did not think that we had carried the burden to prove everything for alternative security. And I promised to you that we would increase our efforts and try to meet the criticisms that had been raised primarily by the Intervenors but by the Plaintiffs as well. And we have done that.

Let me tell you we have an affidavit form for you, three banks; one national, one regional, and Texas Farm Credit, which has denied us Letter of Credit on anything but cash. And we'll submit those to you. Additionally, we found one bonding company that might be willing to do a bond based on property, but we'll need some time to get that done. By time, I mean just several weeks. We also have a potential sale of the property. The Intervenors criticized us for not attempting to sale property, and there is some case law to that indication as well.

We have a sale to Mr. Heighten. Let me explain. We purchased the property, initially, a lot of this property from Mr. Heighten, not all of it but a significant amount. He knew it, so it cut down on the due diligence.

Now, let me tell you a little bit about those two things. To get either of the bond approved or the sale consummated, we will need to lift the abstracts of judgment. We have asked both the Plaintiffs and Intervenors. They have objected to doing that. That's the reason for our request to you.

Let me tell you about the sale. There has been a title commitment issued. The lender in a letter has indicated that things look good, but they're -- we're not there yet because the loan committee has to approve that. You will see those. There is some -- there's some issues there that you need to know about.

The purchase property's about 20 percent, not quite, a little less, 20 percent short of what the appraisals on the property are. And we negotiated, but that's the best we could do. We will also have to pay capital gains tax on the sale, which we have attempted to calculate at the present purchase price. Now, we, obviously, would prefer not to sell it because we're taking a haircut; two, we're going to pay taxes we

A. Yes.
Q. -- by Turner Appraisal out of Wichita Falls?
A. Correct.
MR. HOLMES: Pass the witness.
CROSS-EXAMINATION
BY MR. COOK:
Q. But, all of that was after August 17th, right?
A. That would be correct.
Q. And our hearing was August 3rd, for your information, two weeks before that. First time you heard of anything formally was August 17th, right?
A. It would have probably been before August 17th. I don't know the exact date. Only reason I say this, we contacted a few sureties in between finding somebody who had interest before we got HCC, and they asked us to fill out an application. So, could have been August 15th or 16th. I don't know the exact date, but before we actually filled out the application. The surety that was interested would have been the 17th.
MR. COOK: Pass the witness, Your Honor.
CROSS-EXAMINATION
BY MR. CHILDERS:
Q. Mr. DeWitt, if you turn to Exhibit 2 of the Stephens Affidavit, you'll see that it is three sheets of paper. That's not the final application, right?

A. No. Well, there's always attached documents that go to it, that's correct.

Q. All right, sir. So, if Mr. Stephens in his Affidavit swore that, "I completed the civil court bond application. The application is a true and correct copy of what it purports to be or an exact duplicate of the original." That's not right, is it?

MR. HOLMES: Objection; misleading. It's misleading.

THE COURT: Overruled.

A. That's just an application to get started with the process. In the end, there's a whole different indemnity agreement and different documents that are called up. So, I guess there's some credence to that application in the fact that we're looking for the information and the pieces with that case. But, it's not the whole thing.

Q. (BY MR. CHILDERS) And this bond, whatever Exhibit 2 is, that was signed on August 17th, correct?

A. I guess, yeah. I don't have it in front of me. That sounds correct.

MR. CHILDERS: Pass the witness.

MR. HOLMES: No further questions, Your Honor.

THE COURT: You may step down. Anything

else?

MR. KELTNER: That's all we have, Your Honor, on evidence.

THE COURT: Plaintiffs have anything to present?

MR. COOK: Plaintiffs have no witnesses, Your Honor.

THE COURT: Intervenors?

MR. CHILDERS: No witnesses for Intervenors, Your Honor.

THE COURT: Okay. I do appreciate this. But, I do feel like we're kind of in the same song, second verse, a little bit faster, a little bit worse. I'm still hearing things like "hopefully," "typically," and "for some amount." I'm not -- still not impressed with the Defendants' efforts to secure either a sale or this bond.

And so Defendants' Motion for Alternate Security and Motion to Release Abstracts to Specific Properties is denied. Thank you.

MR. CHILDERS: Your Honor, I have a proposed order.

THE COURT: Thank you.

(Conference with attorneys off record.)

THE COURT: Let's go on the record. Court

will come to order. Back on the record in DC2013-0016.

Court has just signed an order denying the Defendants' Supplemental Motion for Alternate Security and to Release Abstracts to Specific Properties, and further ordered that the stay of execution as set forth in the Court's August 3, 2016 order and in the Court's September 1, 2016 order is hereby vacated due to this ruling today.

Mr. Keltner, you had a motion?

MR. KELTNER: Yes. Your Honor, at the bench, we discussed in presence of all counsel, I alerted the Court that we would be filing a Motion for Mandamus, which you kindly said you understood. And I asked for a stay of seven days to be of your order in order to be able to pursue the Petition for Writ of Mandamus. And I renew that now.

THE COURT: Okay. And just as I said earlier, in as much as y'all had 40 days to do all that you've sought, you've had 40 days to do a mandamus. And that request for additional seven days is denied.

MR. KELTNER: Thank you, Your Honor.

MR. HALL: Thank you, Your Honor.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS )
COUNTY OF FISHER )

I, Mary Margaret Sparks-Cox, Official Court Reporter in and for the 32nd District Court of Fisher County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 14th day of September, 2016.

/s/ Mary Margaret Sparks-Cox
Mary Margaret Sparks-Cox
Texas CSR 1946
Expiration Date: 12/31/07
Official Court Reporter
32nd District Court
P. O. Box 28
Colorado City, Texas 79512

# Exhibit C.3

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
APPELLATE CASE NO. 11-16-00177-CV
TRIAL COURT CAUSE NO. DC2013-0016

| | | |
|---|---|---|
| TIBURON LAND AND CATTLE, LP AND TREK RESOURCES, INC., | * | IN THE DISTRICT COURT |
| Plaintiffs, | * | |
| VS. | * | FISHER COUNTY, TEXAS |
| KERWIN STEPHENS, THUNDERBIRD LAND SERVICES, ET AL, AND CHESTER CARROLL, ET AL, | * | |
| Defendants, | * | |
| L.W. HUNT RESOURCES, LLC, AND RICHARD RAUGHTON, | * | |
| Intervenors. | * | 32ND JUDICIAL DISTRICT |

**********

Motions

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On the 29th day of January, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Glen Harrison, Judge presiding, held in Roby, Fisher County, Texas:

Proceedings reported by shorthand method.

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I N D E X

VOLUME 1

(Motions)



EXHIBIT INDEX

DEFENDANTS'

P R O C E E D I N G S

THE COURT: Let's go on the record in DC2013-0016, Tiburon, et al versus the -- I guess, well, for lack of a better word, let's just go with the Tiburon and Stephens, defendants' motions.

Are the defendants ready to proceed, the movants in this matter?

MR. HOLMES: Alan Carmichael and James Holmes here for movants/defendants. We're ready, Your Honor.

THE COURT: Okay. And the plaintiffs/respondents ready to proceed?

MR. COOK: Darrell Cook and Eric Stahl on behalf of the plaintiffs, and we're ready, Your Honor.

THE COURT: And the intervenors?

MR. CHILDERS: Yes, Your Honor. Jonathan Childers, Christina Mullen, and Michael Hall.

THE COURT: Okay. Good to see everybody again.

Mr. Holmes, if you want to address, I think initially I want to talk about the motion to release the abstracts and allow supersedeas via cash deposit or supersedeas bond.

MR. HOLMES: Thank you, Your Honor, I will. As Your Honor knows, we had hearings on this matter on

August 3rd and September 12th. Both hearings received a lot of evidence. We have incorporated by reference the evidentiary record from those hearings.

The long and short of it is that after August 3rd, when it became apparent we were not able to obtain alternative security as a means of superseding the judgment, a full court press occurred to find someone to provide a supersedeas bond, and that person, largely, was Mark Dewitt of a bond agency firm in Dallas, Holmes Murphy & Associates.

Mr. Dewitt and I have been working together with Mr. Stephens since at least the second week of August to obtain a supersedeas bond. The biggest obstacle, and this was an immense learning process for all of us, is how to turn over nine million dollars of farm ground into collateral that a bank would accept for purposes of issuing a letter of credit. That's not easy. It requires a specialty bank.

Mark Dewitt, because of family connections, farming connections in Oklahoma, had identified a couple of rural Oklahoma banks that did a lot of agricultural lending. Those are places in Alva, Oklahoma, and stuff not too far from Amarillo, but I have never driven through there. But these were remarkably savvy bankers with a group called BancCentral in Alva, Oklahoma.

They got involved the first week of September, right before the September 12th hearing, and when we also didn't receive alternate security at the September 12th hearing, we really stepped up the pace with the Oklahoma bank, BancCentral.

So throughout mid-September to mid-October, it was daily work to get BancCentral comfortable with accepting the farmland as collateral, and the farm equipment, and it just required a lot of due diligence. And it was a daily effort by Stephens' office, by my office, and by the BancCentral folks.

It had become apparent by mid-September that we had very good news. BancCentral did want to accept the farmland as collateral, and the farm equipment, so we had good news. We had bad news, too. It was going to take one to two months of due diligence for them to close the transaction. They have to check with their regulator, their FDIC man, who, in turn, has to check with his higher-ups. That process took at least two months. Meanwhile, they had to reappraise the farmland, they had to inspect the farm equipment, they had to actually come from Oklahoma and drive through the farmland. So BancCentral, coordinating with Stephens' office and with my office, have been working very diligently through October, through right up until a

week ago to get the farmland acceptable as collateral for BancCentral.

BancCentral now finds the farmland as acceptable collateral. It's willing to issue the 6.3-million-dollar letter of credit. That amount of money is the one-half of net worth of Stephens, individually, plus the one-half of net worth of Thunderbird Resources, it comes up to 6.3 million and some change. BancCentral, with the backing of Bank of Oklahoma, will issue the letter of credit. That was another month-long delay in the story, as BancCentral wasn't quite big enough to make it onto the preferred lender's list for the bond surety company.

The bond surety company needed another big-name bank involved. So BancCentral reached out to Bank of Oklahoma. The two of them together will provide the letter of credit I've described.

Finally, the ball got kicked back over to Mark Dewitt. He had sort of been sitting on the sidelines for two and a half months while this bank due diligence took place. Mr. Dewitt then resurfaced and said the nation's biggest supersedeas bond company, HCC Surety in Los Angeles, finds BancCentral backed by Bank of Oklahoma to be acceptable.

Within 24 to 48 hours of the bank's issuing

the letter of credit, HCC Surety will issue a supersedeas bond. That's how quickly this can move.

So if we have relief from the Court today by means of a subordination of the judgment-related liens that the parties opposing us are ordered to subordinate their judgment-related liens so that BancCentral is the first lienholder on the farmland and on the farm equipment, then that takes about a week and a half from today's ruling for the letter of credit to officially issue, and within 24 to 48 hours, we have the supersedeas bond. So that's what we're looking at.

THE COURT: So you believe that can be accomplished within 10 to 12 days?

MR. HOLMES: It absolutely can be. It can be. The banks are represented by a very competent sharp lawyer from Crowe & Dunlevy in Oklahoma City. He is -- he understands the urgency of the situation and he wanted to close tomorrow.

He said if I can get a ruling from the court on Wednesday, I can close by Friday. They very much wanted to close before the calendar year 2016. Mr. Bryant is his name. I said, "Mr. Bryant, it cannot happen by Wednesday. At the earliest, it would be Thursday." And he said, "Well, then we're going to have to do it the first week of January, if we can."

THE COURT: You're saying it's akin to appealing a writ?

MS. MULLEN: Your Honor, yes, we agree that this is akin to appealing a writ and the case law that we found says that this is not appropriate, to appeal a writ. I haven't found case law --

THE COURT: Okay. What about quashing a writ?

MS. MULLEN: I have not found case law where quashing a writ was allowed. I did find a case where -- actually where a Court did quash a writ and didn't assist the party recovering -- the party that had the judgment -- let me rephrase.

The party in whose favor the judgment was rendered was trying to execute on that judgment. When the Court quashed the writ, the court of appeals actually overturned and said it was inappropriate for that Court to undo his previous writ because it wasn't helping execute on the judgment.

I do not have that case in my head, what the title is, and I can get that to you and opposing counsel.

THE COURT: Thank you.

MR. CHILDERS: You know, I think Ms. Mullen answered your question, but I will further state that I

don't think that's an issue here, even assuming you can quash the writ, because this writ is fine. The complaint would be if a defendant was misnamed, that doesn't exist here. It just doesn't. Thank you, Your Honor.

And also I made the point about the Rule 11 and the constructive notice and the quitclaim deed.

THE COURT: Anything else, Mr. Holmes?

MR. HOLMES: No. Other than I've asked the Court to issue orders that we not dissipate assets, sell properties that are not subject to subordination of liens. We would voluntarily not do that anyway. We'll sign whatever agreement needs to be signed to ensure that the house in Fort Worth, which is not necessary for the bank's collateral, we'll not sell it or do anything with it, and we can back that up with a court order. It wouldn't be necessary because we'll just voluntarily not do anything.

There are ways to protect them that are much superior to forced sales of land, which at the rate we're going, number one, will disrupt my client's ability to get a supersedeas bond in place and, number two, will certainly result in satellite litigation in various counties. Every county in which they try to do a forced sale, there's a new lawsuit created. And

that's going to be what we have to do to try to protect ourselves.

THE COURT: You're telling me, essentially, we've got competing essential rights. They have a right to execute on their judgment, you've got a right to make a supersedeas bond. You want me to stop them from proceeding on their right so you can proceed on yours?

MR. HOLMES: Essentially, yes, Your Honor. Because if, for instance, we had gone to a bankruptcy judge or if we had gone to a federal court that had some sort of preferential right over -- a court -- a bankruptcy court or another Texas state court or a federal court could certainly issue an order that stops writs of execution.

I don't know where this is coming from. I don't think the attorneys in the room have done sufficient research, but the writs of execution are not sacrosanct missiles, that once sent into flight cannot be returned or quashed or stopped. That certainly is not the law. We feel as though if we get an order from the Court that quashes the writs, that we will be able to take that order and stop any kind of levy sale pursuant to the writs. We feel very confident we will be able to do that. And we have to have that, because if those writs are in place, we can't get the financing

from the Oklahoma banks and we can't get the bond in place.

THE COURT: I mean, there's a specific statute to quash a writ of garnishment. Correspondingly, any other authority, other than these cases to recall the missiles?

MR. HOLMES: Yeah. Your Honor, I appreciate it. Let me mention some other cases here. Okay. Here's a case. Raymond, O-U-K-R-O-P, is his last name, Oukrop, vs. Tatsch, T-A-T-S-C-H, Austin Court of Appeals. I have a LEXIS cite, 2014 Tex. App. LEXIS 7873 or 2014 Westlaw 3734192. The Westlaw, 2014 Westlaw 3734192. Reading from the case, Austin Court of Appeals writes, "A writ of execution is the principal process for the collection of money judgments." It cites Texas Rule of Civil Procedure 621. "It's issued by the clerk of the court where the judgment was signed and delivered to a sheriff or constable in Texas. The writ empowers the officer to levy on a debtor's nonexempt real and personal property within the officer's jurisdiction. Sell the property at public auction and apply the proceeds towards satisfaction of the judgment." Then the Court cites Rule of Civil Procedure 622, 627, and 637. "The term 'issue' as applied to an execution means more than the mere clerical preparation and attestation

THE COURT: I'll sustain. Let's just stay with the redirect.

MR. HALL: Nothing further, Your Honor.

MR. HOLMES: No further questions.

THE COURT: You may step down.

MR. HOLMES: Your Honor, I think what -- the wheels have been turning as we've put these witnesses on and we want to re-urge the motion to release in this respect. If we --

THE COURT: No, thank you. I've heard your arguments to that and this was just for, essentially, a bill upon my consideration of -- further consideration of the testimony of Mark Dewitt, Stewart Heighten, and Kerwin Stephens, the ruling of the Court to deny the motion to re-tax bill of cost, motion to quash execution of writs, and motion to release abstracts to obtain a cash deposit or supersedeas bond are overruled and denied.

MR. CHILDERS: Your Honor, I have written orders, if it will please the Court.

MR. HOLMES: And, Your Honor, before we get to the orders, I simply want to say, if we have a partial relief on the motion to release abstracts, we may be able to get the bond. And what I'm thinking here is, we have a subordination of the judgment liens and we

do not speak to the levies, and they can continue to charge forward on the levy executions, I will then, of course, explore with the Oklahoma banks and the bond surety whether they would issue a bond with that risk out there, that would be their choice.

THE COURT: You can certainly pursue that, but at this point, the title company wants the levies released and that seems to be a big impediment. At this point, the Court is not prepared to do that.

MR. HOLMES: Understood. Speaking nothing to the levies, would the Court be willing to order that the judgment liens be subordinated, just that? Just the abstracts of judgment, which is --

THE COURT: I think you've kind of seen my thought process here today. I haven't been trying to hide the ball as to the direction I was leaning and hit a hurdle that I don't believe I was prepared to even try to attempt with these levies. You said, without that, you couldn't make the bond.

MR. HOLMES: Correct. And as I stand here today, in light of what I know about the title policy that's going to be required and in light of what I know about the Oklahoma banks and what they're going to require in the title policy, I am probably going to have to address the levies at some point. That's what I know

today.

However, if we had a ruling that the judgment liens are subordinated to the bank's liens for the letter of credit, and the levies are left alone and untouched by any judicial order from here, I would then go to work working on the title policy group and the Oklahoma banks to see what they would do, what they would be willing to accept in terms of the risk that those levies present, and they may not -- they may issue a policy and letter of credit without them.

THE COURT: That's exactly the type of risk that I wanted to avoid. I wanted a date certain what would happen, when it would happen, and there's not evidence here that convinces me that that could happen.

I know you would try and do your best, but in the meantime, it's still an open-ended question and I'm not prepared to leave the courtroom without those details tied up.

MR. HOLMES: Okay. Thank you, Your Honor.

MR. CHILDERS: May I approach?

THE COURT: Yes.

MR. CHILDERS: I've handed counsel copies of the proposed orders, the written orders.

THE COURT: Are there any other matters that we need to take up at this point, except for the

to happen on it before the 13th? Tarrant County, which is not an issue. That's the only one, as I see it.

THE COURT: So because they can't act on it, I can before the 13th?

MR. CARMICHAEL: Your Honor, I think you -- I do think you can subordinate the judgment lien and the levy until the 13th, conditioned upon bringing me a supersedeas bond in the 6.3-million-dollar amount that's been discussed, and if not by that date, we're back to where we are and they can still go forward unprejudiced by what you've done.

THE COURT: You're skipping over all the conditions of paying their costs, too.

MR. CARMICHAEL: No, sir. I'm just trying to get to that first issue. If that's what's standing in the way of getting this done --

THE COURT: I mean, that was part of the whole direction it was going. That was an issue, but there were other issues that were still there.

MR. CARMICHAEL: I haven't looked to see. Has there been a showing of what their costs are?

THE COURT: There has not been.

MR. CARMICHAEL: Okay. I would think, if upon showing that it's spent in reliance upon or it's allowed under the rules, then you could tax that as

additional costs in this matter, which also goes to the -- but that needs to be taxed by someone in the clerk's office, not by counsel.

THE COURT: Well, I understand y'all disagree with what the clerk issued as a bill of cost, but that's what's issued. And so we're talking about costs -- post-judgment costs that they've incurred.

MR. CARMICHAEL: Sure. And I think -- I would suggest that if the Court is inclined to go that way, then we'll see what their costs are and, you know, I hate to agree to them without knowing what they are.

THE COURT: Certainly.

MR. CARMICHAEL: But I think there's a method for making them whole on that issue.

MR. CHILDERS: Your Honor, may I be heard briefly?

THE COURT: In as much as you can't act or you're not going to be able to act on Young County until February, whatever date that is, how are you harmed at this point to subordinate until then or until mid-January?

MR CHILDERS: Sure. I'm harmed because my clients have a judgment lien in Young, Stephens, Johnson County, and Tarrant County. The Young County assets are indisputably many, and I can give you the number. It

may take me a few minutes of the properties that are subject to this bank -- proposal by BancCentral, which is a financing agreement and is not a letter of credit yet, and that financing agreement says "as collateral." It requires a first-deed-of-trust lien. That cannot happen. It is an impossibility, given that writs of execution have issued. It is impossible for them, based upon their evidence, without any bankers here, even with the testimony we heard from Mr. Dewitt, to make this work. They do not have a first lien. They cannot have it subordinated because my clients have a judgment lien on that that has issued.

THE COURT: And I think that's ultimately where we come back to. What you may agree to, I don't know that I can order at this point, so the objection -- or request is again denied, and we are in recess.

(End of hearing)

STATE OF TEXAS )
COUNTY OF FISHER )

I, Donna Haynes, Deputy Official Court Reporter in and for the 32nd District Court of Fisher County, State of Texas, do hereby certify that the foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted, tendered in an offer of proof or offered into evidence.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid by Defendants.

WITNESS MY OFFICIAL HAND this the 11th day of January, 2017.

/S/DONNA HAYNES
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# Exhibit D

No Pet.

# Drake v. Walker

Court of Appeals of Texas, Fifth District, Dallas

July 6, 2017, Opinion Filed

No. 05-16-00306-CV

**Reporter**
529 S.W.3d 516 *; 2017 Tex. App. LEXIS 6255 **; 2017 WL 2875734

ERIC DRAKE, Appellant v. STEPHEN WALKER, D.D.S. AND MARSHAL GOLDBERG, D.D.S., Appellees

**Prior History:** **[**1]** On Appeal from the County Court at Law No. 4, Dallas County, Texas. Trial Court Cause No. CC-13-06774-D.

*Drake v. Walker, 2015 Tex. App. LEXIS 4732 (Tex. App. Dallas, May 8, 2015)*

**Counsel:** Eric Drake, Appellant, Pro se, Richardson TX.

For Stephen Walker, et al., Appellee: Ty Bailey, Lead counsel, Theibaud Remington Thornton Bailey LLP, Dallas TX.

**Judges:** Before Justices Lang, Myers, and Stoddart. Opinion by Justice Lang.

**Opinion by:** DOUGLAS S. LANG

## Opinion

**[*518]** Opinion by Justice Lang

In this opinion, we must decide two issues of first impression. First, we address whether the filing of a petition pursuant to *Texas Rule of Civil Procedure 202* to "investigate" a "potential" health care liability claim triggers the requirement of a plaintiff to file an expert report pursuant to *section 74.351(a) of the Texas Civil Practice and Remedies Code*. *See TEX. R. CIV. P. 202*; *Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)* (West Supp. 2016). We conclude, on this record, it does not.

Second, we must decide if, after the dismissal with prejudice of a health care liability claim pursuant to *Texas Rule of Civil Procedure 91a* and the reversal on appeal of that dismissal, the 120-day time period for filing an expert report pursuant to *section 74.351(a)* is tolled for the period during which the case was on appeal. *See TEX. R. CIV. P. 91a*; *Civ. Prac. & Rem. § 74.351(a)*. We conclude, on this record, that the 120-day time period is tolled.

Eric Drake, proceeding pro se, appeals the trial court's order dismissing this health care liability lawsuit for failure to provide an expert report and awarding attorney's fees to appellees pursuant to *section 74.351*. *See Civ. Prac. & Rem. § 74.351*. In eight issues on appeal, Drake contends the trial court erred by denying Drake's motions **[**2]** for continuances, to reinstate, and for new trial and requests to participate in hearings by telephone; awarding attorney's fees to appellees in the amount of $15,374.50; awarding attorney's fees against a party "declared as an indigent"; concluding Drake failed to comply with *section 74.351(a)*; violating Drake's due process rights; and not recusing the trial court judge.[1]

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[1] Specifically, Drake's eight issues are stated in his appellate brief as follows:

> ISSUE ONE: Whether or not the trial court erred in denying Appellant's request to participate in the Appellees' February 15, 2016 motion to dismiss hearing and Drake's hearing on his Motion to Reinstate by telephone.
>
> ISSUE TWO: Whether or not the trial court erred in awarding attorney fees to the Appellees.
>
> ISSUE THREE: Whether or not the trial court erred in awarding attorney fees against a party it has declared as an indigent in a legal proceeding or litigation.
>
> ISSUE FOUR: Whether or not the Appellant filed his Expert Report timely.
>
> ISSUE FIVE: Whether or not the trial court violated Appellant's due process rights and was biased and unfair. Appellant, a Christian has a right to object to a "gay" or "lesbian" judge.

**[*519]** We decide (1) in favor of Drake on his fourth issue and portions of his second, seventh, and eighth issues, and (2) against him on his fifth and sixth issues. We need not address Drake's first and third issues or the remaining portions of his second and eighth issues.

We reverse the trial court's order granting appellees' motion to dismiss for failure to provide an expert report and awarding attorney's fees to appellees pursuant to *section 74.351*, render judgment denying appellees' motion to dismiss for failure to provide an expert report, and remand this case to the trial court for further proceedings consistent with this opinion.

## I. FACTUAL AND PROCEDURAL CONTEXT

On December 19, 2011, **[**4]** Drake received dental treatment from appellee Stephen Walker, D.D.S., at a dental clinic owned by appellee Marshal Goldberg, D.D.S. Ten days later, on December 29, 2011, Drake filed a pro se "Petition for Pre-Suit Investigatory Depositions Under *T.R.C.P. 202.1(b)*," *see* TEX. R. CIV. P. *202.1(b)*, which proceeding was assigned trial court cause number CC-11-08852-D (the "*Rule 202* proceeding"). Appellees, who were the named "Respondents" in that petition, jointly filed a January 19, 2012 original answer in that proceeding. On January 22, 2012, Drake nonsuited that proceeding.

Drake filed this case, trial court cause number CC-13-06774-D, against appellees on December 3, 2013. In his last-filed petition at the time of the order complained of, Drake asserted causes of action against appellees for "medical negligence" and deceptive trade practices pertaining to the dental care provided by appellees. Goldberg and Walker filed separate general denial answers dated, respectively, December 30, 2013, and January 8, 2014. Further, appellees jointly filed a February 13, 2014 "Motion to Dismiss Baseless Causes of Action" pursuant to *Texas Rule of Civil Procedure 91a*, *see* TEX. R. CIV. P. *91a*, and a March 11, 2014 "Motion to Dismiss With Prejudice for Failure to Provide Expert Report" pursuant to *section 74.351* **[**5]** . In their motion to dismiss for failure to provide an expert report, appellees stated in part,

> In this case, . . . the 120 day deadline [for providing an expert report] began to run from the date Plaintiff filed his Petition for *Rule 202* Pre-Suit Depositions (here December 29, 2011). The 120 day deadline was then tolled from the time that Plaintiff non-suited the *Rule 202* Petition and the case was dismissed without prejudice (January 22, 2012) until he refiled this case on December 3, 2013. . . . As the original claim was filed on December 29, 2011, tolled between January 22, 2012 and December 3, 2013, and refiled on December 3, 2013, Plaintiff was required by statute to provide expert reports by March 10, 2014. Plaintiff did not serve on Defendants or Defendants' counsel an expert report with a curriculum vitae of the expert listed in the report. Thus, Plaintiff did not comply with the requirements of Chapter 74.

The trial court signed an order dated March 19, 2014, granting appellees' motion to dismiss baseless causes of action with prejudice pursuant to *rule 91a*. Additionally, (1) the trial court judge, Judge Ken Tapscott, denied a motion by Drake to recuse him, and (2) Regional Administrative Judge Mary **[**6]** Murphy denied several motions by Drake to recuse Judge Tonya Parker, who was assigned to hear Drake's **[*520]** recusal motion respecting Judge Tapscott. Drake appealed those rulings in this Court. *See* *Drake v. Walker, No. 05-14-00355-CV, 2015 Tex. App. LEXIS 4732, 2015 WL 2160565 (Tex. App.—Dallas May 8, 2015, no pet.)* (mem. op.). This Court affirmed the denial of the recusals requested by Drake and the dismissal of his claim for deceptive trade practices, but concluded the trial court erred by granting appellees' *rule 91a* motion to dismiss Drake's negligence claim. Accordingly, this Court reversed, in part, the trial court's March 19, 2014 order and remanded this case to the trial court.

On May 14, 2015, Drake served an expert report on appellees. Additionally, Drake filed a May 26, 2015 "emergency motion" to compel discovery. Appellees filed objections to the sufficiency of Drake's expert report on June 1, 2015, asserting the report was "not a good faith effort as to defendants" and should be

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> ISSUE SIX: Whether or not the Honorable William Tapscott Jr. should have recused himself because he was a defendant in a **[**3]** pending federal lawsuit where Drake was the "plaintiff."
>
> ISSUE SEVEN: Whether or not the trial court abused its discretion and erred in dismissing the Appellant's claim against Appellees for failure to file an Expert Report. Appellees' objection to Drake's expert report should be overruled.
>
> ISSUE EIGHT: Whether or not the Honorable William Tapscott Jr. abused his discretion and erred in failing to respond to the Appellant's motions to continue, and by wrongfully denying the Appellant's reinstate [sic] and for new trial.

stricken.

The mandate in the appeal described above was issued on July 20, 2015. On July 27, 2015, the trial court granted a motion by appellees for substitution of counsel. Also, on that same date, the trial court held a hearing on appellees' March 11, 2014 motion to dismiss. At that hearing, the trial court denied a request **[**7]** by Drake that his motion to compel discovery be heard before appellees' motion to dismiss. Further, as to the motion to dismiss, the trial court stated to Drake, "This motion to dismiss is based on one issue. Okay? It is the failure to file an expert report and serve them with an expert report within 120 days of the filing of a healthcare liability claim." Appellees contended *section 74.351(a)*'s 120-day deadline for serving an expert report was triggered by the filing of Drake's *Rule 202* proceeding and therefore Drake's expert report was not timely served. Drake argued his expert report was timely served because (1) a *Rule 202* petition does not trigger the 120-day statutory deadline and (2) the 120-day time period was triggered by the filing of appellees' answers in this case on December 30, 2013, and January 8, 2014, and "stopped with the dismissal and during the time the matter was on appeal."

On July 31, 2015, Drake filed a motion to recuse Judges Tapscott and Murphy. In that motion, Drake stated in part,

> Tapscott is trying to dismiss the Plaintiff's case to assist the "white" doctors and their "white" attorneys. Tapscott has been abusive, unfair, and discriminative toward the Plaintiff. The defendant's attorneys **[**8]** do not argue that the Plaintiff did not file his expert report before the mandate was issued—thus, an impartial judge would grant the Plaintiff's motion to compel [discovery]. But racism will not allow Tapscott to do so. . . . This type of behavior demands that Tapscott be recused.
>
> . . . .
>
> . . . Plaintiff also believes that Tapscott has conspired with the white attorneys and their clients against the Plaintiff. Plaintiff believes that Tapscott and Mary Murphy is [sic] racially motivated against him.

Further, Drake complained Judge Tapscott (1) "had concluded that the Plaintiff was incapable of proving his case," (2) "allowed the defense—who wasn't properly before the Court [sic] to continue to argue the case," and (3) "is actively preventing the Plaintiff from conducting discovery, because this is what the defense desires."

In an order dated August 3, 2015, Judge Tapscott declined to recuse himself. Subsequently, Drake filed a September 17, 2015 amended motion to recuse Judge Tapscott that was substantially similar to the July 31, 2015 motion to recuse described above. Drake's amended motion to recuse was **[*521]** denied by Judge Murphy on November 4, 2015.

On November 6, 2015, Drake filed a "second" **[**9]** motion to recuse Judges Tapscott and Murphy, which motion was substantially similar to Drake's motions to recuse described above. Further, Drake contended that an additional reason for the recusal of Judge Tapscott is that "the judge is a defendant in a lawsuit with the Plaintiff." In an affidavit attached to that motion, Drake stated in part,

> The judge in the above styled cause of action, William Tapscott Jr., has been bias [sic] toward the Plaintiff. The Plaintiff filed a lawsuit in Wichita Falls, Texas federal court, cause number: 7:15-CV_141, requesting an injunction against Tapscott for his abusive, and prejudice ways. . . . The Plaintiff in the above styled and numbered cause of action is the "plaintiff" in the lawsuit against Judge Tapscott.

Drake's November 6, 2015 "second" motion to recuse was assigned to Judge Kelly Moore and was denied by Judge Moore on December 18, 2015.

Drake filed a substantially similar "amended second motion" to recuse Judges Tapscott and Murphy on December 22, 2015, and, in addition, continued to assert his same objections to Judge Tapscott's hearing this case in motions filed for other purposes. Drake's "amended second motion" to recuse was denied on **[**10]** January 14, 2016, and Judge Tapscott signed additional orders declining to recuse himself on February 8, 2016; March 30, 2016; and April 4, 2016.

A second hearing on appellees' motion to dismiss for failure to provide an expert report was held on February 15, 2016. Drake did not appear at that hearing. At the start of the hearing, the trial court stated in part "[w]e're not going to go into the merits of the motion now" and "[t]he purpose of the oral part of this hearing and the record is that . . . Counsel would like to prove up their attorney's fees and costs." Then, appellees' attorney testified as to his attorney's fees. On that same date, the trial court signed an order in which it dismissed this lawsuit for "failure to provide expert report" and awarded attorney's fees to appellees "as mandated by *§ 74.351*" in the amount of $15,374.50.

Drake filed a March 8, 2016 "Verified Motion to Reinstate and for New Trial and to Amend Pleadings to

Add Defendant Tapscott." Following a March 21, 2016 hearing, that motion was denied on April 4, 2016. This appeal timely followed.[2]

**II. DRAKE'S PRE-SUBMISSION MOTION TO STRIKE**

As a preliminary matter, before considering Drake's issues, we address a pending pre-submission **[**11]** motion to strike filed by Drake in this appeal. Following the complained-of February 15, 2016 order in this case, appellees sent a March 30, 2016 letter to the trial court clerk in which they described several "relevant" items omitted from Drake's list of documents to **[*522]** be included in the appellate record and asked that those items be included in the clerk's record in this Court. Those omitted items included, in part, the petition, answer, and motion for nonsuit in trial court cause number CC-11-08852-D, i.e., the *Rule 202* proceeding.

On April 22, 2016, Drake filed in this Court a "Motion to Transfer Older Case Records to the New Appeal Case Records." In that motion, Drake asked this Court to "transfer" to this appeal "all of the trial court records" from the *Rule 202* proceeding and the prior appeal described above. Specifically, Drake stated in part "[a] substantial part of the argument made by the Appellees is that the filing of a *Rule 202* by Drake on December 29, 2011 triggered the 120-day deadline to file his expert report" and "[i]t is imperative that Drake be able to point to the *Rule 202* proceedings, documents filed, and the dates documents were filed to show the Court how these proceedings should not be used in **[**12]** calculating the 120-day deadline for an expert report to be filed on the health care provider."

In an order dated May 5, 2016, this Court granted Drake's request to transfer records from the prior appeal described above, but denied his request to transfer records from the *Rule 202* proceeding. Specifically, this Court stated in part, "Appellant did not file an appeal from trial court cause number CC-11-08852-D. Therefore, we **DENY** appellant's motion as it relates to that case." (emphasis original).

The clerk's record in this case was filed on August 8, 2016. On December 30, 2016, while submission of this appeal was pending, appellees requested a supplemental clerk's record in this appeal. Among the documents appellees requested to be included in that supplemental clerk's record were the petition, answer, and motion for nonsuit in the *Rule 202* proceeding. That supplemental clerk's record was filed on January 18, 2017.

On January 13, 2017, Drake filed a pre-submission motion in this Court in which he requested that this Court strike any records from, or references to, the *Rule 202* proceeding in this appeal. Specifically, Drake stated in part,

> This Court ruled on May 5, 2016 that cause number CC-11-08852-D is not **[**13]** related to the above appeal. . . .
> Because this Court has already ruled on whether or not cause number CC-11-08852-D is relevant to the above suit, Appellant respectfully request [sic] that the Court act without delay and strike cause number CC-11-08852-D from the trial court's record, and strike from the Appellees brief any reference to cause number CC-11-08852-D or the *Rule 202* the Appellant filed for presuit depositions of defendants.

Appellees filed a January 23, 2017 response in which they stated in part (1) this Court's order denying Drake's motion to transfer "did not state that trial court cause number CC-11-08852-D is irrelevant to this appeal"; (2) Drake made a "conclusory assumption" that the denial of his motion to transfer was based on lack of relevance "without ruling out other reasons for the denial of his request"; (3) a possible reason for the denial of Drake's motion to transfer is that his request "for all papers filed in that case be [sic] included in the records in this appeal" was "improper under the Texas Rules of Appellate Procedure and under Texas case law" because it was "impermissibly vague"; (4) appellees "have always contended that Appellant's filing of his *Rule 202* petition **[**14]** started the countdown clock on his 120-day deadline for filing an expert report against each Appellee"; and (5) appellees properly requested "specific, and limited, documents" that should be

[2] Additionally, Drake filed an April 4, 2016 document titled "Plaintiff's Amendment of His Original Petition." That amendment was struck by the trial court on that same date. Subsequently, the trial court signed an April 5, 2016 "Order to Show Cause" in which it (1) notified Drake that, in light of his status as a previously-declared vexatious litigant, the filing of his amended petition constituted "initiating new litigation in violation of court order," and (2) ordered Drake to appear on April 25, 2016, to show cause why he should not be held in contempt of court for failing to comply with the established requirements he must satisfy to proceed with litigation in Texas. Further, in an amended order to show cause dated June 6, 2016, the trial court changed the date of the show cause hearing to August 1, 2016.

considered by this **[*523]** Court when determining whether Drake failed to serve an expert report prior to the expiration of the statutory deadline.

*Texas Rule of Appellate Procedure 34.5(b)* provides in part,

> (1) Time for Request. At any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the record.
>
> (2) Request Must Be Specific. A party requesting that an item be included in the clerk's record must specifically describe the item so that the clerk can readily identify it. The clerk will disregard a general designation, such as one for "all papers filed in the case."

*TEX. R. APP. P. 34.5(b)(1)-(2)*. Further, *Texas Rule of Appellate Procedure 34.5(c)* states, "If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item." *TEX. R. APP. P. 34.5(c)*.

We disagree with Drake's position that this Court's May 5, 2016 order constituted a ruling as to whether the *Rule 202* proceeding was **[**15]** "relevant" or "related" to this appeal. Those matters were not addressed in the order. Further, the order does not contain any language that would preclude the supplementation of the clerk's record with the specific documents from the *Rule 202* proceeding requested by appellees. *See TEX. R. APP. P. 34.5(b)-(c)*.

We deny Drake's January 13, 2017 motion to strike.

## III. DRAKE'S ISSUES

### *A. Granting of Appellees' Motion to Dismiss*

1. Standard of Review

We review a trial court's decision on a motion to dismiss a case for failure to comply with *section 74.351* for an abuse of discretion. *See TTHR Ltd. P'ship v. Moreno, 401 S.W.3d 41, 44 (Tex. 2013)*; *Jelinek v. Casas, 328 S.W.3d 526, 538-39 (Tex. 2010)*; *Senior Care Ctrs., LLC v. Shelton, 459 S.W.3d 753, 756 (Tex. App.—Dallas 2015, no pet.)*. A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *See Walker v. Gutierrez, 111 S.W.3d 56, 63 (Tex. 2003)*. To the extent that resolution of the issue before the trial court requires interpretation of the statute itself, we apply a de novo standard. *See Van Ness v. ETMC First Physicians, 461 S.W.3d 140, 142 (Tex. 2015)*; *Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 177 (Tex. 2012)*; *Fudge v. Wall, 308 S.W.3d 458, 460 (Tex. App.—Dallas 2010, no pet.)*.

2. Applicable Law

"Health care liability claim" means "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or **[**16]** death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract." *Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13)*. *Section 74.351(a)* provides in part that "[i]n a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability **[*524]** claim is asserted."[3] *Id. § 74.351(a)*. If an expert report is not timely served, the trial court must, on the defendant's motion, dismiss the health care liability claims with prejudice and award the defendant its reasonable attorney's fees and costs of court. *Id. § 74.351(b)*.

"The aim of statutory construction is to determine and give effect to the Legislature's intent, which is generally reflected in the statute's plain language." *Zanchi v. Lane, 408 S.W.3d 373, 376 (Tex. 2013)* (quoting *CHCA Woman's Hosp., L.P. v. Lidji, 403 S.W.3d 228, 231 (Tex. 2013))*. "A word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* "Where statutory text is clear, that text is determinative of legislative intent unless the plain

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[3] Prior to September 1, 2013, that section provided that each required expert report was to be served "not later than the 120th day after the date the original petition was filed." *See* Act of June 17, 2005, 79th Leg., R.S., ch. 635, 2005 Tex. Gen. Laws 1590 (amended 2013) (current version at *Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)*). The pre-2013 version of that section was otherwise identical to the current provision described above. *See id.*; *Zanchi v. Lane, 408 S.W.3d 373, 379, n.2 (Tex. 2013)*.

meaning of the statute's words would produce an absurd result." *Hebner v. Reddy, 498 S.W.3d 37, 41 (Tex. 2016)* (quoting *Tex. Mut. Ins. Co. v. Ruttiger, 381 S.W.3d 430, 452 (Tex. 2012)*).

*Texas Rule of Civil Procedure 202.1* provides, "A person **[**17]** may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit." *TEX. R. CIV. P. 202.1*.

3. Application of Law to Facts

We begin by addressing together Drake's fourth and seventh issues, in which he states, respectively, "[w]hether or not the Appellant filed his Expert Report timely" and "[w]hether or not the trial court abused its discretion and erred in dismissing the Appellant [sic] claim against the Appellees for failure to file an Expert Report. Appellees objection to Drake's expert report should be overruled." Specifically, Drake argues (1) filing a *Rule 202* petition does not trigger the 120-day period for serving an expert report described in *section 74.351(a)*; (2) rather, that 120-day period was triggered by the filing of appellees' answers in this case on December 30, 2013, and January 8, 2014; (3) additionally, the 120-day period was tolled from March 19, 2014—i.e., the date of the previous dismissal by the trial court—until at least May 8, 2015, when this Court issued its opinion in the previous appeal, and arguably **[**18]** until the mandate in the previous appeal was issued on July 20, 2015; (4) therefore, his May 14, 2015 expert report was timely served; and (5) that expert report is not deficient because it addresses each of the matters required by *section 74.351*. In support of his position that the 120-day deadline was not triggered by the *Rule 202* proceeding, Drake cites *In re Raja, 216 S.W.3d 404, 408 (Tex. App.—Eastland 2006, pet. denied)*. Further, as to his tolling argument, Drake acknowledges there is no case law directly on point, but asserts this Court should analogize to cases that allow tolling of the 120-day period in *section 74.351(a)* when a plaintiff nonsuits or a defendant fails to timely file an answer. Specifically, Drake cites *CHCA Woman's Hospital, 403 S.W.3d at 232-34*, and *Gardner v. U.S. Imaging, Inc., 274 S.W.3d 669, 671 (Tex. 2008)*.

Appellees respond that the filing of the December 29, 2011 *Rule 202* proceeding triggered the 120-day period in which Drake was required to serve his expert **[*525]** report and the report was therefore due on March 10, 2014.[4] Appellees contend *In re Jorden, 249 S.W.3d 416 (Tex. 2008)*, supports their position.

In *Raja*, a former patient of Dr. Pill Raja filed a request to take Raja's deposition pursuant to *Rule 202* to investigate a potential health care liability claim. *Raja, 216 S.W.3d at 405*. The trial court granted the patient's request and Raja then sought mandamus relief in the Eleventh Court of Appeals in Eastland. *Id.* The court of appeals addressed **[**19]** the issue of whether *section 74.351(s)*, which prevents "discovery in a health care liability claim" until an expert report is filed, precludes *Rule 202* discovery. *Id. at 406*. In its analysis, the court of appeals noted that the Twelfth Court of Appeals in Tyler had concluded "one may take a *Rule 202* deposition of a doctor to investigate a potential medical malpractice action against that doctor." *Id. at 407*. However, the Eastland Court of Appeals disagreed with that position. *Id.* Specifically, the Eastland Court of Appeals stated in part,

> The Tyler Court found that a *Rule 202* proceeding was not subject to the report requirement because a potential cause of action was not a health care liability claim as defined by *Section 74.001(a)(13)*. We agree that a potential claim is not a health care liability claim and, therefore, that merely requesting a *Rule 202* deposition does not trigger *Section 74.351(a)*'s 120-day deadline. But, to then conclude that no provision of *Section 74.351* is applicable to a *Rule 202* proceeding against a potential medical malpractice defendant is contrary to the statute's language and the legislature's stated findings and purpose.

*Id. at 408* (emphasis added). The Eastland Court of Appeals concluded the language of *section 74.351* precluded the patient from taking Raja's deposition before the serving of an expert report. **[**20]** *Id. at 409*.

Two years later, in *Jorden*, the supreme court addressed a split of authority in the courts of appeals as to whether *section 74.351(s)* applies to presuit depositions authorized by *Rule 202*. *Jorden, 249 S.W.3d at 418*. *Raja was* cited, but not otherwise discussed, in a footnote describing the split. *See id. at*

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[4] Appellees contend Drake's expert report was untimely under both the pre-2013 and current versions of the statute. Specifically, appellees assert that under the current version, the deadline to serve an expert report on Goldberg would have expired on March 31, 2014, and the deadline to serve an expert report on Walker would have expired on April 9, 2014.

419 n.4. The supreme court concluded, "Because the statute prohibits 'all discovery' other than three exceptions—and *Rule 202* depositions are not listed among them—we hold the statute prohibits such depositions until after an expert report is served." *Id. at 418, 424*. In reaching that conclusion, the supreme court quoted the statutory definition of "health care liability claim" described above and stated in part "[n]othing in this definition limits 'health care liability claim' to filed suits; instead, it extends coverage to 'a cause of action.'" *Id. at 421*. Additionally, the supreme court stated in its analysis,

> Because the statute here specifically applies to "a cause of action against a health care provider," it applies both before and after such a cause of action is filed. To the extent a presuit deposition is intended to investigate a potential claim against a health-care provider, it is necessarily a "health care liability claim" and falls within coverage of *section 74.351(s)*.

*Id. at 422*.

In the case before **[**21]** us, appellees argue that, based on the language in *Jorden* **[*526]** described above, "a *Rule 202* petition is the commencing of an action against a health care provider" and therefore Drake's 120-day time period for serving an expert report began to run on December 29, 2011, when he filed the *Rule 202* proceeding. However, *Jorden* did not specifically address the question of whether a *Rule 202* proceeding triggers the expert report deadline of *section 74.351(a)*. Further, the supreme court in *Jorden* focused its analysis on the specific language in the applicable provisions of Chapter 74, particularly *section 74.351(s)*. *See id. at 420-22*. Unlike *section 74.351(s)*, *section 74.351(a)* states in part that a claimant is required to serve an expert report within the proper time period "with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted" (emphasis added). *TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a)*. This Court has staled that a *Rule 202* proceeding "is not a separate, independent lawsuit, but is in aid of and incident to an anticipated suit." *Lee v. GST Transp. Sys., LP, 334 S.W.3d 16, 19 (Tex. App.-Dallas 2008, pet. denied)*. Thus, in a proceeding pursuant to *Rule 202*, it is not clear that a claimant would necessarily be aware, at the time of filing a *Rule 202* petition, against whom his health care liability claim "is asserted." *CIV. PRAC. & REM. § 74.351(a)*. We disagree with appellees' position **[**22]** that *Jorden* resolved the issue of whether a *Rule 202* proceeding triggers the 120-day time period for serving an expert report. Further, we conclude appellees' position that the 120-day time period is triggered by a *Rule 202* proceeding is inconsistent with the plain language of *section 74.351(a)*, which describes requirements pertaining to "each physician or health care provider against whom a liability claim is asserted" (emphasis added). *See id.*

Next, we address Drake's argument that the 120-day time period for serving his expert report was tolled from March 19, 2014—i.e., the date of the previous dismissal by the trial court-until at least May 8, 2015, when this Court issued its opinion in the previous appeal, and arguably until the mandate in the previous appeal was issued on July 20, 2015. Appellees do not specifically address that argument on appeal.

In *CHCA Woman's Hospital*, the supreme court concluded that the nonsuiting of a health care liability claim before the expiration of the 120-day period for serving an expert report tolled the period until the lawsuit was refiled. *CHCA Woman's Hosp., 403 S.W.3d at 233*. Specifically, the supreme court stated in part as follows:

> Tolling the expert-report period both protects a claimant's absolute right to nonsuit **[**23]** and is consistent with the statute's overall structure. To that end, we agree with [appellees] that the various provisions of the TM LA's expert-report requirement, construed together, demonstrate legislative intent that the expert report be provided within the context of pending litigation. . . . Construing the TM LA to require service of an expert report in the absence of a pending lawsuit would thus give rise to a host of procedural complications that the statute does not envision and cannot adequately address. We decline to attribute such intent to the Legislature without a clear expression of it in the statute's language.

*Id.* Additionally, in *Gardner*, the supreme court addressed tolling of that 120-day time period in the context of a default judgment. *Gardner, 274 S.W.3d at 671*. The supreme court stated in part, "In light of the expert-report requirement's dual purpose to inform the served party of the conduct called into question and to provide **[*527]** a basis for the trial court to conclude that the plaintiff's claims have merit, it makes little wise to require service of an expert report on a party who by default has admitted the plaintiff's allegations." *Id.*

In the case before us, in light of the March 19,

2014 **[**24]** dismissal with prejudice pursuant to *rule 91a* described above, appellees have not articulated a purpose, nor can we conceive of one on this record, that would exist for requiring an expert report to be served between that date and the resolution of the resulting appeal. *See id.* Further, the filing of Drake's expert report during the time the case was on appeal would presumably have triggered the 21-day deadline in *section 74.351(a)* for appellees to object to the expert report. *See CIV. PRAC. & REM. § 74.351(a)*. Therefore, appellees would have been required to object to an expert report in a case that was dismissed with prejudice and pending on appeal or risk waiving their objections. *See id.* Nothing in the statute shows that "procedural complication" was intended by the statute. *See id.*; *CHCA Woman's Hosp. , 403 S.W.3d at 233*. We conclude the 120-day time period for filing an expert report in this case was tolled from March 19, 2014, until at least May 8, 2015, when this Court issued its opinion in the previous appeal.[5] *See CHCA Woman's Hosp., 403 S.W.3d at 233*; *Gardner, 274 S.W.3d at 671*.

The record shows (1) Drake filed this case on December 3, 2013; (2) Goldberg and Walker filed separate general denial answers dated, respectively, December 30, 2013, and January 8, 2014; (3) on March 19, 2014, the trial court granted appellees' motion **[**25]** to dismiss baseless causes of action pursuant to *rule 91a* with prejudice; (4) this Court issued its opinion in the previous appeal on May 8, 2015; and (5) Drake served an expert report on appellees on May 14, 2015. On this record, we conclude Drake's expert report was timely served pursuant to *section 74.351(a)*.[6] *See CIV. PRAC. & REM. § 74.351(a)*. Accordingly, we conclude the trial court erred by granting appellees' motion to dismiss for failure to provide an expert report.

Additionally, Drake asserts in his seventh issue that his expert report is not deficient because it addresses each of the matters required by *section 74.351*. *See id. § 74.351*. The record does not show the trial court held a hearing or ruled on the adequacy of the expert report filed by Drake. *See id. § 74.351*(*l*) ("A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in [*Subsection (r)(6) of section 74.351*]."). Therefore, Drake's argument respecting the adequacy of his expert report presents nothing for this Court's review. *See TEX. R. APP. P. 33.1*.

We decide in favor of Drake on his fourth issue and the portion of his seventh **[*528]** issue in which he complains **[**26]** appellees' calculations respecting the deadline for serving his expert report are incorrect. Additionally, in light of our conclusions above, we decide in favor of Drake on the portion of his second issue in which he complains the trial court erred by awarding appellees attorney's fees based on *section 74.351* and the portion of his eighth issue in which he complains of the trial court's denial of his motion to reinstate and for new trial based on the timeliness of his expert report. Further, we need not address Drake's first and third issues or the remaining portions of his second and eighth issues, all of which pertain to complaints respecting the granting of appellees' motion to dismiss for failure to provide an expert report, the attorney's fees awarded to appellees, and/or hearings respecting those matters.

### *B. Due Process Violations and Recusal of Trial Court Judge*

1. Standard of Review and Applicable Law

We review an order denying a motion to recuse for an abuse of discretion. *See In re H.M.S., 349 S.W.3d 250, 253 (Tex. App.-Dallas 2011, pet. denied)*; *Sommers v. Concepcion, 20 S.W.3d 27, 41 (Tex. App.-Houston [14th Dist.] 2000, pet. denied)*; *see also TEX. R. CIV. P. 18a(j)(1)*. The movant bears the burden of proving recusal is warranted, and the burden is met only through a showing of bias or impartiality to such an extent that the movant was deprived of a fair trial. *See In re H.M.S., 349 S.W.3d at 253-54*. The **[**27]** test for recusal is "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning

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[5] We need not address whether the 120-day time period was tolled until July 20, 2015, because that determination would not affect the resolution of Drake's issues in this appeal. *See **TEX. R. APP. P.47.1***.

[6] Specifically, (1) from December 30, 2013, to March 19, 2014, is 79 days; (2) from May 8, 2015, to May 14, 2015, is 6 days; and (3) 79 days + 6 days = 85 days. As described above, prior to September 1, 2013, *section 74.351(a)* provided that each required expert report was to be served "not later than the 120th day after the date the original petition was filed." *See Zanchi, 408 S.W.3d at 379, n.2*. We note that even if the 120-day time period is calculated from the date this case was filed, Drake's expert report was timely served. Specifically, (1) from December 3, 2013, to Mach 19, 2014, is 106 days; (2) from May 8, 2015, to May 14, 2015, is 6 days; and (3) 106 days + 6 days = 112 days.

the judge's conduct, would have a reasonable doubt that the judge is actually impartial." *Hansen v. JP Morgan Chase Bank, N.A., 346 S.W.3d 769, 776 (Tex. App.-Dallas 2011, no pet.)*.

Pursuant to *Texas Rule of Civil Procedure 18a*, a motion to recuse a judge "must not be based solely on the judge's rulings in the case" and "must assert one or more of the grounds listed in *Rule 18b*." *TEX. R. CIV. P. 18a Rule 18b* provides in part that a judge must recuse in any proceeding in which (1) "the judge's impartiality might reasonably be questioned"; (2) "the judge has a personal bias or prejudice concerning the subject matter or a party"; (3) the judge knows that he has an "interest that could be substantially affected by the outcome of the proceeding"; or (4) the judge "is to the judge's knowledge likely to be a material witness in the proceeding." *TEX. R. CIV. P. 18b(b)(1), (2), (6), (7)*. Bias by an adjudicator is not lightly established. *In re City of Dallas, 445 S.W.3d 456, 467 (Tex. App.-Dallas 2014, orig. proceeding)*. Judicial rulings alone almost never constitute a valid basis for a motion to recuse based on bias or partiality. *In re H.M.S., 349 S.W.3d at 253* (citing *Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)*). Rather, a party's remedy for unfair rulings is to assign error regarding the adverse rulings. *In re City of Dallas, 445 S.W.3d at 467*; *Sommers, 20 S.W.3d at 41*. Judicial remarks, even those that are critical or disapproving of, or even hostile to, parties or their **[**28]** cases, do not ordinarily support a bias or partiality chat lenge. *Hansen, 346 S.W.3d at 776*. Further, "a party cannot create a constitutional disqualification by filing suit against the judge." *Spigener v. Wallis, 80 S.W.3d 174, 181 (Tex. App.-Waco 2002, no pet.)*. "To hold that merely naming a judge as a party would disqualify him would put power in the hands of litigants to frustrate our judicial system." *Cameron v. Greenhill, 582 S.W.2d 775, 776 (Tex. 1979)*.

**[*529]** 2. Application of Law to Facts

In his fifth issue, Drake (1) contends It] he trial court violated Appellant's due process rights and was unreasonably biased and unfair to Drake" and (2) asserts an "objection" to having Judge Parker or Judge Murphy sign orders in this case "based on [Drake's] religious beliefs and because he is a Christian minister." In the section of his argument pertaining to the first of those complaints, Drake describes efforts by him to conduct discovery and obtain a hearing on his motion to compel discovery described above. Specifically, Drake complains (1) the "Board of Dental Examiners in Austin, Texas" refused to provide information requested by him; (2) he "was barred from this critical information because of the racial bigotry of the Texas Attorney General towards pro se nonwhites in general, which violated his due process rights"; (3) "the trial **[**29]** court judge was the last person who would assist the Appellant in obtaining the documents he sought"; and (4) the trial court allowed appellees to argue their motion to dismiss prior to allowing argument on Drake's motion to compel discovery, which was a "violation of the Appellant's due process rights," a "way for the trial court to prevent the Appellant from bringing his motion before the court," and a "violation of the Appellant's civil and constitutional rights." Drake cites no authority to support his contentions respecting the "bias" and violations of his rights alleged by him. *See TEX. R. APP. P. 38.1(i)*. Consequently, we conclude the first portion of Drake's fifth issue presents nothing for this Court's review. *See id.; see also Birnbaum v. Law Offices of G. David Westfall, P.C., 120 S.W.3d 470, 477 (Tex. App.-Dallas 2003, pet. denied)* (concluding "due process" complaint asserted without citation to authority presented nothing for review).

In the section of his argument pertaining to the second portion of his fifth issue, Drake asserts that the participation of Judges Parker and Murphy in this case "is offensive to him" and he should not be "forced" to have them "make any decisions over [him] " Further, he contends "[t]here is no dispute that Drake's beliefs are founded on basic tenets of the Christian religion, **[**30]** as he understands them, and derived in substantial part from his devotion to the Almighty as the Supreme Being" and "[t]hus, under the U.S. Supreme Court's decision in *United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965)*, the Appellant's position unquestionably was within the 'religious training and belief clause' of the exemption provision." In addition to that authority, Drake cites generally to *Welsh v. United States, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970)*. Both cases cited by Drake pertain to "conscientious objector" status under the *Universal Military Training and Service Act*, which at exempts from combatant training and service in the armed forces of the United States certain persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form. *See Welsh, 398 U.S. at 335*; *Seeger, 380 U.S. at 165*. Drake does not explain, and the record does not show, how that statute is applicable in this case. Nor does the record show Drake asserted an argument in the trial court based on the military "exemption

provision" he describes. On this record, we conclude the second portion of Drake's fifth issue presents nothing for this Court's review. *See TEX. R. APP. P. 33.1*, *38.1(i)*.

We decide against Drake on his fifth issue.

In his sixth issue, Drake contends (1) Judge Tapscott "should have recused himself from Drake's case because **[**31]** he was **[*530]** a defendant in a pending federal lawsuit where Drake was the 'plaintiff'" and (2) Judge Murphy and Judge Moore "abused their discretions by denying Appellant's motions to recuse Judge Tapscott."[7] According to Drake, "[a] judge should not be a defendant or a material witness in a legal proceeding or litigation of any kind with a party, which he is also presently presiding over" and "[s]ubstantial evidence proves to the Court that the trial court judge was bias [sic] towards Drake." Appellees respond in part "[t]he record contains no evidence of bias or prejudice on the part of the trial court" and "naming a judge in a lawsuit is insufficient to create disqualification."

We disagree with Drake's position that Judge Tapscott was required to recuse himself in this case because he "was a defendant in a pending federal lawsuit where Drake was the `plaintiff.'" *See* Cameron, 582 S.W.2d at 776; Spigener, 80 S.W.3d at 181. Also, Drake cites no authority, and we have found none, to support his position that a trial judge must recuse himself when a plaintiff waking recusal files a separate lawsuit against the judge in which the judge will allegedly be a "material witness." Further, the incident described by Drake in his appellate brief to show Judge Tapscott's **[**32]** alleged "degree of antagonism against Drake" is an incident that occurred in January 2014 and was considered and rejected by this Court in Drake's previous appeal as a ground for recusal of Judge Tapscott. *See* Drake, 2015 Tex. App. LEXIS 4732, 2015 WL 2160565, at *6. On this record, we conclude Judge Tapscott did not abuse his discretion by declining to recuse himself in this case. Additionally, in light of that conclusion, we conclude Judge Murphy's and Judge Moore's denials of Drake's motions to recuse Judge Tapscott did not constitute abuse of discretion.[8] *See* Cameron, 582 S.W.2d at 776; Spigener, 80 S.W.3d at 181; *see also* Drake, 2015 Tex. App. LEXIS 4732, 2015 WL 2160565, at *6.

Drake's sixth issue is decided against him.

## IV. CONCLUSION

We decide in favor of Drake on (1) his fourth issue, (2) the portion of his seventh issue in which he complains appellees' calculations respecting the deadline for serving his expert report are incorrect, (3) the portion of his second issue in which he complains the trial court erred by awarding appellees attorney's fees based on section 74.351, and (4) the portion of his eighth issue in which he complains of the trial court's denial of his motion to reinstate and for new trial based on the timeliness **[*531]** of his expert report. We decide against Drake on his fifth and sixth issues. We need not address Drake's first and third issues **[**33]** or the remaining portions of his second and eighth issues.

We reverse the trial court's order granting appellees' motion to dismiss for failure to provide an expert report and awarding attorney's fees to appellees pursuant to section 74.351, render judgment denying that motion to dismiss, and remand this case to the trial court for further proceedings consistent with this opinion.

/s/ Douglas S. Lang

DOUGLAS S. LANG

JUSTICE

## JUDGMENT

[7] Additionally, Drake's argument pertaining to his sixth issue addresses matters other than recusal, including lengthy sections titled (1) "Trial court's abuse of Chapter 11 of the TCPRC" and (2) "The trial court's actions make its own show cause order moot." Those sections contain complaints pertaining to the striking of the April 4, 2016 "Plaintiffs' Amendment of His Original Petition" described above and the trial court's subsequent show cause orders based on Drake's status as a vexatious litigant. To the extent Drake challenges the trial court's jurisdiction respecting the trial court's show cause orders, we disagree with Drake's position that the trial court lacked jurisdiction as to those orders. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.101(b) (West Supp. 2016) (vexatious litigant who disobeys court order prohibiting new litigation is subject to contempt). Further, Drake's other complaints in those sections were not asserted by him in the trial court, nor does he explain how the authority cited by him supports his positions. *See* ***TEX. R. APP. P. 33.1***, ***38.1(i)***.

[8] To the extent Drake's appellate argument pertaining to his sixth issue can be construed to complain of a lack of a hearing respecting his motions to recuse that were denied by Judges Murphy and Moore, Drake cite no portion of the record, and we have found none, showing that complaint was preserved for this Court's review. *See* ***TEX. R. APP. P. 33.1***.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's order granting appellees' motion to dismiss for failure to provide an expert report and awarding attorney's fees to appellees, **RENDER** judgment denying that motion to dismiss, and **REMAND** this case to the trial court for further proceedings consistent with this Court's opinion.

It is **ORDERED** that appellant ERIC DRAKE recover his costs of this appeal from appellees STEPHEN WALKER, D.D.S. and MARSHAL GOLDBERG, D.D.S.

Judgment entered this 6th day of July, 2017.

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Pet. Ref'd

# *Youkers v. State*

Court of Appeals of Texas, Fifth District, Dallas

May 15, 2013, Opinion Filed

No. 05-11-01407-CR

**Reporter**
400 S.W.3d 200 *; 2013 Tex. App. LEXIS 6054 **; 2013 WL 2077196

WILLIAM SCOTT YOUKERS, Appellant v. THE STATE OF TEXAS, Appellee

**Notice:** PUBLISH

**Subsequent History:** Released for Publication June 24, 2013.

Petition for discretionary review refused by *In re Youkers, 2013 Tex. Crim. App. LEXIS 1193 (Tex. Crim. App., Aug. 21, 2013)*

**Prior History:** **[**1]** On Appeal from the 219th Judicial District Court, Collin County, Texas. Trial Court Cause No. 219-80460-2011.

**Counsel:** For appellants: Alan Kramer Taggart, Alan Kramer Taggart Attorney, McKinney, TX.

For appellees: Andrea L. Westerfeld, Collin County District Attorney, Greg Willis, McKinney, TX.

**Judges:** Before Justices Bridges, O'Neill, and Murphy. Opinion by Justice Murphy.

**Opinion by:** MARY MURPHY

## Opinion

**[*203]** William Scott Youkers appeals the revocation of his community supervision and eight-year prison sentence for his conviction of assaulting his girlfriend. He contends (1) the trial judge lacked impartiality or neutrality based on ex parte communications, including a Facebook friendship with the girlfriend's father; (2) his trial counsel's assistance was rendered ineffective due to the Collin County Detention Center's delay in delivering a letter from his attorney; (3) the judge erred by denying his motion for new trial based on Youkers's refusal to waive his attorney-client privilege regarding the contents of the letter; and (4) the judge improperly assessed court-appointed attorney's fees. We modify the judgment to delete the award of attorney's fees and affirm the judgment as modified.

### BACKGROUND

Youkers was on parole for a previous felony conviction of tampering with evidence when he was indicted for assaulting his girlfriend, who was pregnant with his child. *See* *Tex. Penal Code Ann. § 22.01(b)(2)(B)* **[**2]** (West 2011). Youkers pleaded guilty to the assault allegations. Pursuant to a plea agreement, the judge assessed a ten-year prison sentence, suspended for five years, and a $500 fine. Approximately three months later, the State filed a motion to revoke Youkers's supervision, contending he violated the terms and conditions of his supervision by testing positive for methamphetamines, failing to submit to a urinalysis, failing to report as scheduled to his supervision officer, and failing to pay court-ordered fees and costs.

Youkers entered an open plea of true to the allegations in the motion and requested reinstatement of his community supervision. Youkers explained that he previously "didn't have a stable place to live," but he was now living with his mother, had started attending school, and hoped to continue studying. The judge sentenced Youkers to eight years' imprisonment and thereafter denied his motion for new trial. Youkers appealed.

### DISCUSSION

Youkers raises three issues on appeal. In his first two issues, which have subparts, Youkers contends the trial judge abused his discretion in denying Youkers's motion for new trial. We review a trial court's ruling on a motion for new trial **[**3]** under an abuse of discretion

standard. *Smith v. State, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009)*. In conducting our review, we do not substitute our judgment for that of the trial court. *Webb v. State, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007)*. We give great deference to the trial court's ruling and will overrule that decision only if it is arbitrary or unreasonable. *Lewis v. State, 911 S.W.2d 1, 7 (Tex. Crim. App. **[*204]** 1995)*. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Holden v. State, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006)*.

**Judicial Bias**

Youkers's first ground for reversing the trial judge's denial of his motion for new trial is his challenge to the judge's neutrality. Youkers describes two sources evidencing bias—(1) the judge's Facebook friendship with the father of Youkers's girlfriend, which continued during the pendency of the revocation hearing, and (2) emails to the judge from Youkers's community supervision officer.

***Facebook Friendship***

After the judge sentenced Youkers to an eight-year prison term, Youkers filed a motion for new trial complaining "[t]here was an undisclosed **[**4]** friendship" between the judge and the father of Youkers's girlfriend, improper communications between the two, and influence over the judge by the father. He asserted the communications and relationship created both actual and apparent bias. Youkers relied on a private message the judge received on the judge's Facebook page approximately one week before Youkers's original plea and the ongoing status of the judge and the father as Facebook "friends."

The judge testified at the hearing on Youkers's motion for new trial that he knew the father because they both ran for office in the same election cycle. He testified they were designated as "friends" on Facebook and were "running at the same time," but that was "the extent of [their] relationship." The two were not related, and, other than the private Facebook messages, they had had no other contacts through Facebook. At the time of the hearing, they were still Facebook "friends."

The Facebook communications began with a message from the father to the judge seeking leniency for Youkers. That message was posted just prior to Youkers's original plea. The judge responded online formally advising the father the communication was in violation **[**5]** of rules precluding ex parte communications, stating the judge ceased reading the message once he realized the message was improper, and cautioning that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge's Facebook "friends." The judge's online response also advised that the judge was placing a copy of the communications in the court's file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required. The father replied with a message apologizing for breaking any "rules or laws" and promising not to ask questions or make comments "relating to criminal cases" in the future.

At the hearing on Youkers's motion for new trial, the judge confirmed that he followed through based on his Facebook message—he placed a copy of the Facebook communications in the court file, he contacted both Youkers's attorney and the State's attorney to inform them of the communications, and he contacted the judicial conduct commission regarding the communications. He said these were the only Facebook communications he had with the father and **[**6]** he had not read any of the father's Facebook posts.

Youkers's complaint is that the judge's Facebook relationship with the father created actual and apparent absence of impartiality. Although Youkers's motion for new trial addressed both the communications **[*205]** and the online status of the father and the judge as Facebook "friends," his complaint on appeal focuses only on the online status.

No Texas court appears to have addressed the propriety of a judge's use of social media websites such as Facebook. Nor is there a rule, canon of ethics, or judicial ethics opinion in Texas proscribing such use. The general premise that judges are not prohibited from using social media is consistent with the current standards suggested by the American Bar Association, as well as recent articles addressing the topic. *See, e.g.*, ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (concluding judge may participate in electronic social networking); Judge Susan Criss, *The Use of Social Media by Judges*, 60 THE ADVOC. (TEX.) 18 (2012); Judge Gena Slaughter & John G. Browning, *Social Networking Dos and Don'ts for Lawyers and Judges*, 73 TEX. B.J. 192 (2010).

Allowing judges to use Facebook **[**7]** and other social

media is also consistent with the premise that judges do not "forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would . . . lessen the effectiveness of the judicial officer." Comm. on Jud. Ethics, State Bar of Tex., Op. 39 (1978). Social websites are one way judges can remain active in the community. For example, the ABA has stated, "[s]ocial interactions of all kinds, including [the use of social media websites], can . . . prevent [judges] from being thought of as isolated or out of touch." ABA Op. 462. Texas also differs from many states because judges in Texas are elected officials, and the internet and social media websites have become campaign tools to raise funds and to provide information about candidates. *Id*.; *see also* Criss, *supra*, at 18 ("Few judicial campaigns can realistically afford to refrain from using social media to deliver their message to the voting public. Social media can be a very effective and inexpensive method to deliver campaign messages to the voting public.").

While the use of social media websites such as Facebook "can benefit judges in **[**8]** both their personal and professional lives," the use presents concerns unique to the role of the judiciary in our justice system. ABA Op. 462. An independent and honorable judiciary is indispensable to justice in our society. *In re Thoma, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal)*. Thus, judges must be mindful of their responsibilities under applicable judicial codes of conduct. *See* ABA Op. 462; TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2005).

The preamble to the Texas Code of Judicial Conduct first reminds us of the role of the judiciary and provides that intrinsic to all sections of the code are the precepts that judges must respect and honor their judicial office as a public trust. TEX. CODE JUD. CONDUCT, Preamble. The individual canons are intended to state basic standards for judicial conduct and to provide guidance to judges. *Id*. Several of those canons are relevant to our analysis of Youkers's issue.

Canon two provides that judges "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "shall not allow any relationship to influence judicial conduct or **[**9]** judgment." *Id*. Canon 2(A), (B). It follows that the judge may not "convey or permit others to convey the impression that they are in a special position to influence the judge." *Id*. Canon 2(B). Similarly, canon four cautions a judge to conduct all extra-judicial activities to avoid casting reasonable doubt on the **[*206]** judge's capacity to act impartially as a judge. *Id*. Canon 4(A).

Canon three also addresses the judge's duty of impartiality and prohibits, with limited exceptions, any direct or indirect ex parte communications concerning the merits of a pending or impending judicial proceeding. *Id*. Canon 3(B)(8). An ex parte communication is one that involves fewer than all parties who are legally entitled to be present during the discussion of any matter with the judge. *Erskine v. Baker, 22 S.W.3d 537, 539 (Tex. App.—El Paso 2000, pet. denied)*. Ex parte communications are prohibited because they are inconsistent with the right of every litigant to be heard and with the principle of maintaining an impartial judiciary. *Abdygapparova v. State, 243 S.W.3d 191, 208 (Tex. App.—San Antonio 2007, pet. ref'd)*. This proscription applies regardless of whether the communication occurs through a social **[**10]** media website, in the judge's chambers, or elsewhere. That is, while the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.

A judge must recuse in any proceeding in which "the judge's impartiality might reasonably be questioned" or "the judge has a personal bias or prejudice concerning the subject matter or a party." *TEX. R. CIV. P. 18b*; *see also Gaal v. State, 332 S.W.3d 448, 452 (Tex. Crim. App. 2011)*. Recusal based on bias is not required simply because of a business relationship or acquaintance with a party. *See Woodruff v. Wright, 51 S.W.3d 727, 737-38 (Tex. App.—Texarkana 2001, pet. denied)* (noting appearance of impropriety determined by reasonable person with all facts; mere business relationship, that included judge's performance of wedding ceremony for defendant and defendant's surgery on family member of judge, insufficient for reasonable person to find bias).

Merely designating someone as a "friend" on Facebook "does not show the degree or intensity of a judge's relationship with a person." ABA Op. 462. One cannot say, based on this designation alone, whether the **[**11]** judge and the "friend" have met; are acquaintances that have met only once; are former business acquaintances; or have some deeper, more meaningful relationship. Thus, the designation, standing alone, provides no insight into the nature of the relationship. *See Lueg v. Lueg, 976 S.W.2d 308, 311 (Tex. App.—Corpus Christi 1998, pet. denied)*

(concluding recusal not required where one party's attorney was judge's past campaign manager; that designation alone provided no insight into the nature of the relationship). Further context is required. *See id.*; ABA Op. 462.

The judge testified at the hearing on Youkers's motion for new trial regarding the nature of the relationship with the father. He stated they were running for office at the same time—that was "the extent of [their] relationship." That evidence, with no other context, provides no insight into any relationship that would influence the judge and lead to bias or partiality. *See* Lueg, 976 S.W.2d at 311. The record also does not show the father had a role in Youkers's revocation hearing or was called as a witness.

The record regarding the earlier Facebook communications also provides no additional context that would support Youkers's **[**12]** suggestion of bias. We first observe the communication was not adverse to Youkers; the father sought leniency. Additionally, the judge stated that he ceased reading the father's message once he realized it was an ex parte communication; he emphasized, "I have not considered any of the information in your e-mail as it would **[*207]** be improper for me to do so." The judge also acted in full compliance with the Texas Committee on Judicial Ethics' recommended procedure for treatment of ex parte communications. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 154 (1993) (providing that judge receiving ex parte communication from litigant may comply with canon 3B(8) by placing the communication in clerk's file; providing the communication to all parties; determining if the communication is proper; and, if it is not, advising the communicant that all ex parte communications must cease).

Youkers asserts that even if actual bias is absent, the evidence shows an appearance of bias. Specifically, he relies on an affidavit from Youkers's mother filed in support of the motion for new trial. In that affidavit, the mother states that "[the father] said that he had influence with [the judge] and would help **[**13]** [Youkers] with his case." The appearance of impropriety must be determined by a "reasonable person" who is in possession of all of the facts. Woodruff, 51 S.W.3d at 738. A reasonable person in possession of all of the facts in this case likely would conclude the contact between the judge and the father did not cause the judge to abandon his judicial role of impartiality; besides the evidence that the judge and the father's acquaintance was limited, any appearance of bias created by the Facebook communications was dismissed quickly by the judge's handling of the situation.

We acknowledge the judge had an obligation not to let the father convey the impression that he was in a special position to influence the judge. TEX. CODE JUD. CONDUCT, Canon 2(B). Assuming the father made the improper statement to Youkers's mother suggesting he had influence with the judge, the record contains no evidence the judge was aware of the statement. Importantly, the judge quickly disposed of any suggestion by his full disclosure of the Facebook communications, and his judgment in no way supports any implication of influence. Based on the facts in this record, we conclude the trial judge did not abuse his **[**14]** discretion in denying Youkers's motion for new trial based on his Facebook-based claims of bias.

***Community Supervision Officer***

Youkers also complains that ex parte emails sent by his community supervision officer created judicial bias. Youkers was placed on five years community supervision on June 2, 2011. Approximately two months later, on August 18, the officer emailed the judge letting the judge know she was sending a notice of violation regarding Youkers's case. She stated that, "I just wanted to give you advanced notice so that you would keep an eye out for it. I am very concerned about this case." The officer then emailed a notice of violation to the State. On September 20, the officer sent another email to the judge. Attached to this email was a memorandum from the officer advising the judge that "[i]t is believed that Mr. Youkers is a major threat to both himself and others." The State filed its motion to revoke Youkers's community supervision that same day, and a capias was issued based on Youkers's probation violation.

Youkers argues this record shows the judge predetermined Youkers's sentence based on his community supervision officer's emails informing the judge of Youkers's **[**15]** "poor character" before the probation hearing; he claims this information was not introduced as evidence at any hearing in the case "yet it clearly prejudiced [the judge's] impartiality such that he was unable to consider the full range of punishment and mitigating evidence."

**[*208]** The State contends Youkers waived this complaint because he failed to raise the issue in the

motion for new trial or at the hearing. Youkers asserts he could not raise this complaint in the motion for new trial because the emails were not part of the "public" file and he was unaware of them until the Clerk's Record was filed in this appeal.

The Clerk's Record filed in this appeal is the record that was available to the public. That record shows the community supervision officer's August 18 email was stamped with the Collin County District Clerk's file mark on August 19, 2011 and was filed prior to the September 20 motion to revoke. Similarly, the September 20 email and memorandum (the same date the motion to revoke was filed) are part of the same record; they are placed in the file directly after the motion to revoke and just before the file-marked capias showing the sheriff's return of service. Accordingly, Youkers's **[**16]** statements that the communications were not disclosed and not discoverable are incorrect. Youkers thus has failed to preserve any objection to the communications by failing to present his complaint to the trial judge. *See TEX. R. APP. P. 33.1(a)*. The record also contains no evidence the judge predetermined Youkers's sentence or failed to consider the evidence presented.

Due process requires a neutral and detached hearing body or officer. *Brumit v. State, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006)*. Absent a clear showing of bias, a trial court's actions will be presumed to have been correct. *Id*. A judge's remarks during trial that are critical, disapproving, or hostile to a party "usually will not support a bias or partiality challenge, although they *may* do so if they reveal an opinion based on extrajudicial information." *Gaal, 332 S.W.3d at 454*.

As evidence of the judge's bias, Youkers identifies statements made at the revocation hearing, which he asserts show a predetermined sentence based in part on the officer's emails. Specifically, the judge stated that the reason he was "leaning towards greater force rather than less force" was because "when a smart person is left unmonitored or **[**17]** lightly monitored, they are the ones who are more able to quickly figure out how to get around . . . and not necessarily follow the rules." He further explained to Youkers that he was giving him two years less than the maximum sentence "in the hopes that you use your intelligence to realize that you've got to fix these things and not keep trying to fix them to the minimum to where people stop watching you. Because the moment you are unwatched, you are untrustworthy."

These statements are supported by the evidence. Youkers's mother testified about Youkers's "high IQ" shortly before the trial judge commented regarding Youkers's intelligence. She described Youkers as having "been through a lot in his life," detailing some of the abuse he had suffered from his father. When the judge questioned Youkers's mother regarding "the least amount of force" needed to "get [Youkers] to stop screwing up," his mother explained that "now" he had a child he loved very much and he had a passion to go to school. She then admitted "[n]obody was stopping him from doing that" earlier and she could not "make excuses." She agreed she would probably "try to train him until he's 43" because she is "his mom" and **[**18]** loves him. The judge also asked the mother "[w]hat's different today than any of the other times that he's come before the Courts and asked for mercy?" Continuing to admit she could not make excuses for her son, she described terrible abuse he had endured as a **[*209]** child and asked that her son be given a chance.

Youkers also testified. He said his mother had "rules" she expected him to abide by when he lived with her; yet when he stayed with others, he "used." He stated he needed help, including "a stable place to stay." Additionally, Youkers's record showed numerous violations. His prior probation for the tampering with evidence conviction was revoked because he did not "show up." He admitted he used drugs while on probation for that conviction and he assaulted his pregnant girlfriend by choking her. He then received probation for the assault family violence conviction, and he again used methamphetamine and quit attending counseling at Hope's Door because he was not living close enough to ride his bike.

It was only after hearing all of the evidence that the judge stated, "[b]ased on the totality of the information presented to the Court at [the] hearing and [his] review of the file," he **[**19]** was sentencing Youkers to eight years in prison. The judge added the statement (about which Youkers complains) that he believed he was "making a mistake and it should be a bigger number"; he was giving Youkers two years less than the maximum sentence "in the hopes that [Youkers] use [his] intelligence to realize that [he's] got to fix these things and not keep trying to fix them to the minimum to where people stop watching [him]. Because the moment [he is] unwatched, [he] is untrustworthy."

The evidence supports the judge's comments, which do not reflect bias, partiality, or the judge's failure to consider the full range of punishment. *See Brumit, 206 S.W3d at 645*. We conclude the trial judge did not abuse

his discretion in overruling Youkers's motion for new trial based on complaints regarding tribunal partiality.

**Ineffective Assistance of Counsel**

Youkers also asserts that a mail delay at the Collin County Detention Center rendered his trial attorney's assistance ineffective. Specifically, he blames the center for the mail delay, which resulted in his failure to receive a letter from his attorney advising of a plea offer. Youkers claims that immediately after the revocation hearing in **[**20]** which the judge sentenced him to an eight-year prison term, he returned to his cell to find a letter from his attorney. The letter had been sent approximately six days earlier. Youkers testified by affidavit that "[w]hen I read the letter I was devastated, had I received it earlier it would have caused me to change my plans and accept the plea offer which had been offered me by the State."

Youkers does not argue he was unaware of the offer at the revocation hearing. Conversely, he testified he spoke with his attorney before the hearing. That attorney is the same attorney who drafted the letter Youkers claims he did not receive. The attorney advised Youkers prior to the revocation hearing of the State's two-year offer as well as a second offer she was able to negotiate. Specifically, Youkers's attorney testified she had the opportunity to speak with Youkers before the revocation hearing. She said she had spoken with the prosecuting attorney before the hearing, and the State was willing to "continue [Youkers] on probation and let him go into [Substance Abuse Felony Punishment]." She testified she conveyed both offers to Youkers, but he "decided not to take [the SAFP] offer or the two **[**21]** TDC . . . ." Thus, Youkers was aware of two plea offers and refused both.

Despite Youkers's and his attorney's testimony at the revocation hearing, Youkers claims he would have taken the offer had he read the letter. The wording of the **[*210]** letter was not before the judge. Nor is the letter before this Court. Youkers stated in his affidavit that the letter contained "some critical advice and the result of an investigation [his trial attorney] had conducted." In her testimony at the hearing on Youkers's motion for new trial, his attorney verified the letter contained the terms of the offer made by the State, "what the rights on a revocation are, the ramifications, the range of punishment, etcetera." When the State tried to question the attorney about the letter's specific contents, however, Youkers's appellate attorney (who represented him during the hearing on the motion for new trial) objected on the basis of the attorney-client privilege. The judge sustained the objection.

To prevail on an ineffective assistance of counsel claim, an appellant typically must show by a preponderance of the evidence both deficient performance and prejudice. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; **[**22]** *Williams v. State, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009)*. He must demonstrate under the first prong that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland, 466 U.S. at 687-88*; *Ex parte Lane, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009)*. To meet the second prong, the appellant must show the existence of a reasonable probability, sufficient to undermine confidence in the outcome, that but for his attorney's deficient performance, the result of the proceeding would have been different. *Strickland, 466 U.S. at 694*; *Ex parte Lane, 303 S.W.3d at 707*. Prejudice may be presumed in a few situations. *Ex parte McFarland, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005)*. One of those is "state interference" with counsel's assistance. *Id.*; *see also Strickland, 466 U.S. at 692*.

Both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized the Sixth Amendment's right to counsel can be violated when the government adversely affects an attorney's ability to perform the attorney's duties. *See Geders v. United States, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976)*; *Batiste v. State, 888 S.W.2d 9, 18-19 (Tex. Crim. App. 1994)*. **[**23]** Relying on *Geders*, Youkers argues that an ineffective assistance of counsel claim can be premised on government action that blocks the free flow of communication between attorney and client, and "it is clear that this right is violated where the government takes any actions—intentional or otherwise—that hinders this right."

In *Geders*, the Supreme Court concluded that a trial court's order banning attorney-client consultation during an overnight recess deprived the defendant of his Sixth Amendment right to trial counsel. *See Geders, 425 U.S. at 91*. Similarly, the Texas Court of Criminal Appeals concluded a prisoner's right to counsel was violated by a sheriff's refusal to allow the defendant to speak to his attorney outside the sheriff's presence. *See Turner v. State, 91 Tex. Crim. 627, 241 S.W. 162, 164 (Tex. Crim. App. 1922)*. Neither factual scenario is present here.

Youkers was not deprived at any time of his right to

consult with his attorney. Nor does he claim he was not allowed to confer with counsel in private. Instead, he argues it is well established that a failure to inform a defendant of a plea offer made by the State is an omission that falls below an objective standard of reasonableness.

To **[**24]** support this claim, Youkers also relies on *Ex parte Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000)*, *overruled on other grounds by Ex parte Argent, 393 S.W.3d 781 (Tex. Crim. App. 2013)*. In that case, **[*211]** the defendant's attorney told him the State had not offered any plea bargains, when in fact the State had offered him two. *Ex parte Lemke, 13 S.W.3d at 794*. The defendant became aware of the plea offers several months after his sentencing when he testified against his trial counsel in an unrelated matter. *Id. at 794-95*. The court concluded the attorney's failure to relay the offer to his client fell below an objective standard of professional reasonableness and, as a remedy, required the government to reinstate the original offer. *Id. at 796, 798*.

Youkers's facts are distinguishable from *Ex parte Lemke*. The trial attorney in *Ex parte Lemke* failed to tell the defendant that there was any plea offer on the table; the defendant was left with the justified misunderstanding that the State had provided no offer. *Id. at 794*. In contrast, Youkers testified his trial attorney told him about the plea offer before the revocation hearing, the attorney confirmed the information provided, and Youkers **[**25]** rejected the offer. Youkers, unlike the defendant in *Ex parte Lemke*, did not miss the opportunity to accept a plea offer because he did not know about it. He missed the opportunity because he chose not to accept it.

The burden of proving ineffectiveness rests upon the defendant and requires proof by a preponderance of the evidence. *Rodriguez v. State, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995)*. Youkers has not met that burden, and the trial judge did not abuse his discretion in denying Youkers's motion for new trial.

**Waiver of Attorney-Client Privilege**

Youkers also contends the judge abused his discretion in denying his motion for new trial because the judge improperly based his denial on Youkers's refusal to waive his attorney-client privilege. Youkers testified in support of his motion for new trial he would have accepted the State's plea offer had he received his attorney's letter earlier. Yet he refused to testify to the contents of the letter based on the attorney-client privilege. In response to the judge's observation that Youkers's argument "he would have changed his actions based on what's in the letter . . . . would make the contents of that letter quite relevant," Youkers's **[**26]** attorney insisted the contents of the letter were privileged. The judge asked, "Since he's talking about them, don't you think he's waived it?" His attorney maintained there was no waiver, and the judge sustained the objection.

During closing arguments on Youkers's motion for new trial, the judge interrupted Youkers's attorney and asked, "You want me to grant a Motion for New Trial based on the contents of a letter that I don't know if it says something of any significance or it says the moon is made of green cheese?" The attorney responded that the motion should be granted because Youkers was "prevented from receiving a communication from [his] attorney" and he "testified had he received it timely he would have altered his course in a criminal action." The judge questioned how—without knowing the contents of the letter—Youkers would "expect any fact finder to make a credible determination as to whether or not that belief is reasonable or unreasonable?" The attorney argued Youkers's testimony that the letter made a difference to him and it would have changed his course of conduct had he received it was sufficient to show "denial of significant aid from his attorney." The judge denied **[**27]** the motion.

Youkers claims error in the judge's denial of his motion, arguing to "deny a motion for new trial based upon the correct raising of a privilege . . . was to deny [Youkers] **[*212]** his Constitutional right to effective counsel due to his refusal to waive a well established privilege." The State responds that Youkers has produced no evidence the motion was denied because he refused to waive the privilege; while the judge did raise questions regarding whether he could grant the motion without knowing the contents of the letter, the judge did not state this was the basis of his denial. The State also argues Youkers waived his attorney-client privilege by raising the ineffective assistance of counsel claim. Youkers did not request findings of fact and conclusions of law to establish the basis of the judge's ruling.

The attorney-client privilege is not absolute; it may be waived. *Ballew v. State, 640 S.W.2d 237, 240 (Tex. Crim. App. [Panel Op.] 1980)*. One way the privilege can be waived is by litigating a claim against an attorney for

a breach of legal duty. *See Joseph v. State, 3 S.W.3d 627, 637 (Tex. App.—Houston [14th Dist.] 1999, no pet.)*.

Youkers necessarily placed in issue privileged **[**28]** communications when he argued his attorney breached her legal duty to provide effective assistance of counsel. By doing so, he effectively waived his attorney-client privilege. *See id. at 638*. When he refused to disclose the contents of the letter on which he relies as the basis for a new trial, he failed to provide sufficient evidence to meet his burden of proving his attorney was ineffective. *See Rodriguez, 899 S.W.2d at 665* (noting defendant bears burden of proving by preponderance of evidence counsel's ineffective assistance). Simply stated, Youkers cannot hide behind the privilege. He was required to meet his burden of showing ineffective assistance of counsel, and the attorney-client privilege does not relieve Youkers of that burden. On this record, we cannot conclude the judge abused his discretion by denying Youkers's motion for new trial.

**Assessment of Attorney's Fees Against Youkers**

Youkers's final argument is that the trial judge erred in assessing court-appointed attorney's fees against him. Specifically, the judge found Youkers to be indigent and provided court-appointed counsel as requested by Youkers. Yet the judge assessed the court-appointed attorney's fees as costs **[**29]** and taxed the fees against Youkers as part of the judgment revoking his community supervision. The State agrees the assessment was in error.

Once a trial court finds a criminal defendant to be indigent, the defendant is presumed to remain indigent for the remainder of the proceedings unless a material change in the defendant's financial resources occurs. *See Tex. Code Crim. Proc. Ann. art. 26.04(p)* (West Supp. 2012). For the trial court to assess attorney's fees, it must determine the defendant has the financial resources that enable the court to offset those costs. *Id. art. 26.05(g)*; *see also Mayer v. State, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)*; *In re Daniel, No. AP-76959, 2013 Tex. Crim. App. Unpub. LEXIS 475, 2013 WL 1628937, at *2 (Tex. Crim. App. Apr. 17, 2013)* (orig. proceeding). The record also must show some factual basis to support the trial court's determination. *See Barrera v. State, 291 S.W.3d 515, 518 (Tex. App.—Amarillo 2009, no pet.)*.

The record contains no evidence of a material change in Youkers's financial circumstances once the judge found him to be indigent. Accordingly, the evidence is insufficient to justify the trial judge's assessment of attorney's fees against Youkers. *See Mayer, 309 S.W.3d at 556*.

When **[**30]** the evidence does not support the assessment of attorney's fees as court costs, the proper remedy is to modify **[*213]** the judgment to delete the requirement. *Id. at 557*. We therefore modify the judgment revoking Youker's community supervision by deleting the assessment of attorney's fees.

**CONCLUSION**

Youkers has failed to show actual or apparent lack of tribunal neutrality. The judge's designation as a Facebook "friend," without context providing insight into the nature of the relationship, was insufficient to show bias. Youkers also failed to meet his burden of showing the government's mail delay rendered his attorney's assistance ineffective. The plea offer purportedly referenced in the letter was conveyed by his attorney prior to the revocation hearing and Youkers rejected the offer. The judge also did not abuse his discretion in denying Youkers's motion for new trial when Youkers refused to disclose the contents of the letter and the only information known to the judge—that the letter contained a plea offer—was conveyed to Youkers properly and timely. We therefore overrule issues one and two. Regarding issue three, that the trial judge improperly assessed court-appointed attorney's fees **[**31]** against Youkers, we sustain the issue and modify the judgment to delete the assessment. We affirm the judgment as modified.

/s/ Mary Murphy

MARY MURPHY

JUSTICE

Publish

*TEX. R. APP. P. 47.2*

**JUDGMENT**

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The paragraph on page 2 of the judgment that states:

It is further Ordered that the cost to Collin County for the payment of this defendant's court-appointed attorney, if any, is taxed against this defendant as court cost. The District Clerk is granted leave to amend the court cost to reflect this amount without the necessity of a further order.

is **DELETED** from the judgment.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 15th day of May, 2013.

/s/ Mary Murphy

MARY MURPHY

JUSTICE

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# *In re Slaughter*

Special Court of Review Appointed By the Supreme Court of Texas

September 30, 2015, Opinion Issued

DOCKET NO. 15-0001

**Reporter**

480 S.W.3d 842 *; 2015 Tex. LEXIS 1167 **

IN RE HONORABLE MICHELLE SLAUGHTER, PRESIDING JUDGE OF THE 405TH JUDICIAL DISTRICT COURT, GALVESTON COUNTY, TEXAS

## Opinion

**[*844]** This Special Court of Review [1] is assigned to conduct a trial de novo of the **[*845]** State Commission on Judicial Conduct's Public Admonition and Order of Additional Education issued against Respondent, the Honorable Michelle Slaughter, Judge of the 405th Judicial District Court in Galveston, Galveston County, Texas, selected "by lot" and appointed by the Chief Justice of the Texas Supreme Court. *See* Tex. Gov't Code Ann. § 33.034 (West Supp. 2014) (providing the procedure for appealing the Commission's sanctions). We note at the outset that the function of the Commission "is not to punish; instead, its purpose is to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the citizens of Texas." *In re Lowery, 999 S.W.2d 639, 648 (Tex. Rev. Trib. 1998, pet. denied)* **[**1]** .

Article V of the Texas Constitution states that any judge may be disciplined for:

> willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the **[**2]** office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his [or her] duties or casts public discredit upon the judiciary or administration of justice.

Tex. Const. art. V, § 1-a(6)(A). The Texas Constitution further provides that after receipt of a written complaint and an investigation, the Commission may, among other things, issue a private or public admonition, warning, reprimand, or requirement that the judge obtain additional training or education. Tex. Const. art. V, § 1-a(6)(A), (8). Upon receipt of notification of any type of sanction, the judge may request a special court of review be appointed by the chief justice of the supreme court to review the action of the Commission. Tex. Gov't Code Ann. § 33.034(b); *Tex. Rules Rem'l/Ret. Judg. R. 9(a)* (West 2015). The Commission then files a charging document with the allegations of judicial misconduct against the judge. Tex. Gov't Code Ann. § 33.034(d). The special court of review holds a trial de novo and renders its decision by written opinion. *Id.* § 33.034(e), (h). As this review is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of a civil action, the Commission has the burden to prove the charges against a respondent by a preponderance of the evidence. **[**3]** *See id.* § 33.034(f); *In re Hecht, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006)*; *In re Canales, 113 S.W.3d 56, 66 (Tex. Rev. Trib. 2003, pet. denied)*; *In re Davis, 82 S.W.3d 140,142 (Tex. Spec. Ct. Rev. 2002)*.

In its Charging Document, the Commission charged the Respondent with misconduct for posting certain comments on her Facebook page about an ongoing trial in her court, as well as other matters unrelated to the trial that had occurred in her courtroom. In Charge I, the Commission alleged that:

> Judge Slaughter's decision to use her "Judge Michelle Slaughter" Facebook page as the medium through which to comment publicly and enthusiastically about pending criminal cases was inconsistent with the proper performance of her duties as a judge. By engaging in this conduct,

[1] The Special Court of Review panel consists of Justice Charles A. Kreger of the Ninth Court of Appeals in Beaumont, designated presiding justice; Justice Gina Benavides of the Thirteenth Court of Appeals in Corpus Christi and Edinburg; and Justice John Bailey of the Eleventh Court of Appeals in Eastland.

> Judge Slaughter used the trappings of judicial office to boost her message and, thereby, cast reasonable doubt upon her impartiality and gave rise to a legitimate concern that she would not be fair or impartial in these or other cases.

Pursuant to this allegation, the Commission alleged that the Respondent willfully **[*846]** violated Canon 3B(10) of the Texas Code of Judicial Conduct, and that her willful or persistent conduct was clearly inconsistent with the proper performance of her duties in violation of Article V, Section 1-a(6)(A) of the Texas Constitution.

In Charge II, the Commission alleged that "Judge Slaughter's extrajudicial Facebook activities cast reasonable doubt upon her impartiality and interfered with the **[**4]** proper performance of her duties as a judge in that, as a direct result of her conduct, Judge Slaughter was ordered to be removed from presiding over a criminal case...." Her removal ultimately led to a subsequent judge granting a mistrial in the case. Under this charge, the Commission alleged that Respondent's conduct constituted willful violations of Canon 4A of the Texas Code of Judicial Conduct, and willful or persistent conduct that is clearly inconsistent with the proper performance of her duties in violation of the standards set forth in Article V, Section 1-a(6)(A) of the Texas Constitution.

Finally, in Charge III, the Commission alleged that by engaging in the extrajudicial Facebook activity and by "disregarding her own admonition to jurors about the use of social media during the trial, Judge Slaughter failed to uphold her duty to promote and maintain public confidence in the integrity, impartiality, and independence of the judiciary." The Commission alleged the Respondent's conduct "became the focus of criticism due to the attendant media attention" and "cast public discredit upon the judiciary or administration of justice" in violation of the standards set forth in Article V, Section 1-a(6)(A) of the Texas Constitution.

The Respondent, in both her written responses to the Commission's allegations and her testimony at trial, **[**5]** asserted that her social media postings did not violate the Texas Code of Judicial Conduct of the Texas constitution. In the alternative, she asserted that if her conduct was found to be in violation of the Texas Code of Judicial Conduct, then the Code abridges her freedom of speech guaranteed by the *First Amendment to the United States Constitution*.

We conclude the Commission has failed to meet its burden of proving the Respondent violated the Canons of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution, we dismiss the Commission's public admonition, and find the Respondent not guilty of all charges.[2]

## I. FACTS

The Respondent maintained a public Facebook page which displayed: (1) a photograph of the Respondent wearing her judicial robe; (2) featured a photograph of the Galveston County Courthouse; and (3) described the Respondent as a "public figure" and as "Judge of the 405th Judicial District Court." After her election to the bench, the Respondent was very active in posting comments about matters that were occurring in her court and in utilizing her Facebook page as a means to educate the public about her **[**6]** court.

On April 28, 2014, a high profile, criminal jury trial was scheduled to begin in the Respondent's court. The case involved a man charged with unlawful restraint of a child for allegedly keeping a nine-year-old boy in a six-foot by eight-foot wooden enclosure inside the family home. The case became known in the media as "the Boy in the Box" case.

**[*847]** A couple of days before the trial was set to begin, the Respondent posted the following on her Facebook page,

> We have a big criminal trial starting Monday! Jury selection Monday and opening statements Tues. morning.

The following day, in response to the above-described post, a person posted the following comment on the Respondent's Facebook page,

> One of my favorite Clint Eastwood movies is 'Hang 'Em High,' jus sayin your honor...

After the jury was seated in the case, the Respondent provided the jurors with oral instructions regarding their conduct during the trial. Specifically, the Respondent admonished the jury regarding their use of social media, including Facebook, and their prohibition of accessing any news stories related to the trial. The Respondent expressly told the jurors the following:

> During the trial of the case, as I

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[2] Because we conclude the Respondent did not violate the Canons of Judicial Conduct or the Texas Constitution, we do not address the constitutional question. *See Hecht, 213 S.W.3d at 551-52*.

> mentioned **[**7]** before, you cannot talk to anyone. So make sure that you don't talk to anyone. Again, this is by any means of communication. So no texting, e-mailing, talking person to person or on the phone or Facebook. Any of that is absolutely forbidden.

In addition, the Respondent provided written instructions to the jury that included the following admonition:

> Do not make any investigation about the facts of this case.... All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me (the Respondent).

On April 28, 2014, the defendant in the criminal case elected to have the Respondent determine his punishment in the event of his conviction. The following day, the Respondent posted the following separate comments on her Facebook page:

> Opening statements this morning at 9:30 am in the trial called by the press "the boy in a box" case.
>
> After we finished Day 1 of the case called the "Boy in the Box" case, trustees from the jail came in and assembled the actual 6'x8' "box" inside the courtroom!
>
> This is the case currently in the **[**8]** 405th!

In the third post listed above, the Respondent included a link to a *Reuters* article entitled "Texas father on trial for putting son in box as punishment."

On the third day of trial, defense counsel in the criminal case filed a motion to recuse the Respondent and a motion for mistrial based on the Respondent's Facebook activities. A visiting judge assigned to hear the motion to recuse granted the motion and removed the Respondent from the case. The case was transferred to another court and that judge granted the defendant's motion for mistrial, causing the case to be retried. In the subsequent trial, the defendant was acquitted of the charges.

After the initial complaint was filed, the Commission examined all of the Respondent's Facebook postings and found other postings it believed improper. On February 5, 2014, the Respondent posted the following comment on her Facebook page regarding another matter pending in her court:

> We have a jury deliberating on punishment for two counts of possession of child pornography. It is probably one of the most difficult types of cases for jurors (and the judge and anyone else) to sit through because of the evidence they have to see. Bless the jury **[**9]** for their **[*848]** service and especially bless the poor child victims.

At the time of the post, the jury had heard the evidence on punishment and was deliberating in the case.

On May 13, 2014, the Respondent posted the following Facebook comment regarding another case:

We finished up sentencing today with a very challenging defendant.

The Special Court of Review held a trial de novo on July 20 and 21, 2015. At the hearing, to prove its case the Commission called a complaining witness by deposition, called the defense attorney who initially complained of the Respondent's postings and filed the motion to recuse, and called the Respondent.

## II. DISCUSSION

### A. Applicable Law

The Texas Constitution provides that a judge may be disciplined for a willful violation of the Code of Judicial Conduct or for willful or persistent conduct that is clearly inconsistent with the proper performance of his or her duties or that casts public discredit upon the judiciary or administration of justice. *Tex. Const. art. V, § 1-a(6)(A)*. For purposes of Article V, Section 1-a, "'wilful [sic] or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties'" includes willful violation of a provision of the Code of Judicial Conduct. **[**10]** *Tex. Gov't Code Ann. § 33.001(b)(2)*.

"Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence." *In re Sharp, 480 S.W.3d 829, 2013 WL 979361, at *2 (Tex. Spec. Ct. Rev. 2013)*; *Davis, 82 S.W.3d at 148*; *In re Bell, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995)*. A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined. *Davis, 82 S.W.3d at 148*; *see In re Barr, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998)*.

### B. Social Media and Judicial Conduct

"Social media is having a transformative effect on society as it revolutionizes the way we share information and ourselves." John G. Browning, *Symposium: Social Media and the Law: Keynote Address*, 68 U. Miami L. Rev. 353, 359 (2014). In *Youkers v. State*, the Dallas Court of Appeals considered an allegation that a trial judge's designation as a "friend" of a victim's father on Facebook constituted a basis for recusal. *Youkers v. State, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, pet. ref'd)*. In reaching its decision, the court found that no rule, canon of ethics, or judicial ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook. *Id.* "The general premise that judges are not prohibited from using social media is consistent with the current standards suggested by the American Bar Association, as well as recent articles addressing the topic." *Id., see* **[**11]** , e.g., ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 462 (2013); Susan Criss, *The Use of Social Media by Judges*, 60 The Advoc. 18 (2012); Gena Slaughter & John G. Browning, *Social Networking Dos and Don'ts for Lawyers and Judges*, 73 Tex. B.J. 192 (2010). However, the Dallas Court of Appeals warned that while the use of social media websites "'can benefit judges in both their personal and professional lives,' the use presents concerns unique to the role of the judiciary in our justice system" because "an independent and honorable judiciary is indispensable to justice in our society[,]" and, **[*849]** "[t]hus, judges must be mindful of their responsibilities under applicable judicial codes of conduct." *Youkers, 400 S.W.3d at 205* (internal citations omitted). "While the technology involved may be newer, at their core, social networking sites are simply platforms for communication and social interaction. Judges have had to contend with the ethical risks, such as the appearance of impropriety posed by other forms of social interaction for decades, if not centuries." John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. Miami L. Rev. 487, 490 (2014). "Existing rules of judicial conduct are more than sufficient to provide guidance when it comes to judges' use of social media, once one recognizes that communications and interaction via social media are no different in their implications than more traditional forms of communication." *Id.* Thus, our analysis of the allegations of misconduct alleged against the Respondent should not change simply because the communication occurred online rather than offline. *See Youkers, 400 S.W.3d at 206*. Our analysis, therefore, should focus on the substance of the comments rather than the vehicle by which they were disseminated.

**C. Analysis**

**1. Charge I**

At least two attorneys involved in the pending criminal case complained to the Commission about the Respondent's comments on Facebook, which were about the pending trial. They complained that the Respondent's actions violated the provision of Canon 2 of the Code of Judicial Conduct requiring that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Tex. Code Jud. Conduct, Canon 2(A), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B (West 2013). The evidence supports that the Respondent was motivated by the admonition of the Preamble to the Code of Judicial Conduct for judges to "strive to enhance and maintain confidence in our legal system," as she sought to educate the public of the events occurring in her court. *See* Tex. Code Jud. Conduct, Preamble. However, as noted by John Browning, **[**12]** a recognized expert in the field of legal ethics and the use of social media in the legal system, any extrajudicial comment by a judge about a pending case can pose a problem.

The Commission alleges in Charge I that the Respondent's postings violated Canon 3(B)(10) of the Texas Code of Judicial Conduct. This Canon states, in pertinent part:

> A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.
>
> . . . .
>
> This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Tex. Code Jud. Conduct, Canon 3(B)(10). We note at the outset that Canon 3(B)(10) does not constitute a complete prohibition against a judge ever commenting about a pending proceeding.[3] Instead, the Canon only prohibits a comment "which suggests to a reasonable person the judge's probable decision on any particular

[3] Canon 3(B)(10) also applies to "impending" proceedings "which may come before the judge's court." Since this case only involves a "pending" proceeding, we only will omit further reference to "impending" proceedings.

case." In **[*850]** this regard, Canon 4(A) of the Texas Code of Judicial Conduct states that, "A judge shall conduct all of the judge's extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with **[**13]** the proper performance of judicial duties." Tex. Code Jud. Conduct, Canon 4(A).[4]

The first comment by the Respondent stated, in part, "We have a big criminal trial starting Monday!" The Commission criticized the Respondent's use of the adjective "big" and the exclamation point, indicating that she was attempting to sensationalize the matter before her court for self-aggrandizement. Defense counsel in the underlying criminal trial testified that the comment raised concerns that because the Respondent felt the case was a "big" case, she might be unduly influenced by public opinion and thus, the comment cast doubt upon her impartiality. However, defense counsel testified that while he may not have agreed with all of the Respondent's rulings in the case, he never observed any action or ruling that he felt was biased for or against either party. The only other witness critical of the Respondent's statement **[**14]** was the attorney ad litem for the child in the same underlying criminal trial, who actively sought prosecution of the criminal defendant stepparent. She testified that the Respondent's comment could have been interpreted by some as indicating that the Respondent was biased and favored the prosecution.

In her defense, the Respondent presented testimony from Renee Knake, a law professor from Michigan State University College of Law and a published author in the field of legal ethics and judicial ethics; John Browning, a lawyer and published authority regarding the legal and judicial ethics surrounding the use of social media; the Honorable Lonnie Cox, Judge of the 56th Judicial District Court of Galveston County, Texas; and the Honorable Amy Clark Meachum, Judge of the 201st District Court of Travis County, Texas.

As indicated above, after the trial of the underlying criminal case had begun, the Respondent posted two additional comments about the case on her Facebook page wherein she referred to the case as "the boy in a box case."

Counsel for the criminal defendant testified that it was part of his defensive strategy to avoid calling the structure a "box" in front of the jury to avoid **[**15]** any prejudice from that connotation. Defense counsel complained that he felt the comment regarding the "box" violated Canon 3, suggesting to a reasonable person the Respondent's probable decision on her ruling on any objection to having the "box" presented before the jury. In a pretrial hearing, defense counsel argued a motion *in limine* to limit the use of the term "box" to describe the wooden enclosure at trial, arguing that the term was prejudicial to the defendant and misstated the evidence. The Respondent denied defense counsel's motion, stating, "[c]alling it a wooden enclosure — certainly the press has referred to it as 'The Boy in the Box' case, that sort of thing. So I don't think that there's going to be prejudice. The jury can make up their own minds as to what they believe that is." The record shows that both the prosecutor and defense counsel sometimes referred to the structure in voir dire and opening statements as the "box" even before the Respondent posted her comments on Facebook.

**[*851]** Before the second comment referencing the box was posted by the Respondent, a videotape of the structure had been admitted into evidence and was viewed by the jury. Further, counsel for all parties **[**16]** met with the Respondent in open court and outside the presence of the jury to discuss the agreed-upon procedure for constructing the structure in the courtroom. In response to a question posed by the Respondent, defense counsel affirmatively stated on the record that he had no objection to proceeding in the agreed-upon manner of constructing the "box" in the courtroom. The record shows that the only objection lodged by defense counsel to the "box" during the first trial was that it was cumulative, which was overruled.

As indicated above, the Commission also considered comments the Respondent made regarding two other cases pending in her court. In the first case, she posted a comment that indicated that a jury was deliberating on punishment for two counts of possession of child pornography. The comment expressed the Respondent's opinion that that type of case was probably one of the most difficult "for jurors (and the judge and anyone else) to sit through because of the evidence they have to see." The comment concluded by thanking the jurors for their service but was worded as "[b]less the jury for their service and especially bless the poor child victims." With regard to yet another case, **[**17]** she posted a comment describing the defendant in the case as being "very challenging[.]"

The Commission relied solely on the Respondent's

[4] As noted previously, the Commission alleges in Charge II that the Respondent/s postings violated Canon 4(A).

testimony to support its position regarding these two additional comments. In her testimony, the Respondent explained that her comments were meant to express her appreciation to the jurors for their service in a particularly difficult case and to describe her day with a particularly challenging defendant who spat upon the judge and used profanity in the courtroom. The Respondent testified that she made a campaign promise to be transparent and to keep the public informed of the cases being tried in her court. She testified that she made the Facebook comments in order to keep that promise to her constituents. Reelection in the future may also have motivated the Respondent in part, but that goal is not necessarily inconsistent with the proper performance of her duties as a judge. The Respondent presented expert witness testimony that her Facebook comments did not violate the Canons of the Code of Judicial Conduct, did not amount to willful or persistent conduct clearly inconsistent with the proper performance of the judge's duties, and did not cast public **[**18]** discredit upon the judiciary or administration of justice.

In *Sharp* and *Davis*, two cases where the judges' conduct was found to be willful or persistent, the judges' actions were shown to have been an intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment. *See* *Sharp, 480 S.W.3d 829, 2013 WL 979361, at *3-5, *7*; *Davis, 82 S.W.3d at 148*. Here, the testimony from the Respondent was that she read and considered the Canons before making her comments on social media. However, we find troublesome that these comments go beyond mere factual statements of events occurring in the courtroom and add the judge's subjective interpretation of these events at or near the time of their occurrence. Regardless, we find such comments, at most, showed what amounted to an error in judgment by posting facts from a pending case in her court.

After considering all of the evidence presented in the trial de novo with regard to Charge I, the Special Court of Review finds that the credible evidence overwhelmingly preponderates in favor of a **[*852]** finding that Respondent did not violate Canons 3(B)(10) and 4(A) of the Code of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution. The Commission did not present evidence that the Respondent's extrajudicial statements would suggest to a reasonable person the judge's probable decision **[**19]** on any particular case or that would cause reasonable doubt on the judge's capacity to act impartially as a judge. Further, there was no evidence or legally insufficient evidence that the Respondent's comments rose to the level of willful or persistent conduct clearly inconsistent with the proper performance of the Respondent's duties as a judge. The Commission presented no evidence that the Respondent's actions amounted to an intentional or grossly indifferent misuse of her office.

While we have held that such communications did not rise to the level of communicating to others how the judge might have ruled in the case, the timing of the posts is troublesome for the judiciary. A judge should never reveal his or her thought processes in making any judgment. Even calling attention to certain facts or evidence found significant enough for the judge to comment on in a pending matter before any decision has been rendered may tend to give the public the impression that they are seeing into the deliberation process of the judge.

Additionally, extrajudicial comments made by a judge about a pending proceeding will likely invite scrutiny, as it did in this case. While the Respondent's comments **[**20]** were ultimately proven to not be suggestive of her probable decision on any particular case, the process for reaching this conclusion required the expenditure of a great deal of time, energy, and expense. And as this case illustrates, comments made by judges about pending proceedings create the very real possibility of a recusal (or even a mistrial) and may detract from the public trust and confidence in the administration of justice.

**2. Charge II**

The Commission additionally argues that implicitly, the Respondent's extrajudicial Facebook activities resulted in her recusal, as her postings were made the sole basis for the motion seeking her recusal. The Commission asserts that that fact alone is sufficient evidence that the Respondent violated the Canons of the Code of Judicial Conduct as the Respondent's extrajudicial Facebook comments interfered with the proper performance of her judicial duties as proscribed by Canon 4(A).

Recusal motions—even in the criminal context—are governed by *Rule 18a* and *Rule 18b of the Texas Rules of Civil Procedure*. *See Tex. R. Civ. P. 18a*, *b*. When a motion to recuse is filed, the trial judge is not a party to the motion and therefore, is not represented in the hearing and is not allowed an opportunity to appear and defend against **[**21]** the motion. *See Tex. R. Civ. P. 18(a)*. The visiting administrative judge who heard and

considered the motion to recuse in the criminal case did not testify in the trial de novo before the Special Court of Review, and there is no evidence of the factors or grounds he relied upon to recuse the Respondent from the underlying criminal trial. Ethical violations alone are not necessarily grounds for recusal. *See* Gaal v. State, 332 S.W.3d 448, 454-55 (Tex. Crim. App. 2011); Rosas v. State, 76 S.W.3d 771, 775 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Extrajudicial statements by a trial judge have been the subject of motions to recuse in other cases. In *Simpson v. State*, the Houston Court of Appeals held that violations of the Code of Judicial Conduct will **[*853]** not support recusal without further evidence of bias. No. 01-12-00380-CR, 2014 Tex. App. LEXIS 6527, 2014 WL 2767126 *10 (Tex. App.—Houston [1st Dist.] June 17, 2014, pet. Ref'd) (mem. op., not designated for publication). In that case, the court acknowledged that judges have their own personal opinions, but unless the movant can establish judicial bias, it is presumed that a judge will base her judgment upon the facts as they are developed at the trial. *Id.*

Sometimes the judge may need to recuse herself, or be recused, even though she has no actual bias and would do her very best to weigh the scales of justice equally between contending parties. *See, e.g.,* Keene Corp. v. Rogers, 863 S.W.2d 168, 180 (Tex. App.—Texarkana 1993, no writ). It is recognized that people **[**22]** who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. *Id.* The judiciary must strive to not only give all parties a fair trial, but also maintain a high level of public trust and confidence. *See* Indem. Ins. Co. v. McGee, 163 Tex. 412, 356 S.W.2d 666, 668 (Tex. 1962). We are not charged with reviewing the administrative judge's decision to recuse the Respondent, but only whether the Respondent's actions violated the Code of Judicial Conduct. Each involves implementation of separate and distinct standards of review.

Without further evidence, the panel finds the Commission has not met its burden to prove by a preponderance of the evidence any violation of Canon 4(A) arising solely from the Respondent's recusal. Accordingly, we find the Respondent not guilty of any violation of Canon 4(A) for being recused from a case pending in her court.

**3. Charge III**

In Charge III, the Commission criticizes the Respondent for disregarding her own admonition to the jury about the use of social media during a trial. As such, the Commission charged that the Respondent failed to uphold her duty to promote and maintain public confidence in the integrity, impartiality, and independence of the judiciary, in **[**23]** violation of Article V, Section 1-a(6)(A) of the Texas Constitution, by posting a link on social media to an online news article about the pending trial, which may have contained extraneous facts.

In the underlying criminal trial, the Respondent provided the jury with two admonitions concerning the use of social media. The Respondent provided the jury with a written admonition concerning their *receipt* of information during the trial. She admonished the jury that they were to guard themselves from receiving any evidence except that which was introduced in the trial of the cause. This admonition prohibited the jurors from reading any newspapers, watching the local news, or engaging in social media where they may come in contact with outside influences. The Respondent concluded this written admonition about the receipt of extraneous information about the case with the following statement: "These rules apply to jurors the same as they apply to the parties and to me."

The Respondent additionally provided the jury with an oral admonition concerning their *disclosure* of information about the case during the trial. Specifically, she admonished the jury as follows:

> During the trial of the case, as I mentioned before, you cannot talk to anyone. So **[**24]** make sure that you don't talk to anyone. Again, this is by any means of communication. So no texting, e-mailing, talking person to person or on the phone or Facebook. Any of that is absolutely forbidden.

**[*854]** This oral admonition concerning the disclosure of information about the case by the jury was not accompanied by a statement to the effect that the same rules applied to the parties or the judge. In an apparent disregard of her own admonitions to the jurors concerning their receipt of information, the Respondent posted a link to a *Reuters* article describing the trial.

The Court of Criminal Appeals has held that a trial judge's refusal to poll the jury mid-trial to determine whether the jurors had been influenced by a newspaper article was proper when the trial judge repeatedly admonished the jury not to read any newspaper articles concerning the case. *See* Powell v. State, 898 S.W.2d

821, 828 (Tex. Crim. App. 1994). In *Powell*, the appellant argued that the trial court's refusal to poll the jury was error. *Id.* The Court of Criminal Appeals held that the trial judge's refusal to poll the jury was correct after the trial judge reiterated its admonishments not to read any newspapers. *Id.*

In *Powell*, the trial judge was necessarily exposed to the substance **[**25]** of the newspaper article because the defendant brought the article to the judge's attention in order to request the judge to poll the jury to see if any improper influence had been brought to bear on the jury members. *Id.* Judges, as gatekeepers of the evidence that is admitted before the jury, are routinely exposed to inadmissible evidence. As the Texas Court of Criminal Appeals pointed out in *Layton v. State*, the rules of evidence place the "trial judge in the role of a 'gatekeeper,' whose responsibility it is to weed out inadmissible evidence...." 280 S.W.3d 235, 241 (Tex. Crim. App. 2009). The rules recognize that certain evidence "has the ability to mislead a jury that is not properly equipped to judge the probative force of the evidence[,]" and thus, it is the role of the judge to determine whether the evidence offered is relevant and reliable for a jury to consider. *Id.* Implicit in that acknowledged role is that judges are properly equipped to judge the probative force of any evidence and separate that from any decision that must be rendered in cases that come before them.

Here, there was no evidence to suggest that the Respondent used extraneous evidence in any improper manner to the prejudice of either party before **[**26]** her. In this regard, there is no evidence that the *Reuters* article contained any extraneous information that was not already made known to the Respondent in her capacity as the judge presiding over the defendant's trial. Further, the Respondent took the extra step of polling the jury during the trial and every member of the jury panel answered affirmatively that he or she had not seen or been exposed to anyone's social media posts regarding the trial. No evidence presented by the Commission rises to the level of willful or persistent conduct as required by the Texas Constitution.

We hold the preponderance of the evidence shows no constitutional violation by the Respondent by her posting a link to the *Reuters* article on social media during the pendency of the trial in her court. Accordingly, we find the Respondent not guilty of violating Article V, Section 1-a(6)(A) of the Texas Constitution for posting a public comment referring to media reports of a trial pending in her court after having admonished the jury to refrain from viewing any media coverage of the trial while they were serving on the jury panel.

Finally, as noted previously, the "Factual Allegations" of the Commission's Charging Document cites the "Hang'Em High" comment that **[**27]** a person posted on the Respondent's Facebook page. This comment is not specifically referenced in **[*855]** any of the three Charges presented by the Commission.

The evidence elicited at the trial de novo revealed that the comment was unsolicited by the Respondent and was removed by the Respondent as soon as it was brought to her attention. Our review of the Canons does not indicate any express requirement for judges to patrol their social media websites to either delete or disavow any comments made by others. We are reluctant to impose a requirement of this type in the absence of an express requirement in the Canons. Furthermore, we find that a reasonable person would not believe that a comment of this type made by a third party would cause a judge to become biased or partial for or against one party or that a judge-host of the page is condoning the sentiments of any such unsolicited comment from the mere fact that it is posted on the judge's wall. However, judges should be cautious and exercise discretion to avoid posting factual statements regarding pending proceedings that may invite disparaging comments about the parties, the judiciary, or the administration of justice.

We conclude the Commission **[**28]** has failed to meet its burden of proving by a preponderance of the evidence that the Respondent, Judge Slaughter, violated the Canons of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution when an unsolicited comment was posted on her social media website.

Accordingly, we find the Respondent not guilty of all charges and we dismiss the Commission's public admonition. *See Tex. Rules Rem'l/Ret. Judg. R. 9(d)*.

**CHARGES DISMISSED**.

**PER CURIAM**

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Pet. Denied

# *Tex. Ethics Comm'n v. Sullivan*

Court of Appeals of Texas, Second District, Fort Worth

November 5, 2015, Delivered; November 5, 2015, Opinion Filed

NO. 02-15-00103-CV

**Reporter**
2015 Tex. App. LEXIS 11518 *; 2015 WL 6759306

TEXAS ETHICS COMMISSION, APPELLANT AND APPELLEE v. MICHAEL QUINN SULLIVAN, APPELLEE AND APPELLANT

**Subsequent History:** Petition for review denied by *Sullivan v. Tex. Ethics Comm'n, 2017 Tex. LEXIS 152 (Tex., Feb. 17, 2017)*

Decision reached on appeal by, Costs and fees proceeding at, Request denied by *Sullivan v. Tex. Ethics Comm'n, 2018 Tex. App. LEXIS 3462 (Tex. App. Austin, May 17, 2018)*

**Prior History: [*1]** FROM THE 158TH DISTRICT COURT OF DENTON COUNTY. TRIAL COURT NO. 14-06508-16. TRIAL COURT JUDGE: HON. STEVE BURGESS.

*In re Tex. Ethics Comm'n, 2015 Tex. App. LEXIS 2803 (Tex. App. Fort Worth, Mar. 25, 2015)*

**Counsel:** FOR APPELLANT/APPELLEE: ERIC J.R. NICHOLS, GRETCHEN S. SWEEN, BECK REDDEN LLP, AUSTIN, TEXAS.

FOR APPELLEE/APPELLANT: RICHARD D. HAYES, HAYES, BERRY, WHITE & VANZANT LLP, DENTON, TEXAS; JAMES E. "TREY" TRAINOR, III, BEIRNE, MAYNARD & PARSONS, L.L.P., AUSTIN, TEXAS; N. TERRY ADAMS, JR., JOSEPH M. NIXON, BEIRNE, MAYNARD & PARSONS, L.L.P., HOUSTON, TEXAS.

**Judges:** PANEL: GABRIEL, J.; LIVINGSTON, C.J.; and GARDNER, J.

## Opinion

### MEMORANDUM OPINION[1]

In this appeal, we are asked to determine the appropriate venue for an administrative respondent's appeal by trial de novo of a state agency's final administrative decision. We conclude that venue of the administrative respondent's appeal by trial de novo was mandatorily set in Travis County because the administrative respondent failed to proffer prima facie proof that he resided in Denton County at the time the cause of action accrued. Because the trial court concluded otherwise, we reverse the trial court's order denying the state agency's motion to transfer venue and remand for further proceedings.

### I. BACKGROUND

#### A. Administrative Enforcement Action [*2]

Michael Quinn Sullivan is the president of Empower Texans, a self-described "new media," nonprofit corporation located in Austin that seeks to "educate citizens about actions and activities of Texas elected officials" by scoring them based on a "fiscal responsibility index." The Texas Ethics Commission (the TEC) is a constitutionally created state agency, which is part of the legislative branch of Texas government, that is charged with administering and enforcing statutes governing elections and related governmental processes. *See* *Tex. Const. art. III, § 24a*; *Tex. Gov't Code Ann. § 305.035(a)* (West 2013), *§§ 571.001*, *571.061* (West 2012).

In March 2012, two members of the Texas House of Representatives filed sworn complaints against Sullivan with the TEC, alleging that Sullivan received compensation for directly contacting legislators, on

[1] *See* ***Tex. R. App. P. 47.4***.

behalf of Empower Texans, to influence specific legislation in 2010 and 2011 and that Sullivan had failed to register as required by the lobbyist-registration laws. *See* Tex. Gov't Code Ann. §§ 305.003(b), 305.035(c) (West 2013); *see also id.* §§ 305.035(a), 571.061(a)(1), 571.122 (West 2012) (empowering the TEC to administer and enforce lobbyist-registration requirement upon filed, sworn complaint). The TEC held a formal hearing and issued a unanimous, final decision on July 21, 2014, concluding that Sullivan **[*3]** twice had failed to register as a professional lobbyist, even though he directly communicated with legislators on behalf of Empower Texans to influence specific legislative action, and assessing a $10,000 civil fine. *See id.* § 305.032 (West 2013), §§ 571.132, 571.173 (West 2012). Sullivan received the final decision the same day it was issued.

### B. Appeal By Trial De Novo

On August 22, 2014, Sullivan appealed the TEC's final decision by filing a petition in a district court in Denton County, where he alleged he resided. *See id.* § 571.133(a) (West 2012). Sullivan alleged that his "cause of action" was a "de novo appeal of the [TEC's] July 21, 2014 Final Order pursuant to Tex. Gov't. Code § 571.133." The presiding, district-court judge was Judge Steve Burgess. As a result of Sullivan's petition, the TEC's final decision was automatically vacated. *See id.* § 2001.176(b)(3) (West 2008).

The TEC filed a motion to transfer venue to Travis County, supported by the affidavits of the TEC's executive director and an investigator hired by the TEC, alleging that Sullivan resided in Travis County and that mandatory venue, therefore, lay in Travis County. *See id.* § 571.133(a); Tex. R. Civ. P. 86.1, 87.3(a), *88*. The TEC's executive director attached to her affidavit four different lawsuits filed by Sullivan against the TEC **[*4]** and its individual commissioners, relying on venue statements he made in those pleadings to support the TEC's assertion that Sullivan resided in Travis County. These lawsuits were not considered by the TEC during its administrative enforcement action. The executive director also verified and attached the TEC's final decision against Sullivan. In response, Sullivan attached his affidavit in which he averred that he is a resident of Denton County. Although Sullivan objected to the investigator's affidavit,[2] he did not object to the executive director's affidavit or her attachments in his response to the TEC's motion to transfer venue. In its reply in support of its venue arguments, the TEC attached more evidence purporting to show that Sullivan resided in Travis County, none of which was a part of the underlying administrative enforcement proceeding.

Sullivan then filed an agreed motion to realign the parties because the TEC "still bears the burden of proof in this case," which Judge Burgess granted. *See* Tex. Gov't Code Ann. § 571.129 (West 2012) (specifying the TEC must determine violation by a preponderance of the evidence). The TEC filed a "First Amended Pleading as Realigned Plaintiff" and asserted that Sullivan failed to register as a lobbyist in 2010 and 2011 as statutorily required.

Sullivan then filed a motion to dismiss the TEC's failure-to-register claim, arguing that the TEC violated the Texas Citizens' Participation Act (the TCPA), an anti-SLAPP statute[3] by filing a legal action based on Sullivan's exercise of his *First Amendment* rights.[4] *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (West 2015). Sullivan also requested attorneys' fees, court costs, and sanctions against the TEC. *See id.* § 27.009(a) (West 2015).

On February 18, 2015, Judge Burgess held a hearing on the venue and dismissal motions, signed an order denying the motion to transfer venue, and orally granted the motion to dismiss. Five days later on February 23, 2015, the TEC filed a motion to recuse Judge Burgess, arguing that on the evening of February 18, 2015, a reporter for the Fort Worth Star-Telegram tweeted about

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[2] There is no indication in the record that Judge Burgess expressly ruled on Sullivan's objection to the affidavit, but Judge Burgess stated in his order denying the TEC's motion that it considered all the pleadings on file. This was an implicit overruling of Sullivan's objection. *Cf.* Frazier v. Yu, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied) (holding order granting summary judgment implicitly sustained **[*5]** movant's objections to nonmovant's affidavits). No party on appeal argues that the investigator's affidavit, which was not submitted during the administrative enforcement action, may not be considered in our review.

[3] SLAPP is an acronym for Strategic Lawsuits Against Public Participation. *See* Jardin v. Marklund, 431 S.W.3d 765, 769 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (op. on reh'g).

[4] Sullivan had also moved the TEC to dismiss the sworn complaints based on the TCPA in the administrative **[*6]** proceeding. See Tex. Gov't Code Ann. § 571.126(d) (West 2012). The TEC rejected Sullivan's argument in its final decision.

the hearing and noted that Judge Burgess followed Sullivan on Twitter: "Looks like the Denton judge who threw out [Sullivan], ethics complaint, [Judge Burgess], is [a Sullivan] Twitter follower." *See generally Tex. R. Civ. P. 18b(b)* (listing grounds justifying recusal of a judge). Eleven minutes after the reporter's tweet, Sullivan's attorney responded with this tweet: "I bet [Judge Burgess] also communicates, at least semi-annually, with the [TEC]." The next day at 5:57 a.m., the reporter posted on Twitter that Judge Burgess had deleted his Twitter account: "1 day after ruling in [Sullivan's] favor without disclosing he's a Twitter follower, judge deletes account." The regional presiding judge assigned a judge to hear the motion to recuse, and the **[*7]** assigned judge granted the motion. *See Tex. R. Civ. P. 18a(g)(1)*. On March 9, 2015, the regional presiding judge assigned Judge David Cleveland, a senior district judge, to preside in the appeal by trial de novo of the TEC's final decision. *See Tex. R. Civ. P. 18a(g)(7)*.

Two days later on March 11, 2015, Sullivan moved for an award of attorneys' fees as a prevailing party under the TCPA based on Judge Burgess's prior oral grant of his motion to dismiss at the hearing on February 18, 2015, and further moved for sanctions against the TEC. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a). Sullivan averred that his quick action was necessitated by the statutory, 30-day deadline under which the court was required to rule on his motion to dismiss after the date of the February 18, 2015 hearing or risk that it would be denied by operation of law. *See id.* §§ 27.005(a), 27.008(a) (West 2015). The TEC filed a motion to reconsider its motion to transfer venue on March 17, 2015.

The next day, Judge Cleveland held a hearing to address Sullivan's motion for attorneys' fees, his motion to dismiss, and the TEC's motion to reconsider. Sullivan argued that the only pending issue was his motion for attorneys' fees because application of the TCPA had been finally decided by Judge Burgess; thus, any written order granting **[*8]** the motion to dismiss and awarding attorneys' fees was "a ministerial task." Sullivan also asserted that the TEC's motion to transfer venue could not be reconsidered because further venue motions were barred by the rules. *See* Tex. R. Civ. P. 87.5. In summary, Sullivan argued that "[t]here's no reason to undo Judge Burgess'[s] orders." Although Judge Cleveland stated at the hearing that he did not "think the case ought to be dismissed," he considered the pleadings and affidavits and signed an order on March 18, 2015, granting Sullivan's motion to dismiss under the TCPA, awarding him "- 0 -" in court costs and attorneys' fees, and awarding no sanctions against the TEC. Judge Cleveland did not expressly rule on the TEC's motion to reconsider the venue determination, but the order included language that "any relief not expressly granted herein is denied." Neither Sullivan nor the TEC requested findings of fact and conclusions of law. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.007 (West 2015); *Tex. R. Civ. P. 296*. Both the TEC and Sullivan appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.008; Tex. Gov't Code Ann. § 2001.901(a) (West 2008); *Tex. R. App. P. 25.1(c)*.

## II. DETERMINING PROPER VENUE FOR APPEAL BY TRIAL DE NOVO

When an administrative respondent files an appeal by trial de novo from a final decision of the TEC, he must file the petition "in a district court in Travis **[*9]** County or in the county in which the respondent resides." Tex. Gov't Code Ann. § 571.133(a); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 15.016 (West 2002). In its first issue, the TEC asserts that this mandatory venue provision operated to place venue solely in Travis County because Sullivan did not reside in Denton County at the time the cause of action accrued; thus, because Denton County was a county of improper venue under section 571.133(a), the TEC argues that Judge Burgess erred by denying its motion to transfer and that Judge Cleveland erred by denying its motion to reconsider the venue ruling. *See* In re Reynolds, 369 S.W.3d 638, 647 (Tex. App.—Tyler 2012, orig. proceeding) (discussing trial court's authority to reconsider denial of motion to transfer venue if plenary power has not expired); Fincher v. Wright, 141 S.W.3d 255, 260 (Tex. App.—Fort Worth 2004, orig. proceeding & no pet.) (same).

### A. TEC'S ABILITY TO CHALLENGE VENUE

Sullivan asserts that section 571.133 gives only the administrative respondent—Sullivan—the initial right to choose venue and the subsequent right to transfer venue to another county of mandatory venue if his initially chosen county is not sustainable; therefore, the TEC could not seek to transfer venue. *See* Tex. Gov't Code Ann. § 571.133(a), (d). Sullivan argues, therefore, that "there is no basis under the plain language of section 571.133 for the TEC's motion to transfer venue in the first place," requiring this court to affirm Judge Burgess's **[*10]** order denying the TEC's motion to

transfer.

Section 571.133 does provide that the administrative respondent initially chooses venue for his petition for review by trial de novo of the TEC's final decision. *Id.* § 571.133(a). Because the TEC could not appeal its own final decision, it necessarily follows that the administrative respondent would choose venue for his petition seeking to appeal the TEC's final decision in a trial de novo. *See id.* (authorizing respondent or respondent's agent to appeal TEC's final decision by filing petition). Section 571.133 further allows the administrative respondent to "request that the appeal be transferred to a district court in Travis County or in the county in which the respondent resides, as appropriate," within thirty days after he filed the petition initiating the appeal by trial de novo. *Id.* § 571.133(a), (c). But we do not read this provision to mean that the TEC has no right to challenge the administrative respondent's choice of venue. Section 571.133(c) merely provides that after an administrative respondent files a petition to appeal the TEC's final decision, he then has thirty days to request an automatic transfer to one of the permissible counties allowed by section 571.133(a). Neither this subsequent right of automatic transfer **[*11]** nor the initial right to choose venue, which are both expressly vested in the administrative respondent, precludes the TEC's ability to challenge the venue chosen by the administrative respondent in filing his appeal of the final decision by trial de novo. As argued by the TEC, such an interpretation would render the TEC "powerless when the respondent filed in an improper venue," which "makes no sense." *See generally id.* § 311.023(5) (West 2013) (allowing courts to consider "consequences of a particular construction" in construing a statute); State v. Hodges, 92 S.W.3d 489, 494 (Tex. 2002) (allowing courts to consider statute's objectives and consequences of particular construction even if statute is clear and unambiguous).

Indeed, Sullivan notes that the TEC "may deny a respondent's venue facts" or may "present[] conclusive evidence" contradicting an administrative respondent's "prima facie proof that venue is proper in the county of suit"; however, Sullivan fails to recognize that the procedural device by which the TEC would do so would be a motion to transfer venue. *See* Tex. R. Civ. P. 86.1. *See generally* Wichita Cty. v. Hart, 917 S.W.2d 779, 781 (Tex. 1996) ("A defendant raises the question of proper venue by objecting to a plaintiff's venue choice through a motion to transfer venue."). Although Sullivan asserts **[*12]** that only he—as the administrative respondent—would be allowed to choose another proper county of mandatory venue if the TEC successfully challenged his initial choice of venue, the only remaining mandatory county in this instance is Travis County. We conclude that the TEC had the power to move to transfer venue based on an alleged improper venue choice by the administrative respondent, as would any other party in a civil action. *See* Tex. Gov't Code Ann. §§ 571.133(d), 2001.173(a) (West 2008) (mandating that reviewing court in appeal by trial de novo shall try all issues of fact and law as in other civil cases); *see also* Tex. R. Civ. P. 87.2(a) (discussing burdens of establishing venue in terms of "party," not "plaintiff" or "defendant"); *cf.* Korndorffer v. Baker, 976 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1997, pet. dism'd w.o.j.) ("[W]here the application of the statute's plain language would lead to absurd consequences that the legislature could not have possibly intended, we will not apply the statutory language literally.").

### B. Standard And Scope Of Review

Because the legal issue of venue must be tried "in the manner applicable to other civil suits," we apply the general venue statutes and rules to our review of Judge Burgess's venue determination. Tex. Gov't Code Ann. § 571.133(d); *see also id.* § 2001.173(a). We review Judge Burgess's order denying the TEC's motion to transfer venue by **[*13]** considering the entire record and must uphold his venue determination if there is any probative evidence—pleadings, affidavits, or attachments—supporting it.[5] *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.064; Tex. R. Civ. P. 87.3(b), *88*; Bonham State Bank v. Beadle, 907 S.W.2d 465, 471 (Tex. 1995); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757-58 (Tex. 1993) (op. on reh'g); Killeen v. Lighthouse Elec. Contractors, L.P., 248 S.W.3d 343, 347 (Tex. App.—San Antonio 2007, pet. denied). In other words, if there is any probative evidence in the entire record that venue

[5] We note that when the application of a mandatory venue provision is challenged by mandamus, the standard of review is abuse of discretion. *See, e.g.*, In re Signorelli Co., 446 S.W.3d 470, 473 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). Although the TEC initially sought mandamus **[*15]** relief from the trial court's denial, we dismissed the mandamus petition on the TEC's motion after Judge Cleveland dismissed the case under the TCPA. In re Tex. Ethics Comm'n, No. 02-15-00085-CV, 2015 Tex. App. LEXIS 2803, 2015 WL 1499033, at *1 (Tex. App.—Fort Worth Mar. 25, 2015, orig. proceeding).

was proper[6] in the county where venue is chosen, we must uphold the trial court's determination even if the preponderance of the evidence is to the contrary. *See* Ruiz, 868 S.W.2d at 758; Gilcrease v. Garlock, Inc., 211 S.W.3d 448, 459 (Tex. App.—El Paso 2006, no pet.). We review the entire evidentiary record in the light most favorable to the venue ruling while giving no deference to the trial court's application of the law. Ruiz, 868 S.W.2d at 758; Garza v. State & Cty. Mut. Fire Ins. Co., No. 2-06-202-CV, 2007 Tex. App. LEXIS 3070, 2007 WL 1168468, at *3 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied) (mem. op.). Both Sullivan and the TEC state in their briefing that Judge Burgess did not consider the TEC's attachments to its venue pleadings in ruling on its motion to transfer venue. But Judge Burgess specifically stated in the denial order that he considered "the pleadings on file," which would include any pleading attachments. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.064(a) (West 2002); Tex. R. Civ. P. 87.3(b), *88*; *see also Tex. R. Civ. P. 59* (recognizing "written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made **[*14]** a part of the pleadings" by attachment). The order controls over any statements made at the hearing. *See* Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S.W.2d 561, 566 (Tex. 1937) ("Judgments and orders of courts of record to be effectual must be entered of record."); In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 914 n.3 (Tex. App.—Dallas 2006, orig. proceeding) (holding conflict between oral pronouncement and written order resolved in favor of order). Further, other than the final decision, which the TEC attached for jurisdictional purposes, none of the TEC's attached venue proof was a part of the underlying administrative proceeding; thus, section 571.133(d) does not apply to bar consideration of the venue attachments as Sullivan seems to argue. *See* Tex. Gov't Code Ann. § 571.133(d) (in trial de novo, barring trial court's admission "in evidence the fact of prior action by the [TEC] or the nature of that action" except to show trial court's jurisdiction). Indeed, venue was not at issue in the administrative proceeding. Thus, the TEC's attachments to its venue pleadings are part of the entire record we are to consider in our review of Judge Burgess's venue ruling and Judge Cleveland's refusal to reconsider.

Sullivan filed his petition initiating an appeal by trial de novo in Denton County as the alleged county of his residence, and the TEC specifically denied Sullivan's pleaded venue fact. Thus, under the venue rules, Sullivan was required to present prima facie proof that Denton County was a county of his residence by any probative evidence. *See* Tex. R. Civ. P. 87.3(a); GeoChem Tech Corp. v. Verseckes, 962 S.W.2d 541, 543 (Tex. 1998); Wilson v. Tex. Parks & Wildlife Dep't, 886 S.W.2d 259, 262 (Tex. 1994). A party's prima facie proof of his residence, standing alone, is sufficient to constitute probative evidence supporting the choice of venue, which cannot be rebutted except through conclusive evidence to the contrary. *See* Ruiz, 868 S.W.2d at 757-58; Rosales v. H.E. Butt Grocery Co., 905 S.W.2d 745, 750 (Tex. App.—San Antonio 1995, writ denied) (op. on reh'g); *see also* Tex. R. Civ. P. 87.3(a). Prima facie proof is a minimal evidentiary hurdle and need only support a rational inference that the factual venue allegation is true. *See* Rosales, 905 S.W.2d at 748.

### C. Application

We now turn to our review of the venue determinations made by Judge Burgess and Judge Cleveland, which is a threshold **[*16]** question. Again, statutory, mandatory venue lay in up to two counties: Travis County and the county of Sullivan's residence. The TEC asserts that Travis County and the county of Sullivan's residence were the same and that no probative evidence showed that Sullivan resided anywhere other than Travis County at the time the claim accrued.

#### 1. Accrual Date

Judge Burgess was required to determine venue "based on the facts existing at the time the cause of action that is the basis of the suit accrued." Tex. Civ. Prac. & Rem. Code Ann. § 15.006 (West 2002). The TEC argues that the suit accrued, at the latest, on the date it issued its final decision and when Sullivan received it—July 21, 2014. Sullivan suggests that accrual could have occurred when Sullivan filed his petition to appeal the TEC's final decision—August 22, 2014—or when the TEC filed its petition as a realigned plaintiff—December 23, 2014. At oral argument, Sullivan argued that the accrual date was August 22, 2014.

Accrual means the point in time at which the right to institute suit arose, not when the right is exercised. *See* Shamrock Oil & Gas Corp. v. Price, 364 S.W.2d 260,

[6] "Proper venue" is statutorily defined as "the venue required by . . . [a] statute prescribing mandatory venue." Tex. Civ. Prac. & Rem. Code Ann. § 15.001(b)(1) (West 2002).

262 (Tex. Civ. App.—Amarillo 1963, no writ) ("By the expression 'the cause of action or a part thereof accrued' [the venue statute] means the right to institute and maintain suit[,] and whenever **[*17]** one person may sue another[,] a cause of action has accrued."); *cf.* S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) (discussing "accrual" in the context of statutes of limitations). Sullivan's right to an appeal by trial de novo, which is the "cause of action" he initially brought in Denton County, arose or accrued on the date Sullivan received the TEC's final decision—July 21, 2014. *See* Tex. Gov't Code Ann. § 571.133(b) (starting appellate timetable from the date final decision received by respondent); Gen. Motors Acceptance Corp. v. Howard, 487 SW.2d 708, 710 (Tex. 1972) (holding venue in county of residence established through evidence of date of accrual of claim and plaintiffs' residence in that county on that date). Therefore, we look to the entire record for probative venue evidence supporting the trial court's decision that Sullivan resided in Denton County as of July 21, 2014. *See* In re Socorro Indep. Sch. Dist., No. 13-09-00500-CV, 2010 Tex. App. LEXIS 2126, 2010 WL 1138451, at *5 (Tex. App.—Corpus Christi Mar. 22, 2010, orig. proceeding) (mem. op.) ("In sifting through the foregoing [venue] evidence, . . . we must focus our attention on the real parties' residence at the time of the accrual of their causes of action.").

**2. Proffered Venue Evidence**

In his petition, Sullivan alleged that he resided in Denton County. The TEC then specifically denied this venue fact in its motion to transfer venue. The TEC attached to its venue **[*18]** pleadings four separate complaints and petitions Sullivan filed against the TEC in state and federal courts located in Travis County and in which Sullivan alleged he was a resident of Travis County. Sullivan made these venue allegations between September 3, 2013, and August 18, 2014. An investigator hired by the TEC averred in his October 10, 2014 affidavit that Sullivan owned a home in Travis County at least since 2003, which he declared to be his homestead for 2014 for property-tax purposes, and that he was registered to vote in Travis County, although Sullivan had filed a voter-registration application in Denton County on September 24, 2014, and identified his address as an apartment in Denton County. Sullivan's vehicles were registered with the state at his Travis County address, and his driver's license listed his address as being in Travis County. The investigator noted that Sullivan announced on his website[7] on August 21, 2014 that "the Sullivans have decided to renounce residency in Travis County. I'm moving my residency somewhere that respects the rule of law." Before October 13, 2014, Sullivan's wife stated on her Facebook page that she lived in Travis County.

Sullivan responded and attached his December 19, 2014 affidavit in which he averred he had been a resident of Denton County "for more than one year":

> I am a resident of Denton County. . . . I have resided in Denton County for more than one year. My employer has had an office in north Texas for eighteen . . . months and I have been routinely coming to Denton County to work out of the office and surrounding area throughout that time. I will be working and residing in Denton County and north Texas for the foreseeable future.
>
> I have an apartment in Denton County. I entered into a lease on August 21, 2014 . . . . The lease is for one year. . . .
>
> It is my intent to reside in Denton County permanently. Both my wife and I are registered to vote in Denton County and we registered to vote in Denton County immediately after signing a lease. In the last election in November, 2014, we voted in Denton County.
>
> All of my immediate family, including my **[*20]** parents, live in Denton County, some for more than fifteen . . . years. Prior to getting an apartment in Denton County, I considered my parents' home as my Denton County residence. I had a complete right of access to my parents' property.

Sullivan attached a copy of the one-year lease to his affidavit, which showed that only Sullivan would be living in the apartment.

In reply, the TEC attached a second affidavit from its hired investigator in which he averred that Empower Texans named Sullivan as its president and registered agent on August 27, 2014, and that Texans for Fiscal Accountability[8] named Sullivan as its registered agent

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[7] **[*19]** The website—www.michaelquinnsullivan.com—is not the Empower Texans website but identifies Sullivan as having "the honor of leading Empower Texans" and a goal "to make it easier for citizens to be informed and effectively engaged in our government." The site has links to the Empower Texans site.

[8] Texans for Fiscal Responsibility is an assumed name of

as of November 6, 2014. Both listed Sullivan's address as being in Travis County at that time. The investigator also noted that before September 17, 2014, the address for Empower Texans was in Travis County; however "[a]t some point thereafter," Empower Texans added a Dallas County address as one of its contact points. A paralegal for the TEC's attorney attached her affidavit in which she stated that Sullivan again listed the Travis County home as his homestead for 2015 for property-tax purposes.

**3. Prima Facie Proof**

The TEC argues, as it did before Judge Burgess, that Sullivan's assertions of residence in his December 2014 affidavit were conclusory and, thus, no probative evidence of his residence on the date of accrual. Affidavits regarding venue "must be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify." Tex. R. Civ. P. 87.3(a). *See generally* Surgitek, Bristol-Myers Corp. v. Abel, 997 S.W.2d 598, 603 (Tex. 1999) ("The usual types of prima facie proof in a venue determination—pleadings and affidavits establishing places of residence, principal offices, and even where the cause of action accrued—are usually objective enough that pleadings and affidavits can fairly be said to enable the trial court to correctly decide the [venue] issue.").

Sullivan's assertion that he was "a resident" of Denton County "for more than one year"—before December 2013—is nothing more than a legal conclusion unless it is supported by facts that establish such residence. *See* A.H. Belo Corp. v. Blanton, 133 Tex. 391, 129 S.W.2d 619, 622-23 (Tex. 1939) (holding allegation that plaintiff resided in county where suit was filed at the time claim accrued was legal conclusion); Republic Bankers Life Ins. Co. v. McCool, 441 S.W.2d 314, 315-16 (Tex. Civ. App.—Tyler 1969, no writ) (concluding venue affidavit statement that plaintiffs were "residents of Hopkins **[*22]** County" when cause of action accrued was legal conclusion unsupported by facts); *see also* Lenoir v. Marino, No. 01-13-01034-CV, 2014 Tex. App. LEXIS 12703, 2015 WL 4043248, at *14 (Tex. App.—Houston [1st Dist.] July 2, 2015, pet. filed) (op. on reh'g) ("[L]ogical conclusions are not improperly conclusory if they are based on underlying facts stated in the affidavit or its attachments."); Weech v. Baptist Health Sys., 392 S.W.3d 821, 826 (Tex. App.—San Antonio 2012, no pet.) ("A conclusory statement is one that does not provide the underlying facts to support the conclusion."). Sullivan relied on three facts, occurring before July 21, 2014, to establish his more-than-one-year residence in Denton County: (1) his self-described routine travel to Denton County to work in his employer's "office in north Texas" and the "surrounding area," (2) his "complete right of access" to his parents' Denton County home, which he considered to be his "Denton County residence," and (3) his "immediate family" has lived in Denton County, with some members residing there for more than fifteen years.[9]

For venue purposes, an individual may have more than one residence. Snyder v. Pitts, 150 Tex. 407, 241 S.W.2d 136, 139-40 (Tex. 1951) (orig. proceeding); Rosales, 905 S.W.2d at 748; Howell v. Mauzy, 899 S.W.2d 690, 697 (Tex. App.—Austin 1994, writ denied). To qualify as a second residence for venue purposes, the residence must meet three elements: (1) a fixed place of abode within the possession of the party, (2) occupied or intended to be occupied consistently over a substantial period of time, and (3) with an element of permanence. *See* Snyder, 241 S.W.2d at 140; In re Salgado, 53 S.W.3d 752, 762 (Tex. App.—El Paso 2001, orig. proceeding); Howell, 899 S.W.2d at 697; Moore v. Oliver, 295 S.W.2d 735, 737 (Tex. App.—Beaumont 1956, no writ). A person's declaration as to his intent is not conclusive. *See* Cauble v. Gray, 604 S.W.2d 197, 198 (Tex. Civ. App.—Dallas 1979, no writ); Kerr v. Davenport, 233 S.W.2d 197, 199 (Tex. Civ. App.—San Antonio 1950, no writ).

Where Sullivan's "immediate family,"[10] including his

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Empower Texans. **[*21]**

[9] The other facts Sullivan relied on to establish his residency occurred after July 21, 2014—the apartment lease, registering to vote in Denton County, voting in the December 2014 election in Denton County, his statement that he "will be working and residing in Denton County and north Texas for the foreseeable future," his statement that he had "decided **[*23]** to renounce residency in Travis County" and move "somewhere that respects the rule of law," and his assertion that his intention at the time he made the affidavit was "to reside in Denton County permanently." We note that his post-accrual statement renouncing residency in Travis County did not specify that he was moving to Denton County, only that he was moving where the "rule of law" was "respect[ed]."

[10] It is unclear whom Sullivan intended to include in his "immediate family" other than his parents. Aside from Sullivan's statements that his wife registered to vote in Denton

parents, lived is not probative as to where Sullivan lived at the operative time. *Cf.* Socorro, 2010 Tex. App. LEXIS 2126, 2010 WL 1138451, at *5-6 (holding venue proper in El Paso County even though party "born and raised" in Cameron County and intended Cameron County to be her permanent residence because claim accrued while party temporarily lived in El Paso **[*24]** County); Ward v. Lavy, 314 S.W.2d 381, 383 (Tex. Civ. App.—Eastland 1958, no writ) ("Ordinarily, a *minor's* [residence] is that of his parents." (emphasis added)). Further, his right of "access" to his parents' home in Denton County does not equate to a right of possession in that home sufficient to raise prima facie proof of a secondary residence. *See* Snyder, 241 S.W.2d at 140 ("For a place of abode to become a residence [under the first element of the secondary-residence test] the defendant must have some right of possession and not be a mere visitor."); *cf.* In re Kuntz, 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding) (holding access to documents not possession of documents under discovery rules). The plain meaning of possession includes an element of control or dominion over the property, while access is a broader term that confers the mere opportunity or ability to enter.[11] *See* *Access & Possession*, Black's Law Dictionary (10th ed. 2014); *cf.* Snyder, 241 S.W.2d at 140 (holding payment of rent meets the right-of-possession element to establish a secondary residence). *See generally* Zanchi v. Lane, 408 S.W.3d 373, 378 (Tex. 2013) (considering dictionary definitions in interpreting undefined, statutory term).

Finally, Sullivan's routine travel to Denton County to work for his employer in "north Texas" and the "surrounding area" is not prima facie proof of a secondary residence in Denton County. In the absence of other evidence showing that a person's presence within the county is fixed, consistent, and permanent, business activities in a particular county alone are insufficient to establish a secondary residence. Plains Ins. Co. v. Acuna, 614 S.W.2d 885, 887-89 (Tex. Civ. App.—Eastland 1981, no writ); Cauble, 604 S.W.2d at 199; Hanslik v. Dittfurth, 356 S.W.2d 495, 496 (Tex. Civ. App.—San Antonio 1962, no writ); Greer v. Newton, 245 S.W.2d 299, 303 (Tex. Civ. App.—Eastland 1951, no writ). Sullivan's business trips to Denton County, which are undefined as to frequency and duration, are not prima facie evidence that his "combined volition, intention[,] and action" before July 21, 2014 established a consistent occupancy in Denton County over a substantial period of time. Mills v. Bartlett, 377 S.W.2d 636, 637 (Tex. 1964); *see* Snyder, 241 S.W.2d at 141 (collecting cases on second element of secondary-residence test and concluding evidence that defendant spent five days a week in county for two consecutive years was consistent occupancy over **[*27]** a substantial period of time); Plains Ins., 614 S.W.2d at 887-89 (finding no evidence of secondary residence in Maverick County because plaintiff testified he previously rented a house in Maverick County to "live there for . . . several months" before leaving to work in other counties while his wife "sometimes" stayed in Maverick County, lived in Lubbock County at the time his claim accrued, and moved back to Maverick County after claim accrued); *cf.* Rosales, 905 SW.2d at 749 (reviewing record evidence—including evidence that Maverick County house, which was partially owned by party, "has always been his permanent residence which he has occupied for substantial periods of times in the past and intends to continue to occupy in the future"—and concluding party presented prima facie proof of secondary residence in Maverick County). Sullivan wholly failed to supply any underlying facts to support his vague and summary assertion of routine travel to Denton County to work in North Texas; therefore, his routine-travel assertion in his affidavit was a conclusion unsupported by facts and cannot be prima facie proof of

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County and that **[*25]** they "decided to renounce" their Travis County residency and would move—all of which occurred after the claim accrued—the venue evidence shows that his wife lived in the Travis County home that they had designated as a homestead for property-tax purposes. *Cf.* Weisenburg v. Teleprompter Corp., 605 S.W.2d 737, 739 (Tex. Civ. App.—Dallas 1980, no writ) (holding evidence of party's claimed homestead is some evidence that the party had a possession right, intended to occupy the property, and considered the property to be his permanent residence for venue purposes). Indeed, no one other than Sullivan was allowed to live in the Denton County apartment under the terms of Sullivan's lease.

[11] Sullivan implies that his right of access to his parents' home equated to "derivative possession," which established his secondary residence in Denton County. Other than defining "derivative possession," Sullivan provides no legal authority to support this argument. As we have concluded, Sullivan's bare right to "access" his parents' house does not equate to possession sufficient to establish a secondary residence and would meet no definition of a tenant or bailee as Sullivan seems to suggest. *See generally* Tex. Bus. & Com. Code Ann. § 7.102(a)(1) (West 2011) (defining bailee); Tex. Prop. Code Ann. § 92.001(6) (West 2014) (defining tenant). Indeed, people generally **[*26]** have access to many places, both public and private; but that access, without evidence of more, does not establish a fixed place of abode within the possession of the party that was permanent rather than temporary equating to a necessary element of a legal, secondary residence for venue purposes.

a secondary residence.

The facts occurring before the claim accrued likewise do not support his legal conclusion that he had a secondary **[*28]** residence in Denton County on July 21, 2014. *See* Blanton, 129 S.W.2d at 622-23 (holding allegation that plaintiff resided in county where suit was filed at the time claim accrued was legal conclusion). Therefore, his legal conclusion in his affidavit that he was a resident of Denton County did not qualify as prima facie proof because it was unsupported by facts showing that he had at least a secondary residence in Denton County on the date the claim accrued. *See* Tex. R. Civ. P. 87.3(a) ("Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed *fully and specifically setting forth the facts supporting such pleading*." (emphasis added)); *cf.* Cent. Tex. Elec. Co-op. v. Stehling, 282 S.W.2d 729, 730 (Tex. Civ. App.—San Antonio 1955, writ dism'd) (concluding party did not have secondary residence in Gillespie County because "he did most everything that he could have done to indicate that he was moving away from Gillespie County and establishing his home in Bexar County" approximately nine months before suit filed, including divesting himself of all property and business interests in Gillespie County); Gilbert v. Mecom, 247 S.W.2d 573, 573-74 (Tex. App.—San Antonio 1952, no writ) (affirming trial court's grant of defendant's motion to transfer venue out of Zapata County because evidence that defendant used ranch in Zapata County **[*29]** for "recreational purposes" did not show as a matter of law that ranch was fixed place of abode occupied consistently over a substantial period of time; thus, ranch was not secondary residence for venue purposes).

The TEC specifically denied Sullivan's allegation that he was a resident of Denton County. Thus, Sullivan was required to offer prima facie proof of at least a secondary residence in Denton County on the date the claim accrued. *See* Tex. R. Civ. P. 87.3(a); GeoChem Tech, 962 S.W.2d at 543. This he did not do. Accordingly, there was no probative evidence supporting the trial court's legal determination that venue was proper in Denton County, and no rational inference could have been made placing venue in Denton County at the time the claim accrued. The burden then shifted to the TEC to prove that venue was proper in its chosen county, which it met by raising an applicable mandatory-venue statute providing for venue in Travis County. *See* Tex. R. Civ. P. 87.2(a); In re Mo. Pac. R.R. Co., 998 S.W.2d 212, 221 (Tex. 1999) (orig. proceeding). Thus, Sullivan failed to offer any prima facie proof of a secondary residence as of July 21, 2014; therefore, Judge Burgess erred by denying the TEC's motion to transfer venue, and Judge Cleveland erred by denying its motion to reconsider. *See* Mo. Pac. R.R., 998 S.W.2d at 216 (holding trial court has no **[*30]** discretion to determine legal principles controlling its venue ruling or in applying the law to the facts). We sustain the TEC's first issue.

## III. CONCLUSION

Because Sullivan offered no prima facie proof that he resided in Denton County for venue purposes on the date the claim accrued, we conclude that Judge Burgess erred by denying the TEC's motion to transfer venue to Travis County and that Judge Cleveland erred by failing to reconsider the denial. Because this is a threshold determination, we need not address the TEC's second issue and the arguments raised by amici curiae that the TCPA was inapplicable to the appeal by trial de novo or Sullivan's issue that he was entitled to attorneys' fees and costs under the TCPA. *See Tex. R. App. P. 47.1*. Indeed, we express no opinion as to the applicability of the TCPA to an administrative respondent's appeal by trial de novo from an administrative final decision or as to the merits of that appeal by trial de novo. Accordingly, we reverse Judge Burgess's order denying the TEC's motion to transfer venue and Judge Cleveland's subsequent dismissal order and remand with instructions to (1) transfer the appeal by trial de novo to the county of mandatory venue—Travis **[*31]** County—and (2) tax costs that were "incurred [in the trial court] prior to the time such suit is filed in the court to which said cause is transferred" against Sullivan. *Tex. R. Civ. P. 89*; *see Tex. R. App. P. 43.2(d)*, *43.3*; In re S.G.S., 53 S.W.3d 848, 852 (Tex. App.—Fort Worth 2001, no pet.). The TEC's appellate court costs are taxed against Sullivan. *See Tex. R. App. P. 43.4*.

PER CURIAM

PANEL: GABRIEL, J.; LIVINGSTON, C.J.; and GARDNER, J.

DELIVERED: November 5, 2015

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# *United States v. Sierra Pac. Indus., Inc.*

United States Court of Appeals for the Ninth Circuit

May 17, 2017, Argued and Submitted, San Francisco, California; July 13, 2017, Filed

No. 15-15799

**Reporter**
862 F.3d 1157 *; 2017 U.S. App. LEXIS 12528 **; 98 Fed. R. Serv. 3d (Callaghan) 429; 2017 WL 2979765

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SIERRA PACIFIC INDUSTRIES, INC.; W.M. BEATY AND ASSOCIATES, INC.; ANN MCKEEVER HATCH, as trustee of the Hatch 1987 revocable trust; RICHARD L. GREENE, As Trustee of the Hatch Irrevocable Trust; BROOKS WALKER, JR., as Trustee of the Brooks Walker, Jr. Revocable Trust and the Della Walker Van Loben Sels Trust for the issue of Brooks Walker, Jr; BROOKS WALKER III, individually and as trustee of the Clayton Brooks Danielsen, the Myles Walker Danielsen, and the Benjamin Walker Burlock trust, the Margaret Charlotte Burlock Trust; LESLIE WALKER, individually and as trustee of the Brooks Thomas Walker Trust, the Susie Kate Walker Trust and the Della Grace Walker trusts; WELLINGTON SMITH HENDERSON, JR., as Trustee of the Henderson Revocable Trust; ELENA D. HENDERSON; MARK W. HENDERSON, as Trustee of the Mark W. Henderson Revocable Trust; JOHN C. WALKER, individually and as trustee of the Della Walker Van Loben Sels trust for the issue of John C. Walker; JAMES A. HENDERSON; CHARLES C. HENDERSON, as Trustee of the Charles C. and Kirsten Henderson Revocable Trust; JOAN H. HENDERSON; JENNIFER WALKER, individually and as trustee of the Emma Walker Silverman Trust and the Max Walker Silverman Trust; KIRBY WALKER; LINDSEY WALKER, AKA Lindsey Walker-Silverman, individually and as trustee of the Reilly Hudson Keenan and Madison Flanders Keenan Trust; EUNICE E. HOWELL, DBA Howell's Forest Havesting Company, individually, Defendants-Appellants.

**Subsequent History:** US Supreme Court certiorari denied by *Sierra Pac. Indus. v. United States, 2018 U.S. LEXIS 3984 (U.S., June 25, 2018)*

**Prior History: [**1]** Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:09-cv-02445-WBS-AC. William B. Shubb, Senior District Judge, Presiding.

*United States v. Sierra Pac. Indus., 100 F. Supp. 3d 948, 2015 U.S. Dist. LEXIS 51113 (E.D. Cal., Apr. 17, 2015)*

**Disposition:** AFFIRMED.

**Summary:**

**SUMMARY**[**]

**Fraud on the Court / *Fed. R. Civ. P. 60(d)(3)***

The panel affirmed the district court's denial of defendants' motion for relief from judgment under *Fed. R. Civ. P. 60(d)(3)* based on allegations of fraud, following a settlement in a civil action brought by the United States against private forestry operators and individuals to recover damages for the Moonlight Fire that burned portions of the Plumas and Lassen National Forests in 2007.

The defendants argued that the government's alleged misrepresentations throughout the investigation and litigation constituted fraud on the court. The defendants also alleged newly-discovered fraud after the settlement.

The panel held that a finding of fraud on the court is reserved for material, intentional misrepresentations that could not have been discovered earlier, even through due diligence. The panel held that the district court properly concluded that Sierra Pacific Industries, Inc. did not demonstrate fraud on the court regarding any of the alleged fraud it discovered before settlement. The panel further held that **[**2]** none of the allegations of after-

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

discovered fraud, either individually or as a whole, established that the government committed fraud on the court within the meaning of *Rule 60*.

The panel rejected defendants' argument that the district court judge was required to recuse himself under Canon 3C of the Code of Conduct for United States Judges and *28 U.S.C. § 455(a)* because of an appearance of bias created by activity on a Twitter account that did not bear the judge's name, but was allegedly controlled by him. The panel reviewed the allegations for plain error because defendants failed to first raise the issue before the district court. Specifically, the panel held that the claim — that an unknown Twitter account, not identified with a judge or the judiciary, followed a public Twitter account maintained by the U.S. Attorney — did not provide a basis for recusal. The panel further held that the fact that the Twitter account followed the U.S. Attorney did not mean that the public tweets published by the U.S. Attorney constituted improper *ex parte* communications. Finally, the panel rejected defendants' allegation that the judge's action in tweeting the link to an allegedly erroneous news article required reversal. **[**3]** The panel concluded that retroactive recusal of the district court judge was not warranted, and vacatur of the district court's order was also unwarranted.

**Counsel:** William R. Warne (argued), Meghan M. Baker, Annie S. Amaral, and Michael J. Thomas, Downey Brand LLP, Sacramento, California; Jennifer T. Lias and Richard W. Beckler, Bracewell & Giuliani LLP, Washington, D.C.; for Defendants-Appellants Sierra Pacific Industries, Inc.

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Theodore J. Boutrous, Jr. and Blaine H. Evanson, Gibson Dunn & Crutcher LLP, Los Angeles, California; Katherine C. Yarger, Gibson Dunn & Crutcher LLP, Denver, Colorado; Stephen S. Schwartz and Daniel Z. Epstein, Cause **[**4]** of Action Institute, Washington, D.C.; for Amicus Curiae Cause of Action Institute.

Parker Douglas, Utah Federal Solicitor, and Sean D. Reyes, Attorney General, Utah Attorney General's Office, Salt Lake City, Utah; Mark Brnovich, Attorney General, United States Attorney's Office, Phoenix, Arizona; Adam Paul Laxalt, Attorney General, United States Attorney's Office, Carson City, Nevada; Doug Peterson, Attorney General, Attorney General's Office, Lincoln, Nebraska; Brad D. Schimel, Attorney General, Wisconsin Department of Justice, Madison, Wisconsin; for Amici Curiae Attorney Generals for the States of Arizona, Nebraska, Nevada, Utah, and Wisconsin.

**Judges:** Before: Sidney R. Thomas, Chief Judge, Mary H. Murguia, Circuit Judge, and Jon P. McCalla,* District Judge. Opinion by Chief Judge Thomas.

**Opinion by:** Sidney R. Thomas

## Opinion

**[*1162]** THOMAS, Chief Judge:

We are asked to decide whether certain allegations of fraud, some of which were known before the parties settled and some of which came to light after settlement, rise to the level of fraud on the court such that relief from the settlement agreement is warranted under *Federal Rule of Civil Procedure 60(d)(3)* **[*1163]** . Because the instances of alleged fraud known before settlement cannot justify relief, and the instances **[**5]** discovered after settlement do not rise to the level of fraud on the court under *Rule 60(d)(3)*, we affirm.

I

This case arises from a forest fire that broke out on private property near the Plumas National Forest in northern California on September 3, 2007. The Moonlight Fire, as it came to be known, eventually burned 46,000 acres of the Plumas and Lassen National Forests and resulted in the United States bringing a civil action against private forestry operators, Sierra Pacific Industries, Inc. ("Sierra Pacific") and Howell's Forest Harvesting Company ("Howell"), and other individuals to recover damages for that fire.

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* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

A

Sierra Pacific contracted with Howell to conduct logging operations on the land where the Moonlight Fire is believed to have started. On the morning of the fire, two Howell employees had been operating bulldozers in the area, but they left without inspecting the site for sparks or signs of fire.

After the fire was spotted from a U.S. Forest Service ("Forest Service") lookout tower in the early afternoon, Forest Service investigator Dave Reynolds visited the site where the fire was believed to have started. Reynolds interviewed JW Bush, one of the Howell employees who had been working **[**6]** at the site that morning, but the site was too hot to investigate further at the time.

Reynolds returned to the site the following day with Josh White, an investigator from the California Department of Forestry and Fire Protection ("Cal Fire"). According to the Origin and Cause Investigation Report jointly released by the Forest Service and Cal Fire, that day the investigators identified a "general origin area" and a "specific origin area" based on fire indicators in the area. On September 4th and 5th, White and Reynolds took numerous photos and measurements of relevant points within the origin site, and they placed numbered markers and colored flags to mark certain fire indicators and other evidence.

Sierra Pacific and the other defendants allege that White and Reynolds identified a specific point of origin that they marked with a single white flag, and took measurements and photographs of that point. The government denies that the investigators identified this point as the specific point of origin. Instead, the government notes that the investigators took photos of two other rocks, which appeared to have marks from bulldozer blades or treads, and which were ultimately identified in **[**7]** the final report as the points of origin for the fire. Investigators White and Reynolds also used a magnet to search the area and identified metal shavings near these two rocks, which they collected as evidence. Diane Welton, another Forest Service investigator, joined the investigation and visited the origin site on September 8th. Welton agreed with the other investigators' assessment of the fire's origin.

Cal Fire and the Forest Service released their joint Origin and Cause Investigation Report in June 2009. The report concluded that one of the Howell bulldozers had caused the fire by striking a rock, which created a spark that ignited forest litter on the ground and eventually broke out into a fire that spread into the surrounding forest.

B

The United States filed this action against Sierra Pacific, Howell, and a number **[*1164]** of individual defendants (collectively, "the Defendants") in August 2009. The government sought nearly $800 million in damages caused by the Moonlight Fire and compensation for the resources spent fighting it. The California Attorney General's office, representing Cal Fire, filed a state court action against the Defendants earlier the same month. The U.S. Attorney and **[**8]** the California Attorney General entered into a joint prosecution agreement, but the two cases proceeded separately.[1]

The parties in this federal case engaged in extensive discovery and motion practice over the next three years. Most relevantly, the government produced a number of documents during discovery that led the Defendants to believe that the government had engaged in fraud during and after its investigation of the Moonlight Fire, in an attempt to blame the fire on them. Specifically, the Defendants discovered photographs and an early sketch that appeared to place the point of origin in a slightly different spot than the final report; an aerial video of the smoke plume that allegedly undermined the government's point-of-origin determination; an expert report that had used the wrong slope angle in modeling fire dynamics and had not been corrected; and evidence regarding alleged employee misconduct at the Forest Service's Red Rock Lookout Tower before the fire was spotted. The Defendants also alleged at various points in the pre-trial proceedings that the government had advanced a fraudulent Origin and Cause report based on these cover-ups; had misrepresented the investigator's **[**9]** interview with Howell employee JW Bush shortly after the fire started; had misrepresented evidence regarding other forest fires started by Howell; had proffered false testimony by the investigators regarding the origin of the fire; and had failed to adequately investigate arson as a possible cause of the fire, particularly in light of evidence that wood cutter Ryan Bauer had been using a chainsaw in the vicinity of the fire on the day it began.

The government moved *in limine* to exclude much of the evidence supporting the Defendants' theories of fraud and concealment, and the district court granted this

[1] Cal Fire and the California Attorney General's office took no part in the federal case, and the U.S. Attorney's office took no part in the state case.

motion in part. The court's final pre-trial order precluded the Defendants from introducing evidence to show conspiracy but permitted them "to introduce evidence that there was an attempt to conceal information from the public or the defense." The Defendants also wanted to present evidence that the government had failed to investigate possible arson by Ryan Bauer, though the Defendants disavowed any intention of actually proving that Bauer started the fire. The court permitted the Defendants to introduce "evidence indicating arson was not considered to show weaknesses in the investigation **[**10]** following the fire" but precluded evidence demonstrating that a particular person, such as Bauer, had started the fire. Nonetheless, the court's oral ruling explained that the Defendants would be permitted to present evidence that Bauer was "near the scene, seen by witnesses, and there was no follow-up" during the fire investigation. The court's written order specifically stated that each of these *in limine* rulings was "made without prejudice and [was] subject to proper renewal, in whole or in part, during trial."

Three days before trial was set to begin, the parties reached a settlement agreement under which the Defendants agreed to pay $55 million and transfer 22,500 **[*1165]** acres of land to the government.[2] The terms also specified:

> The Parties understand and acknowledge that the facts and/or potential claims with respect to liability or damages regarding the above-captioned actions may be different from facts now believed to be true or claims now believed to be available ("Unknown Claims"). Each Party accepts and assumes the risks of such possible differences in facts and potential claims and agrees that this Settlement Agreement shall remain effective notwithstanding any such differences. **[**11]** . . . Accordingly, this Settlement Agreement, and the releases contained herein, shall remain in full force as a complete release of Unknown Claims notwithstanding the discovery or existence of additional or different claims or facts before or after the date of this Settlement Agreement.

Following entry of the settlement agreement, the district court entered judgment dismissing the case with prejudice at the parties' request.

The state case proceeded after settlement of the federal case. While the state proceedings were pending, several other instances of alleged misrepresentation and fraud came to light. The state case was ultimately dismissed with prejudice before going to trial, and the California Superior Court imposed terminating sanctions on Cal Fire's attorneys, concluding that they had engaged in "pervasive misconduct" and "a systematic campaign of misdirection with the purpose of recovering money from the Defendants."

In the federal case, the Defendants then filed a motion for relief from judgment under *Federal Rule of Civil Procedure 60(d)(3)*, arguing that the government's alleged misrepresentations throughout the investigation and litigation constituted fraud on the court. That motion is the subject of this appeal. **[**12]**

In addition to the misrepresentations that the Defendants raised prior to settlement, which it re-alleged in the *Rule 60(d)(3)* motion, the Defendants also alleged newly-discovered fraud. First, Defendants had learned that Ryan Bauer's father, Edwin Bauer, had accused Sierra Pacific's legal counsel (apparently falsely) of offering him a bribe to say that his son started the fire. The Defendants alleged that the government knew of this false bribe accusation but fraudulently failed to disclose it, despite representing to the court that there was not a "shred" of evidence pointing to Bauer. The Defendants also alleged that they had learned that the government had instructed the fire investigators to lie about the significance of the white flag by telling them it was a "non-issue" during a meeting prior to the investigators' depositions.

Finally, the Defendants cited a new report issued by the California State Auditor that some of the funds recovered in state wildfire cases were being put into an extra-legal account called the Wildland Fire Investigation Training and Equipment Fund ("WiFITER"), rather than into the state treasury. In their *Rule 60(d)(3)* motion, the Defendants alleged that the government had misrepresented **[**13]** the nature of the fund in this federal case. The Defendants also alleged that Cal Fire's Investigator White stood to benefit from the fund and that his improper financial incentives had tainted the entire wildfire investigation on which the government had relied.

After an initial status conference on the *Rule 60* motion, the district court ordered the parties to submit briefing on the **[*1166]** "threshold question" of "whether, assuming the truth of the Defendants' allegations, each alleged act of misconduct separately or collectively

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[2] Sierra Pacific agreed to pay $47 million and transfer 22,500 acres; Howell's agreed to pay $1 million; Beaty and the other landowners agreed to pay $7 million.

constituted 'fraud on the court' within the meaning of Rule 60(d)(3)."[3] The district court also asked the parties to identify whether the Defendants had learned of each alleged act before or after the settlement and dismissal of the case.

After holding an oral hearing on the Rule 60 motion, the district court denied the motion in a detailed written order. With respect to the alleged fraud that the Defendants had known about before settlement—namely the conflicting evidence regarding the point of origin and the alleged misconduct at the lookout tower—the district court concluded that this conduct could not constitute fraud on the court because the doctrine only allows relief from judgment for **[**14]** "after-discovered fraud." *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944).

With respect to the allegations of fraud that the Defendants claimed to have discovered only after settlement, the district court concluded that relief was barred by the specific terms of the settlement; alternatively, it concluded that relief was unwarranted because the new allegations surrounding the white flag testimony were unsupported by the record, the government did not have a duty to disclose the false bribe accusation made by Edwin Bauer, and the government had not committed fraud on the court through its representations about Cal Fire's WiFITER fund.[4] The district court concluded that, because none of these allegations constituted fraud on the court, the totality of the government's conduct similarly failed to rise to that level.

The same day that the district court denied the Defendants' motion, the U.S. Attorney's Office for the Eastern District of California posted eight tweets about the outcome of the case via its Twitter account. That evening, a Twitter account allegedly owned by the federal district judge presiding over the Rule 60 motion, which followed the U.S. Attorney's account, posted a tweet with a link to a news article about the Moonlight **[**15]** Fire. The tweet contained the title of the news article, "Sierra Pacific still liable for Moonlight Fire damages," as well as a link to the article itself.

The Defendants timely appealed the denial of their Rule 60 motion, arguing that the district court erred in failing to grant the motion and that the judge should be retroactively recused based on the activity of the Twitter account allegedly belonging to him. The district court had jurisdiction over this case under 28 U.S.C. §1345, and we have jurisdiction to hear the appeal under 28 U.S.C. § 1291 because the denial of a Rule 60 motion for relief from judgment is a final, appealable order. *See* United States v. Estate of Stonehill, 660 F.3d 415, 443 (9th Cir. 2011).

In the context of Rule 60(d)(3), we "review denials of motions to vacate for abuse of discretion."[5] *Id. at 443*. Under this **[*1167]** standard, we review questions of law de novo, United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009), and "[a] district court by definition abuses its discretion when it makes an error of law," Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)). We review the district court's findings of fact for clear error. Hinkson, 585 F.3d at 1261. A district judge's failure to sua sponte recuse himself or herself is reviewed for plain error where, as here, the issue was not raised in the district court.[6] United States v. Spangle, 626 F.3d 488, 495 (9th Cir.

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[3] After the original district court judge recused herself from hearing the Rule 60 motion, the case was eventually assigned to a different judge within the Eastern District of California.

[4] The district court also discussed and rejected the Defendants' allegations regarding an investigator's handwritten notes, and the removal of one of the Assistant United States Attorneys who originally worked on the case. Because the Defendants did not discuss those allegations on appeal, they are waived. ***Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009)***.

[5] The Defendants argue that *de novo* review is appropriate because, by asking the parties to brief only the legal sufficiency of the Defendants' allegations, the district court created a procedural posture akin to a Rule 12(b)(6) motion to dismiss. Yet a motion under Rule 60(d)(3) is grounded in the court's inherent power to set aside a judgment. Such an action "is based on equity," and we "review a district court's decision to deny equitable relief for an abuse of discretion." Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003). Abuse of discretion review is therefore appropriate here.

[6] The Defendants argue that they had no opportunity to raise this issue in the district court because the challenged tweet was not posted until after judgment was entered. But evidence submitted by the Defendants shows that the same Twitter account had posted several other news articles about the case while proceedings were still ongoing. The Defendants therefore had an opportunity to raise the issue below, and only plain error review is available on appeal.

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II

A

Federal Rule of Civil Procedure 60 enumerates several possible grounds for setting aside a judgment. While Rule 60(c) sets a one-year time limit for **[**16]** a Rule 60(b)(3) motion based on "fraud . . . , misrepresentation, or misconduct," Rule 60(d)(3) provides that "[t]his rule does not limit a court's power to . . . set aside a judgment for fraud *on the court*" (emphasis added). Therefore, relief based on fraud on the court is not subject to the one-year time limit. Appling, 340 F.3d at 784.[7] Because its motion was made more than a year after the entry of judgment in this case, Sierra Pacific moved for relief under Rule 60(d)(3) and therefore must show fraud on the court, rather than the lower showing required for relief under Rule 60(b)(3).

A court's power to grant relief from judgment for fraud on the court stems from "a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." Hazel-Atlas, 322 U.S. at 244 (citing Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 332, 3 L. Ed. 362 (1813); Marshall v. Holmes, 141 U.S. 589, 12 S. Ct. 62, 35 L. Ed. 870 (1891)). However, the Supreme Court has noted that "[o]ut of deference to the deep-rooted policy in favor of the repose of judgments . . . , courts of equity have been cautious in exercising [this] power." *Id.* (citing United States v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93 (1878)). Thus, relief from judgment for fraud on the court is "available only to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998).

Our own cases, similarly, have emphasized that "not all fraud is fraud on the court." **[**17]** In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999). "In determining whether fraud constitutes fraud on the **[*1168]** court, the relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it 'harmed the integrity of the judicial process.'" Estate of Stonehill, 660 F.3d at 444 (internal alterations omitted) (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)). Fraud on the court must be an "intentional, material misrepresentation." In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009). Thus, fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (quoting Abatti v. Commissioner, 859 F.2d 115, 118 (9th Cir. 1988)).

In addition, the relevant misrepresentations must go "to the central issue in the case," Estate of Stonehill, 660 F.3d at 452, and must "affect the outcome of the case," id. at 448. In other words, the newly discovered misrepresentations must "significantly change the picture already drawn by previously available evidence." Id. at 435. In that vein, "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court'" unless it is "so fundamental that it undermined the workings of the adversary process itself." Id. at 444-45 (quoting In re Levander, 180 F.3d at 1119). However, perjury may constitute fraud on the court if it "involves, or is suborned by, an officer of the court." **[**18]** 12 J.W. MOORE, MOORE'S FEDERAL PRACTICE § 60.21[4][c]; *see* In re Intermagnetics Am., Inc., 926 F.2d 912, 917 (9th Cir. 1991). Despite Sierra Pacific's arguments to the contrary, our Court and the Supreme Court have consistently applied this standard for fraud on the court even in cases involving government attorneys, rather than creating some different standard for these cases. Beggerly, 524 U.S. at 47; Pizzuto, 783 F.3d at 1181; Estate of Stonehill, 660 F.3d at 449. Finally, relief for fraud on the court is available only where the fraud was not known at the time of settlement or entry of judgment. *See, e.g.*, Hazel-Atlas, 322 U.S. at 244 (allowing relief for "after-discovered fraud); Haeger v. Goodyear Tire & Rubber Co., 813 F.3d 1233, 1243-45 (9th Cir. 2016) (analogizing to fraud on the court, where crucial information was concealed until after settlement and entry of judgment), *overruled on other grounds*, 137 S. Ct. 1178, 197 L. Ed. 2d 585 (2017); Pumphrey, 62 F.3d at 1133 (finding fraud on the court where crucial information was concealed and came to light after entry of judgment); In re Levander, 180 F.3d at 1120 (same). This limitation arises because issues that are before the court or could potentially be brought before the court during the original proceedings "could and should be exposed at trial." In re Levander, 180 F.3d at 1120 (citing Gleason v. Jandrucko, 860 F.2d 556, 560 (2d Cir. 1988)); *see also* id. at 1119-20 (explaining that there is

[7] At the time of *Appling*, Rule 60(b) contained the language now in Rule 60(d)(3), preserving the court's right to set aside a judgment for fraud on the court.

no fraud on the court where "the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court"). As the district court correctly explained, **[**19]** allowing parties to raise issues that should have been resolved at trial amounts to collateral attack and undermines "the deep rooted policy in favor of the repose of judgments." *Hazel-Atlas, 322 U.S. at 244*.

The decision in *Hazel-Atlas* does not undermine this principle, despite the Defendants' argument that the moving party **[*1169]** in that case had some knowledge of the fraud prior to trial and settlement. First, as we have already noted, the Court's opinion in *Hazel-Atlas* specifically stated that relief is available for "after-discovered fraud." *Id.* And second, the majority opinion in *Hazel-Atlas* explained that Hazel-Atlas Glass Company had indeed attempted to uncover the suspected fraud before trial, but it had been thwarted by a witness who blatantly lied about the relevant issue. *Id. at 242-43*. After settlement and entry of judgment, it came to light that the witness had been contacted by Hartford Empire's attorneys shortly before he lied to Hazel-Atlas's attorneys, and that Hartford-Empire had compensated the witness shortly thereafter with an $8,000 payment for his lie. *Id.* Thus, the key information in *Hazel-Atlas* was revealed only after entry of judgment, ultimately supporting the proposition that relief is available only **[**20]** for fraud discovered after judgment is entered.

Similarly, despite some earlier language suggesting otherwise, *see Pumphrey, 62 F.3d at 1133*, our decision in *Appling v. State Farm* clarified that where the moving party "through due diligence could have discovered" the alleged perjury or non-disclosure, such fraud does "not disrupt the judicial process" and thus does not constitute fraud on the court. *340 F.3d at 780*. Thus, a finding of fraud on the court is reserved for material, intentional misrepresentations that could not have been discovered earlier, even through due diligence.

B

Under the standard described above, the district court properly concluded that Sierra Pacific cannot demonstrate fraud on the court regarding any of the alleged fraud it discovered before settlement. In addition to the fact that these allegations do not constitute "after-discovered fraud," *Hazel-Atlas, 322 U.S. at 244*, Sierra Pacific had explicitly stated its intention to raise the alleged fraud at trial, and the court's *in limine* ruling permitted it "to introduce evidence that there was an attempt to conceal information from the public or the defense." Thus, "the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue **[**21]** was already before the court," *In re Levander, 180 F.3d at 1119-20*, and these allegations cannot be grounds for subsequent relief after Sierra Pacific voluntarily settled instead of going to trial.[8]

The district court therefore did not abuse its discretion in finding that there was no fraud on the court related to the photographs, sketches, and investigator testimony about the white flag; the aerial video and erroneous expert report; the misconduct at the lookout tower; the government's interview with the Howell employee; the other fires allegedly started by Howell; or the lack of an arson investigation.

C

Nor do the instances of alleged fraud discovered after settlement constitute actionable fraud on the court warranting *Rule 60* relief. To begin with, the district court correctly noted that the express settlement terms appear to preclude any relief, even for newly discovered facts or evidence. In agreeing that the "Settlement **[*1170]** Agreement . . . shall remain in full force as a complete release of Unknown Claims notwithstanding the discovery or existence of additional or different claims or facts before or after the date of this Settlement Agreement," it appears that the Defendants bound themselves not to seek future relief, **[**22]** even for fraud on the court. Thus, the district court did not abuse its discretion by finding that relief is precluded on this ground.

Even if the terms of the settlement agreement did not bar relief, the district court properly concluded that relief is unwarranted because the allegations of after-discovered fraud fail to rise to the level of fraud on the court. The Defendants allege three instances of alleged fraud or misrepresentation that they did not discover until after settlement. They argue that each of these allegations demonstrates fraud on the court, and that the district court erred by failing to assume the truth of the allegations, given its specific instructions that the parties brief only the legal sufficiency of the Defendants'

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[8] *Hazel-Atlas* does not undermine this conclusion because, unlike in that case where the plaintiffs tried and failed to gain information about the fraud before trial, the Defendants here received numerous documents through discovery that allegedly demonstrated fraud, and they were prepared to present this evidence at trial.

claims. Yet, even assuming the truth of these allegations,[9] we conclude that they do not constitute fraud on the court.[10]

1

First, the Defendants have consistently alleged that Investigators White and Reynolds testified falsely about their investigation of the fire's origin, specifically regarding the white flag that allegedly marked the initial "concealed" point of origin. The only allegation of after-discovered fraud regarding this dispute is the **[**23]** Defendants' new allegation that the government attorneys actually suborned this perjury by instructing White and Reynolds to lie in their testimony.[11] During his deposition in the state case, Reynolds mentioned a January 2011 meeting in which the government attorneys spoke with the fire investigators and told them that the issue of the white flag was likely to come up and that the attorneys "saw it as a nonissue." According to the Defendants, this language is tantamount to the attorneys telling the investigators to conceal any relevant information about the white flag.

Assuming the truth of the Defendants' allegation on this point,[12] Reynolds' testimony still does not establish that the investigators were instructed to lie. The attorneys' comment that they saw the white flag as a "nonissue" is merely an opinion about the relative importance of an element of the case; it is not an instruction to commit perjury. As the government accurately notes, it is not fraud on the court for a party's attorneys to have their own theory of the case and discuss it with their **[*1171]** witnesses. Moreover, the Defendants knew about this meeting before settlement, as Reynolds had explained in his deposition in the **[**24]** *federal* case that the investigators had met with the attorneys and had discussed the insignificance of the white flag. The slightly different language used by Reynolds in his state deposition did not "significantly change the picture already drawn by previously available evidence," *Estate of Stonehill, 660 F.3d at 435*, nor does it demonstrate that any "grave miscarriage of justice" occurred, *Beggerly, 524 U.S. at 47*. Accordingly, the district court did not abuse its discretion by denying relief on this ground.

2

The Defendants' second allegation of after-discovered fraud is that the government failed to disclose Edwin Bauer's accusation that Sierra Pacific's legal counsel had offered him a bribe to say that his son started the fire. According to the Defendants, this information constituted exculpatory evidence as to the Defendants because it suggests that Edwin Bauer was trying to point investigators away from his son, who may have actually started the fire, by claiming that his son was asked to falsely confess in exchange for a bribe. The Defendants argue that, by withholding this information, the government secured a "critical" *in limine* ruling limiting the evidence that the Defendants could present regarding its arson theory. The Defendants **[**25]** also contend that the district court failed to accept as true its allegation that this *in limine* ruling prejudiced the Defendants.

We uphold the district court's conclusion that relief was unwarranted on these grounds. To begin with, it was not error for the district court to look at the content of the earlier *in limine* rulings and conclude that the Defendants were not prejudiced by these rulings. In the analogous context of a motion to dismiss, a court can consider matters of public record even when assuming the truth of the allegations, *United States v. 14.02 Acres of Land More or Less in Fresno Cty., 547 F.3d 943, 955 (9th Cir. 2008)*, and the district court here was likewise permitted to consider the record of earlier proceedings even when assuming the truth of the Defendants' allegations. The court's oral discussion of the *in limine* ruling specifically explained that the Defendants would be permitted to present evidence that Bauer was "near the scene, seen by witnesses, and there was no follow-up." The Defendants thus overstate the impact of the *in*

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[9] Because we conclude that these allegations do not demonstrate fraud on the court even if taken as true, we need not decide whether the district court erred in failing to assume their truth.

[10] The Defendants also argue that the district court erred by requiring that they act with diligence in attempting to discover the alleged fraud before trial, and that the court made clearly erroneous findings of fact as to whether the Defendants had been diligent. Because none of the alleged instances of fraud rise to the level of fraud on the court regardless of the Defendants' diligence, we need not and do not reach this issue.

[11] As the Defendants conceded in the district court, they had received the photographs of the white flag and the earlier point of origin sketch during discovery, and the Defendants questioned White and Reynolds extensively about the white flag during their lengthy depositions.

[12] It was proper for the district court to consider the transcript of Reynolds's deposition that included the "nonissue" comment, which the Defendants filed with the district court in support of their *Rule 60* motion.

*limine* ruling that was allegedly secured through the government's nondisclosure of the bribe allegation, as the Defendants were still allowed to present evidence relating to its arson theory. Moreover, the district **[**26]** court expressly stated that this ruling was subject to reconsideration during trial. In this context, it was not clearly erroneous for the district court to find that the Defendants were not prejudiced by the ruling.

Next, because the district court correctly concluded that *Brady* does not generally apply in civil proceedings, *see* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009); Fox ex rel. Fox v. Elk Run Coal Co., 739 F.3d 131, 138-39 (4th Cir. 2014), the government did not have a specific duty to disclose the false bribe information, beyond its standard discovery obligations. Under the high standard for a Rule 60(d)(3) motion, a mere discovery violation or non-disclosure does not rise to the level of fraud on the court. Appling, 340 F.3d at 780. In addition, the Defendants could have obtained this information by interviewing Edwin Bauer on **[*1172]** their own. *See* Fed. R. Civ. P. 26(b)(1) (allowing consideration of "the parties' relative access to relevant information" in determining discovery obligations).

Furthermore, despite the Defendants' confidence in the probative value of the false bribe accusation, the government's failure to disclose this information "do[es] not significantly change the story as presented to the district court" prior to settlement, given that the Defendants already possessed other circumstantial evidence of arson. Estate of Stonehill, 660 F.3d at 452. For all of these reasons, the district **[**27]** court did not abuse its discretion by denying relief on this ground.

3

The Defendants' third allegation is that the government committed fraud on the court by misrepresenting the true nature of Cal Fire's WiFITER fund, which was later determined by the California State Auditor to be structured such that it was "open to possible misuse." The Defendants allege that, because the WiFITER fund was not subject to adequate oversight, the funds were used improperly to send Cal Fire investigators to luxury retreats and purchase expensive equipment. The Defendants concede that Cal Fire's Investigator White had no contingent financial interest in the outcome of the federal case currently before us, because none of the federal recovery was destined for the WiFITER fund, but they argue that White's contingent interest in the outcome of the *state* case tainted the entire fire investigation on which both cases relied.

Because our case law requires that a party show willful deception rather than simply reckless disregard for the truth, *e.g.*, Napster, 479 F.3d at 1097, White's contingent financial interest only rises to the level of fraud on the court if the government knew about White's interest and wilfully concealed it. Here, **[**28]** the United States' only affirmative representations about the nature of the WiFITER fund were that it was "a separate public trust fund to support investigator training and to purchase equipment for investigators" and that it was "a public program established to train and equip fire investigators." The Defendants admitted in the district court that they had no evidence that the United States knew of the improper nature of the WiFITER fund; the Defendants alleged only that the government had a duty to fully investigate any agency it was working with and root out any improper motives.[13] The Defendants now argue that Cal Fire's knowledge of the fund's impropriety should be imputed to the United States due to the two entities' joint prosecution agreement, but the Defendants waived this argument by failing to raise it below. *Padgett, 587 F.3d at 985 n.2*.

Similarly, the United States could not have had a duty to disclose documents that it did not possess relating to the WiFITER fund. The United States represented to the district court that it did not know about or have access to any documents demonstrating the true nature of the fund, and the district court ruled that the Defendants would have to subpoena any such documents **[**29]** from Cal Fire. The Defendants have not challenged the United States' representation that it did not possess these documents. The Defendants have therefore failed to show that the United States knew about the fund's improprieties and made "intentional, material misrepresentation[s]" **[*1173]** on this point. Napster, 479 F.3d at 1097. Accordingly, the district court did not abuse its discretion by denying relief on this ground.

4

Finally, the Defendants argue that the district court failed to consider the totality of the United States' conduct, which the Defendants label a "trail of fraud." *See* Hazel-Atlas, 322 U.S. at 250. Contrary to the district court's assertion that "the whole can be no greater than the sum of its parts," a long trail of small

[13] Indeed, a 2009 internal audit report had failed to reveal any problems with the WiFITER fund.

misrepresentations—none of which constitutes fraud on the court in isolation—could theoretically paint a picture of intentional, material deception when viewed together. Nonetheless, the instances of possible misinformation in this case do not constitute fraud on the court within the meaning of *Rule 60*, because almost all of the evidence of alleged fraud was received by the Defendants through discovery and thus was known to them when they made the decision to settle. The three instances of alleged fraud that came to light after settlement, **[**30]** even when viewed together, do not "significantly change the picture already drawn by previously available evidence." *Stonehill, 660 F.3d at 435*. Therefore, the district court did not abuse its discretion by denying relief based on the totality of the circumstances.

5

In sum, none of the allegations of after-discovered fraud, either individually or as a whole, establish that the government committed fraud on the court within the meaning of *Rule 60*. Accordingly, the district court did not err in denying the Defendants' motion for relief for judgment under *Rule 60(d)(3)*.

III

The Defendants argue that the district court judge assigned to the *Rule 60* motion should be recused because of an appearance of bias created by activity on a Twitter account that does not bear his name, but is allegedly controlled by him. As explained above, the Defendants could have raised this issue in the district court following either of the disputed Twitter account's pre-judgment tweets. Because they failed to do so, plain error review applies. *Spangle, 626 F.3d 495*. The Defendants also filed a motion for judicial notice and a motion for leave to supplement their reply brief with further information regarding the contents of this Twitter account and other related documents. We deny both **[**31]** motions as moot because, under the plain error standard, the allegations do not warrant retroactive recusal even if the judge is the owner of the account.

The Code of Conduct for United States Judges "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary." *United States v. Microsoft Corp., 253 F.3d 34, 111, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. To this end, Canon 2 of the Code instructs judges to "avoid impropriety and the appearance of impropriety in all activities." Canon 3A(4) prohibits *ex parte* communications or any "communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers," and Canon 3A(6) provides that "[a] judge should not make public comment on the merits of a matter pending or impending in any court."[14] Canon 3C instructs that a judge must disqualify **[*1174]** himself or herself in a proceeding where his or her impartiality could reasonably be questioned, mirroring the provision of *28 U.S.C. § 455(a)* which mandates that a United States judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The test for recusal under these provisions is "an objective test based on public perception." *United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008)*.

The Defendants argue **[**32]** that the judge's alleged "following" of the U.S. Attorney's office on Twitter created an appearance of bias, in violation of Canon 2, and constituted an *ex parte* communication, in violation of Canon 3A(4). They also argue that the judge's alleged tweet on the evening of his ruling created a further appearance of bias and constituted an impermissible public comment on the substance of a pending case (given the impending appeal), violating Canon 3A(6). Because of these violations, the Defendants argue that the judge was required to recuse himself under Canon 3C and *28 U.S.C. § 455(a)*. Even assuming that the judge owned or controlled the disputed Twitter account, these arguments fail.

The claim that an unknown account, not identified with a judge or the judiciary, followed a public Twitter account maintained by the U.S. Attorney does not provide a basis for recusal here. As we know, Twitter is a news and social networking service where users post comments, restricted to 140 characters, in "tweets." A Twitter account holder may "follow" other Twitter account holders, meaning that the "following" user will receive all of the tweets generated by the other user. Some Twitter users restrict their posts to a **[**33]** private audience. But news organizations, celebrities, and even high-up government officials use Twitter as an official means of communication, with the message intended for wide audiences. Thus, without more, the fact that an account holder "follows" another Twitter user does not evidence a personal relationship and certainly not one that, without more, would require

[14] For purposes of this rule, pending matters include those that have been resolved by the court or judge in question but remain pending on appeal. Code of Conduct for United States Judges cmt. 3A(6).

recusal.[15] Thus, assuming the account belonged to the district judge, the judge did not plainly err in not recusing himself because he "followed" the U.S. Attorney's office on Twitter.[16]

For similar reasons, the fact that the Twitter account "followed" the U.S. Attorney does not mean that the public tweets published by the U.S. Attorney constituted improper *ex parte* communications. The relevant opinion from the Committee on Codes of Conduct explains that concerns of improper communication arise in the context of "the exchange of frequent messages, 'wall posts,' or 'tweets' between a judge or judicial employee and a 'friend' on a social network who is also counsel in a **[*1175]** case pending before the court." Comm. on Codes of Conduct Advisory Opinion 112. The situation in the current case, however, does not present the type of circumstance **[**34]** that the Committee warned against in its opinion. Here, none of the challenged tweets were specifically directed from the U.S. Attorney to the judge, nor have the Defendants alleged that there were any personally directed tweets. Thus, the public tweets did not constitute communication from the U.S. Attorney to the judge. Rather, the relevant tweets from the U.S. Attorney's account constituted news items released to the general public, intended for wide distribution to an anonymous public audience. Under the circumstances, the social media activity alleged to have occurred in this case did not constitute prohibited *ex parte* communication.

Finally, the Defendants also allege that the judge's action in tweeting the link to an allegedly erroneous news article requires recusal. Assuming the challenged tweet was from the judge's account, it still does not warrant retroactive recusal in this case. The tweet consisted only of the title and link to a publicly available news article about the case in a local newspaper, without any further commentary. Under the standard of review applicable at this stage, the district judge did not plainly err in not recusing himself because he tweeted the link **[**35]** to this news article.

The Defendants rely heavily on *United States v. Microsoft Corp., 253 F.3d at 107*, but in fact the conduct in *Microsoft* was far more problematic: the judge in that case had given numerous secret interviews to the press, in which he spoke extensively about his views on the merits of the case. *Id. at 107-11*. Even in *In re Boston's Children First*, which the Defendants cite for the proposition that a violation of Canon 3A(c) requires recusal for even the *appearance* of partiality, the judge had expressed her own views about the case in a published letter to the editor and an interview with a reporter. *244 F.3d 164, 166 (1st Cir. 2001)*. Here, in contrast, the tweets allegedly posted by the judge expressed no opinion on the case or on the linked news articles. Although "the analysis of a particular *section 455(a)* claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue," *Holland, 519 F.3d at 913*, these cases nonetheless help put the circumstances of the current case in context.

Under the facts and circumstances present here, the single challenged tweet does not amount to "public comment on the merits of a [pending] matter" in violation of Canon 3A(6). **[**36]** Even if the judge's choice of the particular article he posted and its allegedly inaccurate title could be construed as public commentary, as the Defendants argue, not every violation of the Code of Conduct creates an appearance of bias requiring recusal under *§ 455(a)*. *Microsoft, 253 F.3d at 114-15*. Here, the three relevant tweets—containing only links to news articles, and coming from an account not publicly identifying a member of the judiciary—do not create an appearance of bias such that recusal is warranted under *§ 455(a)*.

For these reasons, under the plain error standard we conclude that there was no appearance of bias created by the instances of alleged conduct in this case, so retroactive recusal is not warranted. Vacatur of the district court's order is therefore also unwarranted. Nonetheless, this case is a cautionary tale about the

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[15] Of course, there are circumstances in which use of social media may create concern. For example, the Judicial Conference of the United States' Committee on Codes of Conduct has issued an opinion noting that "identifying oneself as a 'fan' of an organization" on social media may create the appearance of impropriety. Comm. on Codes of Conduct, Advisory Opinion 112. The ABA's formal opinion on social media similarly notes that a "judge must be mindful that [an electronic social media] connection *may* give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal." ABA Formal Opinion 462 (Feb. 21, 2013) (emphasis added). Nothing suggests that following a Twitter account under the circumstances here rises to the level of creating an appearance of impropriety.

[16] As explained above, the Defendants could have raised this issue in the district court following either of the pre-judgment tweets. Doing so would have allowed a full development of the record. However, because the Defendants' failed do so, plain error review applies. *Spangle, 626 F.3d 495*.

possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance **[*1176]** of propriety both on and off the bench.

IV

In deference to the longstanding policy in favor of the repose of judgments, courts have consistently required a very high showing for relief for judgment on the basis of fraud on the court. After voluntarily **[**37]** settling this case and asking the district court to enter judgment based on that settlement, the Defendants' allegations of newly discovered fraud fail to meet this high standard. We therefore affirm the district court's denial of the Defendants' motion for relief from judgment under *Rule 60(d)(3)*, and we decline to order vacatur or direct retroactive recusal.[17]

**AFFIRMED**.

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End of Document

[17] In making this decision, we do not express any opinion as to the veracity of either party's factual assertions, attempt to decide any of the underlying issues, or express any opinion as to the troubling issues discussed in the state court opinion. Nor do we make any findings as to the alleged use of the judge's Twitter account, which was an issue undeveloped in the district court. Those questions must be resolved, if at all, in another forum.

# Exhibit B

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AND DEBTOR-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **In re:** | § | **Chapter 11 (V)** |
| | § | |
| **KERWIN BURL STEPHENS,** | § | **Case No.: 21-40817-elm-11** |
| | § | |
| **THUNDERBIRD OIL & GAS, LLC,** | § | **Case No.: 21-41010-elm-11** |
| | § | |
| **THUNDERBIRD RESOURCES, LLC,** | § | **Case No.: 21-41011-elm-11** |
| | § | |
| **Debtors.** | § | **Jointly Administered Under** |
| | § | **Case No. 21-40817-elm-11** |
| | § | |

**RESPONSE TO PLAINTIFFS' BRIEF ON RECUSAL**

TO THE HONORABLE EDWARD LEE MORRIS, UNITED STATES BANKRUPTCY JUDGE:

Kerwin Burl Stephens (the "Debtor"), as debtor-in-possession, provides this brief in response to "State Court Plaintiffs' Brief in Response to Argument that Judge Harrison Should be Recused" (the "Plaintiffs' Brief") filed October 13, 2021, respectfully showing the Court as follows:

## SUMMARY OF ARGUMENT

Plaintiffs' Brief misses the mark from its very title – referencing an "Argument that Judge Harrison Should Be Recused" – and in its opening passages on recusal proceedings under Texas Rules of Civil Procedure 18a-18b. In the Application to Employ John G. Browning (Document Nos. 132 & 173), the Debtor does not request that this Court conduct recusal proceedings over

Judge Harrison's improper social-media activity or that this Court somehow supplant Texas recusal procedures. Rather, the Debtor intends to demonstrate that lengthy and contentious recusal litigation would occur if this case were remanded to state court. If recusal does not happen (voluntarily by Judge Harrison, or following the Presiding Judge's involvement), further litigation concerning any judgment against the Debtor *as well as recusal* will take place through a lengthy Texas appellate process. That appellate process may enforce recusal, thereby restarting litigation over a judgment against Debtor before a new state trial judge. The Debtor, his bankruptcy estate and his creditors will benefit if this Court addresses the allowance for Plaintiffs' claims, if any, in place of the foregoing state-court process.

**1. The Social-Media Activity Here Far Exceeds Facebook "Friendships."**

While appealing to precedents from Florida, Tennessee, California, and Wisconsin (but not Texas), Plaintiffs liken Judge Harrison's Twitter activity to "friending" on Facebook. The Twitter activity here is far more egregious than "friending."

Among many bad facts, the trial judge here "liked" (*i.e.*, approved or endorsed, in Twitter parlance) tweets by opposing counsel expressing their negative viewpoints on the Debtor and their celebrations of their trial victory over him. *See* **Exhibits 1, 4 & 5** to Browning Affidavit (**Ex. A** to Doc. No. 178). Furthermore, much of the Twitter activity occurred just before and just after the trial judge had denied the Debtor any relief on his motion for judgment notwithstanding verdict, during February-March 2016. Worse, the most intensive Twitter activity – almost daily exchanges between the judge and opposing counsel – occurred contemporaneously with the judge's denial of supersedeas relief to Debtor on August 3, 2016, September 12, 2016 and January 29, 2017. In fact, just after the second supersedeas denial and before the third one, the trial judge posted photographs of himself with his grandson on the bench – the very day opposing counsel Jordyn Gingras had tweeted that the grandson "needs a picture in the courtroom!" *See, e.g.*, **Exhibit 8** to Browning Affidavit (September 30, 2016 tweets).

This activity runs badly afoul of Texas law that "[t]he judiciary must not only attempt to give all parties a fair trial, but it must also try to maintain the trust and confidence of the public at a high level [and] it is of great importance that the courts should be free from reproach or the suspicion of unfairness." *Indemnity Ins. Co. v. McGee*, 356 S.W.2d 666, 668 (Tex. 1962)). This activity shows the trial judge's actual and active partiality, bias and prejudice against the Debtor. At a very minimum, it shows the appearance of such partiality, bias and prejudice – which is sufficient for recusal under Texas law. *See, e.g.*, *Youkers v. State*, 400 S.W.3d 200, 207 (Tex. App. – Dallas 2013, pet. ref'd) ("We acknowledge the judge had an obligation not to let the [litigant] *convey the impression* that he was in a special position to influence the judge." (emphasis added)).

**2. The Debtor Relies on What Texas Courts Have Done, Not on Speculation.**

The Debtor has not "ask[ed] this Court to speculate about what Texas courts might do if Debtors actually sought recusal" upon a remand. *See* Plaintiffs' Brief at 4. Rather, the Debtor and Mr. Browning have highlighted actual recusals in Texas courts for social-media activity much more tenuous than Judge Harrison's activity. *See Texas Ethics Commission v. Michael Quinn Sullivan*, No. 02-15-00103-CV, 2015 Tex. App. LEXIS 11518, 2015 WL 6759306 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied) (recusal following TRCP 18a-18b proceedings); *State Fair of Texas v. Riggs & Ray, P.C.*, Cause No. DC-15-04484, 101st Judicial District Court, Dallas County (voluntary recusal). Moreover, in the context of the remand-related motions pending before the Court, the Debtor seeks merely to demonstrate the existence of a genuine issue on recusal, were this case remanded. The Debtor is not seeking the Court's ruling on the recusal issue.

**3. Wrongful Activity with Only Some Opposing Counsel Shows Partiality, Bias and Prejudice Against Debtor.**

That Judge Harrison's Twitter activity concerned primarily Intervenors' counsel (and not Plaintiffs' counsel) is of no consequence. Twitter activity against the Debtor (such as **Exhibits 1,**

**4 & 5** to Browning Affidavit) shows partiality, bias and prejudice against the Debtor that may inure – and did inure – to the benefit of *all* the Debtor's opponents, both Intervenors and Plaintiffs. Further, Twitter activity against the Debtor creates an appearance of unfairness that undermines public faith in legal proceedings; for that reason alone recusal should occur, were this case remanded. *In re Slaughter*, 480 S.W.3d 842, 853 (Tex. Spec. Ct. Rev. 2015) (per curiam) ("Sometimes the judge may need to recuse herself, or be recused, even though she has no actual bias and would do her very best to weigh the scales of justice equally between contending parties. . . . The judiciary must strive to not only give all parties a fair trial, but also maintain a high level of public trust and confidence.").

## CONCLUSION

The Debtor's counsel are not active on Twitter and had no knowledge of the wrongful Twitter activity during 2015-2016. They learned of the wrongful activity late in the appellate process, when the case was no longer before Judge Harrison, but was pending in the Texas Supreme Court, seeking petition for review. Following denial of petition for review, the Debtor used bankruptcy procedures to remove jurisdiction from the Texas state court and/or to stay proceedings there. The Debtor has raised the recusal issues in a timely and relevant manner and respectfully requests that the Court deny Plaintiffs' efforts to remand their case for administration by Texas courts. Such a remand either would engender lengthy recusal litigation, would put the case before a new judge entirely unfamiliar with the facts and history, or would do both.

Dated: October 18, 2021

Respectfully submitted,

*/s/ James Holmes*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served upon the parties listed below via email or via ECF electronic Notice, if available, on October 18, 2021.

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