APPENDIX

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10. *Sanctions Order*
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NO. 12-17-00280-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	§	
JERRY LAZA,	§	*ORIGINAL PROCEEDING*
RELATOR	§	

MEMORANDUM OPINION
PER CURIAM

Jerry Laza filed this original proceeding to challenge the trial court's denial of his motion to show authority.[1] In a subsequently filed motion for emergency stay, Laza stated that the City of Palestine filed a notice of removal to federal court on September 18, 2017. Because of the removal to federal court, this Court took no action on the motion. On December 15, we informed Laza that "[p]ursuant to 28 U.S.C. 1446(d) notice is hereby given that the petition, as indicated by the motion for stay, received in this proceeding does not show the jurisdiction of this Court, to-wit: the case has been removed to federal court and the federal court now has exclusive jurisdiction over the case." We informed Laza that the petition would be dismissed unless amended on or before December 19 to show this Court's jurisdiction. That deadline has passed, and Laza has not responded to this Court's December 15 notice.

Once a notice of removal is filed, it "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. 1446(d); *see* ***In re Sw. Bell Tel. Co., L.P.***, 235 S.W.3d 619, 624 (Tex. 2007) ("[f]rom the time the case was removed to federal court until it was remanded to state court, the state court was prohibited from taking further action[]"). "Following removal, the federal court has exclusive jurisdiction over the action." ***J.P. Morgan Chase Bank, N.A. v. Del Mar Properties, L.P.***, 443 S.W.3d 455, 460

[1] Respondent is the Honorable Dwight L. Phifer, assigned judge for the 349th Judicial District Court in Anderson County, Texas. The Real Party in Interest is the City of Palestine.

(Tex. App.—El Paso 2014, no pet.). Accordingly, the City's notice of removal effected the removal and vested the federal court with exclusive jurisdiction over the case. *See* 28 U.S.C. 1446(d); *see also* ***In re Sw. Bell Tel. Co., L.P.***, 235 S.W.3d at 624; ***J.P. Morgan Chase Bank, N.A.***, 443 S.W.3d at 460. Thus, we lack jurisdiction over this proceeding and Laza's petition for writ of mandamus is ***dismissed for want of jurisdiction***.

Opinion delivered January 3, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 3, 2018

NO. 12-17-00280-CV

JERRY LAZA,
Relator
V.

HON. DWIGHT L. PHIFER,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Jerry Laza; who is the relator in Cause No. DCCV16-356-349, pending on the docket of the 349th Judicial District Court of Anderson County, Texas. Said petition for writ of mandamus having been filed herein on September 18, 2017, and the same having been duly considered, because it is the opinion of this Court that it lacks jurisdiction, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **dismissed for want of jurisdiction**.

By *per curiam* opinion.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.

NO. DCCV16-356-349

CITY OF PALESTINE, TEXAS	§	IN THE 349TH JUDICIAL DISTRICT
PLAINTIFF,	§	
V.	§	COURT OF
JERRY LAZA,	§	
DEFENDANT	§	ANDERSON COUNTY, TEXAS

JUDGMENT

On September 18, 2017, this cause came on to be heard and City of Palestine, Texas, the Plaintiff, appeared in person and by attorney and announced ready for trial and Jerry Laza, the defendant, appeared in person and by attorney of record and announced not ready for trial. A jury having been previously demanded, a jury consisting of 12 qualified jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the court submitted the questions of fact in the case to the jury. The charge of the court and the verdict of the jury are incorporated for all purposes by reference. Because it appears to the court that the verdict of the jury was for the Plaintiff, City of Palestine, Texas, and against the Defendant, Jerry Laza, judgment should be rendered on the verdict in favor of the Plaintiff, City of Palestine, Texas, against the Defendant, Jerry Laza.

IT IS THEREFORE ORDERED by the court that the City of Palestine, Texas have and recover from Jerry Laza as civil penalties the sum of One Hundred Sixty-Three Thousand One Hundred Fifty-Five Dollars ($163,155.00).

The Court further finds that based on the jury's answers to jury questions 1, 2, 2C, 3, 4, 5, 6, 7, 8, 9, and 10 that the City of Palestine, Texas, Plaintiff is entitled to equitable relief against Jerry Laza, Defendant.

Having considered the evidence and arguments, and having received and accepted the verdict of the jury, the court finds and concludes that the Plaintiff, the City of Palestine, Texas is entitled to the relief hereinafter given.

IT IS, THEREFORE, ORDERED that the Defendant Jerry Laza be, and hereby is, commanded to cease and refrain from all the following:

- storing materials or merchandise on the Lot 40 of Block B-5, Texas Land Company, Palestine, Texas, also known as 402 Texas Avenue, Lots 27A and 28A of Block B-5, Texas Land Company, Palestine, Texas, also known as 307 North Fort, and Lot 26R of Block B-5, Texas Land Company, Palestine, Texas, (the "Residential Lots"), specifically;
    - storing more than two lawnmowers and one other piece of small-engine equipment (such as a four-wheeler, golf cart, or jet ski) on any residential lot.
    - storing more than two motor vehicles and one trailer on any residential lot;
- storing materials or merchandise within 10 feet of the right of way on the Lots 23B, 24A, 25A, and 26A of Block B-5, Texas Land Company, Palestine, Texas, also known as 1101 West Oak and Lots 20B and 20C of Block B-4, Texas Land

Company, Palestine, Texas, also known as 1019 West Oak (the "Commercial Lots");

- storing materials or merchandise in front of the primary buildings located on the Commercial Lots. The "primary building on 1101 West Oak is defined as the masonry building that is located within 30 feet of the road surface of West Oak, and being the building on 1101 West Oak which is closest to the road surface of West Oak. The "front" of both buildings is defined at that part of the building facing West Oak;
- storing materials or merchandise on any unimproved surfaces, or on any surface that is not improved with materials such as concrete, asphalt, concrete pavers, or dust-free crushed rock, on the Commercial Lots (dirt, grass, and gravel are, for the purposes of this injunction, "unimproved surfaces");
- storing materials or merchandise on the Commercial Lots that is not screened from residential lots by a wooden fence (or other substantial type wall or fence material, supported by a frame or base constructed of concrete, metal, or other substantial material, and not readily subject to damage by operations within the enclosure or by the effects of winds or other weather elements);
- storing materials or merchandise on 1019 West Oak unless and until Mr. Laza obtains a certificate of occupancy for the operation of a lawnmower shop or any other commercial activity on 1019 West Oak;
- operating a junkyard or salvage yard on the Commercial Lots, specifically:

- storing outside more than 50 pieces of small engine equipment (such as a lawnmower, four-wheeler, golf cart, chain saw, motorcycle, or jet ski) on 1101 West Oak;
- storing outside more than 20 pieces of small engine equipment (such as a lawnmower, four-wheeler, golf cart, chain saw, motorcycle, or jet ski) on 1019 West Oak, if a certificate of occupancy for a lawnmower repair shop is issued for 1019 West Oak; or
- storing outside scrap iron or other metals, appliances, or other used or secondhand materials and merchandise;

- on the Residential Lots or the Commercial Lots:
  - keeping of livestock, which is defined as any animal other than fowl raised for agricultural purposes, including horses, mules, donkeys, hogs, sheep, cattle, goats, emus, ostriches, and rheas;
  - keeping any inoperable motor vehicle;
  - allowing weeds to grow over 12 inches high; and
  - creating a rat harborage by allowing trash and rubbish – or anything other than lawnmowers and small engine equipment as allowed herein - to accumulate outdoors on the property.

IT IS FURTHER ORDERED that the Defendant Jerry Laza be, and hereby is, commanded to:

- permit City of Palestine Code Enforcement personnel to enter the Property (outside any building) between the hours of 8 a.m and 5 p.m., Monday through Friday, no more frequently than once per calendar month, to determine compliance with this injunction;
- start and move any motor vehicle on the property to demonstrate that it is not inoperable upon request of City of Palestine Code Enforcement personnel; and
- comply completely with this order by no later than the 16th day of April, 2018.

IT IS FURTHER ORDERED that the total amount of the judgment here rendered will bear interest at the rate of five percent (5%) from the date of the judgment until paid.

All costs of court spent or incurred in this cause are adjudged against Jerry Laza, the Defendant.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

The clerk shall forthwith, when requested by the Plaintiff, City of Palestine, Texas, issue a writ of injunction and conform it with the law and the terms of this judgment.

SIGNED this 16th day of February, 2018.

JUDGE PRESIDING

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 18-9083

TRANSFER OF CASES FROM COURTS OF APPEALS

ORDERED:

I.

Except as otherwise provided by this Order, the first 30 cases filed in the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, on or after June 1, 2018, are transferred to the Court of Appeals for the First Court of Appeals District, Houston, Texas; the next 20 cases filed in the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, are transferred to the Court of Appeals for the Sixth Court of Appeals District, Texarkana, Texas; and the next 12 cases filed in the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, are transferred to the Court of Appeals for the Seventh Court of Appeals District, Amarillo, Texas.

II.

Except as otherwise provided by this Order, the first 11 cases filed in the Court of Appeals for the Third Court of Appeals District, Austin, Texas, on or after June 1, 2018, are transferred to the Court of Appeals for the First Court of Appeals District, Houston, Texas; the next 10 cases filed in the Court of Appeals for the Third Court of Appeals District, Austin, Texas, are transferred to the Thirteenth Court of Appeals District, Corpus Christi, Texas; and the next 42 cases filed in the Court of Appeals for the Third Court of Appeals District, Austin, Texas, are transferred to the Fourteenth Court of Appeals District, Houston, Texas.

III.

Except as otherwise provided by this Order, the first 10 cases filed in the Court of Appeals for the Tenth Court of Appeals District, Waco, Texas, on or after June 6, 2018, are transferred to the Thirteenth Court of Appeals District, Corpus Christi, Texas.

IV.

Except as otherwise provided by this Order, the first 10 cases filed in the Court of Appeals for the Twelfth Court of Appeals District, Tyler, Texas, on or after June 5, 2018, are transferred to the Sixth Court of Appeals District, Texarkana, Texas.

For purposes of determining the effective date of transfers pursuant to this order, "filed" in a court of appeals means the receipt of notice of appeal by the court of appeals.

In effectuating this Order, companion cases shall either all be transferred, or shall all be retained by the Court in which filed, as determined by the Chief Justice of the transferring Court, provided that cases which are companions to any case filed before the respective operative dates of transfer specified above, shall be retained by the Court in which originally filed.

It is specifically provided that the cases ordered transferred by this Order shall, in each instance, not include original proceedings; appeals from interlocutory orders; appeals from denial of writs of habeas corpus; appeals in extradition cases; appeals regarding the amount of bail set in a criminal case; appeals from trial courts and pretrial courts in multidistrict litigation pursuant to Rule 13.9(b) of the Rules of Judicial Administration; appeals in cases involving termination of parental rights; and those cases that, in the opinion of the Chief Justice of the transferring court, contain extraordinary circumstances or circumstances indicating that emergency action may be required.

The transferring Court of Appeals will make the necessary orders for transfer of the cases as directed hereby, and will cause the Clerk of that Court to transfer the appellate record in each case, and certify all orders made, to the court of appeals to which the cases are transferred. When a block of cases is transferred, the transferring court will implement the transfer of the case files in groups not less than once a month, or after all the requisite number of cases have been filed. Upon completion of the transfer of the requisite number of cases ordered transferred, the transferring Court shall submit a list of the cases transferred, identified by style and number, to the State Office of Court Administration, and shall immediately notify the parties or their attorneys in the cases transferred of the transfer and the court to which transferred.

The provisions of Misc. Docket Order No. 06-9136 shall apply.

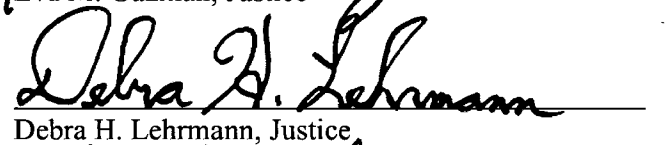
SO ORDERED this 19th day of June, 2018.

Nathan L. Hecht, Chief Justice

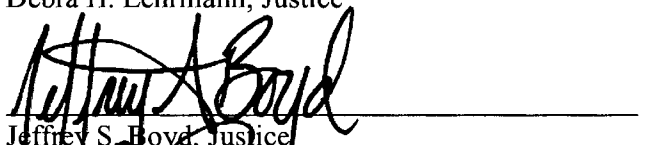
Paul W. Green, Justice

Phil Johnson, Justice

Eva M. Guzman, Justice



Debra H. Lehrmann, Justice



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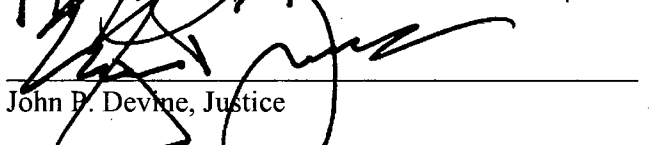
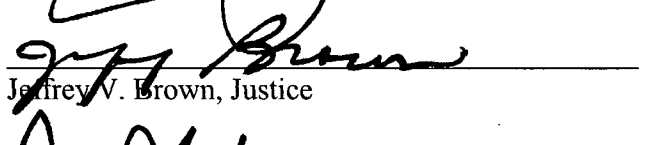
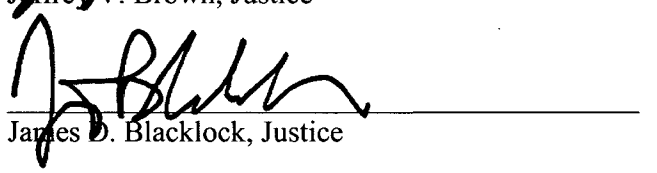


John P. Devine, Justice



Jeffrey V. Brown, Justice



James D. Blacklock, Justice

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-18-00051-CV

JERRY LAZA, Appellant

V.

CITY OF PALESTINE, TEXAS, Appellee

On Appeal from the 349th District Court
Anderson County, Texas
Trial Court No. DCCV16-356-349

Before Morriss, C.J., Stevens and van Cleef, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

In response to a lawsuit by the City of Palestine, Texas,[1] alleging that Jerry Laza violated various City ordinances by improperly maintaining specific properties of his within the City and unlawfully keeping junk, vehicles, equipment, and other unsightly items on those tracts, Laza interposed numerous and varied procedural defenses over time. After the jury made a number of findings against him[2] and a number of trial court rulings went against him, Laza's energetic struggle in the trial court proved unsuccessful. Laza now appeals. We affirm the City's judgment because (1) the trial court had jurisdiction to enter judgment and post-judgment orders, (2) the trial court did not err in denying Laza's Rule 12 motion to show authority, (3) Laza

[1]Originally appealed to the Twelfth Court of Appeals in Tyler, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Twelfth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]The jury found that:

- Laza displayed lawn mowers or other equipment in front of his primary building at 1101 West Oak or 1019 West Oak, for which the jury assessed a penalty of $18,250.00;
- Laza stored lawn mowers and other equipment within ten feet of the property line of the City's property, for which the jury assessed a penalty of $365.00;
- Laza stored lawn mowers and other equipment outside and on an unimproved surface, for which the jury assessed a penalty of $365.00;
- Laza kept junk motor vehicles on his property, for which the jury assessed a penalty of $16,425.00;
- Laza used and maintained his property as a junkyard or a salvage yard, for which the jury assessed a penalty of $31,025.00;
- Laza used certain of his property in his business as a lawn mower repair shop, for which the jury assessed a penalty of $3,650.00;
- Laza kept a horse or goats in a non-agricultural area, for which the jury assessed a penalty of $1,825.00;
- Laza failed to maintain the grass and weeds on certain of his properties at a height of less than twelve inches, for which the jury assessed a penalty of $9,125.00;
- Laza failed to keep the buildings, grounds, and premises at certain of his properties free of garbage, trash, and rubbish, for which the jury assessed a penalty of $27,375.00;
- Laza failed to dispose of articles and accumulations that have caused certain of his properties to become unsanitary and unsightly, for which the jury assessed a penalty of $27,375.00; and
- Laza maintained certain of his property in a manner that created rat harborage, for which the jury assessed a penalty of $23,375.00.

procedurally waived any complaints regarding the trial court's denial of his special exceptions, (4) Laza failed to preserve his claimed jury charge error, (5) the motion to recuse was properly denied, and (6) there is no basis on which to vacate the judgment.[3]

In this appeal, Laza does not challenge any of the jury's findings. Based on the jury's findings, the trial court entered a judgment assessing civil penalties, prohibited Laza from operating a junkyard or salvage yard on his properties, and granted other injunctive relief.

The resolution of the issues before us requires a brief discussion of the development of the underlying litigation. In its lawsuit against Laza, the City sought injunctive relief and civil penalties, alleging that Laza used certain properties as junk and salvage yards in violation of various city codes and zoning ordinances. Laza filed counterclaims against the City alleging violations of his federal civil rights and violations of the Texas Open Meetings Act (TOMA), among other things. After the trial court severed Laza's counterclaims from the remainder of the lawsuit, the City removed the severed action to federal court. The City's claims against Laza

[3]The City filed a motion to dismiss this appeal on the basis that (1) Laza admitted the validity of the City's judgment in his bankruptcy case and is now judicially estopped from taking the opposite position in this appeal, or (2) Laza made a voluntary, substantial payment on the City's judgment in his bankruptcy case and has waived his right to appeal the judgment. In support of its arguments, the City alleges that (1) after the City obtained a judgment lien, Laza fraudulently transferred all of his real property except his homestead; (2) after fraudulently transferring all his real property except his homestead, Laza filed a Chapter 7 bankruptcy case; (3) the bankruptcy court lifted the stay for the City to pursue criminal penalties against Laza; (4) the trustee recovered the real property that Laza fraudulently transferred before he filed bankruptcy; (5) the bankruptcy court's order of discharge did not discharge the City's judgment and lien; (6) the trustee and the City entered into a settlement—subject to the bankruptcy court's approval—under which the trustee agreed to dismiss this appeal; (7) as a result of Laza's representations, the trustee backed out of the settlement with the City and entered into a settlement with Laza; (8) as a result of Laza's representations, the bankruptcy court approved the trustee's settlement with Laza; (9) from Laza's settlement payment, the trustee paid $130,319.25 on the City's judgment against Laza; (10) on Laza's request, the Court reinstated this appeal. Because we have jurisdiction over this appeal, we decline to delve into the facts of Laza's bankruptcy and choose, instead, to decide this case on the merits of the appeal. We, therefore, deny the City's motion to dismiss this appeal.

proceeded to a jury trial. The trial court entered a judgment on the jury's verdict awarding the City $163,155.00 and granting the City's requested injunctive relief.

(1) The Trial Court Had Jurisdiction to Enter Judgment and Post-Judgment Orders

Laza claims that all proceedings in the trial court—including the jury trial, the judgment, and post-judgment orders—were void based on the prior removal of what he contends was the entire case to federal court. We examine the circumstances of the severance and removal to determine whether the trial court retained jurisdiction—post removal—over the City's claims against Laza.

On August 18, 2017, in advance of the September 18, 2017, trial date, Laza filed his third amended original answer and original counterclaim and petition for relief, seeking damages and a demand for jury trial. Laza's original counterclaim alleged causes of action for breach of contract, declaratory relief, and inverse condemnation. In the alternative, Laza claimed an unlawful taking under the Constitution of the United States and the Constitution of the State of Texas. Laza asserted that his counterclaims were brought pursuant to "United States Constitution Article 1 Section 10 and 42 U.S.C.A. § 1983" and alleged "violations of [his] civil rights as guaranteed by the Contracts Clause and Fourteenth Amendment to the United States Constitution and in violation of the Texas Constitution art. 1, § 17."

Also, on August 18, 2017, Laza filed his fourth amended original answer and first amended counterclaim. The first amended counterclaim included new claims alleging violations of TOMA against new parties, including the city administrator, the city attorney, and "Defendant, John or Jane Does 1-9, City Council Persons." On August 21, 2017, less than thirty

days before the scheduled trial date, Laza filed his fifth amended original answer and second amended counterclaim.[4] The second amended counterclaim did not assert any new claims or add any new parties.

The City filed a motion to strike and, in the alternative, to sever Laza's first and second amended counterclaims on the basis that those filings failed to comply with the trial court's scheduling order setting forth a May 10, 2017, deadline for filing amended pleadings asserting new claims or defenses. The City alleged that the newly added causes of action in the first amended counterclaim lacked merit. It also argued that both the first and second amended counterclaim, which added no additional causes, were designed to delay the proceedings in the trial court. It therefore asked the trial court to strike the new counterclaims or, in the alternative, to "sever Laza's counterclaims from the claims made by the City of Palestine, which [had] been ready for trial for several months."

On September 15, 2017, the trial court entered a severance order, stating,

> Defendant Jerry Laza's First and Second Amended Counterclaims would, if not severed, inevitably delay the initial lawsuit.
>
> ACCORDINGLY, it is hereby ordered that the counterclaims filed by defendant and Counter-Plaintiff in Defendant Jerry Laza's Fifth Amended Original answer and Defendant Jerry Laza's Second Amended Counterclaim Preservation of Counterclaim, and Petition for Relief and Inverse Condemnation and violation of Texas Open Meetings Act, Seeking Damages, Alternative Damages and Demand for Jury Trial which were new and additional counterclaims and which were not pled in Defendant's Pleadings before the filing of Defendant Jerry Laza's Fourth Amended Original Answer and Defendant Jerry Laza's Second Amended Counterclaim, and Petition for Relief and Inverse Condemnation and violation of

[4]Laza styled that pleading "Defendant Jerry Laza's Fifth Amended Original Answer and Defendant Jerry Laza's Second Amended Counterclaim, Preservation of Counterclaim, And Petition For Relief And Inverse Condemnation And Violation Of Texas Open Meetings Act, Seeking Damages, Alternative Damages And Demand For Jury Trial."

> Texas Opens Meetings Act, Seeking Damages and Demand for Jury Trial be and the same are hereby severed into a separate suit, which shall be given the Cause Number DCCV16-349A.

On September 18, 2017, the City removed the severed action, cause number DCCV16-356-349A, to the United States District Court for the Eastern District of Texas under docket number 6:17-cv-00533-RWS.

Meanwhile, the City's claims against Laza proceeded in the 349th Judicial District Court of Anderson County under cause number DCCV16-356-349. In conjunction with that case, the trial court conducted a hearing October 12, 2017, "regarding the jurisdiction of the Court following the removal to Federal Court of those counterclaims which had been severed into a separate cause no: Cause No. DCCV16-356-349A." At that hearing, Laza argued that the federal court had "complete" jurisdiction over the case and that the "State Court's jurisdiction over the action [was] suspended from the moment of removal." Counsel for the City pointed out that the notice of removal specifically removed cause number DCCV16-356-349A, but the state court matter was cause number DCCV16-356-349. That cause number, the City argued, did not include any of the actions that were severed and subsequently removed to federal court. Contrarily, Laza argued that the severance order severed only "the difference between the third and the fifth." The trial court responded,

> [W]hat I said I would do is I would sever all the counterclaims which were newly alleged in the Fourth and Fifth Amended Answer. So that anything that was in the Fifth that was not in the Third was going to be severed. And what I said I would do is I would sever all the counterclaims which were newly alleged in the Fourth and Fifth Amended Answer. So that anything that was in the Fifth that was not in the Third was going to be severed.
>
> . . . .

> My order very clearly says the only thing I'm severing are the counterclaims, the ones that are in the Fifth, but weren't in the Third. That's the only thing that was severed from the existing suit.

The trial court stated that only the severed case, "which included some counterclaims," was removed to federal court. The court concluded that, since only the severed case was removed, it had jurisdiction of the City's claims against Laza.

At the hearing, the court raised the question of which precise counterclaims were severed from the remainder of the case to determine which counterclaims were removed to federal court. To make that determination, the trial court indicated that it would be necessary to construe its severance order. Counsel for the City suggested that it was unnecessary to construe the order. Instead, the City took the following position: "[A]ll you have to do is look at the Third Amended Answer and [original] counterclaim. If it's in there, it's in this case. If it's not in there, it's either never been [pled] or it was [pled] later and it's been . . . severed." The trial court determined that it had jurisdiction over the City's claims against Laza in the non-severed case.

In a further effort to end the proceedings in the trial court, Laza filed a motion for emergency stay on October 16, 2017, in conjunction with a previous petition for a writ of mandamus that he had filed in the 12th Court of Appeals in Tyler.[5] In his emergency motion,

[5]On the same day, the trial court issued its order for a separate trial of "all counterclaims of Jerry Laza against the City of Palestine and all cross-claims of Jerry Laza against other parties" because "there [was] uncertainty regarding which claims were severed into Cause No. DCCV16-356-349A, and which claims remain[ed] in . . . Cause No. DCCV16-356-349." After the trial concluded, the City filed a second motion to sever. The trial court granted that motion on March 9, 2018, severing all counterclaims "pending in [that] Court filed by Counter-Plaintiff, Jerry Laza . . . into a separate suit which [was] given the Cause Number DCCV16-356-349-B."

Laza claimed that the trial court lacked jurisdiction.[6] Among other things, Laza's emergency motion alleged:

- On 18 September 2017, the City of Palestine filed a notice of removal in the Cause Number DCCV16-356-349A, claiming that there is a pleading in that cause number. See Exhibit A 349A Case Summary A, DCCV16-356-349A. [sic] and Exhibit B Fed Docket Report 10 Oct 2017; CASE #: 6:17-cv-00533-RWS.

- The only pleading attached to the Notice of Removal is from Cause Number DCCV16-356-349.

- Relator will be irreparably harmed if the case is tried while the trial court does not have Subject Matter Jurisdiction. See Exhibit F [5] Motion hearing and emergency and exhibits 1-4 in CASE #: 6:17-cv-00533-RWS.

The federal docket for cause number 6:17-cv-00533-RWS lists the following documents filed in conjunction with the notice of removal "by the City of Palestine, Texas from 349th Judicial District Court of Anderson County, Texas, cause number DCCV16-356-349A":

- Laza's First Amended Counterclaim

- Laza's Second Amended Counterclaim

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[6]The City has requested this Court to take judicial notice of the certified records in the following matters included in its appendix:

- *In re Jerry D. Laza*, No. 18-60485, in the United States Bankruptcy Court for the Eastern District of Texas, Tyler Division
- *Jason R. Searcy, Trustee v. VEREIN #47229312875134990127 83, L.C.*, No. 18-06007, in the United States Bankruptcy Court for the Eastern District of Texas, Tyler Division
- *Laza v. City of Palestine, Texas, et al.*, in the United States District Court for the Eastern District of Texas, Tyler Division, case number 6:17-cv-00533-JDL
- *In re Jerry Laza*, case number 12-17-00280-CV, in the Twelfth Court of Appeals

"The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201(b)(2). "The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." TEX. R. EVID. 201(c)(2). At appellee's request, we take judicial notice of the certified records from the listed proceedings. *See In re Estate of Hutto*, No. 06-05-00100-CV, 2006 WL 541031, at *1 (Tex. App.—Texarkana Mar. 7, 2006, no pet.) (mem. op.); *Antonov v. Walters*, 168 S.W.3d 901, 903 n.1 (Tex. App.—Fort Worth 2005, pet. denied); *Sparkman v. Kimmey*, 970 S.W.2d 654, 659 (Tex. App.—Tyler 1998, pet. denied).

- City of Palestine's Motion to Strike
- Order Granting City of Palestine's Motion to Sever

In addition, the following documents were listed on the federal court docket as also having been filed in the federal case:

- Complaint against City of Palestine, Texas, filed by Jerry Laza. (Originally filed in state court as "Fifth Amended Original Answer and Second Amended Counterclaim . . . and Demand for Jury Trial.").
- City of Palestine's Answer to Complaint (2nd Amended Counterclaim and Petition for Relief and Inverse condemnation and Violation of Texas open Meetings Act) by City of Palestine, Texas.

In a nutshell, Laza claimed that the City removed cause number DCCV16-356-349 because the trial court documents attached to the notice of appeal—listed above—contained the cause number DCCV16-356-349 and not cause number DCCV16-356-349A. Therefore, according to Laza, there was nothing to remove in cause number DCCV16-356-349A.

The Tyler Court thereafter issued a letter to Laza in reference to trial court cause number DCCV16-356-349, indicating that, "due to the removal of the case to federal court, [the Tyler] Court [would] take no action on said [emergency] motion." On December 15, 2017, the Tyler Court issued a jurisdictional defect letter to Laza stating, "[I]t appears that the City of Palestine filed a notice of removal to federal court on September 18, 2017." The Court advised Laza that, as indicated in the emergency motion, it did not appear that the court had jurisdiction based on the removal to federal court. Laza was further advised that the petition would be dismissed unless Laza could "show the jurisdiction of [that] Court." In a memorandum opinion stating that it received no response to the jurisdictional defect letter, the Tyler Court dismissed Laza's

petition and motion for emergency stay for want of jurisdiction because "the city's notice of removal effected the removal and vested the federal court with exclusive jurisdiction over the case." *In re Laza*, No. 12-17-00280-CV, 2018 WL 271833, at *1 (Tex. App.—Tyler Jan. 3, 2018, orig. proceeding) (citing 28 U.S.C. 1446(d)).

Based on the Tyler Court's pronouncement that the notice of removal vested the federal court with exclusive jurisdiction over the case, Laza claims here that the trial court lost jurisdiction of the entire case below once it was removed to federal court on September 18, 2017. Laza further contends that the law of the case doctrine dictates that our determination of whether the trial court retained jurisdiction of the case following the notice of removal is governed by the Tyler Court's pronouncement. We disagree.

(a) The Law of the Case Doctrine Does Not Prevent our Examination of Jurisdiction

"The 'law of the case' doctrine provides that a decision of a court of last resort on a question of law will govern a case throughout its subsequent stages." *City of Houston v. Jackson*, 192 S.W.3d 764, 769 (Tex. 2006) (citing *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986)). The doctrine

> is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. The doctrine is based on public policy and is aimed at putting an end to litigation.

Briscoe v. Goodmark Corp., 102 S.W.3d 714, 716 (Tex. 2003) (quoting *Hudson*, 711 S.W.2d at 630). As a result, "a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case." *Id.* Even so, "[a] decision rendered on an issue before the

appellate court does not absolutely bar re-consideration of the same issue on a second appeal." *Id.* "Application of the doctrine lies within the discretion of the court, depending on the particular circumstances surrounding that case." *Id.* The Texas Supreme Court has also "long recognized as an exception to the law of the case doctrine that if the appellate court's original decision is clearly erroneous, the court is not required to adhere to its original rulings." *Id.*

This Court has previously recognized that the law of the case doctrine applies only "to matters that are fully litigated and determined on appeal." *Sherer v. Sherer*, 393 S.W.3d 480, 486 n.13 (Tex. App.—Texarkana 2013, pet. denied) (citing *Briscoe*, 102 S.W.3d at 716); *see Visage v. Marshall*, 763 S.W.2d 17, 19 (Tex. App.—Tyler 1988, no writ) (parties bound by matters fully litigated and determined in order). Because "a mandamus . . . is not an appeal . . . [t]he denial of mandamus relief is not an adjudication on the merits and does not prevent reconsideration of the matter in a subsequent appeal." *Sherer*, 393 S.W.3d at 486 n.13 (citing *Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007)).

Here, the Tyler Court seemingly addressed the merits of the dismissal of the petition and motion when it stated that the federal court had exclusive jurisdiction over the case based on the notice of removal. Even so, that issue was not fully litigated. We do not, therefore, find that the law of the case doctrine applies here due to the Tyler Court's mandamus opinion. As a result, we will address the merits of the jurisdictional issue.

(b) The Notice of Removal Effected the Removal of Only the Severed Case

"Any claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. "The effect of a severance is to divide a lawsuit into two or more independent suits that

will be adjudicated by distinct and separate judgments." *Levetz v. Sutton*, 404 S.W.3d 798, 802–03 (citing *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 383 (Tex. 1985)). "The controlling reasons to allow a severance" are "avoiding prejudice, doing justice, and increasing convenience." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007).

The trial court's severance order purported to sever only Laza's first and second amended counterclaims and assigned cause number DCCV16-356-349A to the severed action. The civil docket sheet for cause number 6:17-cv-00533-RWS filed in the United States District Court for the Eastern District of Texas indicates that the notice of removal was filed by the City of Palestine "from the 349th Judicial District Court of Anderson County, Texas, case number DCCV16-356-349A." The order granting the City of Palestine's motion to sever was filed in conjunction with the notice of removal. Also included as exhibits to the notice of removal were Laza's first and second amended counterclaims.

Laza's claim that the entire case was removed to federal court, based on the assertion that the counterclaims attached to the notice of removal did not bear cause number DCCV16-356-349A, is meritless. *See McRoberts v. Ryals*, 863 S.W.2d 450, 452–53 (Tex. 1993) ("order granting a severance . . . is effective when signed . . . without the district clerk's creation of a separate physical file with a different cause number"). Those counterclaims were assigned the new cause number DCCV16-356-349A and were removed to federal court under the notice of removal designating that cause number. It is also clear from the record that none of the City's claims against Laza were severed and none of the City's claims against Laza were removed to

federal court. The question of the trial court's jurisdiction should end there, but Laza has raised one final argument.

In a last-ditch effort to convince this Court that the trial court lacked jurisdiction based on the removal, Laza contends that the severance order effected the removal of only the differences between the first and second amended counterclaims. Because the second amended counterclaim did not assert claims not previously asserted and did not add parties not previously named in the first amended counterclaim, Laza claims that nothing was removed to federal court under cause number DCCV16-356-349A. He claims that, as a result, the entire case was removed under cause number DCCV16-356-349 to federal court, leaving the trial court with no jurisdiction over the City's claims against him. This claim is specious and wholly without merit.

In 2017, the federal court decided that the only matters removed to that court bore cause number DCCV16-356-349A. In its order, the federal court stated,

> The pleadings before this Court are based on the City of Palestine's Notice of Removal from Cause No. DCCV16-356-349A, in the 349th Judicial District Court, Anderson County, Texas, for claims invoking a federal question pursuant to 28 U.S.C. § 1441(a). . . . Pursuant to the Notice of Removal, the live complaint before this Court is Docket No. 3, which was originally filed in state court as Plaintiff's "Fifth Amended Original Answer and Second Amended Counterclaim." . . . This is the only live pleading filed before this Court and one that indeed asserts claims arising under the United States Constitution and 42 U.S.C. § 1983. . . . To the extent there is a discrepancy regarding what counterclaims were severed in state court by virtue of the state court judge's severance order, *no motion to remand was timely brought on that basis.*
>
> As it stands, on the pleadings before this Court, the Court finds that the allegations in the complaint (filed originally as "Fifth Amended Original Answer and Second Amended Counterclaim"[]) that invoke federal jurisdiction have been properly removed to this Court.

(Emphasis added).

There can be no question that—as was undoubtedly apparent to Laza when the federal court issued its order in 2017—Laza's fifth amended original answer and second amended counterclaim was properly removed to federal court under cause number DCCV16-356-349A.[7]

Consequently, we conclude that the trial court had jurisdiction over all claims in cause number DCCV16-356-349. Because the trial court retained jurisdiction of the City's claims

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[7]In its memorandum opinion and order issued on March 29, 2022, in which the federal court denied Laza's motion for summary judgment, the court outlined the following history of the case:

> Upon removal, Plaintiff Jerry Laza immediately petitioned this court for an emergency hearing seeking clarity on what was removed to federal court. . . . The court found that Plaintiff's "Fifth Amended Original Answer and Second Amended Counterclaim" filed in state court included allegations that invoked federal question jurisdiction. . . . Nonetheless, certain related state court claims remained in state court about to go to trial. As a result, the court stayed this action, but ordered Plaintiff to file an amended complaint delineating the federal claims he intended to assert in this matter. On December 15, 2017, Plaintiff filed an amended complaint in this matter. . . .
>
> The case remained stayed before this court while the court received status reports from the parties on the state court action and the desire to proceed with the federal claims before this court. On January 25, 2019, Plaintiff filed a suggestion of bankruptcy in this case. . . . Plaintiff had filed a Chapter 7 Bankruptcy petition in the Bankruptcy Court for the Eastern District of Texas. *See In Re Jerry D. Laza*, No. 18-60485 (Bankr. E.D. Tex. 2018). As a result, the claims asserted before this court became an asset of the bankruptcy estate and the trustee became the real party in interest. Accordingly, the court added trustee Michelle Chow to this case and administratively closed the action pending bankruptcy proceedings. . . . Chow continued to provide the court status updates on the bankruptcy proceedings. . . . On October 1, 2020, Ms. Chow informed the court that Plaintiff and Chow reached a settlement approved by the United States Bankruptcy Court for the Eastern District of Texas whereby Chow abandoned the estate's interest in the case and Plaintiff's interest in the federal claims was returned to him.
>
> On February 15, 2021, following an order for a status update on the case, Plaintiff informed the court that he had retained counsel and would proceed with claims under 42 U.S.C. § 1983 and the Texas Open Meetings Act ("TOMA"). . . . On the same day, the court ordered Plaintiff to file and serve his amended complaint within fourteen days. . . . On March 9, 2021, Plaintiff filed his amended complaint with six causes of action against previously named Defendants. . . . This amended complaint remains to be the live complaint in this action.

Any issues regarding the propriety of the trial court's severance are moot, in light of the federal court's opinion resolving the claims removed to that court.

against Laza, the trial court's judgment and post-judgment orders in the non-severed action are not void and are valid and enforceable.[8]

(2) The Trial Court Did Not Err Denying Laza's Rule 12 Motion to Show Authority

In the trial court, Laza filed a "Motion to show Authority and Request for Emergency Hearing," claiming that Ronald Stutes, "the alleged said attorney for CITY OF PALESTINE," did not have authority to represent the City because he was "acting without due authority of the City of Palestine's duly elected city council." Laza claimed that, because "the City Council of the City of Palestine ha[d] never authorized the actions described in the Original or Amended petitions in [the] case," Stutes was "prosecuting this suit without the authority of the CITY OF PALESTINE."

The trial court held a hearing on Laza's motion at which attorney Stutes testified as follows:

> [M]y name is Ronald Suttts [sic], I'm an attorney, I've been licensed since 1985, and I am now a member of the law firm of Potter Minton in Tyler, Texas. Approximately 11 years ago, I think it was 2006, I was hired by the City of Palestine to be the city attorney for the City of Palestine, and I've been since 2006. The city charter says that the -- says that the city attorney is authorized to bring and defend all litigation on behalf of the City of Palestine.
>
> I presume -- presented you the affidavit of Mike Alexander,[9] who's the city manager of the City of Palestine and he states that I am the city attorney and I am

[8]Based on our resolution of this issue, we deny Laza's March 2, 2022, motion to vacate and to dismiss this appeal. We likewise deny Laza's March 14, 2022, motion to reconsider jurisdictional matters.

On March 9, 2018, the trial court entered a second severance order in which it ordered that "all counter-claims now pending in this Court filed by Counter-Plaintiff, Jerry Laza, be and the same are hereby severed into a separate suit which shall be given the Cause Number DCCV16-356-349-B," and, as a result, "the judgment entered by the Court in Cause Number DCCV16-356-349 is now a final judgment."

[9]Although considered by the trial court, Alexander's affidavit was not made a part of the record in this case. His affidavit is included in the appendix to Laza's petition for a writ of mandamus filed in *In re Jerry Laza*, cause number 12-17-00280-CV, in the Twelfth Court of Appeals, the certified record of which we have judicially noticed.

> authorized to represent the city, and that he has authorized the filing of this lawsuit. That concludes my testimony.

The trial court took judicial notice of the Palestine, Texas, Code of Ordinances, as it existed at the time of the hearing. This Court likewise takes judicial notice of the City's code of ordinances.[10] As it pertains to this issue, the city charter stated that "the city attorney shall represent the city in all litigation and controversies." The city attorney likewise was charged with the "duty to see that all penal ordinances of the city [were] impartially enforced." CITY OF PALESTINE, TEX., CODE OF ORDINANCES, pt. 1, art. VIII, sec. 8.7 (2020), https://library.municode.com/tx/palestine/codes/code_of_ordinances?nodeId=PTICH_ARTVIIIOFEM_S8.7CIAT.[11]

Alexander testified that he was the city manager for the City of Palestine and that Stutes was "the appointed City Attorney for the City of Palestine." He explained, "Under the City Charter of the City of Palestine, the City Attorney is authorized to represent the City in all litigation and controversies." He further testified that Stutes "was authorized to file the lawsuit against Jerry Laza and [was] authorized to prosecute such suit." Alexander's affidavit testimony does not include adjudicative facts that can be judicially noticed under Rule 201 of the Texas Rules of Evidence. *See* TEX. R. EVID. 201.

[10]Courts may take judicial notice of the provisions of city charters. *Air Curtain Destructor Corp. v. City of Austin*, 675 S.W.2d 615, 618 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *Lowther v. Fernandez*, 668 S.W.2d 886, 888 (Tex. App.—San Antonio 1984, no pet.); *Cone v. City of Lubbock*, 431 S.W.2d 639, 647 (Tex. App.—Amarillo 1968, writ ref'd n.r.e.); *McKee v. City of Mt. Pleasant*, 328 S.W.2d 224 (Tex. App.—Texarkana 1959, no writ); *Hayden v. City of Houston*, 305 S.W.2d 798 (Tex. App.—Fort Worth 1957, writ ref'd n.r.e.).

[11]This section of the City's charter contains one directive, which reads:

> Whenever it shall be brought to the city attorney's knowledge through the affidavits of 10 creditable persons that any persons, firms or corporations exercising or enjoying any franchise or privilege from the City of Palestine have been guilty of a breach of any condition of such franchise or privilege, or have failed to comply in any material manner with the terms and stipulations of such franchise or privilege, it shall be the city attorney's duty to report the breach or failure to comply to the city council, together with all relevant facts. If the city council shall determine that the complaints are well founded, it shall be the city attorney's duty to take such actions as may be necessary, and in the event the offending corporation, firm, or person shall fail or refuse to conform to the orders of the council, *it shall be the duty of the council to direct the city attorney to institute suit in the court having jurisdiction against such corporation, firm, or person, for a judgment of forfeiture or franchise or privilege, or any other proper judgment.*

(At the hearing, it was uncontested that there was never a city ordinance or resolution from the city council that authorized the filing of the *specific lawsuit* against Laza.) Laza claimed such ordinance or resolution was required for Stutes to file a lawsuit against him. The trial court disagreed and denied the motion. On appeal, Laza claims that, because the City "failed to produce any ordinance or resolution from the city council granting authority to prosecute the suit or hiring or retention of the lawyer purport[ing] to act on its behalf," the trial court abused its discretion in denying his Rule 12 motion to show authority.

Rule 12 allows a party "by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act." TEX. R. CIV. P. 12. "At the hearing on the motion, the burden of proof shall be on the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party." *Id.* If the challenged attorney fails to show sufficient authority, "the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears." *Id.* "The primary purpose of rule 12 is to enforce a party's right to know who authorized the suit." *In re Guardianship of Benavides*, 403 S.W.3d 370, 373 (Tex. App.—San Antonio 2013, pet. denied) (citing *Angelina Cnty. v. McFarland*, 374 S.W.2d 417, 422–23 (Tex. 1964)).

Appellate courts generally review a trial court's ruling under Rule 12 for an abuse of discretion. *See Urbish v. 127th Jud. Dist. Ct.*, 708 S.W.2d 429, 432 (Tex. 1986); *Montalvo v.*

CITY OF PALESTINE, TEX., CODE OF ORDINANCES, pt. 1, art. VIII, sec. 8.7 (2020), https://library.municode.com/tx/palestine/codes/code_of_ordinances?nodeId=PTICH_ARTVIIIOFEM_S8.7CIAT (emphasis added). Laza argues that the italicized language indicates that the city council must have directed Stutes to file the lawsuit against Laza. That language, when read in context, only applies in the instances specifically described.

Guerra, No. 13-18-00565-CV, 2020 WL 7393434, at *4 (Tex. App.—Corpus Christi Dec. 17, 2020, pet. denied) (mem. op.); *Benavides*, 403 S.W.3d at 373; *R.H. v. Smith*, 339 S.W.3d 756, 762 (Tex. App.—Dallas 2011, no pet.). "We defer to the trial court on factual findings and review legal conclusions de novo." *City of San Antonio v. River City Cabaret, Ltd.*, 32 S.W.3d 291, 293 (Tex. App.—San Antonio 2000, pet. denied). "The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable." *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

The City relies on the language of its charter, stating that "the city attorney shall represent the city in all litigation and controversies," to conclude that Stutes was authorized to file and prosecute this suit on behalf of the City absent any resolution or ordinance of the city council directing him to do so. In support of this claim, the City relies on *City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App.—San Antonio 1984, writ dism'd). In *Aguilar*, the city attorney for San Antonio appealed a lawsuit to our sister court in San Antonio. Aguilar filed a motion to dismiss the lawsuit for want of jurisdiction based on the claim that the city attorney was not authorized by the city council to pursue the appeal. *Id.* at 682. In its examination of this issue, the court recognized the existence of an agency-principal relationship between the city attorney and the city. *Id.* at 683. It recognized:

> Express authority exists where the principal has made it clear to the agent that he wants the act under scrutiny to be done. H. Reuschlein & W. Gregory, AGENCY AND PARTNERSHIP, § 14 (1979); implied authority exists where there is no proof of express authority, but appearances justify a finding that in some manner the agent was authorized to do what he did; in other words, there is circumstantial proof of actual authority. *Id.* at § 15.

Id. at 683–84. The court recognized language from the city charter that authorized the city attorney to perform "all services incident to his position" as "a broad grant of implied authority." The city attorney, therefore, had the implied authority to pursue the appeal because it fell within the charter's "broad grant of implied authority." *Id.* at 684. As a result, the court concluded, where "the city attorney ha[d] authority derived from the city charter to represent the city in all legal proceedings, the city council [was] not required to pass a resolution or an ordinance as a prerequisite to an appeal." *Id.* at 686.

It is also true that the *Aguilar* court recognized that "an attorney who has conducted a case in the trial court is presumed to have authority to pursue an appeal, although this presumption can be rebutted." *Id.* at 684 (citing *Stephenson v. Chappell*, 33 S.W. 880 (Tex. App.—Dallas 1896, no writ); 7 TEX. JUR. 3d *Attorneys at Law* § 63 (1980)). This reasoning, though, was not necessary to the disposition of the appeal, as the court had already determined that "the city attorney possessed the implied authority to pursue the appeal." *Id.*

Although *Aguilar* involved the authority of the city attorney to file an appeal rather than the authority to file a lawsuit, we find its reasoning and logic persuasive. The language of the city charter stating that "the city attorney shall represent the city in all litigation and controversies" is a broad grant of implied authority authorizing the city attorney to file the suit against Laza. Certainly, appearances justify a conclusion that the city attorney was authorized to file the lawsuit. In addition to the circumstantial evidence of actual authority, Stutes testified, without objection, that he was expressly authorized by the city manager to file the lawsuit. Even if express authorization by the city manager is not sufficient, as Laza argues, to authorize the

filing of the lawsuit, it is additional circumstantial proof of actual authority. *See Aguilar* at 683–84.

The city charter likewise charged the city attorney with the "duty to see that all penal ordinances of the city [were] impartially enforced." CITY OF PALESTINE, TEX., CODE OF ORDINANCES, pt. 1, art. VIII, sec. 8.7 (2020), https://library.municode.com/tx/palestine/codes/code_of_ordinances?nodeId=PTICH_ARTVIIIOFEM_S8.7CIAT. In this case, the City's petition requested the enforcement of the following city ordinance: "It shall be unlawful for a person to maintain a public nuisance as determined under this section. . . . A person who violates this section shall, on conviction, be punished by a fine not to exceed $200." CITY OF PALESTINE, TEX., CODE OF ORDINANCES, ch. 46, art. VI, sec. 46-186(b) (2020), https://library.municode.com/tx/palestine/codes/code_of_ordinances?nodeId=PTIICOOR_CH46EN_ARTVIJUABPR_DIV1GE. The ordinances sought to be enforced by the lawsuit also provided "defenses to prosecution."

An ordinance that makes a violation punishable by a fine or that makes conduct unlawful is penal in nature. *See State ex rel. Flowers v. Woodruff*, 200 S.W.2d 178, 181 (Tex. Crim. App. 1947) ("There can be no question but that the ordinance under consideration is penal in its nature, as it provides a fine up to $100 for each violation of any part of the ordinance."); *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 803 (Tex. App.—Dallas 2014, no pet.) (ordinance punishable by fine and that made violation an "offense" was penal ordinance); *Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211, 216 (Tex. App.—Tyler 2012, no pet.) (ordinance that in part authorizes citations and fines was "primarily penal in nature"); *Destructors, Inc. v. City of Forest Hill*, No. 2-08-440-CV, 2010 WL 1946875, at *3

(Tex. App.—Fort Worth 2010, no pet.) (mem. op.) (ordinance using term "unlawful" was penal). We conclude that the petition filed by Stutes sought to enforce, at least in part, penal ordinances. The city charter granted the city attorney the authority to enforce such ordinances.

Because the city charter impliedly authorized the city attorney—Stutes in this case—to file the instant lawsuit against Laza, and because the circumstances indicate a grant of actual authority to file the lawsuit, we cannot conclude that the trial court abused its discretion in concluding that Stutes met his burden under Rule 12 to show sufficient authority to prosecute the lawsuit against Laza on behalf of the City. As a result, the fact that the city council did not pass an ordinance or resolution as a prerequisite to filing the lawsuit is of no consequence and was not required.

Yet, Laza vigorously contends that, absent a city ordinance or resolution, Stutes had no authority to file the lawsuit. In support of this position, Laza relies on *City of San Antonio v. Micklejohn*, 33 S.W. 735 (Tex. 1895); *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex. App.—Tyler 1969, writ ref'd n.r.e.); *City of Floydada v. Gilliam*, 111 S.W.2d 761, 764 (Tex. App.—Amarillo 1937, no writ); *Austin Neighborhoods Council, Inc. v. Bd. of Adjustment of City of Austin*, 644 S.W.2d 560 (Tex. App.—Austin 1982, writ ref'd n.r.e.); *Cook v. City of Addison*, 656 S.W.2d 650, 657 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). These authorities are inapposite.

Micklejohn decided the questions of whether (1) a resolution could be deemed an ordinance and (2) whether the city council could, by resolution, abolish an office that it created. *Micklejohn*, 33 S.W. at 736. The court held that "a public office (superintendent of public

works) established by an ordinance could not be abolished by resolution." *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 832 (Tex. 1970) (citing *Micklejohn*, 33 S.W. at 736). *Micklejohn* has no bearing on the Rule 12 issue before us.

In the same vein, *Stirman* was not a Rule 12 case. Instead, *Stirman* involved a condemnation proceeding brought by a city. *Stirman*, 443 S.W.2d at 356. The primary issue in *Stirman* was whether the city's condemnation of a fee to the surface estate was valid when the city did not pass a formal resolution expressing a desire to condemn the fee to the surface estate. *Id.* at 358. In 1969, the relevant law stated, "Any such city may acquire the fee simple title to any land or property when same is expressed in the resolution ordering said condemnation proceedings by the governing body." *Id.* at 357. The city charter expressly provided that all official acts of the city be by resolution or ordinance. *Id.* at 356. Because the city did not express its intention to condemn a fee simple title by means of a resolution, the trial court's authority was limited to the expropriation of an easement only. *Id.* at 359. This case does not involve a condemnation action, and the City's charter does not require authorization in the form of a resolution or ordinance in order for the city attorney to file a lawsuit on behalf of the City.

City of Loydada v. Gilliam, another eminent domain case, is likewise inapposite. The law in effect in 1937 permitted cities of less than 5,000 inhabitants to exercise the power of eminent domain when expressed by the governing authority "to take the fee in the lands so condemned." *Gilliam*, 111 S.W.2d at 764. In *Gilliam*, there was no proof of "an expression by the city council of the necessity for condemnation of the fee-simple title in the land." *Id.* As a result, the city

acquired only an easement over the property. *Id.* at 762. Because *Gilliam* deals with the requirements, in 1937, for a city to condemn a fee simple title in land, it does not apply here.

Laza also relies on *Austin Neighborhoods Council* in support of his argument that Stutes lacked authority to file suit on behalf of the City. *Austin Neighborhoods Council* involved the interpretation of a city zoning ordinance on which a building permit was issued by the Austin Building Department. Capitol Mortgage Bankers, Inc., an appellee, challenged appellants' standing to initially bring the appeal to the Austin Board of Adjustment from the building department's issuance of the building permit. *Austin Neighborhoods Council*, 644 S.W.2d at 562. Capitol Mortgage argued that appellants lacked standing because they suffered no unique or practical effect to themselves not suffered by the general public, nor were they an "officer, department, board, or bureau of the municipality affected" as their actions were not ratified or authorized by the City of Austin. *Id.* at 563. The appellate court found that appellants failed to show that they were aggrieved by the building permit and further failed to show that they were an "officer, department, board, or bureau of the municipality affected." *Id.* at 564. Although one appellant was a member of the Austin City Council, the court determined that he was before the court as a private individual and not as a representative of the people of Austin. *Id.* In so concluding, the court recognized that the city charter conferred authority on the council as a whole and not singularly on its members. *Id.*

Laza points to the fact that the Austin City Charter contained language similar to that of the Palestine City Charter. That language is quoted in that opinion as follows:

> There shall be a department of law, the head of which shall be the city attorney . . . The city attorney SHALL be the legal advisor of, and attorney for ALL of the

> officers and departments of the city, and HE SHALL REPRESENT THE CITY IN ALL LITIGATION AND LEGAL PROCEEDINGS . . . .

Id. This language merely points to the fact that the city attorney was authorized to represent the city in all litigation and legal proceedings. The language was used to illustrate the fact that an individual councilman had no such authority. *Id.* The court went on to state that it could find no "authority to be bestowed on [the councilman] to file independent actions challenging the actions of any agency of municipal government." *Id.* Further, the councilman did not show "any adoption or ratification of his actions by the city council in bringing [the] appeal. Such an affirmative act by the governing body of the city [was] required." *Id.*

Laza argues that, in this case, Stutes likewise required authorization from the city council to file the lawsuit. We do not believe the reasoning in *Austin Neighborhoods* applies here. *Austin Neighborhoods* was a case regarding standing, not an application of Rule 12. In this case, Stutes was the city attorney, not an independent councilman filing an independent action "challenging the actions of any agency of municipal government." And, as explained earlier, the city charter authorized the city attorney to file suit on behalf of the City.

Finally, in *Cook*, also cited by Laza, the court held that the City of Addison was not bound, or its rights limited in its ability to assess property owners, by expressions of intent contained in a memorandum from the Addison City Manager to use funds to improve other streets when those funds were assessed against owners of certain property fronting on a particular road. *Cook*, 656 S.W.2d at 657. The court based this conclusion on the statute in effect at the time, stating that "Article 1105b, Section 9, contains language directed to this very situation, i.e., 'no words or acts of any officer or employee of the city, or member of any

governing body shown in its written proceedings and records shall in any way affect the force and effect of the provisions of this Act.'" *Id.* Moreover, "[s]tatements by individual members of a council or board are not binding on a governmental body which may act only in its official capacity." *Id.* As a result, the court held, "[T]he city manager's memoranda do not affect the city's rights under Article 1105b to assess the property owners in the present case." *Id.* at 658.

As in the other cases cited by Laza, *Cook* was not a Rule 12 case. Beyond that, this case does not concern statements by an individual council member that are claimed to be binding on the City. The issue before us is whether Stutes, the city attorney for the City of Palestine, was authorized to file suit against Laza on behalf of the City. We find nothing in the language or reasoning of *Cook* or in the other cases cited by Laza that leads us to question our determination that the trial court acted within its discretion in determining that Stutes was so authorized. We overrule this point of error.

(3) Laza Procedurally Waived any Complaints Regarding the Trial Court's Denial of His Special Exceptions

Laza contends that the trial court erred in denying his special exceptions based on the City's failure to plead a cause of action.

The record indicates that Laza specially excepted to the City's first amended original petition on November 28, 2016. More particularly, Laza excepted to paragraphs 7, 8, 9, 10, and 11 because those paragraphs did "not give fair notice of plaintiff's claim." Laza also excepted to paragraph VI of the petition "because plaintiff did not plead any of the elements of its cause of action." On March 3, 2017, Laza filed his first supplemental special exceptions to the City's first amended original petition. Laza's additional exceptions were aimed at paragraph VI of the

amended petition, in which he listed six reasons why he believed paragraph VI did not provide fair notice of the City's claim.

On March 24, 2017, the trial court issued its order on Laza's special exceptions and first supplemental special exceptions, sustaining Laza's special exceptions with respect to paragraphs 8(h) and 8(n) of the plaintiff's first amended original petition and ordering the City to replead regarding those paragraphs to specify the ordinance that Laza allegedly violated. The trial court likewise sustained Laza's special exception to paragraph 11 and ordered the City to replead to specify "who [was] affected by the Defendant's actions and what the danger to those persons [was]." The trial court overruled all other special exceptions. On April 3, 2017, the City filed its second amended original petition and request for temporary and permanent injunctions.

On May 10, 2017, Laza specially excepted to the City's second original amended petition. More particularly, Laza specially excepted to paragraphs 8 and 11 of the second amended original petition "because plaintiff's pleading [did] not give fair notice of plaintiff's claim." Laza did not obtain a ruling on his special exceptions to the City's second original amended petition.

On June 6, 2017, the City filed its third amended petition. Laza did not specially except to the City's third amended petition. On August 18, 2017, Laza filed his third amended answer and original counterclaim, which incorporated his special exceptions to the City's second amended original petition. Also, on August 18, 2017, Laza filed his fourth amended answer and first amended counterclaim, which incorporated his special exceptions to the City's second amended original petition. Finally, on August 21, 2017, Laza filed his fifth amended original

answer and second amended counterclaim, which incorporated his special exceptions to plaintiff's second amended original petition. The record does not include any special exceptions to the City's third amended original petition.

The City contends that Laza waived any complaint regarding the allegations in its third amended original petition by failing to file special exceptions to that pleading and to obtain a ruling.

Rule 90 of the Texas Rules of Civil Procedure provides that a party waives its right to complain about a pleading defect if it fails to complain of the defect by special exception:

> Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account . . . .

TEX. R. CIV. P. 90. There is no dispute that Laza failed to specially except to the City's third amended petition. Laza claims, though, that, following the special exception ruling, the live pleading was the second amended original petition.[12] In support of this claim, Laza cites Rule 65 of the Texas Rules of Civil Procedure.[13] Laza fails to explain how that rule supports his argument. On the contrary, that rule supports the proposition that the City's third amended

[12]Laza makes this claim even though he acknowledges that the City later filed its third amended original petition, which he contends contains "many of the same errors and omissions as the second amended original petition."

[13]Rule 65 provides:

> Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

TEX. R. CIV. P. 65.

petition was the live pleading at the time of trial. The Texas Supreme Court has plainly stated that "amended pleadings and their contents take the place of prior pleadings." *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008). Accordingly, as a general rule, an amended pleading supersedes the original pleading. *Denton Cnty. Elec. Co-op., Inc. v. Hackett*, 368 S.W.3d 765 (Tex. App.—Fort Worth 2012, pet. denied); *see Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 54 (Tex. 2003).

We, therefore, conclude that the City's third amended petition was the live pleading at the time of trial. Because the record does not reflect that Laza specially excepted to any portion of the City's third amended petition, we conclude that Laza waived any "defect, omission or fault" in that pleading, "either of form or of substance." TEX. R. CIV. P. 90; *see Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 805 (Tex. 1989) ("In the absence of special exceptions or other motion, defendant waives the right to complain of such a defect if plaintiff establishes the trial court's jurisdiction before resting its case."); *In re C.A.*, No. 10-16-00351-CV, 2021 WL 409621, at *7 (Tex. App.—Waco Feb. 3, 2021, no pet.) (mem. op.); *Smith v. Grace*, 919 S.W.2d 673, 678 (Tex. App.—Dallas 1996, pet. denied); *Lewter v. Dallas Cnty.*, 525 S.W.2d 885, 886 (Tex. App.—Waco 1975, writ ref'd n.r.e.); *Ward v. Clark*, 435 S.W.2d 621, 623 (Tex. App.—Tyler 1968, no writ); *see also Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 764–65 (Tex. App.—Texarkana 2017, pet. dism'd).

We further conclude that, although Laza specially excepted to the City's second amended petition, those exceptions were likewise waived because Laza failed to seek a ruling on those

special exceptions. *See Hartwell*, 528 S.W.3d at 765; *In re Estate of Tyner*, 292 S.W.3d 179, 185 (Tex. App.—Tyler 2009, no pet.).[14]

(4) Laza Failed to Preserve His Complaint of Jury Charge Error

Laza also contends that the trial court erred in instructing the jury that the City's remedies of civil penalties and injunctive relief must be proven by a preponderance of the evidence. Laza claims that the jury should have been instructed, instead, that clear and convincing evidence is required to show entitlement to those remedies. Laza posits that, because he objected to the jury instructions, this issue has been preserved for our review. We disagree.

"Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. The test for preservation of jury charge error "ultimately asks 'whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.'" *Burbage v. Burbage*, 447 S.W.3d 249, 256 (Tex. 2014) (quoting *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)). This is because "the 'purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge by requiring objections both to clearly designate the error and to explain the grounds for complaint.'" *Id.* (quoting *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987)).

On October 20, 2017, Laza filed multiple written objections to the court's proposed jury charge. None of Laza's written objections to the court's proposed charge, though, complained of

[14]Laza cites *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974), for the proposition that a party need only specially except once based on the failure to plead a cause of action. We do not read this case as standing for the proposition espoused by Laza.

the instruction regarding the burden of proof to show entitlement to civil penalties and injunctive relief. On the same day, the trial court held the charge conference, at which the trial court asked whether each attorney had a copy of the proposed charge. Laza was represented by two attorneys at trial. Both attorneys indicated that they had a copy of the charge, although one of Laza's attorneys indicated that he did not have an adequate opportunity to review the charge because "lots of things" were wrong with it. The court responded, "Well that's fine and you're going to make your objections to it because you've reviewed it." Counsel for Laza responded, "I . . . reviewed it." The court then noted that it had a "copy of objection to the jury charge that was filed [that] morning by defendant." After the trial court ruled on Laza's written objections to the charge, it asked whether the defendant had any further objections. Counsel for Laza made several additional objections to the charge. None of the additional objections complained of the burden-of-proof issue now before us.

Although Laza objected to much of the charge, he did not object to the instruction on preponderance of the evidence and did not request an instruction that would set out the standard of clear and convincing evidence.[15] As a result, Laza waived his complaint of error in the standard-of-proof instruction given to the jury. We overrule this point of error.

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[15]Laza cites *Lopez v. Southern Pacific Transportation Co.*, 847 S.W.2d 330, 333 (Tex. App.—El Paso 1993, no writ), for the proposition that "a mere objection to the charge, standing alone, will preserve error as to a defective instruction." He, therefore, claims that his objections to the jury instructions were preserved on this issue. In *Lopez*, appellants objected to the failure of the charge to contain an instruction on a certain presumption, but the record did not reflect that such instruction was requested, tendered to, or ruled upon by the trial court. *Id.* The court held that "a mere objection to the charge, standing alone, will preserve error as to a defective instruction but will not preserve error as to an omitted instruction." *Id.* The appellants' failure to request or tender a proposed instruction as to the evidentiary presumption waived their complaint of error. *Id. Lopez* does nothing to advance Laza's appellate complaint.

(5) The Motion to Recuse Was Properly Denied

Laza also contends that the trial judge exceeded his authority by failing to recuse himself and that the administrative judge erred in refusing to order the trial judge's recusal. Laza further complains that the trial court exceeded its authority by failing to follow the mandates of this Court's abatement order.

The procedural background of this case in this Court is important to a full understanding of Laza's complaint. We briefly outline that background here.

After Laza filed his notice of appeal in this Court on June 4, 2018, he filed a suggestion of bankruptcy on September 10, 2018. The case was administratively abated until its reinstatement on November 16, 2020. The clerk's record was filed November 16, 2020, and the reporter's record was filed November 19 and November 20, 2020. In his second motion for extension of time in which to file his brief, Laza made complaints about an omission from the reporter's record. The court reporter thereafter filed a supplemental reporter's record of the hearing on Laza's motion to show authority. Laza filed a third motion for extension of time in which to file his brief, complaining that the affidavit of Mike Alexander was missing from the supplemental reporter's record. The court reporter filed a second supplemental reporter's record, but the attached exhibit was that of Michael Hornes. Laza then filed a fourth motion for extension of time in which to file his brief, complaining that the hearing record included the wrong exhibit.

This Court thereafter issued an abatement order pursuant to Rule 34.6, subsections (e) and (f), of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 34.6(e), (f). The order

instructed the trial court to conduct an evidentiary hearing to determine precisely what portions of the record were claimed to be missing or inaccurate and whether the issue was one that could be resolved by agreement as contemplated by Rule 34.6(e)(1) of the Texas Rules of Appellate Procedure. We advised that, if the error or omission could not be corrected by agreement, then the trial court was to resolve the dispute in accordance with Rule 34.6(e)(2) of the Texas Rules of Appellate Procedure. The trial court was further instructed to take evidence on, and enter findings with respect to, each exhibit or portion of the record that was determined to be lost or destroyed.

Following the first of two evidentiary hearings on July 13, 2021,[16] Laza filed an emergency motion on August 26, 2021, seeking the trial court's recusal. Laza claimed, among other things, that the trial judge "interjected himself into the facts of this case by personally conducting ex-parte investigations, calling himself as a witness, testifying about his recollection of events, [and] interrogating witnesses based on his ex parte investigations."[17] Laza's motion

[16]On January 17, 2017, the judge of the First Administrative Judicial Region of Texas assigned the Honorable Dwight Phifer, Senior Judge of the 2nd Judicial District Court, to the 349th Judicial District Court of Anderson County, Texas, to hear cause number DCCV 16-356-349, *City of Palestine v. Jerry Laza*. On July 13, 2021, the presiding judge of the Tenth Administrative Judicial Region assigned the Honorable Dwight Phifer, Senior Judge of the 2nd Judicial District Court to the Judicial District Court of Anderson County, Texas, to the same cause number, this time on abatement by the order of this Court. The trial court did not sign any contested order prior to the second order of assignment.

[17]The fact that the trial judge had personal knowledge of what occurred at trial and therefore had unique knowledge of the record is not a basis for recusal under the Rule. The trial judge explained, on the record, that he had viewed the voluminous trial record to prepare for the abatement hearing and to enable the hearing to proceed efficiently. The trial court acted appropriately in speaking with court personnel about the record to prepare for the hearing. Canon 3.B.(8)(d) of the Code of Judicial Conduct specifically recognizes that a judge's communication with court personnel does not constitute an impermissible ex parte communication. TEX. CODE JUD. CONDUCT, Canon 3.B.(8)(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. C. The trial court's groundwork in preparing for the abatement hearing was conducted for the purpose of clarifying the issues and expediting the hearing. The trial court was, after all, tasked with determining the accuracy of the record. Allegations that his efforts in doing so formed the basis of a valid recusal motion are meritless.

was based solely on what the trial court stated on the record during the July 13 hearing. The second of the two evidentiary hearings was scheduled to commence on August 27, 2021.

The trial court declined to recuse and signed an order referring the motion to recuse to the Tenth Administrative Judicial Region. On September 27, 2021, the presiding judge of the Tenth Administrative Judicial Region issued an order denying the emergency motion to recuse. After conducting a hearing, the presiding judge found as follows:

> [T]he movant did not file the motion as soon as practicable after the movant knew the grounds stated in the motion. The undersigned found that the movant knew of these grounds at a previous hearing on July 13, 2021. The movant did not object or request the recusal of the judge at that hearing. The movant did not file this motion to recuse until August 26, 2021, the day before the August 27, 2021, hearing was scheduled to commence.

Rule 18a of the Texas Rules of Civil Procedure governs recusal of judges. *See* TEX. R. CIV. P. 18a. Under that rule, a party may file a motion asserting one or more grounds for recusal under Rule 18b. TEX. R. CIV. P. 18a(a)(2); *Barron v. State Att'y Gen.*, 108 S.W.3d 379, 382 (Tex. App.—Tyler 2003, no pet.). Among other things, the rule requires that the motion must be filed "as soon as practicable after the movant knows of the ground stated in the motion" and "must not be filed after the tenth day before the date set for trial or other hearing." TEX. R. CIV. P. 18a(b)(1)(A), (B). "If the motion to recuse is denied, the standard for review is abuse of discretion, and the denial may be reviewed on appeal from the final judgment." *Newsome v. Dretke*, No. 12-08-00105-CV, 2008 WL 4335111, at *1 (Tex. App.—Tyler Sept. 24, 2008, no pet.) (mem. op.) (citing TEX. R. CIV. P. 18a(f); *Barron*, 108 S.W.3d at 382). "A party who fails to file a motion which complies with Rule 18a waives the right to complain of a judge's refusal to recuse himself." *Spigner v. Wallis*, 80 S.W.3d 174, 180 (Tex. App.—Waco 2002, no pet.).

"Thus, the provisions of Rule 18a obligating a trial judge to either recuse himself or refer the motion to the presiding judge of the administrative judicial district never come into play unless and until a formal timely, written and verified motion to recuse is filed." *Newsome*, 2008 WL 4335111, at *2 (citing *Barron*, 108 S.W.3d at 383). As a result, a motion to recuse that does not comply with Rule 18a may be summarily denied without an oral hearing. TEX. R. CIV. P. 18a(g)(3)(A).

Here, the alleged grounds for recusal were known to Laza on July 13, 2021. Even so, Laza did not file his motion to recuse until August 26, 2021, the day before the evidentiary record hearing scheduled for August 27. Not only must a motion to recuse be filed more than ten days before the date set for hearing, but it must also be filed as soon as practicable after the movant knows of the ground stated in the motion. Under these circumstances, the presiding judge properly exercised his discretion in denying Laza's motion to recuse. We overrule this point of error.

To the extent Laza complains that the trial court failed to follow the mandates of this Court's abatement order, we conclude that this point of error is meritless and not adequately briefed. *See* TEX. R. APP. P. 38.1(i).

(6) There Is No Basis on Which to Vacate the Judgment

In his final point of error, Laza asserts that this "Court Should vacate the Judgment and order a new trial given the multitude of fabricated documents that proliferate in the Record and the Trial Court's inability to adhere to any Rules of Professional Conduct or Civil Procedure." In support of this assertion, Laza has included a list in his brief of his claims regarding the

inadequacies of the record and/or falsifications of the record. This list also includes alleged inappropriate behavior and/or lack of knowledge by the trial judge, the administrative judge, trial court personnel, and the clerk of this Court. In short, Laza alleges extra-judicial creation of the record.

This point of error is wholly without merit. After having conducted two extensive evidentiary hearings regarding the record in this case, the trial court issued its report to this Court on December 14, 2021, in which it concluded, "There is no error or omission in the Appellate Record that is significant or would affect the resolution of this appeal." On December 28, 2021, this Court adopted each of the trial court's findings and its conclusion that there was no error or omission in the appellate record that was significant or that would affect the resolution of this appeal. We overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: June 16, 2022
Date Decided: August 18, 2022

Court of Appeals
Sixth Appellate District of Texas

JUDGMENT

Jerry Laza, Appellant

No. 06-18-00051-CV v.

City of Palestine, Texas, Appellee

Appeal from the 349th District Court of Anderson County, Texas (Tr. Ct. No. DCCV16-356-349). Memorandum Opinion delivered by Chief Justice Morriss, Justice Stevens and Justice van Cleef participating.

As stated in the Court's opinion of this date, we find no error in the judgment of the court below. We affirm the judgment of the trial court.

We further order that the appellant, Jerry Laza, pay all costs incurred by reason of this appeal.

RENDERED AUGUST 18, 2022
BY ORDER OF THE COURT
JOSH R. MORRISS, III
CHIEF JUSTICE

ATTEST:
Debra K. Autrey, Clerk

IN THE SUPREME COURT OF TEXAS

-- -- -- --

NO. 22-1098

JERRY LAZA
v.
CITY OF PALESTINE, TEXAS

§
§
§
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§
§

Anderson County,

6th District.

March 31, 2023

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

June 16, 2023

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

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I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, JERRY LAZA, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 16th day of June, 2023.

Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-18-00051-CV

JERRY LAZA, Appellant

V.

CITY OF PALESTINE, TEXAS, Appellee

On Appeal from the 349th District Court
Anderson County, Texas
Trial Court No. DCCV16-356-349

Before Morriss, C.J., Burgess and Stevens, JJ.

ORDER

On February 2, 2021, this Court abated this appeal to the trial court in accordance with Rule 34.6 of the Texas Rules of Appellate Procedure for resolution of a dispute regarding the accuracy of the record. *See* TEX. R. APP. P. 34.6. The trial court held two evidentiary hearings in connection with the accuracy of the record and, thereafter, submitted its findings regarding the appellate record in a report dated December 14, 2021. By separate order dated December 28, 2021, this Court adopted each of the trial court's findings and its conclusion that there is no error or omission in the appellate record that is significant or that would affect the resolution of this appeal. Consequently, the record in this appeal is complete.[1]

On January 14, 2022, Appellant filed a motion to abate this appeal (Motion to Abate), much of which disputed the trial court's findings. Appellant asked this Court to either "abate or extend the briefing deadline for Laza from January 27, 2022, for at least 30 days until February 28, 2022, or preferably, until 30 days after the record is made complete." On January 19, 2022, this Court denied Appellant's Motion to Abate and granted appellant's motion to extend the briefing deadline to Monday, February 28, 2022. This Court's clerk's office notified

[1]On December 14, 2021, the trial court specifically found that the appellant did not file a request with the district clerk or designate the transcription of the June 2, 2017, hearing to be a part of the appellate record. The trial court's findings stated, "Appellant's attorney, if he wants the Reporter's Record to be prepared and made a part of the Appellate record, may comply with T.R.A.P. 34.6(b)." The trial court further stated, "[The court reporter] can have the June 3, 2019, hearing prepared and filed in the Appellate record. This Court finds that Appellant has wholly failed to comply with T.R.A.P. 34.6(b). Appellant's attorney has been instructed to comply with T.R.A.P. 34.6(b) if he wants this record included in the Appellate record." The trial court's findings also stated, "The December 16, 2016[,] hearing was recorded by Jerry Poole. This Court finds that Appellant has wholly failed to comply with T.R.A.P. 34.6(b). Appellant's attorney has been instructed to comply with T.R.A.P. 34.6(b) if he wants this record included in the Appellate record." To the extent the Appellant has properly requested additional portions of the reporter's record or clerk's record in accordance with the Texas Rules of Appellate Procedure, this Court has granted an extension of the deadline to file Appellant's brief, to the end that any such additional records may be filed in a timely fashion, as explained in this order.

Appellant's attorney, Nicholas Mosser, via a January 19, 2022, letter, of the Court's partial denial and partial grant of Appellant's motion. The letter stated, "The Court entered its order this date in the referenced proceeding whereby Appellant's motion to abate the briefing deadline indefinitely was **DENIED**. However, the court has **GRANTED** the appellant an extension of the briefing deadline to and including: **Monday, February 28, 2022**. Further extension requests will not be granted." The letter was signed by a deputy clerk in our clerk's office. Appellant's motion was, therefore, disposed of by this Court and is no longer pending before this Court.

On January 21, 2022, Appellant attempted to file "Appellant's EMERGENCY Supplemental Motion to Abate" (Emergency Motion). Attorney Mosser designated that document as an "Other Document," rather than a motion, in the statewide e-filing system. Because Appellant did not have a motion pending before this Court when Mosser attempted to file the Emergency Motion, our clerk's office deemed the document a motion, *see* TEX. R. APP. P. 10.1(a), which requires the payment of a $10.00 filing fee, *see* TEX. R. APP. P. app. A, § B(3)(a). Accordingly, the clerk's office attempted to file the document as a motion, and the statewide e-filing system attempted, unsuccessfully, to process the payment. As a result, the filing was rejected. After our clerk's office explained the reason for the rejected filing to Mosser, Mosser responded in an unprofessional and disrespectful manner towards our clerk and deputy clerk through a series of telephone calls, emails, and a letter. As noted below, this is not the first time Mosser has acted in this manner in this case.

Mosser's flawed reasoning on this occasion stemmed from the manner in which our clerk's office communicated this Court's resolution of his January 14 Motion to Abate. Because

the clerk's letter communicating our resolution used the word "order" or for some other reason, Mosser reasoned that there had to be a written order entered by the Court. In the absence of such an order, he concluded, the Motion to Abate had not been resolved, and the Emergency Motion was a supplement to the Motion to Abate rather than a new motion. Despite the clerk's January 19 letter clearly informing Mosser that this Court had resolved the Appellant's Motion to Abate and numerous attempts by our clerk and deputy clerk during telephone conversations to confirm this fact to Mosser, Mosser insisted that his interpretation of events was fact. During several telephone conversations with our clerk's office to voice his displeasure at the rejection of Appellant's Emergency Motion, Mosser raised his voice and argued with both our clerk and our deputy clerk in an unprofessional manner.

After this telephone call, Mosser penned a letter to the clerk in which he accused members of our clerk's office of inappropriate behavior and accused this Court of engaging in subterfuge by entering secret orders. Mosser's allegations impugn the integrity of our staff and of each judge on this Court, with absolutely no factual or evidentiary support.[2]

We note that we are not the first court Mosser has treated in this manner. Specifically, four years ago, Mosser was sanctioned by Judge Amos Mazzant, Presiding Judge of the United States Federal Court for the Eastern District of Texas, Sherman Division. *See Jabary v. McCullough*, 325 F.R.D. 175 (E.D. Tex. 2018, order). Mosser's conduct in this case is strikingly similar to the conduct for which he was sanctioned by Judge Mazzant in *Jabary*. While Mosser is unquestionably free to disagree with the rulings of this Court, he is required, as an attorney and

[2]We note that the manner in which our clerk informed Mosser of our ruling is no different than the way standard motions are routinely handled in this Court.

"an officer of the legal system," to do so in a respectful and professional manner. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, Preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. The behavior noted above clearly falls short of the standards expected of Texas attorneys. We also note that the behavior described above is not the first time Mosser has engaged in other such disrespectful behavior towards our clerk and court staff in this case. A few examples suffice.

- On November 30, 2021, Mosser contacted our clerk's office via telephone regarding the trial court's docket sheet in the clerk's record, claiming that someone at the Office of Court Administration had told him that all district clerks have a uniform docket sheet that could be printed through the Texas Appeals Management and eFiling System (TAMES). He insisted that our clerk require the district clerk to file such uniform docket sheet as part of the record in this case. Mosser refused to identify the person with whom he spoke at the Office of Court Administration. Mosser's attitude was angry, rude, demeaning, and demanding.

- On December 6, 2021, Mosser, in a telephone conversation with a deputy clerk of this Court, accused the clerk of having engaged in improper ex parte communications as evidenced by docket entries he viewed in TAMES, via our website, of "email sent" and "email received." He demanded to see the emails referenced in those docket entries. When asked to put his request in writing, Mosser was angry and rude, claimed that he did not have to do that, and demanded the information.

- On December 6, 2021, Mosser made accusations regarding this Court's responsibility for the May 2020 ransomware attack that affected not only this Court, but all appellate courts, the Texas Court of Criminal Appeals, and the Texas Supreme Court. He inappropriately suggested that someone from this office caused the statewide ransomware attack by watching "porn" on a state computer. Mosser also used profanity while speaking with the clerk during this telephone conversation.

- In a different conversation on December 6, 2021, Mosser called this Court's clerk's office and asked to speak with the Court's chief staff attorney. Mosser was advised by the clerk that, in accordance with Rule 9.6 of the Texas Rules of Appellate Procedure, all communications about a case must be made only through the clerk. *See* TEX. R. APP. P. 9.6. When Mosser disputed that statement, the clerk read him the text of Rule 9.6. Nevertheless, Mosser emailed this Court's chief staff attorney directly on December 6, 2021, regarding his complaints.

Most of Mosser's disrespectful telephone conversations with the clerk's office arose from his disagreement with matters already resolved by this Court's rulings. Yet, instead of presenting a motion for reconsideration as contemplated by the Rules of Appellate Procedure supported by facts, authorities, and new arguments for reconsideration of our rulings, Mosser appears to believe that this Court's denial of requested relief is an invitation to continue arguing the same points in the hope that the Court will eventually give in and grant the requested relief—if for no other reason than to buy peace. While requesting that a Court reconsider its prior rulings in a properly supported motion for reconsideration is not, in and of itself, improper, engaging in a campaign of attrition against the Court's clerk and supporting staff is. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, Preamble. Engaging in such behavior implicates several standards of conduct required of all Texas attorneys.

Specifically, Mosser's conduct towards this Court's clerk's office implicates Section IV(3) of the Texas Lawyer's Creed, which provides that a lawyer "will treat counsel, opposing parties, the Court and members of the Court staff with courtesy and civility." TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, § IV(3) (adopted November 7, 1989). Mosser's conduct toward the staff of this Court also implicates the Standards for Appellate Conduct, which provide, under the heading Lawyers' Duties to the Court, that "Counsel will be civil and respectful in all communications with the judges and staff." STANDARDS FOR APPELLATE CONDUCT, LAWYERS' DUTIES TO THE COURT, ¶ 8. Mosser's conduct also implicates the Texas Disciplinary Rules of Professional Conduct.

In addition to his disrespectful, unprofessional, and inappropriate manner of communicating with our clerk's office, Mosser has, in several filings with this Court, impugned the integrity of this Court; and, just as in *Jabary*, his attacks are not supported by facts or evidence. By way of example, in his Motion to Abate, Mosser states, "[T]his Court has improperly sealed matters concerning *ex parte* communications with witnesses in the Trial Court as to instructions on the exhibits in this case. *See* TEX. R. CIV. P. 76a." Later in the same motion, Mosser states that "this Court has improperly sealed matters without compliance with Rule 76 or 76a." Mosser's assertions that this Court has sealed any records in this appeal is patently false, and the inferences of impropriety enveloped in his accusations are baseless and unsupported by facts or evidence.

Rule 8.02 of the Texas Disciplinary Rules of Professional Conduct states, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge . . . ." If Mosser does not know that his statements regarding this Court sealing records in this appeal are false, then he made them with reckless disregard as to their truth or falsity.

"It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed within a Court, because they are necessary to the exercise of all others.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)). "For this reason, '[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their

lawful mandates.'" *Id.* (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)). "Texas courts, like all civilized courts of justice, have these inherent powers." *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex. App.—Corpus Christi 1992, no pet.). Nevertheless, this Court does not elect to exercise such drastic powers at this time, but instead will issue a stern warning to counsel to cease engaging in the pattern of behavior described herein. We are confident that Mosser will take these warnings to heart and modify his behavior accordingly, but if not, we are certainly prepared to proceed with any further disciplinary actions that we deem are necessary.

To that end, based on Mosser's behavior to date, as described herein, we issue the following admonishments to Mosser:

1. The clerk's office of this Court is the mouthpiece of this Court, and Mosser is admonished to treat it as such. Mosser is admonished not to use profanity in his verbal communications with the clerk of this Court or the deputy clerks of this Court and is admonished not to address the clerk of this Court, or the deputy clerks of this court, in a disrespectful, rude, or hostile manner.

2. Mosser is admonished not to engage in further violations of Rule 9.6 of the Texas Rules of Appellate Procedure.

3. Statements made to this Court, both in filings with this Court and through representations made to this Court's clerk's office, must be based in fact, must have evidentiary support, and must be made without reckless disregard as to their truth or falsity. Mosser is admonished that unfounded, baseless attacks on the integrity of this Court or its staff will not be tolerated.

Mosser is admonished to heed these warnings and not to engage in similar conduct. He is further admonished that this Court continues to have the authority to take further action, not only as to any future conduct, but also as to the conduct described herein.

Finally, and for purposes of clarity, we hereby order the clerk of this Court to reject the document currently in the e-filing system captioned "Appellant's EMERGENCY Supplemental

Motion to Abate." We caution Mosser not to file that document or any form of that document again without the required $10.00 filing fee.

IT IS SO ORDERED.

BY THE COURT

Date: January 26, 2022

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-18-00051-CV

JERRY LAZA, Appellant

V.

CITY OF PALESTINE, TEXAS, Appellee

On Appeal from the 349th District Court
Anderson County, Texas
Trial Court No. DCCV16-356-349

Before Morriss, C.J., Stevens and van Cleef, JJ.

ORDER

Nicholas D. Mosser has filed a motion captioned Verified Motion to Recuse, Disqualify, and Transfer, asking that each of the three justices of this Court recuse or disqualify themselves from presiding over a show cause hearing on Monday, October 31, scheduled pursuant to this Court's Order to Show Cause issued on September 16, 2022. Mosser seeks recusal or disqualification because he claims that the justices of this Court have made false allegations against him and "cannot be entrusted with presiding over this matter with impartiality."

Rule 16.3 of the Texas Rules of Appellate procedure states, in pertinent part:

> (a) *Motion.* A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.
>
> (b) *Decision.* Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

TEX. R. APP. P. 16.3.

Pursuant to the procedure set forth in Rule 16.3(b), upon the filing of the recusal motion and prior to any further proceedings in this appeal, each of the challenged justices of this Court considered the motion in chambers. Chief Justice Josh R. Morriss, III, and Justices Scott E. Stevens and Charles van Cleef each found no reason to recuse or disqualify themselves and certified the matter to the remaining members of the Court, en banc. *See id.*; *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied) (per curiam) (order). This

Court then followed the accepted procedure set out in Rule 16.3(b). *See* TEX. R. APP. P. 16.3(b); *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984); *McCullough*, 50 S.W.3d at 88.

Having carefully examined the pleadings and record as to the allegations pertaining to each challenged justice and finding the allegations to be unsubstantiated, we issue the following orders:

ORDER DENYING MOTION AS TO CHIEF JUSTICE JOSH R. MORRISS, III

This Court, Chief Justice Josh R. Morriss, III, not participating, finds no reason to recuse or disqualify Chief Justice Morriss. *See* TEX. R. APP. P. 16.2; TEX. R. CIV. P. 18b. Accordingly, Mosser's motion to recuse or disqualify Chief Justice Morriss is denied.

IT IS SO ORDERED.

BY THE COURT

STEVENS, J.
VAN CLEEF, J.
MORRISS, C.J., not participating

Date: October 24, 2022

ORDER DENYING MOTION AS TO JUSTICE SCOTT E. STEVENS

This Court, Justice Scott E. Stevens not participating, finds no reason to recuse or disqualify Justice Stevens. *See* TEX. R. APP. P. 16.2; TEX. R. CIV. P. 18b. Accordingly, Mosser's motion to recuse or disqualify Justice Stevens is denied.

IT IS SO ORDERED.

BY THE COURT

MORRISS, C.J.
VAN CLEEF, J.
STEVENS, J., not participating

Date: October 24, 2022

ORDER DENYING MOTION AS TO JUSTICE CHARLES VAN CLEEF

This Court, Justice Charles van Cleef not participating, finds no reason to recuse or disqualify Justice van Cleef. *See* TEX. R. APP. P. 16.2; TEX. R. CIV. P. 18b. Accordingly, Mosser's motion to recuse or disqualify Justice van Cleef is denied.

IT IS SO ORDERED.

BY THE COURT

MORRISS, C.J.
STEVENS, J.
VAN CLEEF, J., not participating

Date: October 24, 2022

Cause No. 06-18-00051-CV

In re Nicholas Mosser

Ancillary to
Jerry Laza v. City of Palestine, Texas

* * * * *

Order and Notice to Show Cause

* * * * *

Issued on September 16, 2022

Debra K. Autrey, Clerk
Sixth Court of Appeals

by _____
Deputy

ORDER TO SHOW CAUSE

"Courts possess inherent power to discipline an attorney's behavior." *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997); *see Brewer v. Lennox Hearth Prod., LLC*, 601 S.W.3d 704, 707 (Tex. 2020). In our order dated January 26, 2022, we cited the Texas Disciplinary Rules of Professional Conduct and warned Mosser that his conduct fell "short of the standards expected of Texas attorneys."

In doing so, this Court showed great leniency to Mosser. Even so, since the January 26 Order, Mosser has made the following statements in documents filed with this Court, among

others, which fail to comply with the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyers Creed:

I. Statements made in "Appellant's Response to Chief Justice Morriss Letter on Lack of Jurisdiction," filed March 1, 2022:

   a. Justice Morriss made "erroneous comments and [an] impassioned plea to retain a case that he has no jurisdiction over." (p. 2);

   b. Justice Morriss's "desire to retain the case without jurisdiction has blinded him to" the law. (p. 2); and

   c. "Justice Morriss fails to appreciate the law of Texas on where to file, how to file, and what to file that creates a case in the Court of Appeals." (p. 3).

II. Statements made in "Appellant's Brief," filed March 23, 2022:

   a. "Setting the atrocities that were committed by the Administrative Judge and the 'Trial Judge,' one of them should have determined that Judge Phifer became personally invested in the creation of a record, the investigation into the lost records, the manipulation of trial exhibits, and through the information he gained while not presiding over the case should have recused him from sitting after he conducted this *ex parte* investigation." (pp. 64-5);

   b. "Judge Phifer suborned perjury by soliciting the testimony of Ms. Vick who testified under oath that the Court of Appeals, on March 10, 2021, instructed her to change volumes or indexes, and then told Ms. Vick that the 'court of appeals said they would pull everything and refile.'" (p. 67);

   c. "Judge Phifer requested to stay on the case and attempted to influence the Administrative Judge by indicating his wishes on remaining on the case. . . . All of this was off the record, in *ex parte* correspondence with the Administrative Judge." (p. 68);

   d. The "Trial Judge change[d] testimony of witnesses." (p. 75);

   e. "[T]here has still NEVER been a filed copy of the Docket Sheet . . . ." (p. xv);

   f. "This Court has determined that unnecessary expenditure of judicial resources and spurious ad hominin [sic] attacks on counsel for Appellant, without evidence,

factual hearings, or testimony, make more sense than addressing the jurisdictional issues at the outset of this matter." (p. 77);

g. "[T]he six versions of the records, the ex parte interrogations, and creation of exhibits never presented during trial by the individual claiming to be a sitting judge demonstrates that it would be manifestly impossible attempt to demonstrate the elements provided in Rule 34.6. Moreover, the rule was simply not drafted to address the present extra-judicial creation of a record." (pp. 76-77); and

h. "Combined with the atrocious conduct of the individual masquerading as a judge . . . and the sheer volume of error attributed to the actions of this court and the lower court, this decision cannot stand . . . ." (p. 67).

III. Statements made in "Appellant's Reply Brief," filed June 13, 2022:

a. "[T]he Court's *ad hominin* [sic] attacks on counsel are unfounded . . . ." (p. 8);

b. "Appellee simply attempts to mislead and bandwagon on to the Court's bully pulpit in an effort to harass Appellant and his counsel." (p. 8);

c. "Contrary to the court's spurious attacks and Appellee's band-wagoning, Appellant presented the court with a list of these atrocities committed by the various officials regarding this case . . . ." (pp. 8-9);

d. "Moreover, this Court's prior contention that it never sealed documents in violation of Rule 76 is belied by the fact that only after the Court launched its spurious personal attack on Laza's counsel did the Court decide to provide Laza with the Documents requested under Rule 76." (p. 9);

e. "Note, Appellant denies the spurious allegations the Court claims, without evidence, have been made against its staff." (p. 43); and

f. "This Court's response to criticism by Counsel demonstrates that the criticism was founded, and the Court cannot properly discharge its duties." (pp. 43-44) (footnote omitted).

As a result of Mosser's continued inappropriate conduct, we order Nicholas Mosser to appear and show cause why he should not be sanctioned by this Court for the statements specified in this Order. **The show cause hearing is scheduled for Monday, October 31, 2022, at 11:00**

a.m. in the courtroom of the Court of Appeals, Sixth Apellate District, State of Texas, Bi-State Justice Building, 100 N. State Line Ave., Texarkana, Texas 75501. Failure to attend the hearing will result in the imposition of just sanctions. Any response to this order shall be filed with the clerk of this Court on or before twelve o'clock noon on Monday, October 24, 2022.

It is further ordered that the clerk of this Court shall issue a Notice to Show Cause commanding Mosser to show cause, in the manner and within the time specified in this order, why he should not be sanctioned by this Court. A copy of this Order shall accompany the Notice.

IT IS SO ORDERED ON THIS THE 16th DAY OF SEPTEMBER 2022.

BY THE COURT

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-18-00051-CV

JERRY LAZA, Appellant

V.

CITY OF PALESTINE, TEXAS, Appellee

On Appeal from the 349th District Court
Anderson County, Texas
Trial Court No. DCCV16-356-349

Before Morriss, C.J., Stevens and van Cleef, JJ.

REVISED ORDER

Pending before this Court is the decision on the possibility of sanctioning Jerry Laza's attorney, Nicholas D. Mosser, for statements by Mosser while representing Laza before this Court, statements that we have concluded transgress his obligation as an attorney to conduct himself in a professional and ethical manner. While this Court does not take the matter of sanctions lightly, we cannot ignore the many disrespectful statements Mosser has made to this Court—about this Court, the trial court, and the administrative judge—that are without any basis in fact. Having considered all relevant pleadings, the Court finds that sanctions are appropriate and necessary.

I. Background

In 2016, the City of Palestine sued Laza, alleging that Laza violated various city ordinances by improperly maintaining certain of his properties within the city and by unlawfully keeping junk, vehicles, equipment, and other unsightly items on those properties. The case proceeded to trial, and the trial court entered judgment in favor of the city in February 2018. On appeal, Laza was represented by Nicholas D. Mosser.

The clerk's and reporter's records were filed in November 2020. In a second motion for extension of time in which to file his brief, Laza complained about an omission from the reporter's record. On February 2, 2021, after Laza filed two additional motions for extensions of time in which to file his brief, this Court abated this appeal to the trial court pursuant to Rule 34.6 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 34.6(e), (f). Our order

instructed the trial court to take evidence on, and enter findings with respect to, each exhibit or portion of the record that was determined to be lost or destroyed.

Pursuant to our order, the trial court held two evidentiary hearings, the first of which was conducted on July 13, 2021.[1] After the first hearing, Mosser filed an emergency motion on August 26, 2021, seeking the trial court's recusal. The motion claimed, among other things, that the trial judge "interjected himself into the facts of this case by personally conducting ex-parte investigations, calling himself as witness, testifying about his recollection of events, [and] interrogating witnesses based on his ex-parte investigations." The trial court declined to recuse and signed an order referring the motion to recuse to the presiding judge of the Tenth Administrative Judicial Region. On September 27, 2021, the presiding judge of the Tenth Administrative Judicial Region issued an order denying the emergency motion to recuse, finding that "the movant did not file the motion as soon as practicable after the movant knew the grounds stated in the motion." *Laza v. City of Palestine*, No. 06-18-00051-CV, 2022 WL 3449819, at *17 (Tex. App.—Texarkana Aug. 18, 2022, no pet. h.) (mem. op.).

The trial court held a second evidentiary hearing in connection with the accuracy of the record and, thereafter, submitted its findings regarding the appellate record in a report dated December 14, 2021. By separate order dated December 28, 2021, this Court adopted each of the trial court's findings and its conclusion that there was no error or omission in the appellate record

[1]On January 17, 2017, the presiding judge of the First Administrative Judicial Region of Texas assigned the Honorable Dwight Phifer, senior judge of the 2nd Judicial District Court, to the 349th Judicial District Court of Anderson County, Texas, to hear cause number DCCV 16-356-349, *City of Palestine v. Jerry Laza*. On July 13, 2021, the presiding judge of the Tenth Administrative Judicial Region assigned Judge Phifer to the Anderson County district court to the same cause number, this time on abatement by the order of this Court. The trial court did not sign any contested order prior to the second order of assignment.

that was significant or that would affect the resolution of the appeal. The appellate record was completed and filed in this Court.

Despite our December 28 order adopting the trial court's findings and conclusions, Mosser filed a motion to abate the appeal to the trial court on January 14, 2022, complaining about the record and stating, "This Court accepts false statements of fact as conclusive, such as the trial court's 'finding' that certain exhibits were in the record, except had anyone actually looked, it would be clear they were not." We denied the motion to abate. After the Court denied the motion, Mosser attempted to file "Appellant's EMERGENCY Supplemental Motion to Abate" (Emergency Motion). Mosser designated that document as an "Other Document," rather than a motion, in the statewide e-filing system. Because there was no motion pending before this Court when Mosser attempted to file the Emergency Motion, our clerk's office deemed the document a motion, *see* TEX. R. APP. P. 10.1(a), which requires the payment of a $10.00 filing fee, *see* TEX. R. APP. P. app. A, § B(3)(a). Accordingly, the clerk's office attempted to file the document as a motion, and the statewide e-filing system attempted, unsuccessfully, to process the payment. As a result, the filing was rejected.

A. Mosser's Conduct Leads to An Order of Admonishment

After our clerk's office explained the reason for the rejected filing to Mosser, Mosser responded in an unprofessional and disrespectful manner towards our clerk and deputy clerks through a series of telephone calls, emails, and letters. As a result of those actions, among others, this Court issued an order admonishing Mosser to cease engaging in that conduct. In our

order, we outlined a few examples of Mosser's "disrespectful behavior towards our clerk and court staff in this case," including the following:

> - On December 6, 2021, Mosser made accusations regarding this Court's responsibility for the May 2020 ransomware attack that affected not only this Court, but all appellate courts, the Texas Court of Criminal Appeals, and the Texas Supreme Court. He inappropriately suggested that someone from this office caused the statewide ransomware attack by watching "porn" on a state computer. Mosser also used profanity while speaking with the clerk during this telephone conversation.
>
> - In a different conversation on December 6, 2021, Mosser called this Court's clerk's office and asked to speak with the Court's chief staff attorney. Mosser was advised by the clerk that, in accordance with Rule 9.6 of the Texas Rules of Appellate Procedure, all communications about a case must be made only through the clerk. *See* TEX. R. APP. P. 9.6. When Mosser disputed that statement, the clerk read him the text of Rule 9.6. Nevertheless, Mosser emailed this Court's chief staff attorney directly on December 6.

Laza v. City of Palestine, No. 06-18-00051-CV, 2022 WL 258495, at *3 (Tex. App.—Texarkana Jan. 26, 2022, order).

We further recited that "Mosser penned a letter to the clerk in which he accused members of our clerk's office of inappropriate behavior and accused this Court of engaging in subterfuge by entering secret orders." *Id.* at *2. Our order continued,

> In addition to his disrespectful, unprofessional, and inappropriate manner of communicating with our clerk's office, Mosser has, in several filings with this Court, impugned the integrity of this Court; and, just as in *Jabary* [*v. McCollough*, 325 F.D.R. 175 (E.D. Tex. 2018, order)], his attacks are not supported by facts or evidence. By way of example, in his Motion to Abate, Mosser states, "[T]his Court has improperly sealed matters concerning *ex parte* communications with witnesses in the Trial Court as to instructions on the exhibits in this case. *See* TEX. R. CIV. P. 76a." Later in the same motion, Mosser states that "this Court has improperly sealed matters without compliance with Rule 76 or 76a." Mosser's assertions that this Court has sealed any records in this

> appeal [are] patently false, and the inferences of impropriety enveloped in his accusations are baseless and unsupported by facts or evidence.

Id. at *3 (second alteration in original). As a result of that conduct and other conduct outlined in our order, this Court admonished Mosser as follows:

> 1. The clerk's office of this Court is the mouthpiece of this Court, and Mosser is admonished to treat it as such. Mosser is admonished not to use profanity in his verbal communications with the clerk of this Court or the deputy clerks of this Court and is admonished not to address the clerk of this Court, or the deputy clerks of this court, in a disrespectful, rude, or hostile manner.
>
> 2. Mosser is admonished not to engage in further violations of Rule 9.6 of the Texas Rules of Appellate Procedure.
>
> 3. Statements made to this Court, both in filings with this Court and through representations made to this Court's clerk's office, must be based in fact, must have evidentiary support, and must be made without reckless disregard as to their truth or falsity. Mosser is admonished that unfounded, baseless attacks on the integrity of this Court or its staff will not be tolerated.
>
> Mosser is admonished to heed these warnings and not to engage in similar conduct. He is further admonished that this Court continues to have the authority to take further action, not only as to any future conduct, but also as to the conduct described herein.

Id. at *4. Mosser did not heed our warning set forth in paragraph three of our admonishment order.

B. Despite Admonishment, Mosser Continued to Engage in Sanctionable Conduct

Following the issuance of our admonishment order, Mosser made sanctionable statements in his briefing filed with this Court. Among many inappropriate statements, Mosser made six statements that we find particularly sanctionable. Five statements, further discussed below, accused the administrative judge and Judge Phifer of committing "atrocities" and accused Judge

Phifer of "masquerading as a judge," becoming "personally invested in the creation of a record," "conducting ex parte investigation," changing witness testimony, suborning perjury, attempting to influence the administrative judge, and "manipulating trial exhibits." In a sixth statement, Mosser accused this Court of unnecessarily expending judicial resources and making "spurious ad hominin [sic] attacks on" him.[2]

II. Notice and Show Cause Order

As a result of these sanctionable statements, on September 16, 2022, we issued a notice and order to show cause to Mosser, commanding Mosser to show cause why he should not be sanctioned by this Court for such statements. In our notice and order, we commanded Mosser to appear on "Monday, October 31, 2022, at 11:00 a.m. at the Court of Appeals, Sixth Appellate District, State of Texas, Bi-State Justice Building, 100 N. State Line Ave., Texarkana, Texas 75501 to show cause why he should not be sanctioned by this Court for the statements specified in the Order of September 16, 2022." Our order admonished Mosser that "[f]ailure to attend the hearing [would] result in the imposition of just sanctions." Even though Mosser had actual notice of the show cause hearing, he chose not to personally appear.

III. Service and Actual Notice

The notice and order to show cause were delivered to the Collin County Sheriff on September 19, 2022, and were returned unserved by Collin County Deputy Sheriff Bryan Borton

[2]Mosser also made the following unprofessional statements, which are not addressed in this order: (1) "Justice Morriss failed to appreciate the law of Texas on where to file, how to file, and what to file that creates a case in the Court of Appeals," (2) Justice Morriss's "desire to retain the case without jurisdiction has blinded him to" the law, (3) Justice Morriss made "erroneous comments and [an] impassioned plea to retain a case that he has no jurisdiction over," (4) "Anderson County tends to lose files, which suddenly re-appear sporadically during the process of trying to get a complete record on appeal," (5) the District Clerk and Court of Appeals Clerk do not "know what a Docket Sheet is," and (6) this Court's opinion distinguishing the cases cited by Mosser was "absurd."

on September 29, 2022. On behalf of the Court, a private process server then attempted to personally serve the notice and order on Mosser on September 30, October 4, October 6, October 7, October 8, and October 10. In an affidavit filed with this Court, the process server, Roger Bigony, PSC#5307 of Malone Process Service, LLC, stated that Mosser called him at approximately 4:00 p.m. on October 6 and asked if the service documents were stamped by a judge. According to Bigony, Mosser called from a 214-area code. Bigony was ultimately unsuccessful in his efforts to personally serve Mosser with the notice and order to show cause.

On October 6, 2022, the clerk of this Court emailed Mosser this Court's order and notice to show cause.

On October 21, Mosser filed a motion in this Court captioned Verified Motion to Recuse, Disqualify, and Transfer, asking that each of the three justices of this Court recuse or disqualify themselves from presiding over the show cause hearing scheduled for Monday, October 31. Mosser sought recusal or disqualification because he claimed that the justices of this Court made false allegations against him and could not "be entrusted with presiding over this matter with impartiality." Mosser attached to his motion a copy of the clerk's October 6 email and letter notifying him to show cause.[3] He further claimed that he gained knowledge of the order to show cause when a Law360 reporter requested comment.

[3]Pursuant to the procedure set forth in Rule 16.3(b), the justices considered the motion in chambers and found no reason to recuse or disqualify themselves and certified the matter to the remaining members of the Court, en banc. *See* TEX. R. APP. P. 16.3(b); *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984); *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied) (per curiam) (order). The motion was denied as to each justice in separate orders. The transfer issue was submitted to the Texas Supreme Court. The Texas Supreme Court issued its order on October 27, 2022, denying the request to transfer this matter from this Court.

On October 28, Mosser filed his response to this Court's show cause order, claiming that his statements did not constitute a threat to the administration of justice, his speech was protected by the First Amendment to the United States Constitution, his statements were factual, there was no seal affixed to the order, the show cause order was insufficiently specific and thus violated due process, the Court failed to personally serve Mosser, this Court lacked jurisdiction, and the justices on this Court improperly failed to recuse or disqualify. Mosser then attempted to explain the alleged factual basis of each specific statement set forth in the show cause order.

It is apparent that Mosser had actual notice of the show cause hearing on October 31 based on (1) his telephone conversation with the process server, (2) this Court's e-service of the notice and order to show cause on October 6, (3) the request for comment from a Law360 reporter, (4) the filing of the motion to recuse, disqualify, and transfer, and (5) the filing of a response to the show cause order.

Rule 15.2 of the Texas Rules of Appellate Procedure states:

> A party who appears in person or by attorney in an appellate court proceeding--or who has actual knowledge of the court's opinion, judgment, or order related to a writ or process--is bound by the opinion, judgment, or order to the same extent as if personally served under 15.1.

TEX. R. APP. P. 15.2. In addition to having actual knowledge of this Court's show cause order, Mosser appeared in this proceeding by virtue of his October 21 and October 28 filings in this Court. *See* TEX. R. APP. P. 6.2. As a result, and in accordance with Rule 15.2, Mosser was bound by this Court's show cause order to the same extent as if he had been personally served under Rule 15.1.

IV. Show Cause Hearing

In Mosser's place, James C. Mosser appeared at the October 31 show cause hearing. James C. Mosser represented to the Court that Mosser had actual knowledge of the hearing. He further claimed that Mosser did not attend the hearing because he lived in Michigan. In our order, this Court warned Mosser that "[f]ailure to attend the hearing [would] result in the imposition of just sanctions." At the hearing, this Court advised James C. Mosser that Mosser failed to attend the hearing at his peril.

V. Authority and Due Process Requirements

As stated in our admonishment order,

> "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed within a Court, because they are necessary to the exercise of all others.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)). "For this reason, '[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" *Id.* (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)). "Texas courts, like all civilized courts of justice, have these inherent powers." *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex. App.—Corpus Christi 1992, no pet.).

Laza, 2022 WL 258495, at *4 (alterations in original). This means that, "[w]hen an attorney engages in misconduct before our court . . . we retain the inherent power to discipline such behavior when reasonably necessary to the extent deemed appropriate." *Johnson v. Johnson*, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied) (citing *Campos v. Inv. Mgmt. Props., Inc.*, 917 S.W.2d 351, 358 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring) (citing *Pub. Util. Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Kutch*

v. Del Mar Coll., 831 S.W.2d 506, 509 (Tex. App.—Corpus Christi 1992, no writ)). As stated by the Texas Supreme Court, "Courts possess inherent power to discipline an attorney's behavior." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (reh'g, order); *see Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 707 (Tex. 2020).

Although we may assess sanctions based on our inherent authority, we are required to provide notice to the affected party that we intend to do so to allow the party to prepare a defense. *Greene v. Young*, 174 S.W.3d 291, 300 n.4 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Kutch*, 831 S.W.2d at 511) ("The traditional Due Process protections of notice and hearing are also necessary before imposition of sanctions."). We conclude that Mosser received those due process protections as he was afforded notice of the hearing, had actual knowledge of this Court's order and of the hearing date, and was provided the opportunity to attend the hearing to make his defense. Our order provided the basis for the proposed sanctions based on this Court's inherent power and described the sanctionable conduct by directly quoting the statements the Court found sanctionable. And, although our order set a deadline of Monday, October 24, 2022, in which to file a response to the order, we nevertheless filed Mosser's response submitted to this Court on Friday, October 28, 2022, at 5:54 p.m. We have likewise considered the merits of Mosser's response.

In addition, sanctions must be just. This means that a sanction "must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited on the offender." *Transamerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). Sanctions must also not be excessive, that is, "[t]he punishment

should fit the crime." *Id.* A court must therefore "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*

This is not the first time that Mosser has engaged in less than exemplary conduct before a court. As we noted in our admonishment order,

> Specifically, four years ago, Mosser was sanctioned by Judge Amos Mazzant, Presiding Judge of the United States Federal Court for the Eastern District of Texas, Sherman Division. *See Jabary* . . . .

Laza, 2022 WL 258495, at *2. In *Jabary*, the court listed every sanctionable statement in its order and explained why each statement was devoid of factual support. After having analyzed each such statement, the court observed,

> Mosser makes such bold, disrespectful, and inappropriate comments with a complete and absolute lack of factual or evidentiary support. Mosser repeatedly attempts to impose his view of how this case has proceeded, his perception of why the Court ruled the way it did, and his own personal frustrations as evidence of how the Court allegedly acted inappropriately. Mosser's actions demonstrate the utmost disrespect.

Jabary, 325 F.R.D. at 199 (footnote omitted). The court further observed that, although Mosser's "statements were disrespectful and unsupported in fact, Mosser did not apologize for making the statements or even admit they were disrespectful." *Id.* at 200 (footnote omitted). The court imposed "a monetary sanction of $250 for each of the twelve [sanctionable] statements" at issue, reasoning that such amount was "appropriate to deter such conduct." *Id.* In addition, the court ordered Mosser to attend two Texas Bar Continuing Legal Education classes on ethical courtroom behavior, as it believed that would "assist in educating Mosser on appropriate courtroom demeanor" and that the classes would "serve Mosser well going forward in the profession." *Id.*

VI. Sanctionable Conduct

We consider the Texas Rules of Professional Conduct in our evaluation of Mosser's statements. Among other things, these rules state that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.03(a)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. In addition, "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer . . . ." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. Finally, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. preamble ¶ 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. We address all six of Mosser's sanctionable statements separately.

> **1. "Setting [sic] the *atrocities that were committed by the Administrative Judge and the 'Trial Judge,'* one of them should have determined that Judge Phifer became personally invested in the creation of a record, the investigation into the lost records, the manipulation of trial exhibits, and through the information he gained while not presiding over the case should have recused him from sitting after *he conducted this ex parte investigation.*"** (Emphasis added).
>
> This claim appears on pages 64 through 65 of the brief Mosser filed on behalf of Laza.

In this statement, Mosser claims that the administrative judge and the trial judge committed atrocities and that the trial judge conducted an ex parte investigation, among other things. By accusing the administrative judge and the trial judge of committing atrocities, Mosser is claiming that they committed "a shockingly bad or atrocious act." *Atrocities*, Merriam-

Webster.com, https://www.merriam-webster.com/dictionary/atrocities (last visited Nov. 9, 2022). An "atrocious" act is one that is "extremely wicked, brutal, or cruel." *Atrocious*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/atrocious (last visited Nov. 9, 2022).

In his response to our order to show cause, Mosser claims that this statement is merely a "simple summation about conduct of Judge Phifer and [and the administrative judge] in isolation, disregarding the some 15 pages of discussion and citations and claims that Mosser cannot say this, again for some reason." He further states, "If these statements are viewed as a violation of those justice's integrity, there is no rule against such briefing. However, if the Court believes that these statements are without support, then it need only look to the record and the 15 pages of briefing discussion [sic] those actions and their conduct."

The statement quoted above appeared in Laza's brief on appeal under the heading "Whether the Trial Court exceeded its authority by failing to recuse himself and by failing to follow the mandates of this Court's Order." In that section of his brief, Laza complained that this case was abated on February 2, 2021, and that Judge Phifer was not assigned to the case by the administrative judge until July 13, 2021. He further complained that the trial court investigated "matters for months and had become a material witness to his own investigation." He claimed this was so because Judge Phifer apparently familiarized himself with the state of the record before he conducted the first of two evidentiary hearings on July 13, 2021. The brief claimed that Judge Phifer offered exhibits, led witnesses through the admission of those exhibits,

and suborned perjury—an allegation that will be addressed below—and therefore should have recused.

Context is important to an understanding of the issues with the record in this matter. The notice of appeal was filed in June 2018. The clerk's record was filed in August 2018, and the reporter's record was filed in September 2018. After the reporter's record was filed, Laza filed a suggestion of bankruptcy, and the case was administratively abated. In May 2020, all appellate courts in the State of Texas, including this Court, the Texas Court of Criminal Appeals, and the Texas Supreme Court, were subjected to a ransomware attack that had the effect, among other things, of deleting the clerk's and reporter's records in this matter from our case management system. When the case was re-instated, the clerk and the court reporter were required to re-file their records. There were discrepancies in the record that required abatement to the trial court to resolve. Complicating the entire matter was the fact that three court reporters recorded the trial.

The record indicates that, on July 13, 2021, the regional presiding judge signed the order appointing Judge Phifer as the judge to preside over the abatement proceeding, presumably because Judge Phifer was appointed to preside over the trial. The record reflects that Judge Phifer conducted no hearings before the July 13, 2021, order.

The trial court undertook the task of ensuring that a complete and accurate record was filed in this appeal. The trial court conducted a lengthy evidentiary hearing on July 13, 2021. That hearing was recessed to afford Laza additional time to identify any alleged defects in the record. The day before the hearing was scheduled to commence again in August 2021, Laza filed a motion to recuse Judge Phifer based solely on what Judge Phifer said on the record at the

prior July hearing regarding his efforts to address Laza's complaints as to the record. After that motion was denied by the administrative judge, the trial court conducted a second lengthy hearing on November 30, 2021. The trial court made findings and conclusions regarding the record, which we adopted.

As for Laza's assertion that the trial judge and the administrative judge committed atrocities, meaning they committed acts that were "shockingly bad" or "extremely wicked, brutal, or cruel," neither Mosser's explanations nor the record itself provide factual support for this statement. Accordingly, we conclude that this statement has no factual support and is a violation of Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A., and of admonishment number 3 of our admonishment order.

As for Laza's assertion that the trial judge conducted an ex parte investigation or otherwise created the record or manipulated exhibits, we find such assertions devoid of any factual basis and, thus, violative of Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A., and of admonishment number 3 of our admonishment order. As we explained in our opinion:

> The fact that the trial judge had personal knowledge of what occurred at trial and therefore had unique knowledge of the record is not a basis for recusal under the Rule. The trial judge explained, on the record, that he had viewed the voluminous trial record to prepare for the abatement hearing and to enable the hearing to proceed efficiently. The trial court acted appropriately in speaking with court personnel about the record to prepare for the hearing. Canon 3.B.(8)(d) of the Code of Judicial Conduct specifically recognizes that a judge's communication with court personnel does not constitute an impermissible ex parte

> communication. TEX. CODE JUD. CONDUCT, Canon 3.B.(8)(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. C. The trial court's groundwork in preparing for the abatement hearing was conducted for the purpose of clarifying the issues and expediting the hearing. The trial court was, after all, tasked with determining the accuracy of the record. Allegations that his efforts in doing so formed the basis of a valid recusal motion are meritless.

Laza, 2022 WL 3449819, at *16 n.17. Mosser's claims that Judge Phifer and the administrative judge acted inappropriately in any fashion lack any factual basis and are therefore sanctionable.

> **2. *"Judge Phifer suborned perjury by soliciting the testimony of Ms. Vick* who testified under oath that the Court of Appeals, on March 10, 2021, instructed her to change volumes or indexes, and then told Ms. Vick that the 'court of appeals said they would pull everything and refile."**
>
> This claim appears on page 67 of the brief Mosser filed on behalf of Laza.

In this statement, Mosser claims that Judge Phifer suborned perjury by soliciting Vick's[4] testimony. "Perjury" means "the voluntary violation of an oath or vow either by swearing to what is untrue or by omission to do what has been promised under oath : false swearing." *Perjury*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/perjury (last visited Nov. 9, 2022). "Suborned" means "to induce to commit perjury." *Suborned*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/suborned (last visited Nov. 9, 2022). Mosser must therefore establish a factual basis for the propositions (1) that Vick lied under oath and (2) that the trial court induced her to do so.

In his response to our order to show cause, Mosser claims that this Court has disregarded the evidentiary support for this "factual statement." Mosser then cites a specific portion of the record in which Vick testified, "I've got a letter from the court of appeals, March the 10th

[4]Vick is Susan Waldrip Vick and is identified in the record at times as Ms. Waldrip. Vick was one of the three court reporters who transcribed the trial proceedings in this matter.

2021,[5] where it was filed and then they came back and wanted the index changed, so Volumes 2, 3 and 4, and the court of appeals said they would pull everything and refile." Mosser stated that he "specifically asked the clerk's office to provide these communications to him," citing a December 7, 2021, letter to our clerk. In that letter, Mosser expressed concern about communications between this Court and unknown persons. Mosser stated that he "called the clerk[']s office to determine the veracity of a statement made by the Court Reporter, that she had been told by [the clerk's] office that the exhibits filed with the Court of Appeals were sufficient." Mosser's letter continues, "Your clerks informed me, unequivocally, that there had been no written communications from the Court of Appeals to anyone regarding this case. However, a simple review of the docket sheet, a term that seems to continually elude everyone in this case, demonstrates that your clerks were not entirely honest."

The written communications referenced by Mosser as reflected in the docket sheet were emails between the clerk's office and the district court coordinator and the district clerk regarding the scheduling of the evidentiary hearings in the trial court. Those emails were provided to Mosser by this Court. Mosser's response stated that he asked our clerk, "So you have no recordings or any other communications that are not publicly available online? Such as: (testimony of Vick above as quoted above)." Our clerk's office responded, "We do not have anything else." From this exchange, Mosser posits that Vick must have been lying when she

[5]By letter dated March 10, 2021, our clerk's office notified the parties that the certified reporter's record (volumes 2, 3, and 4) was electronically received and filed. Susan Waldrip, court reporter, was copied on the letter, as was the trial court.

testified (as quoted above). Mosser did not attempt to explain a factual basis for his assertion that Judge Phifer suborned perjury.

The record of the July 13, 2021, hearing indicates that Mosser filed, on behalf of Laza, a document captioned Notice of Errors and Motion to Correct Court Reporter's Record. At the hearing, the first issue the court addressed based on that document "was a statement of facts in the court of appeals that did not relate to this case, clearly did not relate." Vick explained:

> The portion that they're alleging that was attached to the court's record was heard in 2020. The original court record was filed in September in 2018 and it could not have been included since it was a CPS case that was heard in 2020. It would not have been attached to the original court record or statement of facts that was filed in 2018, September 2018. The original court record that was filed in 2018 was filed and approved from the court of appeals. I have letters stating that.
>
> And then as far as that, the court of appeals got hacked and so I don't know. What happened was the court records in the court of appeals, everything got mixed up.
>
> . . . .
>
> . . . . So they wanted us to refile it again and then once these issues -- I was aware these issues were brought up they pulled the record. So . . . as far as the whole statement of facts to be filed we were supposed to refile everything again, because I've been talking back and forth to the court of appeals.

The trial court summarized, "And I will state it clearly is not -- that part of the record clearly was not related to this case and I assume both parties, even if it were still there, would stipulate to the court of appeals that it has nothing to do with this appeal and it would not affect it." Counsel for the city agreed. James C. Mosser questioned Vick about the certification of the original record filed in September 2018. The trial court then asked Vick whether the irrelevant portion of the record was included in subsequent filings, and she responded that it had not been included.

When James C. Mosser asked the court to clarify, the court stated that it was "speaking strictly about on page two of your Motion to Correct Court Reporter's Records. You have a section called Inapplicable Sections and you claim that there's at least three volumes that relate to matters other than Mr. Laza's case."

Our records further reflect that the volumes filed on March 10, 2021, are related to this case and that our clerk removed the misfiled volumes. This issue was discussed at the hearing at length. It is apparent from the record that the court reporter contacted this Court's clerk's office regarding the misfiled volumes, those volumes were taken down, and the correct volumes were filed in their stead.

Nothing in Mosser's explanation provides a factual basis for the assertions (1) that Vick perjured herself or (2) that Judge Phifer suborned perjury. This statement is particularly egregious not only because it lacks any factual basis, but because it accuses both Vick and Judge Phifer of criminal conduct. This statement violates Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and is therefore sanctionable.

> 3. **"Judge Phifer requested to stay on the case and *attempted to influence the Administrative Judge by indicating his wishes on remaining on the case.* All of this was off the record, in *ex parte* correspondence with the Administrative Judge."** (Emphasis added).

This claim appears on page 68 of the brief Mosser filed on behalf of Laza.

In response to our show cause order, Mosser states that this statement was factually supported by the record and that the entirety of the statement in his brief was:

> Despite this, the Judge Phifer requested to stay on the case and attempted to influence the Administrative Judge by indicating his wishes on remaining on the case. Appx. 6. All of this was off the record, in *ex parte* correspondence with the Administrative Judge." Appx. 6 ("Judge Phifer does not wish to recuse in this matter and has instructed me to forward this motion to you for ruling.").

Mosser points out that he cited Rule 18a(c)(2) of the Texas Rules of Civil Procedure and caselaw in support of this statement, which stands for the proposition that the "rules plainly discourage any attempt by the challenged judge to influence the judgment of the assigned judge." Rule 18a(c)(2) states, "The judge whose recusal or disqualification is sought should not file a response to the motion." TEX. R. CIV. P. 18a(c)(2). The record does not include any response to the motion by Judge Phifer.

The statement quoted above relates to Laza's motion to recuse Judge Phifer on August 26, 2021. In his response and in his brief, Mosser referred to Appendix 6 of the appellant's brief, which consists of an email from Cindy Singletary, the district court coordinator for Anderson County, to Judge Alfonso Charles. This email apparently is the "off the record" "ex parte correspondence with the Administrative Judge" to which Mosser refers in the statement quoted above. The email reads:

> Good morning Judge Charles,
>
> We were set this morning for an evidentiary hearing in this matter when unbeknownst to us, this last-minute Emergency Motion to Recuse was filed. The clerk did not have it pulled out of the efile system until this morning.
>
> We have called off today's hearing. Judge Phifer does not wish to recuse in this matter and has instructed me to forward this motion to you for ruling. Due to the size of the exhibit- it had to be broken up into several documents, my apologies.

Thank you,

Cindy Singletary,
District Court Coordinator

Rule 18a(f) states:

> (1) Responding to the Motion. Regardless of whether the motion complies with this rule, the respondent judge, within three business days after the motion is filed, must either:
>
> (A) sign and file with the clerk an order of recusal or disqualification; or
>
> (B) sign and file with the clerk an order referring the motion to the regional presiding judge.

TEX. R. CIV. P. 18a(f). The record reflects that Judge Phifer signed and filed an order of referral on the motion to recuse to Judge Charles on August 27, 2021. The order stated, "I respectfully decline to recuse myself and request the Presiding Judge of the Tenth Administrative Judicial Region to assign a judge to hear the motion to recuse." This order was properly signed and filed in accordance with, and as required by, Rule 18a(f).

The email from the docket coordinator to Judge Charles stating that Judge Phifer did not wish to recuse provided no factual basis for the assertion that Judge Phifer attempted to influence the Administrative Judge by indicating his wishes to remain on the case. It merely echoed the information in the order filed by Judge Phifer, as was required by Rule 18a(f).

We conclude that, because Mosser has failed to provide factual support for this statement, Mosser's statement violates Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T

CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and is therefore sanctionable.

4. "The 'Trial Judge change[d] testimony of witnesses.'"

This claim appears on page 75 of Laza's brief and alleges a violation of Section 37.09, subsections (a) and (d), of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 37.09(a), (d) (Supp.) (classified as third-degree felony offenses of tampering with or fabricating physical evidence).

In his response to our show cause order, Mosser claims that this statement stems from advocacy based on the record. Mosser points out that, had we not omitted the balance of the quotation, the statement would have read:

The trial court issued its findings in a report to this Court on December 14, 2021. Paragraph five of the findings reads:

> 5. CLAIM: "Vol. 2-Ex 11 & 12-Right of Way?
>
> FINDINGS AND RESOLUTION: As he stated at the hearing, Appellant's objection is that he cannot identify the Right of Way marker in the photograph. Exhibit 11 is a photograph of lawnmowers with high weeds on Appellant's property (as identified in Vol. 2, p. 51). Exhibit 12 is a photograph of Appellant's property taken in October, 2016 (as identified in Vol 2, p. 152–153). This claim is not about an error or omission in the record and is not valid.

In his response, Mosser states,

> When we look to the testimony that the Judge claims provides the evidence that this is a "photograph of Appellant's property taken in October 2016" no such testimony is present in the pages referenced by the Judge (152-153). However, the witness on page 146, while testifying on Exhibit 12 (as confirmed by the Judge several years before) he is able to "point out on 12 where [the right of way marker] is." 20210310. RR2,146.

Volume two of the reporter's record filed in this cause states, on pages 152—53:

> Q. (By Mr. Stutes.) And with regard to Exhibit 12, does that accurately represent what you saw on the property when you were at the pro -- at Mr. Laza's property in August of 2016 -- in October -- I'm sorry -- of 2016?
>
> A. Yes.

Mosser plays fast and loose with his interpretation of the record. The record he relies on in support of his allegation is a record that was filed in this Court on March 10, 2021, prior to the time the trial court entered its findings as to the record. Volume two of the March 10, 2021, record includes the same testimony as volume two of the record filed in this Court on December 14, 2021. It appears as if, though, the page numbers do not precisely correspond in each of these volumes due to a difference in font size. The same testimony quoted above as appearing on pages 152 through 153 of volume two of the December 14, 2021, record appears on page 149 of volume two of the March 10, 2021, record.

Further, in volume two of the March 10, 2021, record the witness testified, on pages 145 through 146:

> Next to the driveway approach on the lower left-hand side, there's piece of concrete with a -- probably a brass circle in it that is a TXDOT right of way marker, or -- right -- establishing that's the Right-of-way line for the highway --
>
> THE COURT: This is on 11?
>
> MR. STUTES: -- 11 and 12.
>
> THE WITNESS: I'm sorry. 12. 12.
>
> MR. MOSSER: I'm going to object. He's not qualified to determine that, and I doubt that he's a surveyor, so I don't think he can make that determination, Judge. He doesn't have the credentials.

This precise testimony also appears in volume two of the December 14, 2021, record on page 149. The point is, even though Judge Phifer was referring to the later version of the record at the hearing rather than the version Mosser points to in his response, both records include the same testimony. Judge Phifer had all of the testimony before him to enable him to make a determination as to the exhibits in this case. The fact is, Judge Phifer determined that exhibit 12 is a photograph of appellant's property taken in October 2016. That is precisely what the testimony on pages 152 through 153 of volume two of the December 14, 2021, reporter's record states. That is also precisely what the testimony on page 149 of volume two of the March 10, 2021, reporter's record states. If Mosser believed that this was not the proper exhibit as identified by the testimony, he simply should have pointed that out to the trial court.

Instead, Mosser chose to make the bold and factually unsupported statement that the trial court changed the testimony of the witnesses, which he claims is a felonious act. We conclude that, because Mosser has failed to provide factual support for this statement, Mosser's statement violates Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and is therefore sanctionable.

> **5. "This Court has determined that *unnecessary expenditure of judicial resources* and *spurious ad hominin [sic] attacks on counsel for Appellant*, without evidence, factual hearings, or testimony, *make more sense than addressing the jurisdictional issues at the outset of this matter.*"** (Emphasis added).

This statement appeared on the last page of Laza's brief, in the prayer. In his response to our show cause order, Mosser explained that this statement is a response to the following language in this Court's admonishment order:

> On December 6, 2021, Mosser made accusations regarding this Court's responsibility for the May 2020 ransomware attack that affected not only this Court, but all appellate courts, the Texas Court of Criminal Appeals, and the Texas Supreme Court. He inappropriately suggested that someone from this office caused the statewide ransomware attack by watching "porn" on a state computer. Mosser also used profanity while speaking with the clerk during this telephone conversation.

Mosser claims that this statement is a spurious *ad hominem* attack on him. He bases this claim on the assertion that this Court's clerk's office denied that he ever made such statements.

Again, context is important. On January 26, 2022, Mosser emailed the clerk of this Court, stating, "In light of the Court's order that nothing in this matter has been sealed under Rule 76a, please provide me with copies of all the email correspondence the Court or its staff has had with any party concerning this case." In response to that email, our clerk emailed Mosser, also on January 27, 2022, stating, "Copies of the email correspondence you requested are attached." As we explained earlier, the emails our clerk sent to Mosser were emails between the clerk's office and the district court coordinator and the district clerk regarding the scheduling of the evidentiary hearings in the trial court. After Mosser received that information, Mosser responded,

> So you have no recordings or any other communications that are not publicly available online? Such as: "MS. VICK: This is Susan Waldrip Vick. I've got a letter from the court of appeals, March the 10th, 2021, where it was filed and then they came back and wanted the index changed, so Volumes 2, 3 and 4, and the court of appeals said they would pull everything and refile." Nothing from Ms. Vick and no recordings of any calls?

Our clerk responded, "We do not have anything else."

Nowhere in the email chain set forth above does the clerk deny having received any telephone calls from Mosser on December 6, 2021.

Mosser also attached the case events sheet from our computer data base in support of his claim that the clerk's office denied that he ever made the statements set forth in our admonishment order as quoted above. The case events sheet documents several events noted as "telephone call received." Apparently, Mosser relies on the absence of such a documented "telephone call received" on December 6, 2021, in support of his claim that he did not call the clerk's office on that date. As a matter of course, the "event type" listed in the case events sheet typically documents only those telephone calls or emails that pertain to filing dates, securing the record, monitoring the status of an order to the trial court, or missed deadlines. Our clerk's office does not document every call regarding case inquiries or complaints. Mosser's December 6, 2021, telephone call was not listed in this Court's case events sheet because it did not pertain to the matters typically documented, as described above. Instead, during Mosser's telephone call, he used profanity and made an improper accusation regarding the ransomware attack. In any event, the absence of such documentation of that telephone call is not, as Mosser suggests, a denial by our clerk's office that the call happened.

We conclude that the statement that this Court made spurious *ad hominem* attacks on Mosser is without a basis in fact. We further conclude that Mosser has not attempted to provide a factual basis for his assertions that this Court has unnecessarily expended judicial resources in personally attacking him rather than addressing the jurisdictional issues at the outset of the matter. Mosser's opinion of the manner in which this case has proceeded does not provide a factual basis for a statement regarding the intent of this Court. Both statements violate Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and are therefore sanctionable.

> **6. "Combined with the *atrocious conduct of the individual masquerading as a judge* . . . and the sheer volume of error attributed to the actions of this court and the lower court, this decision cannot stand . . . ."** (Emphasis added).

In this final statement, Mosser accuses Judge Phifer of committing atrocious conduct and of masquerading as a judge. This statement appeared on the last page of Laza's brief, in the prayer.

In his response to our show cause order, Mosser questions why this language would strike the court's ire, as the Texas Court of Criminal Appeals has made this observation:

> There can be no court, in a legal sense, without a judge, and there can be no judge except as he may be elected and chosen under the Constitution and agreeably to law. It therefore results that, however eminent in learning and however fair in fact may be the person who presides over the trial, *unless he is in a legal sense a district judge the gathering masquerading as a court becomes of no higher dignity than the same number of respectable gentlemen gathered by chance on the street corner.*
>
> *Oates v. State*, 56 Tex. Crim. 571, 584 (1909) (emphasis added).

In the *Oates* case, the district judge was disqualified. The special judge who tried the case was appointed by the governor, who lacked constitutional or statutory authority to make the appointment. As a result, the appointment was void. There can be no claim in this case that Judge Phifer was not properly assigned by the administrative judge to try this case.

To "masquerade" is to "assume the appearance of something one is not." *Masquerade*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/masquerade (last visited Nov. 9, 2022). The statement that Judge Phifer masqueraded as a judge is without a factual basis and violates Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and is therefore sanctionable.

We have previously explained, under item number one above, why there is no factual basis for the statement that the trial court exhibited atrocious conduct. As a result, we find that this same statement listed under item six is likewise without a factual basis and violates Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.02(a) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, and admonishment number 3 of our admonishment order and is therefore sanctionable.

Each of the statements listed above in items one through six likewise violate the preamble of the Texas Lawyer's Creed, which states, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. preamble ¶ 4, *reprinted in* TEX. GOV'T CODE ANN.,

tit. 2, subtit. G, app. A. As was true in Judge Mazzant's court, Mosser's conduct here "demonstrate[s] the utmost disrespect." *Jabary*, 325 F.R.D. at 199.

VII. Appropriate Sanctions

As outlined above, Mosser made factually unsupported and disrespectful comments regarding the trial court, the administrative judge, and this Court. One of Mosser's comments accused the trial court and the court reporter of criminal conduct, and one of his comments accused the trial court of a separate instance of criminal conduct.

Over four years ago, Judge Mazzant sanctioned Mosser $3,000.00 for similar conduct. Judge Mazzant also ordered Mosser to attend continuing legal education on ethics. Given Mosser's continued sanctionable conduct despite having been previously sanctioned, we conclude that a sanction in the amount of $3,000.00 was not sufficient to persuade Mosser to refrain from engaging in similar conduct in the future. As a result, and because of the level of disrespect Mosser has demonstrated to the trial court, the administrative judge, and this Court, we find a monetary sanction of $600.00 for each of the six identified statements appropriate to deter further conduct in the future. We also note Mosser's willful failure to personally attend the show cause hearing on October 31, 2022, but decline to sanction that willful conduct, since he did cause an extensive written response to be filed and did arrange for his law partner, James Mosser, to appear at the hearing.

It is therefore ORDERED that Nicholas D. Mosser pay monetary sanctions in the amount $3,600.00 for the statements made in briefing to this Court as outlined above. Mosser is

ORDERED to pay the entirety of the monetary sanctions to this Court within ten (10) days from the date of this Order.

Further, Mosser's disparaging and factually unsupported remarks about the trial court, the administrative judge, and this Court raise a substantial question about Mosser's "honesty, trustworthiness or fitness as a lawyer." TEX. CODE JUD. CONDUCT, Canon 3D(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B. As a result, we are bound by Canon 3D(2) of the Code of Judicial Conduct to inform the Office of the General Counsel of the State Bar of Texas of this matter. *See Johnson*, 948 S.W.2d at 841.

We, therefore, ORDER the clerk of this Court to promptly forward to the Office of the General Counsel of the State Bar of Texas, for investigation and any other action it may deem necessary, a copy of (1) our order of admonishment dated January 26, 2022, (2) our notice and show cause order dated September 16, 2022, and (3) this order.

BY THE COURT

Date: December 5, 2022

Nicholas D. Mosser

From: no-reply@efilingmail.tylertech.cloud
Sent: Monday, February 6, 2023 1:13 PM
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Filing Attorney	Nicholas Mosser