No._____

IN THE

SUPREME COURT OF THE UNITED STATES

SPENCER FARWELL, Petitioner,

v.

FOUNTAINS AT TIDWELL LTD. ET AL. Respondents.

PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 20, 2024
Lyle W. Cayce
Clerk

No. 24-20033
Summary Calendar

SELENA E. MCDADE; KIARRA A. FARWELL; SPENCER FARWELL; CIARRA S. FARWELL; D'ANDREA A. MCDADE FARWELL,

Plaintiffs—Appellants,

versus

FOUNTAINS AT TIDWELL LIMITED; ISSAC MATTHEWS; HITTIG MANAGEMENT CORPORATION; WALTER BARRY KAHN; JOSHUA R. FLORES; BRISTALYN DANIELS,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-2118

Before DAVIS, HO, and RAMIREZ, *Circuit Judges*.

PER CURIAM:*

Plaintiff-Appellant, Spencer Farwell, proceeding *pro se* and *in forma pauperis*, filed a civil rights complaint on behalf of himself, his wife, Selena

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

court adopted the magistrate judge's reports and recommendations over Farwell's objections. Farwell filed a timely notice of appeal.

"We review de novo the district court's order on a motion to dismiss for failure to state a claim under Rule 12(b)(6)."[3] On appeal, Farwell does not challenge the district court's dismissal of his claims against the Landlord and Attorney Defendants on the basis that they are not state actors for purposes of a § 1983 action. However, Farwell's brief makes a passing allegation that Daniels, who is a state clerk, "enter[ed] into a conspiracy with the defendant" to violate Farwell's due process rights. Although we generally do not consider private individuals state actors for purposes of § 1983, "a private individual may act under color of law in certain circumstances, such as when a private person is involved in a conspiracy or participates in joint activity with state actors."[4] Even liberally construing Farwell's assertion that Daniels conspired with an unnamed defendant, that conclusory allegation, unaccompanied by any reference to a factual allegation showing such an agreement, is insufficient to plausibly assert that the Landlord and Attorney Defendants conspired with a state actor.[5] The district court thus correctly dismissed Farwell's § 1983 claims against the Landlord and Attorney Defendants.

As to Farwell's claims against Daniels, Farwell maintains that she "tampered with evidence by removing records from the docket order." But Farwell does not dispute that Daniels's alleged conduct occurred more than two years before he filed the instant action and thus is barred by Texas's two-

[3] *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

[4] *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005).

[5] *See Arsenaux v. Roberts*, 726 F.2d 1022, 1023–24 (5th Cir. 1982).

year limitations period applied to § 1983 claims.[6] Although we liberally construe *pro se* briefs, "we also require that arguments must be briefed to be preserved."[7] By failing to brief the issue of timeliness, Farwell has abandoned any challenge to the district court's dismissal of his claims against Daniels.[8]

For the first time on appeal, Farwell argues that because the court below did not understand his claims, it erred by not holding a hearing before dismissing his claims. As an initial matter, Farwell did not request a hearing before the district court. Instead, he was given the opportunity to present his case through numerous written submissions to the court. Moreover, the district court was not required to hold a hearing before dismissing his complaint under Rule 12(b)(6).[9] Thus, the district court did not abuse its discretion by dismissing Farwell's complaint without holding a hearing.[10] Finally, despite Farwell's conclusory assertion to the contrary, the district court construed his filings, to the extent discernible, liberally under the proper standard applied to *pro se* briefs.

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[6] *See King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015) (recognizing "that Texas's two-year statute of limitations for personal injury actions applies to § 1983 claims"); TEX. CIV. PRAC. & REM. CODE § 16.003.

[7] *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993) (internal quotation marks and citation omitted).

[8] *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

[9] *See Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) (per curiam) ("Every circuit to consider the issue has determined that the 'hearing' requirements of Rule 12 and Rule 56 do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court.").

[10] *See Sanders v. Agnew*, 306 F. App'x 844, 849 (5th Cir. 2009) (per curiam) (unpublished) (holding that a magistrate judge did not abuse his discretion by denying the plaintiff's motion for an oral hearing on a summary judgment motion).

Based on the foregoing, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SELENA E. MCDADE, *et al*, Plaintiffs,	§	CIVIL ACTION NO. 4:23-cv-02118
vs.	§	JUDGE CHARLES ESKRIDGE
FOUNTAINS AT TIDWELL LTD, *et al*, Defendants.	§	

ORDER ADOPTING
MEMORANDUM AND RECOMMENDATION

Plaintiff Spencer Farwell, proceeding *pro se* and *in forma pauperis*, filed a complaint for violation of civil rights on behalf of himself and his wife and children against the owners and managers of their apartment complex and the clerk of the 165th Harris County District Court. Dkt 1.

Pending is a Memorandum and Recommendation by Magistrate Judge Christina A Bryan, recommending that claims against Defendants Fountains at Tidwell LTD, Issac Matthews, Hittig Management Corp, Walter Barry Kahn, and Joshua R Flores be dismissed with prejudice because Plaintiffs cannot state a claim against private actors under Section 1983 of Title 42 of the United States Code, while also recommending that vexatious litigant sanctions be denied at this time. Dkt 37.

Also pending is a Memorandum and Recommendation by Judge Bryan, recommending that claims against Defendant Bristalyn Daniels be dismissed with prejudice as time-barred. Dkt 38.

The district court reviews *de novo* those conclusions of a magistrate judge to which a party has specifically objected. See FRCP 72(b)(3) & 28 USC § 636(b)(1)(C); see also *United States v Wilson*, 864 F2d 1219, 1221 (5th Cir 1989, *per curiam*). The district court may accept any other portions to which there's no objection if satisfied that no clear error appears on the face of the record. See *Guillory v PPG Industries Inc*, 434 F3d 303, 308 (5th Cir 2005), citing *Douglass v United Services Automobile Association*, 79 F3d 1415, 1430 (5th Cir 1996, *en banc)*; see also FRCP 72(b) advisory committee note (1983).

Plaintiff Spencer Farwell filed objections and a purported affidavit supporting them. Dkts 39 & 40. He argues that the parties didn't consent to proceeding before the Magistrate Judge and makes unsupported allegations of fraud by Defendants. The argument itself proceeds from the mistaken assumption that consent of the parties is necessary for the Magistrate Judge to enter recommended dispositions of pretrial dispositive motions. It isn't. See FRCP 72(b)(1).

As to his other objections, the Federal Rules of Civil Procedure require parties to file "specific written objections to the proposed findings and recommendations." FRCP 72(b)(2). *De novo* review isn't required for parts of the recommendations that aren't "properly objected to." FRCP 72(b)(3). Farwell's other objections are improper because they don't specify any disputed determination in the memoranda and recommendations of the Magistrate Judge. Even so, upon *de novo* review and determination and to the extent discernible, the objections are overruled as lacking merit.

No clear error otherwise appears upon review and consideration of the Memoranda and Recommendations, the record, and the applicable law.

The objections by Plaintiff Spencer Farwell to the Memoranda and Recommendations of the Magistrate Judge are OVERRULED. Dkt 39.

The Memoranda and Recommendations of the Magistrate Judge are ADOPTED as the Memoranda and Orders of this Court. Dkts 37 & 38.

This case is DISMISSED WITH PREJUDICE.

A final judgment will issue by separate order.

SO ORDERED.

Signed on December 28, 2023, at Houston, Texas.

Hon. Charles Eskridge
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SELENA E. MCDADE, *et al*, Plaintiffs,	§	CIVIL ACTION NO. 4:23-cv-02118
vs.	§	JUDGE CHARLES ESKRIDGE
FOUNTAINS AT TIDWELL LTD, *et al*, Defendants.	§	

FINAL JUDGMENT

In accordance with the order adopting the recommendations of the Magistrate Judge entered this same date, this civil action is DISMISSED WITH PREJUDICE. Dkt 42.

This is a FINAL JUDGMENT.

SO ORDERED.

Signed on December 28, 2023, at Houston, Texas.

Hon. Charles Eskridge
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SELENA E. MCDADE, ET AL., *Plaintiffs*,	§	
v.	§	CIVIL ACTION NO. 4:23-CV-2118
FOUNTAINS AT TIDWELL, ET AL., *Defendants*.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiffs, proceeding pro se and in forma pauperis,[1] filed a Complaint for Violation of Civil Rights asserting claims against the owners and managers of their apartment complex and the clerk of the 165th Harris County District Court related to Selena E. Mcdade's unsuccessful state court lawsuit.[2] ECF 1. Pending before the Court is Defendant Bristalyn Daniels' Opposed Motion to Dismiss Plaintiffs' Complaint, to which only Plaintiff Spencer Farwell has responded. ECF 9; ECF 10. Having considered the parties' submissions and the law, Court RECOMMENDS that Daniels' Motion be GRANTED.

[1] *See Mcdade v. Fountains at Tidwell*, 4:23-MC-0897 (ECF 2).
[2] The District Judge referred this case to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. ECF 4.

I. Background

Selena E. Mcdade sued Fountains at Tidwell, Ltd., Hettig Management Corp., and Investors Management Group, LLC in Cause No. 2017-35361 in the 165th District Court in Harris County, Texas, alleging that mold in her apartment made her sick. *McDade v. Fountains at Tidwell, Ltd.*, No. 14-21-00400-CV, 2022 WL 6602885, at *1 (Tex. App. Oct. 11, 2022), pet. denied (Feb. 10, 2023); ECF 9-1. The trial court granted Defendants' Motion for Summary Judgment because Mcdade's own expert submitted a report opining that her lung disease was not caused by mold in the apartment. *Id.* The Texas 14th Court of Appeals affirmed the trial court's decision. *Id.*

On February 14, 2022, while review of the state trial court's decision was pending before the 14th Court of Appeals, Mcdade and Farwell filed a Complaint in federal court against Mcdade's lawyer in the state court case, Kraig L. Rushing. *Farwell v. Rushing*, 4:22-cv-0517 (S.D. Tex.) (ECF 1 Feb. 14, 2022). Although current defendants Matthews, Flores, and Khan were named as defendants they were never served or appeared in the action. After a hearing, District Judge Keith Ellison determined that Plaintiffs did not allege any federal claims and dismissed the case for want of jurisdiction. *Id.* at ECF 35. As far as the Court is aware, Plaintiffs' appeal of that ruling remains pending before the Fifth Circuit as No. 22-20157.

Spencer Farwell filed the instant federal case on June 7, 2023, naming himself, Selena E. Mcdade, and their children D'Andrea A. Mcdade Farwell, Kiarra A. Farwell, and Ciarra S. Farwell as Plaintiffs. ECF 1 at 6-7. Plaintiffs' Complaint asserts claims under 42 U.S.C. § 1983 against the owners and managers of the Fountains at Tidwell apartments ("Landlord Defendants," who were also defendants in state court), an attorney who represented the Landlord Defendants in state court, and Daniels, who is the Court Clerk of the 165th District Court of Harris County. ECF 1 at 9-13. The Complaint makes passing reference to 18 U.S.C. §§ 241, 242, and 245 and 42 U.S.C. § 3631 but these are criminal statutes that do not give rise to a private right of action and therefore must be dismissed. *Johnson v. Fed. Bureau of Investigation*, No. CV H-16-1337, 2016 WL 9776489, at *3 (S.D. Tex. Nov. 17, 2016); *Thomas v. Miramar Lakes Homeowners Ass'n*, No. 4:13-CV-1479, 2014 WL 3897809, at *6 (S.D. Tex. Aug. 6, 2014). In short, Plaintiffs allege that the Landlord Defendants failed to provide a safe living environment for Mcdade and the children, Defendants' attorney fabricated evidence, and Defendant Daniels removed exhibits from the record, preventing a full record before the appellate court. *Id.*

II. Rule 12(b)(6) Standards

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Alexander v. AmeriPro Funding, Inc.*, 48 F.3d 68, 701 (5th Cir. 2017) (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). However, the court does not apply the same presumption to conclusory statements or legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Generally, the court may consider only the allegations in the complaint and any attachments thereto in ruling on a Rule 12(b)(6) motion. If a motion to dismiss refers to matters outside the pleading it is more properly considered as a motion for summary judgment. *See* Fed. R. Civ. P. 12(d). However, the court may take judicial notice of public documents, and may also consider documents a defendant attaches to its motion to dismiss under 12(b)(6) if the documents are referenced in the plaintiff's complaint and central to the plaintiffs' claims. *See Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir. 2007); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000); *King v. Life Sch.*, 809 F. Supp. 2d 572, 579 n.1 (N.D. Tex. 2011). In this case, the Court considers matters of public record filed in (i) Cause No. 2017-35361 in the 165th District Court in Harris County, Texas, (ii)

Appeal No. 14-21-00400-CV in the Texas 14th Court of Appeals; and (iii) Civil Action 4:22-cv-0517 in the Southern District of Texas.

III. Analysis

Daniels asserts the following grounds for dismissal of this case: (1) the jurisdictional bar of the *Rooker-Feldman* doctrine; (2) res judicata and collateral estoppel; (3) absolute immunity; (4) qualified immunity; (5) official immunity; and (6) statute of limitations.

A. Standing

As an initial matter, the Court must address Plaintiffs' standing to bring this action. A person generally does not have standing to vindicate the constitutional rights of a third party. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). Any claim against Daniels under § 1983 for violation of Selena Mcdade's constitutional right to due process in Cause No. 2017-35361 in the 165th District Court in Harris County, Texas belongs to Selena Mcdade, the only plaintiff in that case. Claims brought Spencer Farwell and the children must be dismissed.

Further, 28 U.S.C. § 1654 does not allow Spencer Farwell, who is not a lawyer, to represent Selena Mcdade. *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 210 (5th Cir. 2016) (stating "[i]t is axiomatic that an individual may proceed pro se in civil actions in federal court, *see* 28 U.S.C. § 1654, but it is equally certain that those not licensed to practice law may not represent the legal interests of others,

see Weber v. Garza, 570 F.2d 511, 514 (5th Cir.1978)."). Selena Mcdade did not sign the Complaint or the Response to Daniels' Motion to Dismiss. ECF 1; ECF 10. While the Court will not grant a motion to dismiss solely based on a lack of response, the Response filed by Spencer Farwell is not properly before the Court and will not be considered.

B. *Rooker-Feldman*

The *Rooker-Feldman* doctrine bars federal court review of a state court decision and precludes a losing state court litigant from seeking review, relief, or a remedy from a prior state court judgment in federal court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (explaining the confines of the Rooker-Feldman doctrine and stating that it applies in cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.). Although the inartful Complaint challenges the correctness of the state court judgment, Plaintiffs' specific claim against Daniels is not a collateral attack on the state court judgment. Instead, Plaintiffs seek damages from Daniels under 42 U.S.C. § 1983 alleging Daniels violated Selena Mcdade's constitutional right to due process by removing evidence from the record in the state court case in order to help the defendants. ECF 1 at 4, 11-12. Thus, the *Rooker-Feldman* doctrine does not apply here.

C. Claim and issue preclusion

Res judicata bars litigation of claims that either have been litigated or should have been raised in an earlier suit if: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005). Daniels was not a party to the state court case, thus res judicata does not apply.

Collateral estoppel bars litigation of an issue if (1) the issue is identical to the one involved in the prior action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that earlier action. *Next Level Commc'ns LP v. DSC Commc'ns Corp.*, 179 F.3d 244, 250 (5th Cir. 1999). No claim or issue related to conduct by Daniel was litigated in state court, thus collateral estoppel does not apply.

D. Immunity

As the Clerk of Court for the 165th Judicial District, Daniels' actions as a clerk are protected by absolute quasi-judicial immunity, qualified immunity from federal claims, and official immunity from state law claims. *Kastner v. Lawrence*, 390 F. App'x 311, 315 (5th Cir. 2010) (extending judicial immunity to court clerks from actions "for damages arising from acts they are specifically required to do under

court order or at a judge's discretion."); *Est. of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005) ("Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012) (recognizing that governmental employees are entitled to official immunity on state-law claims for (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that they act in good faith, and that official immunity under Texas law is substantially the same as qualified immunity under federal law). However, immunity would not extend to Daniels' independent, wrongful actions outside the scope of her official duties, such as destroying evidence to influence the outcome of a case. *See id.* Therefore, the Court concludes that Daniels' motion to dismiss the claims against her on the basis of judicial, qualified, and official immunity should be denied as to the specific allegations of the Complaint.

E. Statute of Limitations

Daniels also argues that Plaintiffs' § 1983 claim against her is barred by the statute of limitations. Claims pursuant to 42 U.S.C. § 1983 are subject to Texas's

two-year statute of limitations for personal injury actions. *Mosley v. Houston Cmty. Coll. Sys.*, 951 F. Supp. 1279, 1288 (S.D. Tex. 1996) (two-year statute of limitations in TEX. CIV. PRAC. & REM CODE § 16.003 applies to § 1983 claim). The accrual date of a cause of action under § 1983 is a question of federal law, which provides that a cause of action generally accrues at the time "the plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citations omitted); *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) ("the particular accrual date of a federal cause of action is a matter of federal law."). This federal rule of accrual has been called the "time of event" rule. *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 232 (5th Cir. 1984).

Plaintiffs allege that Daniels removed attachments from Plaintiffs' filing on February 20, 2020. ECF 1 at 11. Plaintiffs also allege that Daniels refused to file the Clerk's record with the appellate court. *Id.* at 12. Plaintiffs make no other specific allegation of a wrongful act by Daniels. Public records demonstrate that the Clerk's record was filed in Appeal No. 14-21-00400 on August 25, 2021, negating any plausible claim that Daniels failed to file the Clerk's record in accordance with state law.[3] The only other basis for Plaintiffs' § 1983 claim is the alleged removal of attachments from Plaintiff's filing on February 20, 2020. Thus, the "time of

[3] *See* https://search.txcourts.gov/Case.aspx?cn=14-21-00400-CV&coa=coa14 (last visited October 16, 2023).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SELENA E. MCDADE, ET AL., *Plaintiffs*,	§	
	§	
v.	§	CIVIL ACTION NO. 4:23-CV-2118
	§	
FOUNTAINS AT TIDWELL, ET AL., *Defendants*.	§	

ORDER

Plaintiff Spencer Farwell has filed a Motion to Request Access to CM/ECF in Forma Pauperis.[1] ECF 45. The District Judge entered Final Judgment dismissing this case with prejudice on December 28, 2023. ECF 43. If Plaintiff files a timely Notice of Appeal, any request for electronic filing privileges on appeal should be made to the Fifth Circuit. It is therefore

ORDERED that Plaintiff's Motion to Request Access to CM/ECF in Forma Pauperis is DENIED.

Signed on January 08, 2024, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

[1] The District Judge referred this case to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. ECF 4.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

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NO. 22-1157

SELENA MCDADE	§	
v.	§	**Harris County,**
FOUNTAINS AT TIDWELL, LTD.;	§	
HETTIG MANAGEMENT CORP;	§	**14th District.**
AND INVESTORS MANAGEMENT GROUP, LLC	§	

February 10, 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.

April 14, 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.

★★★★★★★★★★

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.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 14th day of April, 2023.

Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

APPENDIX E

Affirmed and Memorandum Opinion filed October 11, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00400-CV

SELENA MCDADE, Appellant

V.

FOUNTAINS AT TIDWELL, LTD.; HETTIG MANAGEMENT CORP; AND INVESTORS MANAGEMENT GROUP, LLC, Appellees

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2017-35361

MEMORANDUM OPINION

Appellant Selena McDade filed suit against appellees, Fountains at Tidwell, Ltd., Hettig Management Corp., and Investors Management Group, LLC, alleging that her apartment had dangerous amounts of mold, which was making her sick. Appellees eventually filed a Combined Traditional and No-Evidence Motion for Summary Judgment, which the trial court granted. Concluding that the trial court did not err when it granted appellees' summary judgment motion, we affirm.

BACKGROUND

McDade signed a lease agreement with appellees for an apartment in the Fountains at Tidwell complex. According to McDade, she began experiencing respiratory problems soon after moving into her apartment. McDade reported her health issues to appellees. Believing appellees had failed to address her issues, McDade filed suit alleging appellees were negligent because they rented her a mold-infested apartment. Appellees soon filed a traditional motion for summary judgment. While McDade filed a response to appellees' motion for summary judgment, she subsequently non-suited her claims before the trial court ruled on appellees' motion. The trial court later reinstated McDade's lawsuit. The trial court also issued a new docket control order which set the discovery and dispositive motion deadline as October 21, 2019. The case was set for trial on November 25, 2019, but the case was not reached during that trial setting.

On January 24, 2020, McDade served supplemental discovery responses. McDade included a copy of her mold expert's report in this supplemental discovery response. The report was prepared by Thomas Dydek, Ph.D., D.A.S.T., P.E., of Dydek Toxicology Consulting. Dydek explained that he is a board-certified toxicologist and licensed professional engineer "specializing in the areas of environmental toxicology and environmental engineering." Dydek's report conclusion provided:

> The following is based on my education, training, and experience in the field of toxicology and my review of the documents referenced above. My conclusion next stated is made with a reasonable degree of scientific certainty:
>
> It is my opinion that Ms. McDade's eosinophilic pneumonia and the health problems that followed were not caused by mold exposure in the Fountains at Tidwell Apartments.
>
> This conclusion is based on the following facts:

- Mold levels in Ms. McDade's apartment were not excessive and in test were no greater than mold levels outside.
- Medical tests showed Ms. McDade did not have a fungal infection nor did her medical tests indicate she was exposed to *Aspergillus* molds. It is thus unlikely that her eosinophilic pneumonia was caused by any mold exposure.
- Ms. McDade's continuing medical problems are most likely caused by her on-going pneumonia and by the side effects from the steroid medications she has been taking to treat that disease.

Soon thereafter, McDade's attorney withdrew. McDade continued her lawsuit pro se.

At this point in time, appellees filed a motion asking for leave to file a motion for summary judgment. The trial court granted the motion and set a January 15, 2021 deadline for the filing of dispositive motions. Appellees filed their Combined Traditional and No-Evidence Motion for Summary Judgment ("Combined Motion") on January 13, 2021. The trial court conducted an oral hearing on the Combined Motion and subsequently granted the Combined Motion on all of McDade's claims. This appeal followed.

ANALYSIS

I. Standard of review and applicable law

We review the trial court's grant of summary judgment de novo. *See, e.g., Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 582 (Tex. 2006). When a party moves for summary judgment on both traditional and no-evidence grounds, we ordinarily address the no-evidence grounds first. *See Ford Motor Co.*

v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004). If the trial court grants summary judgment without specifying the grounds, we affirm the judgment if any of the grounds presented are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). And, if an appellant does not challenge every possible ground for summary judgment, we will uphold the summary judgment on the unchallenged ground. *Durham v. Accardi*, 587 S.W.3d 179, 183 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

In a no-evidence motion for summary judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Tamez*, 206 S.W.3d at 582. Evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). A no-evidence summary judgment will be sustained when: (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (citing *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). To prevail on a traditional motion for summary judgment, a movant must prove entitlement to judgment as a matter of law on the issues pled and set out in the motion for summary judgment. Tex. R. Civ. P. 166a(c); *Masterson v. Diocese of Nw. Texas*, 422 S.W.3d 594, 607 (Tex. 2013).

II. Appellees' Combined Motion was not premature.

McDade argues in her first issue on appeal that appellees' Combined Motion was premature because, in her view, it was filed before the end of the discovery period found in a docket control order issued by the trial court. She further argues that the Combined Motion was premature, unlawful, and unfair, because "discovery stops when a motion for summary judgment is filed," so she "was unable to depose [her] two treating doctors." We disagree with both contentions.

Discovery does not stop when a party files a motion for summary judgment. Indeed, the summary judgment rule provides a mechanism to delay the hearing on a summary judgment motion when a party needs additional time for discovery. *See* Tex. R. Civ. P. 166a(g), *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996) ("When a party contends that it has not had adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance."); *Muller v. Stewart Title Guaranty Co.,* 525 S.W.3d 859, 867, n.7 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (stating in a summary judgment case, that showing a motion for continuance was filed with the court clerk does not constitute proof that the motion was brought to the trial court's attention or presented to the trial court with a request for a ruling). McDade did not file an affidavit or verified motion for continuance, thus she failed to preserve any argument she might have had that she needed time for additional discovery.

Appellees' Combined Motion was also not premature because it was supposedly filed before the end of the trial court's discovery deadline. The timing for a defendant to file a traditional summary judgment motion is not tied to a discovery period. Instead, the Rules of Civil Procedure, unless modified by the trial court, allow a defendant to seek a traditional summary judgment at any time.

See Tex. R. Civ. P. 166a(b); *Lindley v. Johnson*, 936 S.W.2d 53, 55 (Tex. App.—Tyler 1996, writ denied) (op. on reh'g) ("[A] trial court is empowered to establish pretrial schedules to govern the course of litigation."). A defendant must wait until after "an adequate time for discovery" has passed before filing a no-evidence motion. Tex. R. Civ. P. 166a(i). In the present appeal, the case had been pending for years, the trial court's discovery and dispositive motions deadline had passed, and the case had not been reached during its initial trial setting. At this point, McDade served supplemental responses to discovery, which included the report prepared by her expert witness, Thomas Dydek. Believing the Dydek report contained admissions which defeated McDade's claims, appellees asked the trial court for permission to file their Combined Motion, which the trial court granted. Because the trial court granted appellees permission to file their Combined Motion, we conclude it was not filed prematurely, nor in an unlawful or unfair manner. We overrule McDade's first issue.

III. McDade did not preserve her second issue for appellate review.

McDade argues in her second issue that the trial court abused its discretion when it considered her own expert's report when it granted appellees' Combined Motion. In McDade's view, the use of the report was unlawful because it was an unsworn toxicological report. Appellees respond that McDade failed to preserve this issue for appellate review because she failed to object in the trial court and obtain a ruling. The Supreme Court of Texas has addressed this very issue. In *Mansions in the Forest, L.P. v. Montgomery County*, the court determined that an objection asserting that a purported affidavit lacked a jurat and was thus unsworn, was a defect of form and required an objection and a ruling in the trial court to preserve error for appellate review. 365 S.W.3d 314, 317–18 (Tex. 2012). Because McDade did not lodge any objection to the Dydek report in the trial court,

we conclude she did not preserve this argument for appellate review. Tex. R. App. P. 33.1(a).

III. The trial court did not err when it granted appellees' no-evidence motion for summary judgment because McDade's own summary judgment evidence conclusively established that appellees did not breach a duty owed to McDade.

McDade asserted a negligence claim against appellees. Specifically, she alleged appellees breached a duty they owed to her by leasing her a "mold infested apartment." The elements of a negligence claim are (1) the existence of a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Appellees argued in the no-evidence part of their Combined Motion that McDade had no evidence they breached a duty owed to her.

McDade filed a response to appellees' Combined Motion which included several exhibits. Exhibit A was a 2017 email from Joe Ecrette and Amanda Ecrette, licensed mold assessment consultants/technicians. In this email the Ecrettes notified McDade that "the lab results indicate that the air in your home was at overall acceptable levels, however, there were still slightly elevated levels of several species detected." McDade also attached Exhibit B-2, an excerpt from the Dydek report quoted at length above, which notified McDade that the mold levels in her apartment "were not excessive and in one test were no greater than mold levels outside." We conclude that McDade's own summary judgment evidence conclusively proved the opposite of a vital fact, i.e. that appellees breached a duty owed to her by leasing her a mold-infested apartment. *See King Ranch, Inc.*, 118 S.W.3d at 751. We therefore hold that the trial court did not err when it granted appellees' Combined Motion. We overrule McDade's third issue.

CONCLUSION

Having overruled McDade's issues on appeal, we affirm the trial court's final summary judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.

APPENDIX F

CAUSE NO. 2024 51449

SELENA MCDADE	IN THE DISTRICT
SPENCER FARWELL	COURT
VS.	OF HARRIS COUNTY, TEXAS
FOUNTAINS AT TIDWELL, LTD.;	165TH JUDICAL DISTRICT
HETTIG MANAGEMENT CORP.; AND	
INVESTORS MANAGEMENT GROUP, LLC. Ex, al.	

Petitioners Verified Original Petition for Equitable Bill of Review

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PETITIONERS SELENA MCDADE and SPENCER FARWELL, hereinafter referred to as Movants, and file this Motion for Bill of Review challenging the judgment rendered in the above-captioned case. Movants argues that the judgment was obtained through fraud, deception and denies due process, necessitating a new trial. In support of this Motion, **Pursuant to (Tex. R. Civ. P 329 b(f)** the Movants will show the following:

I. Discovery Control Plan and relief Sought

1. Movants intend to conduct discovery under Level 3 in Rule 190.4 of the Texas Rules of civil Procedure (T.R.C.P) 190 applies to this suit.

2. Movants is asking this Honorable Court to **set aside the judgement** that was entered in this case in denying the same on and about the said 8th day of July, 2021.

3. In the instant case at bar, Movants will show that Extrinsic and Intrinsic Fraud has been committed on the court and the same was procured through a violation of Movants Due process Rights Under the Constitution of the 14th Amendment of the U.S. Constitution and as such Movants will show the following to wit:

A. Movants has been seeking justice for 7 long years in and out of the Appeals Court and Texas Supreme Court claiming Intrinsic & Extrinsic Fraud on the court and the record will show. Now comes Movants in the same cause of action seeking monetary relief over 10,000,000.00. This was a miscarriage of justice and this Bill of Review challenges the district courts order granting summary judgement in favor of Respondent's Fountains at Tidwell LTD. Ex, al. Moreover, this bill of review is for error appearing on the face of the record, for newly discovered evidence, and for fraud, impeaching the original transaction asserting Conspiracy and Fraud of the court which is clearly unvividly beyond a shadow of doubt.

B. **Misnomer Alter Ego**

In the event any parties are misnamed or not included herein, it is Movants contention that such was a "misidentification" misnomer and or such parties are/were "Alter egos" of parties named herein.

II. **PARTIES**

1. Selena Elain Mcdade and Spencer Farwell, Movants are residents in Harris County Texas.

Respondent's

2. Fountains at Tidwell LTD.

3. Hettig Management Corp.

4. Investors Management Group LLC.

Respondents listed above is an entity and can be served through their Attorney of record Jackson Walker LLP.

1401 McKinny suit 1900

Houston, Texas 77010

Joseph A. Fisher, III State bar # 00789292 tfisher@jw.com

Javier Gonzalez State bar # 3722324 or wherever they may be served.

5. Respondent Joshua R. Flores is a private Attorney that represented Fountains at Tidwell LTD ex, al. And can be served through his Attorney of record above, or wherever he may be served.

6. Respondent Kraig L. Rushing is a private Attorney, and former Attorney for the Movant Selena Mcdade in her state lawsuit and can be served through his Attorney of record Maitreya Tomlinson, bar # 24070751, 1250 Capital of Texas, Highway South Building 3, Suite 400 Austin, Texas 78746 Maitrey@tomlinsonfirm.com or wherever he may be served.

7. Respondent Bristalyn Daniels is Court Clerk of the 165th District Court of Harris County and can be served through her Attorney of record Harris County Attorney's Office **CHRISTIAN MENEFEE TEXAS BAR NO**. 24088049

1019 Congress

Houston, Texas 77002

JAMES C. BUTT State Bar No. 24040354

Fed. Bar No. 725423 Phone: (713) 274-5133 (direct)
james.butt@harriscountytx.gov or wherever she may be served.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter as it rendered the original judgment that is the subject of this Motion for Bill of Review. Venue is proper in Harris. County, Texas, as the original judgment was rendered in this county.

IV. INTRODUCTION

5. This Motion is brought before the Court to review and set aside the judgment rendered against the Movant due to fraudulent actions by the opposing counsel and the Court Clerk tampering and failure to provide due process, thus violating Movant's rights.

6. This Motion is made pursuant to the Texas Rules of Civil Procedure and relevant case law which provides relief in instances where a judgment has been obtained by fraud, accident, or wrongful act of the opposing party or due to official mistake.

V. FACTUAL BACKGROUND

7. On or about May 25, 2017, Movant filed the original suit, Cause No. 201735361, in the 165th Judicial District Court of Harris County, Texas.

8. Throughout the proceedings, the Court staff exhibited a pattern of bias and denial of due process against Movant, a Pro Se litigant, which significantly impacted the fairness of the trial and subsequent appeals.

9. The Court failed to provide basic procedural guidance as required under the Local Rules of the Harris County Civil Courts, thus disadvantaging the Pro Se Movant.

10. The Court failed to timely rule on critical motions, disrupting the proper flow of the case and contributing to the miscarriage of justice.

11. The Movants will show through a preponderance of the evidence that court Clerk Bristalyn Daniels of the 165th was Manipulating court records by concealing exhibits that was once a part of the record. Not only did such clerk of the 165th remove Movants exhibits from the record but she also replaced such documents with a pleading that movant pled months prior see **Exhibit-H**, and when it came time for Judge Hall of the 165th district Court in Harris County to rule on motion for summary judgement, Movants letters to the Judge, Movants medical summary judgement evidence had been taken off the docket control manifest **See. Exhibit-B pg.6.**

12. Opposing counsel **Joshua R. Flores** and his team engaged in multiple instances of fraudulent conduct, including:

13. Filing false documents into a court of law and perjuring himself in a hearing held in or around February of 2021 See. **Exhibit- F 1 and M pgs. 1-27.**

14. Receiving Movant Mcdade legal mail for months, never reporting this miscarriage of justice to the court See. **Exhibit- B 1 pg. 21.**

15. Failing to server Movant Mcdade at her correct address on a numerous of occasion and when this miscarriage of Justice was brought to Counselor Flores attention such Counselor continued to do the same and the record will show See. **Exhibit- B 1 pg.13 and D-2 pg.16-31**. If this honorable court would place its attention on **Exhibit- B pgs. 6-9**, looking in the right margin of such Exhibits, each time that Respondent Flores failed to serve Movants legal documents like required in (T.R.C.P) Movant Farwell placed (no serv or arrow pointed up) on the side of each filing and such count equals 18 meaning between court staff and Attorney Flores Movant Mcdade was not being served at her correct last known address see. **Exhibit-E respectfully.**

16. Movants former attorney **Kraig L. Rushing** Hired a biased expert witness without Movant's knowledge or consent, submitted incomplete and misleading evidence to the Court and withdrew weeks before trial See. **Exhibit-E pg. 1 also see G, G 1 pgs. 5-11,** emails of Toxicology Expert Dr. S. Thomas Dydek and his contradicting statements that had everything to do with such said case # 201735361 ruled against.

17. Kraig L. Rushing made a negligent misrepresentation to the court concerning his withdrawal and the record will show Movants showing up to court on the day of Respondent Rushings Submission Hering, on such 3rd day of February, 2020 and filed a response to former counselors' withdrawal stating Movant was not aware of such withdrawal and Movant did not want Rushing off such case at bar, but on the face of the record this document is titled (Defendants Original Answer) **See. Exhibit-B pg. 9 &J-4.**

A. Rule 10.12 Attorney Withdrawal In civil cases:

No attorney of record shall be permitted to withdraw from any case without presenting a motion and obtaining from the court an order granting leave to withdraw. Such motion shall be accompanied by the client's written consent to such withdrawal or a certificate by another lawyer that he has been employed to represent the client in the case, or a copy of such motion shall be mailed to the client at his last known address, here former counselor Rushing before withdrawing off Movant Mcdade's case, presented to the trial court Mcdade's last known address to be 7211 Northline dr. # 524 when he knew in fact that Mcdade had long moved from this address and further all motion filed by Rushing in the month of Jan-Feb. were fraudulent and misled the court and Movant will show evidence at trial to show the same.

18. Kraig L. Rushing, without permission or legal right to do so, intentionally, unreasonably, and/ or with conscious indifference filed a motion to non-suit Movants case and on the very next day filed motion to reinstate such case back on docket and the same was granted without a hearing by trial court Judge and this was improper See. **Exhibit-J & K.**

19. The judgment in question was rendered in the absence of fair consideration of evidence, including Movant Mcdade's medical expert testimony which confirmed the presence of health-hazardous mold in Mcdade's residence and its impact on her health See. **Exhibit-C 2pg. 13 & C 13 pg. 32.**

VI. CAUSE OF ACTION FOR EQUITABLE BILL OF REVIEW

20. FAIR SHOT: Thats what every Pro-se litigant expect from their justice system, what it means for courts to be fair has changed over the decades. We use to think of fair as being not just equal but equitable. Whereas equal means everyone

gets the same treatment and service as everyone else to succeed. Here in this case at bar Movants were denied access to the court by all Respondent's Herein.

21. Movants will show they were prevented from making a meritorious defense due to fraud and wrongful acts of the opposing party and court staff, unmixed with any fault or negligence of their own see. **Valdez v. Hollenbeck**, 410 S.W.3d 1. see also Patrick J. Dyer, A Practical Guide to the Equitable Bill of Review, 70 Tex. B.J. 20, 22 (2007). Unless otherwise specified by statute, equitable bills of review carry a four-year statute of limitations. Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998) (citing TEX.CIV. PRAC. & REM. CODE § 12.002)

22. Specifically, Movants aim to present evidence of the Court Clerk's collusion with the opposing party's attorney's sabotage removing medical evidence and letters exposing fraud from the record. Movants will also show that their attorney, Kraig L. Rushing, sabotaged the case and withdrew without Movants' agreement. Making a fraudulent misrepresentation to the court before unknowingly withdrawing off Movant Mcdade's case at bar see. **Exhibit-J 1-7**

23. Despite the alleged actions of opposing counsel and court staff, Movants have been diligent in pursuing their case, learning to navigate the legal system as Pro Se litigants and the record will show see. **Exhibit-L 1&2.**

VII. FRAUD ON THIS COURT

24. Pursuant to Rule 60 b3 &18 U.S.C. 371 Placing the court with the holding of Exhibit # 1 with attachments Exhibits A-M. These Exhibit will aid this Honorable Court in actually seeing through clear and convincing evidence of fraud to support making a prima facie case for a bill of review. *Baker v. Goldsmith,* 582 S.W.2d at 408.

25. Only "extrinsic" fraud may entitle the petitioner to relief in a bill of review. The Texas Supreme Court defines extrinsic fraud as fraud that deprives a losing party of the opportunity to fully litigate all rights or defenses available at trial. This type of fraud typically pertains to the manner in which the judgment was obtained, often involving wrongful conduct occurring outside the lawsuit itself.

26. Extrinsic fraud is distinct from intrinsic fraud, which pertains to the substantive issues within the underlying case. Intrinsic fraud includes fraudulent instruments, perjury, or any matter that was presented to and considered by the trial court in its judgment. Such issues either were, or should have been, addressed during the initial trial. The Movant will contend that these issues were addressed during the initial trial complaints were filed on Judge, Coordinator, Clerk, and both attorneys involved. All complaints were filed properly but Judge and attorney complaint was dismissed by the judicial conduct commission **[CJC No. 21-1519]**and State Bar. Ms. Jessica Moir stated after I filed my complaint with her that it would not be shared with her office or with me. See. **Exhibit –D pg.3-5.**

27. The Texas Supreme court has stated; "While this court has always upheld the sanctity of final judgments, we have also always recognized that showing the former judgment was obtained by fraud will justify a bill of review to set it aside." Montgomery v. Kennedy, 669 SW 2d 309 - Tex: Supreme Court 1984.

28. The Texas Supreme court has also stated; "Extrinsic fraud is fraud that denies a losing party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted." See Browning v. Prostok, 165 SW 3d 336 - Tex: Supreme Court 2005. "Where jurisdiction depends upon domicile that question is always open to re-examination, even upon contradictory evidence... Moreover, fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees", Diehl v. United States, 438 F. 2d 705 - Court of Appeals, 5th Circuit 1971.

Below is a screenshot illustration of the docket order Manifest today of case # 201735361 and looking at Exhibit B- in such illustration show 1-14 has been taken of the record today and replaced with a pleading Movant Farwell filed in or around September 2020 and the illustration shows such Exhibit of having 7 pages but if we were to examine such Exhibit –B you will see originally this exhibit used to be 6 pages until such Clerk of the 165th court of law intentionally, unreasonably, and/ or with conscious indifference swapped Movants Exhibits with a pleading see. Exhibit- H and this such said Document has two-time stamps and one of the stamps or on a blank page.

94076334	Filing	Exhibit A-18	01/21/2021	1	
94076335	Filing	Exhibit A-19	01/21/2021	1	
94076336	Filing	Exhibit A-20	01/21/2021	1	
94076338	Filing	Exhibit A-21	01/21/2021	1	
94076339	Filing	Exhibit A-22	01/21/2021	1	
94076340	Filing	Exhibit A-23	01/21/2021	1	
94076342	Filing	Exhibit A-24	01/21/2021	1	
94076344	Filing	Exhibit A-25	01/21/2021	1	
94076345	Filing	Exhibit A-26	01/21/2021	1	
94076346	Filing	Exhibit A-27	01/21/2021	1	
94076348	Filing	Exhibit A-28	01/21/2021	1	
94076349	Filing	Exhibit A-29	01/21/2021	1	
94076350	Filing	Exhibit A-30	01/21/2021	1	
94076317	[redacted]		[redacted]		
94076366	Filing	Exhibit C	01/21/2021	1	

29. Movant will contend that all exhibits in illustration above are missing that was once a part of the court record in such exhibit B 1-14 document # 94076317 through 94076365 that Movant Farwell filed in case # 201735361 on or about the 18th day of Jan 2021. Movant will contend that such pleading reflects two-time stamps. Jan 18th 2021 3:07 pm. and Jan. 21st 2021 and this is when **exhibits B- 1 through 14** was removed from the court records and replaced with exhibit H and further in the discovery of this miscarriage of justice in support of the same Movant will attach an exhibit in which will be made exhibit I, this exhibit is only one of the many removed from the record and such exhibit outlines the 14 exhibits that are missing from the record today and if all summary judgment evidence would have been present during ruling, there's no way Judge Hall could have summary judged out such case with way more than a scintilla of the evidence see . **Exhibit-I**, further discovering this hindsight on the face of the record looking at this document such **exhibit H** has a time stamp on it that reads September 14th 2020, a pleading pled by Movant 4 months prior and the document numbers don't even add up. **Is Court Clerk above the Law?**

30. Movant Farwell is further alleging that court Clerk infringed on Movants rights when she tampered with the record, and exposed Movant Farwell's social security number over the docket order manifest and Movant believes that it was done intentionally see. **Exhibit-D pg.4**. If this Honorable court will place its attention on **Exhibit-B pg.5** two of Movants exhibits are missing, and if you take a look at page 6 within such **Exhibit B pg. 6** the record shows a discombobulated format, exhibits are missing, mixed up, and all out of place. Who does the clerk think she is? Was the clerk influenced to do this? and by whom?

VIII. ARGUMENT

31. Movant have presented competent controverting evidence raising a genuine issue of material fact see. Centeq Realty. Inc. V. Siegler, 899 S.W. 2d 195, 197 (Tex. 1995). The Courts responsibility to view the evidence in light favorable to the nonmovement reflects the fact that the purpose of summary judgement is not to deprive a litigant of his right to a full hearing on the merits of the case see. Mitchell v. Dallas, 855 S.W. 2D 21 (Tex.1993) A summary judgement is not intended to provide trial by deposition or affidavit see. Tate v. Goins, Underkofler, Crawford I Langdon, 24 S.W. 3d 627, 638 (Tex. App.-Dallas 2000 pet. Denied) Instead summary judgement is only appropriate where the claims in question is patently unmeritorious see. Rodgers v. R.J Reynolds Tobacco Co.761 S.W 2d 788 (Tex. App.-Beaumont 1988. Writ denied). As such, the reluctance of courts to grant motion for summary judgement is frequently expressed by the maximum. Summary Judgment cannot be granted where the slightest doubt remains see. Bliss v. Fort Worth, 288 S.W. 2d. 558, 561 (Tex. Civ. App.-ft worth 1956. Writ ref'd n.r.e) as such, the Court should grant Movants Bill of Review as to the Intrinsic and Extrinsic Fraud that was committed on the court.

IX. SUMMARY OF THE ARGUMENT

32. In the case of Selena Mcdade vs. The Fountains at Tidwell et al., every individual named in their claim participated in the injury. Pastor Isaac Matthews, for instance, purchased the property and placed it under the Land Use Restricted Agreement (LURA) program and was funded the monies to develop such said

apartment community, placed this apartment community on low-income housing (HUD) and this indicates that Respondent Pastor Isaac Matthews acted in concert, meaning he knowingly participated in a joint activity or parallel action towards a common goal of acquiring control of a covered institution. Walter Barry Khan, the developer and manager of Fountains at Tidwell, also participates in the development and manages the financial strategies of the project. He is a Multifamily trustee who participates in low-income housing tax credits and a true investor who acts in concert with the State for gain. Joshua Flores participated by omission and material misrepresentation to the court. He did not report to the court that he had received all Movant Mcdade's legal mail for eight months, placed a false statement on record concerning his retrieval of the mail sent to him by priority service in the hearing in or around February 2021, failure to serve Movants legal mail to her correct address and submitted falsified documentation of an expert witness to the court in or around February 2020. Bristalyn Daniels, the clerk, omitted from the records by removing Selena E. Mcdade's medical records and letters to Judge Hall of the 165th concerning Joshua Flores's action and court staff. When it was time for judge Hall to make her ruling on summary judgment, the records were not there and Judge stated that she was not going to rule on summary judgement motion until she saw all of the evidence see. **Exhibit- M pg. 22 line15.**

27. In the Movants case, Isaac Matthews, Walter Barry Khan, Joshua R. Flores, Kraig L. Rushing and Bristalyn Daniels all acted in concert to deprive the Movants constitutional rights. Movants intends to present additional evidence of fraud on the face of the record at trial.

33. While a motion for new trial was timely filed in the same original case. Trial Judge never responded to such said motion filed July 21, 2021, 13 days after Movants case was ruled against and further contending Movant had a Submission docket hearing on such motion for new trial on August 3rd 2021, but Trial Judge of the 165th never entertained such motion.

X. CLOSING ARGUMENT

34. Movants argue that the State and all involved parties have utterly failed to provide evidence demonstrating that the injuries sustained by the Movants Family were not a direct result of their negligence. Under 42 U.S. Code § 1986 states, any party, including **individuals**, **corporations**, or **officials**, who are aware of a wrongful act about to be committed and have the power to prevent it, are liable to the injured party if they fail to intervene. This statute imposes a clear duty on all parties named in this proceeding, making them liable for the injuries suffered by the Movants family due to their gross negligence and failure to act.

35. The argument presented hinges on a straightforward interpretation and application of the law, supported by substantial evidence of negligence and wrongful conduct by the Respondent's. It is imperative to recognize that the Movants has acted with unwavering diligence, complying with all court requests and presenting indisputable factual evidence.

36. The Constitution and the laws of this State provide a remedy for such egregious violations of due process and negligence. Movants has endured immense suffering, living each day with the constant fear of death and the inability to alleviate their pain. This is not merely a legal matter; it is a profound human tragedy.

37. Therefore, Movants implores this Honorable Court to consider these critical factors and the undeniable evidence presented. The judgment rendered must be set aside, and a new trial must be granted to ensure justice is served. The Court must recognize the fundamental right of the Movants to a fair and just legal process, free from fraud, deception, and negligence.

38. The final decision rests with this Court, after a careful examination of all the facts, evidence, and legal arguments presented by both sides. The Movant stands before you, seeking the justice that has long been denied to them. It is within your power to rectify this profound injustice and restore their faith in our legal system.

39. Canon 3 – Clearly states that a Judge shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently

a. A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.

b. A judge shall require lawyers in proceedings before the judge to refrain from a manifesting, by words or conduct, bias, prejudice, or harassment. Here, Movants will ask this Honorable Court to place its attention on **Exhibit- M (transcript).**

c. A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law and the judge shall not abrogate the responsibility personally to decide the matter. Here the Judge of the 165th did the opposite and Movant will strongly argue that if it wasn't for fraud, deception and manipulation the outcome would have been different.

XI. RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that this Court:

a) Set aside the Judgment entered on July 08, 2021 in Cause No. 201735361;

b) Grant a new trial on the merits, to be heard by a jury;

c) Alternatively, order the parties to engage in mediation;

d) If settlement cannot be reached, impose sanctions on all lawyers named in any documents within the past 7 years, including but not limited to disbarment;

e) Sanction and terminate all court staff of the 165th Harris County District Court that was a part of this miscarriage of justice;

f) Refer the matter for potential criminal charges against those who defrauded the court process;
g) Grant such other and further relief to which Movants may be justly entitled.

Movant hereby adopt and incorporate each numbered and lettered paragraph above and the following evidence as set forward herein with the intent that each and every exhibit be used in such pleading to support Movants Bill of Review.

MOVANTS DEMAND A JURY TRIAL ON ALL CLAIMS SO TRIABLE

Respectfully submitted, on this 9 day of August 2024.

SELENA MCDADE **selenamcdade1@gmail.com**

SPENCER FARWELL **farwellspencer@yahoo.com**

7433 Depriest

Houston, Texas 77088

VERIFICATION

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared SPENCER FARWELL, known to me to be the persons whose names is subscribed to the foregoing Motion for Bill of Review, and being by me first duly sworn, upon oath deposed and stated that he have read the above and foregoing Motion for Bill of Review and that every statement contained therein is within his personal knowledge and is true and correct.

Spencer Farwell
SPENCER FARWELL

SUBSCRIBED AND SWORN TO BEFORE ME on this the 7 day of August, 2024, to certify which witness my hand and official seal.

Notary Public in and for
The State of Texas

My Commission Expires: Aug 15, 2028

HOSEA HARRIS, JR
My Notary ID # 4672081
Expires August 15, 2028

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all attorneys of record in accordance with the Texas Rules of Civil Procedure on this the ____ day of _____, 2024.

Attorneys for Fountains at Tidwell LTD ex, al

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FILED
Marilyn Burgess
District Clerk
AUG 09 2024
Time:
Harris County, Texas
By
Deputy

CAUSE NO. 2024 51449

SELENA MCDADE

SPENCER FARWELL

v.

FOUNTAINS AT TIDWELL, LTD.;

HETTIG MANAGEMENT CORP.; AND

INVESTORS MANAGEMENT GROUP, LLC. Ex, al.

IN THE DISTRICT COURT

OF HARRIS COUNTY, TEXAS

165TH JUDICAL DISTRICT

AFFIDAVIT OF SPENCER FARWELL IN SUPORT OF MOVANTS EQUITABLE BILL OF REVIEW

I. BEFORE ME, the undersigned authority, on this day personally appeared SPENCER FARWELL, known to me to be the person whose name is subscribed to the foregoing affidavit to support such Bill of Review, and being by me first duly sworn, upon oath deposed and stated that he has read the affidavit of such foregoing Motion in support for Bill of Review and that every statement contained therein is within his personal knowledge and is true and correct.

QUESTIONS PRESENTED

II. Movant understands that this is not appeals court but Movant Farwell would like, that such question be answered with clean hands:

1. Whether the judgment of this courts, obtained through fraud, deception, and denial of due process, violates the Movants' rights under the Fourteenth Amendment to the United States Constitution.

2. Whether the actions of the court staff, opposing counsel, and Movants' former attorney, which included manipulation of court records and failure to provide procedural guidance, deprived the Movants of a fair trial, thereby justifying relief through an equitable Bill of Review.

III. Summary of Affidavit Concerning Court Clerk Bristalyn Daniels and Defense Counsel Joshua R. Flores.

1. **Privacy Act Violation (March 2020):** The Court Clerk exposed Spencer Farwell's Social Security number on the public docket manifest. The document in question was addressed to Congresswoman Sheila Jackson Lee and was clearly marked as a Privacy Act Form.
2. **Unauthorized Address Change:** The Court Clerk or Court Coordinator changed Selena McDade's address without permission and sent mail intended for her to the Defense Counsel's law firm. This tampering with mail continued for months, as shown by the records.
3. **Record Tampering (January 2021):** The Court Clerk removed medical exhibits from the official court record that were part of the "Plaintiffs Combined Pleadings Answer to the Defendants Motion for Summary Judgment" filed in case #201735361 in the 165th Court of Law. An examination of the current record would show discrepancies compared to the documents presented by Movant Farwell.
4. **Violation of 18 U.S. Code § 2071:** This code prohibits the willful and unlawful concealment, removal, mutilation, obliteration, or destruction of any record or document filed with any court or public office in the United States. Bristalyn Daniels violated this code by tampering with the docket control manifest, changing Movant McDade's address, and removing medical exhibits from the record. Additionally, during the appeal to the 14th Court of Appeals, Respondent Daniels refused to send the entire record on appeal.

Respondent Defense Counsel Joshua R. Flores:

5. **Misrepresentation (since FEB 21, 2021):** Joshua R. Flores, lead defense attorney for case #201735361, misrepresented the Harris County Court 165th from the beginning. In a hearing in or around February 2021, Flores perjured himself by stating to the judge of such said court that he did not receive Movants U.S.B drive that was submitted into evidence, exhibiting gross negligence of property-owners management team, and one team member while attempting to recover the old freon (R-22 Refringent) suck maintenances team member thinking that his recovery system had pumped down all freon, such maintenance team member Mr. Allen cut the main evaporator line and freon busted within the unit, fogging the entire apartment. This was all caught on video by

Movant Farwell and Respondent Flores stated to the court that he did not receive such U.S.B thumb drive but he did in fact receive the hard copies of Movants summary judgement evidence, but how can Flores receive one without the other because such summary judgement evidence were both first classed in the same envelope and further, knowing that all Movant's legal mail was being sent to his firm without addressing this to the court was a miscarriage of justice.

6. **Conspiracy and Misrepresentation:** Movant Farwell believes that Joshua R. Flores conspired with Movant's former counsel **Kraig L. Rushing to sabotage Movant McDade's case.** Their Joint Submission of Pretrial Documents (docket #89402546) misrepresented the case to the court, contributing to the summary judgment in the Defendant's favor see. **Exhibit-F 1**
7. **False Expert Witness (February 12, 2020):** Flores presented Patrick McIntire as an expert witness to rebut Movant Farwell's allegations. However, McIntire was unaware of the litigation, had never been to the Fountains at Tidwell Apartments, and did not provide the document cited. This material misrepresentation was submitted in the Joint Submission of Pretrial Documents filed by both attorneys of record see. **Exhibit-F 1 pg. 8 and also see. Exhibit # 1 pg.10**

IV. Legal Violations: Bristalyn Daniels, Joshua R. Flores and Kraig L. Rushing have actions that may constitute violations of federal law, specifically 18 U.S. Code § 2071, which can result in fines or imprisonment for up to three years. This code prohibits the willful and unlawful concealment, removal, mutilation, obliteration, or destruction of any record or document filed with any court or public office in the United States.

This summary highlights the significant breaches of duty and law committed by the Court Clerk and Defense Counsel, supporting the claims of misconduct and tampering in the litigation process.

8. Movants pursued justice through appeals, presenting evidence of fraud and manipulation by the court clerk and opposing counsel, but their efforts were unsuccessful. The Texas Supreme Court and the Fifth Circuit Court of Appeals failed to grant relief despite substantial evidence of due process violations.

V. REASONS FOR GRANTING THE EQUITABLE BILL OF REVIEW

Due Process Violations

9. Movants were denied due process rights guaranteed under the Fourteenth Amendment. The court failed to address the extrinsic fraud and collusion that prevented Movants from fully litigating their case.

VI. Fraud and Misconduct

10. The actions of the court clerk, who manipulated records and omitted critical evidence, alongside the fraudulent conduct of opposing counsel, deprived Movants of a fair trial. This Court has a responsibility to address such egregious violations to uphold the integrity of the judicial process.

VII. Necessity for Equitable Relief

11. Movants have exhausted all available remedies and continue to face substantial injustice. An equitable Bill of Review is warranted to set aside the fraudulent judgment and grant a new trial.

VIII. CONCLUSION

12. For the foregoing reasons, Movants respectfully request that this Court grant the petition for Equitable Bill of Review or, order all parties to mediate and settle or let's crank it up for trial.

IX. PERSONS WITH KNOWLEDGE OF THE UNDERLINE FACTS

A. Jessica Moir Civil Court Supervisor.

B. Eileen Gaffney Staff Attorney.

C. Crain, Caton & James, P.C.

D. Ben Bronston Legal PC.

E. Johnna Kizer.

F. Candice Rodgers.

G. Fabi Oquendo Notary Public.

H. Vera Matthews.

I. Axis Surplus Insurance Vicky Brooks.

J. John Hettig.

k. John Cucci, Ghostwriter for Movants Appeals Brief filed in 14th Court of appeals case # 14-21-00400-CV in or around January 2022.

13. Movants assert that the City of Houston initially owned the land before selling it to Isaac Matthews and Walter Barry Kahn, a developer and manager who subsequently constructed buildings on the property (**see Exhibit N for reference**). Further discovery is necessary to uncover the full extent of the matter. The City of Houston has flagrantly violated legal regulations by failing to conduct the necessary safety inspections of the habitation. Moreover, the city has actively attempted to conceal its involvement in this matter. A thorough examination of Movants' Bill of Review uncovers a deliberate cover-up, which is both unacceptable and egregious. Such conduct, including the omission of records by our clerk, starkly contrasts with the duties and responsibilities of our governmental bodies to serve the commonwealth of the people. This behavior is so egregious that it borders on a violation of the RICO Act. This case should have been settled years ago; instead, the defense teams have chosen to defend blatant fraud on the court. The time for accountability and resolution is long overdue.

Respectfully, Submitted

Spencer Farwell

VERIFICATION

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared SPENCER FARWELL, known to me to be the persons whose names is subscribed to the foregoing Motion for Bill of Review, and being by me first duly sworn, upon oath deposed and stated that he have read the above and foregoing Motion for Bill of Review and that every statement contained therein is within his personal knowledge and is true and correct.

Spencer Farwell
SPENCER FARWELL

SUBSCRIBED AND SWORN TO BEFORE ME on this the 7 day of August, 2024, to certify which witness my hand and official seal.

Notary Public in and for
The State of Texas

My Commission Expires: Aug. 15, 2028

HOSEA HARRIS, JR
My Notary ID # 4672081
Expires August 15, 2028

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all attorneys of record in accordance with the Texas Rules of Civil Procedure on this the 8 day of Aug., 2024.

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