No. _____

# In The
# Supreme Court of the United States

ALBERT LUTTERODT,

*Petitioner,*

v.

ENVISION REALTY GROUP, LLC, JACKSON POTTER, AND EMILY LANE OWNERS ASSOCIATION, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Texas Fifth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

January 17, 2018

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*Pro Se*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Plaintiff, by law, is entitled to the exact remedies and relief requested in his Original Petition to Inspect and Forensic Audit all the Books and Records of the Association, without restrictions or conditions?

2. Whether a trial court can instruct jurors to look for requirements – such as "reasonable identification" with regard to inspection and forensic auditing – that are not required by the Homeowner Association's governing documents, Bylaws and Declarations, or any statutory or property code, or state and federal laws?

3. Whether the trial court ruling and subsequent opinions by the Court of Appeals and the Texas Supreme Court constituted unreasonable action which is contradictory to Texas business law and to many other state court rulings regarding inspection and auditing of books and records?

4. Whether the ruling regarding defamation is contrary to the application of clearly established federal law, as determined by the US Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)?

5. Whether in a defamation case a trial court can, without defining "malice" in the jury instructions, meet its burden of proof requirement for punitive damages?

6. Whether a trial court can deny Due Process in a defamation case without deciding whether the alleged defamatory remarks are TRUE or FALSE?

## QUESTIONS PRESENTED FOR REVIEW– Continued

7. Whether the First Amendment requires the trial court, the Court of Appeals, and Texas Supreme Court in a defamation case to make an independent determination and examination of ALL evidence, including any records jurors may have requested, before affirming that a plaintiff has met its burden of proving that a claim or allegation is True or False?

8. Whether the Texas Court of Appeals and the Texas Supreme Court have the obligation and jurisdiction to review and address the First Amendment issue in this petition, and to reopen a legal proceeding to correct trial court errors?

9. Whether the trial court instructions regarding defamation can be contrary to or violate the mandatory requirements for proof and specific performance required under the *New York Times* case for proof of malice and reckless acts?

10. Whether the verdict/judgement is undeserved, unwarranted, and a gross violation of Plaintiff's First Amendment right to protected opinion and speech when Plaintiff commented on public matters and concerns and the statements were in fact true?

## IDENTITY OF PARTIES

The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

| | |
|---|---|
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**IDENTITY OF PARTIES** – Continued

| | |
|---|---|
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| Respondent: | Emily Lane Owners Association |
| Respondent Emily Lane's trial and appellate counsel: | Valarie J. Eissler<br>LITCHFIELD CAVO LLP<br>One Riverway, Suite 1000<br>Houston, TX 77056<br>Telephone (713) 418-2000<br>eissler@litchfieldcavo.com |
| Respondent: | Jackson Potter |
| Respondent: | Envision Realty Group, LLC |
| Respondent Jackson Potter and Envision Realty's trial and appellate counsel: | David J. Potter<br>DAVID J. POTTER<br>& ASSOCIATES<br>901 N. Stateline Ave.<br>Texarkana, TX 75501<br>Ph: 903-794-2283<br>dpotter@potter-law.com |

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## OPINION BELOW

16-1036 ALBERT LUTTERODT v. EMILY LANE OWNERS ASSOCIATION, INC., ENVISION REALTY GROUP, LLC AND JACKSON POTTER; from Dallas County; 5th Court of Appeals District (05-14-01329-CV, ___ SW3d ___, 06-16-16)

## STATEMENT OF JURISDICTION

This case was tried to the District Court of Dallas County, and appealed, and subsequently petition for review was timely made to the Texas Supreme Court, which was denied. The United States Supreme Court has jurisdiction due to 28 U.S.C. §1257(a).

Petitioner is Albert Lutterodt, a member and one-time Board President of his condominium owner's association, the Emily Lane Owner's Association, Inc. ("the HOA"). The HOA contracted with Respondent Envision Realty, Inc. ("Envision") to manage the property. Envision is owned by Respondent Jackson Potter ("Potter").

This petition seeks review of a suit for a Writ of Mandamus filed by Petitioner. The cause, number DC-12-12648-G, was tried in the 134th Judicial District Court of Dallas County, Texas, before the Honorable Dale B. Tillery, on July 7-9, 2014. A judgment was rendered in favor of Respondents. Petitioner filed a Motion for Judgment *Non Obstante Veredicto*, which was denied. Petitioner filed a Motion for New Trial which also

was denied. Petitioner then appealed to the Court of Appeals.

The case, No. 05-14-01329-CV, was heard by the Court of Appeals for the Fifth District of Texas at Dallas before Justices Myers, Stoddart and Whitehill. *Lutterodt v. Emily Lane Owners Association, Inc.* (Tex. App., 2016). The Memorandum Opinion was written by Justice Stoddart and filed June 16, 2016, affirming the trial court decision.

A motion for rehearing was filed with the Appeals Court on September 9, 2016 and denied on October 5, 2016. A Motion for *En Banc* Reconsideration was filed October 23, 2016 and denied November 15, 2016. No motion is now pending in the Court of Appeals.

## CONSTITUTIONAL PROVISIONS

1. In this case, the Plaintiff requests that Supreme Court address the statutory interpretation of US First Amendment. . . . , which determines the scope of judicial review on the jurisdictional discretionary decisions of the 5th Texas Court of Appeal and the Texas Supreme Court.

2. Specifically, the Opinion section that implicitly states that 5th Texas Appeals Court has "NO" jurisdiction (or discretion), and that it refused to review "any other decision or action of the District Court or the District Court Judge, Dale Tillery ERROR in ignoring and failing in its obligation, authority and

instructions to the Jury with regards to "MALICE AND RECKLESS DISREGARD FOR TRUTH OR FALSE OR TRUTHFUL EVIDENCE for which is specifically MANDATED by the Supreme Court in the *New York Times* case.

3. District court judge Dale Tillery erred and failed to determine and classify Counter-Plaintiffs Jackson M. Potter and Envision Realty Group as "limited purpose public figures" or public figures as required by law.

4. Judge Dale Tillery made several promises he never kept – including promising to limine in on several other issues.

5. All of courts and judges, the trial court, the Court of Appeal, Dallas, and the Texas Supreme Court never identified or affirmed any *actual malice* from me in my statements, in the records, exhibits, transcripts or even in the media, TV and the news reports – never proved I acted with malice and or actual malice.

6. The district court judge, Dale Tillery, crucially erred and failed to determine and classify the defamatory "status" of plaintiff as required by law and practice.

7. The initial determination and classification of a plaintiff as either public or a special purpose private figure is a question of law that must be *determined initially* by the trial court judge, Dale Tillery.

8. Additionally, the judges of the Texas Court of Appeals in Dallas, Texas also erred and failed to address that crucial determination and failure by the trial court judge, Dale Tillery, of "public vis-a-vis special public figure" question.

9. Even the Texas Supreme Court also erred and failed to address that crucial determination and failure by the trial court judge, Dale Tillery, of "public vis-a-vis special public figure" question.

10. Based on the records presented, Petitioner Albert Lutterodt, shows that the district court judge, Dale Tillery erred by failing to properly instruct the jurors that:

*A.* Respondents Jackson Potter and Envision Realty Group had the burden to prove "actual malice", and are instructed to do so by "clear and convincing evidence" (not disputable evidence – TV and news reports as evidenced show prove).

*B.* Respondents Jackson Potter and Envision Realty Group must by the preponderance of evidence and proof, show that libelous or defamatory statements defendants/counter-plaintiffs introduced as evidence were published with *actual malice, and with reckless abandon and disregard for the truth. Marcone, Frank J., Appellee v. Penthouse International Magazine et al.*

11. Respondents cannot recover without proof that the utterances caused him "special" harm – harm

of a material and generally of a pecuniary nature" – and special damages were never pled. *Agriss*, 483 a.2d at 469.

12. Mere loss of reputation is not sufficient to permit recovery.

13. The US Supreme Court has defined "limited purpose public figures" as "individuals who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues". Potter was on tv, on the news, on the internet, magazines and newspapers.

14. Jurors must be limited by appropriate instructions, and any and all awards must be accompanied by competent evidence concerning the injury. There was various negative publicity about Respondents Jackson Potter and Envision Realty Group *before* the alleged defamation by Petitioner. In fact, Respondent cites negative public information as a basis for the defamation claim. Respondent's reputation was already tarnished before this lawsuit – to the point that no further harm could have occurred from sharing already published reports about them.

15. Under US Supreme Court ruling *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 349-350, 94 S.Ct. 2987, 3011-12, 41 L.Ed.2d 789 (1974), plaintiff may recover compensation for "actual damages" but not presumed or punitive damages unless the heightened *New York Times* **actual malice standard** is used. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Because Respondents Jackson

Potter and Envision Realty Group failed to prove statements made by Petitioner were made with "actual malice," the punitive damage award against Petitioner should be invalidated.

16. The actions and publicity of Jackson Potter and Envision Realty Group transformed Respondents into "**limited purpose public figures**". Even if they did not desire such status.

17. "The purpose of the First Amendment would be frustrated if those persons and activities that most request public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge". *Medico v. Time Inc.*, 643 F.2d 134, 142 (3d Cir. 1981).

18. The district court judge instructions had to prove "outrageous conduct". Additionally, to be permissible, the charge must meet the First Amendment rights requirements established by the U.S. Supreme Court. Because "outrageous conduct" does not connote subjective awareness of falsity, the judges charge, including the alleged defamatory statements, and the mandatory proof for malice was flawed.

19. Additionally, and furthermore, the district court judge incorrectly instructed the jury regarding the burden of proof for punitive damages. In *New York Times*, the Supreme Court stated and required that "the proof (any proof) presented to show *actual malice* must not lack the *convincing clarity* which the constitutional standard demands." 376 U.S. at 285-286, 84 S.Ct at 729. (emphasis added).

20. "This means the plaintiff must have, and had the burden to prove *actual malice* and must do so by *clear and convincing evidence with knowledge of falsity or with reckless abandon and disregard for the truth.*" 418 U.S. at 342, 94 S.Ct. at 3008.

21. Because the jury received incorrect instructions regarding the proper level of proof, and the definition of malice, its award of punitive damages was made under constructionally deficient standard. The verdict may not be used as a predicate to affirm the award of compensatory as well as punitive damages. The Supreme Court has the power to review to make a determination *de novo* review of the evidence of *actual malice* – and must do so.

22. In First Amendment cases, an appellate court has an obligation to make an independent examination of the whole record – *all the records* (emphasis) in order to make sure, "that the judgement does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States Inc.*, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). A *de novo* determination is not only the province of the Supreme Court, it is the affirmative duty of the Supreme Court.

23. It must be noted that the "declaration" of the association which contained the specific language that "the books and records of the HOA must be produced upon demand" was and has been deliberately and intentionally . . . and perhaps fraudulently omitted and not included in the records.

24. Also note, the 2 binders of records that the HOA produced before they were sued were not presented – they were excluded, along with the 10 boxes of exhibit records.

25. "Failure to investigate, without more, does not demonstrate actual malice". See *St. Amant*. 390 U.S. at 731 S.Ct. at 1325; *New York Times*, 376 U.S. at 288, 84 S.Ct. at 730. The Supreme Court has stated and reiterated that "mere failure to investigate does not establish bad faith." The reasonable reliance on the public, TV, newspapers and Internet reports is sufficient enough to defeat Respondents' claim and attempt to show defamation in this case.

26. The veracity of the statements for defamation was never proven – never proven as false, and never proven as a fact.

27. Failure to use "alleged" in the statements uttered by the Petitioner is not actual malice. – U.S. Supreme Court

## STATEMENT OF THE CASE

Petitioner is Albert Lutterodt, currently a 25% owner of a condominium at Emily Lane Horizontal Property Regime and formerly the owner of several condominium units and a member of the Board of Directors of Emily Lane Owners Association, Inc. ("the HOA").

The HOA is a non-profit corporation established in 1981 and comprised solely of owners of Emily Lane Condominiums in Dallas County, Texas. From October 12, 2004, the HOA was listed by the Secretary of State of Texas as "involuntarily dissolved without judicial ascertainment and made null and void". On December 23, 2013, a Notice of Dedicatory Instrument for the HOA was filed by its new registered agent.

Respondent Jackson Potter is the owner of Envision Realty Group LLC ("Envision"), an outside association management firm contracted by the HOA from circa 2004 to 2013. Envision is not in good standing according to the Texas Comptroller of Public Accounts.

In 2008, before Petitioner became a Board member of the HOA, Petitioner noticed that the community property at Emily Lane Condominiums was looking run-down. In order to discover where his HOA fees were being spent, Petitioner formally requested the ability to inspect all the records related to the condominium property and specific financial records of the HOA. Petitioner was provided very little vendor information and contractor information, and no bank statements or invoices. Petitioner later was elected Treasurer of the HOA. A Board Resolution gave him permission to be added as a signatory on the HOA bank accounts – which, due to the inaction of Respondents, never happened.

Petitioner repeated his requests for the missing information in order to do a forensic audit of the HOA books and records was at first claimed by Envision to

be "harassing", and later as not "reasonably specified". It remains unclear how much more specific Petitioner needs to be, when he has requested ANY and ALL records in possession of Envision with regard to the HOA.

The HOA's By-Laws establish an overriding contractual right to owner's open access to its records. The By-Laws, Article V, Paragraph 5.3(k), state that the Board of Directors shall have the duty "To keep and maintain full and accurate books and records showing all of the receipts, expenses or disbursements and to permit examination thereof at any reasonable time by each of the Owners . . . " (*See Appendix Tab 8. By-Laws.*)

The By-Laws of the HOA also contain a separate affirmative duty mandating owners be provided an annual audit showing "all receipts, expenses, or disbursements". That is exactly what Petitioner sought (and still seeks). The only relief requested in his litigation, other than attorney's fees and the costs Petitioner incurred to have Envision and various banks produce what few HOA records have been produced, is the production of those records.

This entire matter is what Respondents themselves judicially admitted was only a Petition for Mandamus of the HOA's outside management firm (Envision) into allowing an owner (and by then President of the HOA) access to the HOA's records in order to perform a forensic audit.

Petitioner's stated purpose for his request was to investigate potential self-dealing, missing funds, and

alleged fraud of Respondents, but his request for documents had to go through those same Respondents. Repeated cordial and informal requests during meetings of the Board were not enough to get the documents. Formal requests did not get the documents, either. Respondents created several unlawful obstacles to inspection of the documents. On information and belief, some of the documents were lost when Envision was evicted from its office.

In January 2009, this case was filed *pro se* in Justice Court, as Petitioner believed was provided for under the records inspection provisions of Prop. C. §209.005.[1] The HOA was named nominally for orders to get banks to comply.

Attorney David Potter, father of Envision's owner Jackson Potter, claimed to represent the HOA as its attorney in the JP cases, although the Board of Directors have no proof of any action allowing it. The financial records that Petitioner sued to get were completely in the hands of the same attorney.

Attached to Petitioner's Statement of Claims in Small Claim Court, Dallas, County, was a December 16, 2011 written request detailing the types of financial and supporting documents to which Petitioner demanded to have access.

The JP case was dismissed, and the case was refiled on October 24, 2012 in District Court. Attached to the Complaint was an October 27, 2010 email from

[1] Property Code §209.005 did not apply.

Petitioner to the Respondents making clear that the request for documents, for which Petitioner had already paid Respondents $600 to produce, was made for the purpose of conducting "an independent study, a review and an audit of the finances for Emily Lane Condos".

Respondents Jackson Potter and Envision then counter-sued Petitioner in his personal capacity, rather than as the HOA's President, for harassment (not defamation); and they sought recovery of shifted attorney's fees – claiming the matter was a deed restriction enforcement matter under the Property Code. This was clearly done for no other purpose than to claim a right to an attorney's fees award, as there is no deed restriction enforcement at issue.

Petitioner was forced in response to engage an attorney. His attorney, who is Board Certified in Commercial Real Estate Law and had 34 years of experience, initially thought the matter was so simple that he agreed to a $1,500 legal fee to simply get full condo owner's access to Association financial records by Mandamus. After all, condominium records are, as a matter of law, openly available for inspection and copying by owners, and Petitioner was both an owner and on the HOA's Board of Directors. Owner inspection was also set out under the Declaration of the HOA. *(See Appendix Tab 10, Declaration.)*

On June 21, 2013, the HOA produced 9 boxes of documents for inspection by Petitioner and his CPA, claiming that the boxes contained "all records of the

Association dating back to 2004 within the possession, custody and care of Envision Realty – without any limit to the documents requested on Plaintiff's list". The documents were not Bates numbered or indexed. On the same day, the HOA sent a letter to Petitioner's counsel advising that certain financial information requested (financials, cash receipts journals and cash disbursement journals) generated from an electronic database known as Yardi would require time-consuming reports to be run to create the requested information. By its own admission, those reports had already been created and were available, but were not included in the 9 boxes that supposedly contained "all" of the HOA's documents in Envision's control and were only produced later upon request. *(Defendant Emily Lane Owners Association, Inc's Motion for Protective Order filed July 12, 2013)*

Additionally, there were many documents missing from the 9 boxes. Petitioner provided a written list of the missing documents and requested that Respondents explain why the requested information was missing. Petitioner's interrogatory prompted the Motion for Protective Order referenced above. Even while attaching Petitioner's "CPA Request List" of missing documents, Respondent sought a protective order against production, claiming "These records have been produced. It is wholly unnecessary to engage in further discovery." *Id.*

On August 5, 2013, Petitioner amended his Petition to include breach of fiduciary duty. His Motion for

Leave to file Amended Pleading was denied on September 9, 2013 and trial was set for November 18, 2013.

On September 10, 2013, a Rule 11 agreement was reached, agreeing, among other things, that before September 20, 2013 Respondents would provide Petitioner authorization to obtain bank statements and copies of checks from the HOA's bank accounts. Although some account numbers were provided, they were NOT the bank accounts for Respondent's accounts and were thus useless.

On March 21, 2014, the Court (having previously denied Petitioner's motion to amend its Complaint, nevertheless) allowed Respondents to file an Amended Answer, which falsely claimed that "numerous and repeated production of documents have been made to the Plaintiff and to his chosen accountant, and at no time has any errors, omissions or misconduct been found to exist." On March 26, 2014, Respondent Envision was allowed to file an Amended Counterclaim against Petitioner.

## ARGUMENT

### I. Qualified Privilege

Under Texas law, "[a] communication on a subject in which the author or the public has an interest, or with respect to which the author has a duty to perform to another owing a corresponding duty, may constitute a qualified or conditional privilege." *Marathon Oil Co.*

*v. Salazar*, 682 S.W.2d 624, 630 (Tex.App. – Houston [1st dist.] 1984, *writ ref'd n.r.e.*).

## II. Proper purpose

Section 5.3(k) of the HOA's By-laws states that the Board of Directors shall have the following duties:

> To keep and maintain full and accurate books and records showing all of the receipts, expenses or disbursements and to permit examination thereof at any reasonable time by each of the Owners and any First Mortgages of a Unit and the Veterans Administration, and to cause a complete audit of the books and accounts by a competent accountant, once each year.

*(Appendix Tab 8, By-laws.)* Note that the only limitation on the Owners' right to examine the books and records was for it to be done at a "reasonable time".

Similarly, Article VII, §7.3 of the HOA's Declaration states that: "The Association shall permit First Mortgagees and the Veterans Administration to examine the books and records of the Association upon request." *(Appendix Tab 10, Declaration.)* Here, there is not even a "reasonable time" limitation.

TUCA clearly states that the only recourse for condo owners is a (self-funded) civil suit. This makes TUCA toothless legislation protecting HOA boards by placing enforcement on individual owners' heads. There are also no penalties for an HOA's failure to comply with any TUCA statute. In fact, Texas went so

far that when the TUCA was updated in 2002, they didn't just ignore enforcement, they specifically excluded the enforcement provision. Regardless of who's right or wrong, enforcing state statute falls on the individual condo owner to hire and pay for a lawyer to file a lawsuit. In doing the state's work for them, an owner is essentially suing themselves and their neighbors – a recipe for unpopularity in addition to the expense. It is clear that Petitioner became very unpopular with his Board of Directors and with Respondents Envision and Jackson Potter over the course of several years' worth of requests for the same documents that have YET to be provided.

## III. Malice

### A. Definition of malice

Under the common law definition, "[m]alice has been defined as ill will, bad or evil motive, or such gross indifference or reckless disregard of the rights of others as to amount to a willful or wanton act." *Marathon Oil Co.*, 682 S.W.2d at 631. "Actual malice," a term of art developed in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.ed.2d 686 (1964), and its progeny, is somewhat different:

"actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. 'Reckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present 'sufficient evidence to permit the conclusion that the

defendant in fact entertained serious doubts as to the truth of his publication.' an error in judgment is not enough." *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989) (*citations omitted*).

This is a higher standard than common law malice; only clear and convincing proof will support recovery. *Howell v. Hecht*, 821 S.W.2d 627, 630 (Tex.App. – Dallas 1991, *writ denied*). Negligence, lack of investigation, or failure to act as a reasonably prudent person are insufficient to show actual malice. *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 924 (Tex.App. – Corpus Christi 1991, *writ dismissed w.o.j.*); *Marathon Oil Co.*, 682 S.W.2d at 631.

In *Dun and Bradstreet, Inc. v. O'neil*, 456 S.W.2d 896 (Tex.1970), the defendant, a mercantile credit reporting agency, was sued for defamation for erroneously reporting to its subscribers that the plaintiff had voluntarily filed for bankruptcy. *Id.* at 898. Finding that the defendant enjoyed a qualified privilege because of its contractual duty to report such information to its subscribers, *Id.* at 899, the Texas Supreme Court held that:

"*The New York Times* definition of actual malice which this court applied in *El Paso Times* is likewise applicable in the instant case, all three cases being libel suits, all three cases involving publishers' privileges and all three cases requiring malice to overcome the privileges. Insofar as the definition of actual malice is concerned we do not think the instant case involving a conditional privilege is distinguishable from the *New*

*York Times* and *El Paso Times* cases which involve First Amendment Constitutional privileges." *Id.*, 456 S.W.2d at 900-01.

Where a qualified privilege exists, actual malice must be shown. See also *Ryder Truck Rentals v. Latham*, 593 S.W.2d 334, 341 (Tex. Civ.App. – El Paso 1979, *writ ref'd n.r.e.*); *Mayfield v. Gleichert*, 484 S.W.2d 619, 627 (Tex.Civ.App. – Tyler 1972, *no writ*); Restatement (second) of Torts § 600.

### B. Evidence of malice

Federal procedural rules require the entry of summary judgment against the nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Texas law places the burden of proof at trial with respect to malice on the plaintiff, or in this case, Counter-plaintiffs Jackson Potter and Envision Realty Group. *Dun and Bradstreet*, 456 S.W.2d at 898.

Unlike the Texas courts in summary judgment cases, therefore, we require that Counter-plaintiffs prove malice, rather than that Plaintiff Albert Lutterodt establish absence of malice. *Compare Lesbrookton, Inc. v. Jackson*, 796 S.W.2d 276, 286 (Tex.App. – Amarillo 1990, *writ denied*) (refusing to adopt the *Celotex* standard because "under the Texas summary judgment scheme, the non-movant has no burden to

produce proof of an element of his cause of action until that element has been conclusively negated by movant").

Because Counter-plaintiffs failed to meet their burden of proof with respect to this element of their claim, the district court was incorrect in awarding them punitive damages against Petitioner Albert Lutterodt.

## IV. Attorney Misconduct by David Potter

Due to Petitioner's unpopularity, Respondents have maintained from the outset that Petitioner's Writ of Mandamus was filed for the improper purpose of harassment. *(Appendix Tab 12, Amended Answer and Counterclaim.)* Further, at trial, attorney David Potter went so far as to falsely claim that an event which occurred long after suit was filed was the impetus for the suit:

> MR. POTTER: Counsel, ladies and gentlemen. I told you when you were in the jury panel and being selected for this jury this case, when you heard it, this case is not about records. It never has been records. What you will find is this was a – this was a case for retribution. This was a case for hurt feelings when he lost the election.

*(Appendix Tab 7, Trial Transcript Volume IV, p. 194.)* The election to replace Petitioner as President of the HOA Board of Directors – regardless of whether or not it was done properly – was held in February, 2012, which was three months AFTER Petitioner filed his

second lawsuit against Respondents in JP Court for inspection of Respondents books and records. It is impossible, therefore, for David Potter's claim to be true. Though the law indulges a liberal attitude toward argument, particularly where the comment complained of responds to prior argument of opposing counsel, the Court of Appeals will not condone knowingly false statements to a jury in closing argument. *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557 (Mo.App.W.Dist. 2003).

By way of contrast, Laura Hedge, the attorney for Respondent the HOA, said in her opening argument, that:

> This lawsuit that I'm defending is about the production of records. The association hired a property management company to be the custodian of those records and respond to any request that was made by homeowners. The association has complied. . . . We're not here today to hide behind the record to hide behind anything that Petitioner wasn't entitled to records.

*(Appendix Tab 5, Trial Transcript Volume II, p. 47.)* Now of course separate Defendants are entitled to have different theories of defense, and they can be at odds with one another. Here, one Defendant is saying that not only was Petitioner entitled to the documents, he was already given everything "reasonably requested".

Attorney David Potter also made false statements about facts in evidence:

> Well ladies and gentlemen I want to run through your jury instructions quickly the answers I anticipate. The answer to No. 1 is no for the reasons that Laura just said. First of all he never at any time in asking what is he looking for what was his purpose he would say it's none of your business. I don't have to say. I have rights. I have a right to these things.

*(Appendix Tab 7, Trial Transcript Volume IV, p. 198.)* For him to claim that "never at any time" did Petitioner state his purpose is simply not true. Even if there wasn't ample evidence in the record, which there is, earlier that day, Petitioner had testified several times – in the hearing of attorney David Potter – that the purpose for his request was to do an audit of the HOA's books and records. For example:

> As a board of director I had to defend the interest of the community and my interest, too. I had to make sure that the property values of the community is maintained. And I have a duty and a responsibility to protect the values and interests of the community. That was my goal. As to the papers I wanted to conduct an audit to find out where the money was going because I couldn't verify where the money was going given the conditions of the community.

*(Appendix Tab 6, Trial Transcript Volume III, p. 41.)* In fact, Petitioner gave his purpose in his Original Petition, which was a written demand for the records:

> 9. On or about November 17, 2009, August 18, 2010, and December 16, 2011, Lutterodt, as a member of the Association and a member of the board of director, made a written demand on the Association, Envision and Potter requesting that he be permitted to examine, in person or through Raymond Abbey, CPA and Ivette Rivera, CPA, his duly authorized agent, the books and records of the Association and to make extracts **for the purpose of looking at the financial condition of the Association**. (emphasis added)

*(Appendix Tab 11, Original Petition to Compel Inspection of Books and Records).*

Further, attorney David Potter claimed he had knowledge not in evidence . . . that he knew Petitioner's purpose for requesting the books and records was to interfere with his son Jackson Potter's ability to make a living:

> . . . you could not satisfy Albert Lutterodt under any circumstances and then the rhetoric got so hot and Albert set about to destroy the people on this board. He set about to destroy Jackson and to destroy his business. That was his purpose. This can't be any question about his purpose.

*(Appendix Tab 7, Trial Transcript Volume IV, p. 196.)* Whereas Petitioner had testified:

> A. [My CPA's] saying that the records that you sent are incomplete and that's the reason

> why we have this lawsuit. You provide me records, but you not provide me full records.

*(Appendix Tab 6, Trial Transcript Volume III, p. 100).*

*Cler v. Providence Health System-Oregon*, 2008 WL 4058571 (Or.App., 2008). (Trial court abused its discretion in allowing improper closing argument based on facts not in evidence by defense counsel.); *Bodkin v. 5401 S.P., Inc.*, 768 N.E.2d 194 (Ill.App.1.Dist., 2002) (Counsel may not raise a suggestion of intoxication by innuendo during argument absent supporting evidence of intoxication.). Even if what David Potter claimed were true, which it is not, it was not until around November of 2011, well AFTER Petitioner began requesting the records (and after the suit was filed in JP court), that Petitioner saw the negative *Dallas Morning News* article and WFAA TV clip about Respondents and called for their resignations.

David Potter claimed that Petitioner was trying to destroy the earning capacity of his son and the Board. Board positions are volunteer, unpaid, positions. Thus, Board members who were asked to resign fare no worse and in fact far better than Petitioner himself, who has lost many, many hours of income and has gained an unpopular reputation from being forced to file suit to get documents that, as Treasurer of the Board, he should have had access to from the outset!

David Potter also testified, during closing arguments, about the facts of another case – presumably *Folkerth, et. al. v. Holly Oaks Townhomes Association, Inc., et al.*, cc-11-06804-E, in the Dallas County Court

at Law No. 5 – which was calculated to defend his son's actions and prejudice the jury against Petitioner. *See McConnell v. Akins*, 586 S.E.2d 688 (Ga.App. 2003) (The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair.); *Lingle v. Dion*, 776 So.2d 1073 (Fla.App.4.Dist., 2001) (Attorney's expression of his personal opinion as to the credibility of a witness, or his personal knowledge of facts, is entirely improper; while an attorney is given broad latitude in closing argument, his remarks must be confined to the evidence, the issues and inferences that can be drawn from the evidence.).

## CONCLUSION

For the reasons stated herein, this Court should grant the petition.

Respectfully submitted,

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