No. 14-14-00666-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

MARK THUESEN,

Appellant,

V.

AMERISURE INSURANCE COMPANY, SWAMPLOT INDUSTRIES LLC, LAURENCE DAVID ALBERT AND BETH ANNE BRINSDON,

Appellees,

On Appeal from the 151st Judicial District Court, Harris County, Texas
Trial Court Cause Number 2012-49262

APPELLANT'S BRIEF
HOUSTON, TEXAS

MARK THUESEN, *PRO SE*
P.O. Box 540365
Houston, Texas 77254
Telephone: (585) 300-5793
Email: xtraderweb@hotmail.com

PRO SE FOR APPELLANT,
MARK THUESEN

IDENTITY OF PARTIES AND COUNSEL

The following list of the parties to the trial court judgment and the names and addresses of trial and Appellee counsel is provided pursuant to the requirements of Tex.R. App. P. 38.1(a).

Appellant:	Mark Thuesen
Pro se for Appellant:	Mark Thuesen P.O. Box 540365 Houston, Texas 77254 Telephone: (585) 300-5793 Email: xtraderweb@hotmail.com
Appellees:	Swamplot Industries LLC, Laurence David Albert, and Beth Anne Brinsdon
Attorney for Appellees:	James A. Hemphill GRAVES, DOUGHERTY, HEARON & MOODY, P.C. 401 Congress Ave., Suite 2200 Austin, Texas 78701 Telephone: 512-480-5762 Facsimile: 512-536-9907 Email for Hemphill: jhemphill@gdhm.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

Citations to the Record

The record in this case consists of three volumes, Volume I, Volume II, and 1st Supplemental numbered Clerk's Record and a one-volume, sequentially numbered Reporter's Record. Citations to the record are in the format:

1. (Volume I CR:[*page*][*paragraph*]) for the Clerk's Record;
2. (Volume II CR:[*page*][*paragraph*]) for the Clerk's Record;
3. (1st Supplemental CR:[*page*][*paragraph*]) for the Clerk's Record; and
4. (RR:[*page*][*line*]) for the Reporter's Record.

STATEMENT OF THE CASE

This case began as a civil malicious prosecution and defamation case (Cause No. 2012-49262), and amended on February 21, 2013 as the last remaining live pleading. (Volume I CR:11). Appellant answered with various counter-claims. Appellant's last live answer is "Defendant's Second Amended Original Answer" (Volume I CR:48) filed March 31, 2013. Appellant filed a new lawsuit (Cause No. 2014-07537) against Appellees' that was assigned to a different trial court, titled "Plaintiff's Original Petition and Request for Disclosure" (Volume I CR:231) filed February 18, 2014. The new lawsuit was a breach of contract suit. Appellees answered this new lawsuit in their "Original Answer of Defendants Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:416) filed March 28, 2014. Appellees reached a settlement agreement for all of their claims against Appellant, thus Appellees dismissed all claims with prejudice against Appellant, as evidenced in the Order "NON-SUIT WITH PREJUDICE AND TAKE NOTHING JUDGMENT" (Volume I CR:475) signed April 2, 2014. Shortly thereafter, the second lawsuit (Cause No. 2014-07537) was consolidated into the first lawsuit (Cause No. 2012-49262) "ORDER GRANTING CONSOLIDATION" (Volume I CR:674) signed May 8, 2014. The case was disposed of by Appellant's non-suit of Appellees "Plaintiff's Notice of Non-Suit Without Prejudice as to Only Defendants Swamplot Industries LLC, Laurence David Albert and Beth Brinsdon" (Volume II CR:943) filed June 30, 2014, and Appellee's Rule 91a dismissal motion, and the trial court's rulings in the "ORDER GRANTING SWAMPLOT PARTIES MOTION ON 2014 CLAIMS" (Volume II CR:1032) signed July 14, 2014, and "ORDER GRANTING SWAMPLOT PARTIES MOTION FOR FEES AND EXPENSES INCURRED IN 2014 CLAIMS" (Volume II CR:1232) signed August 26, 2014.

ISSUES PRESENTED

Issue #1 Appellee Lawyers' Dual Roles as Trial Lawyer and Fact Witness Caused Actual Prejudice to Appellant

Issue #2 Appellee's Motion to Consolidate Violated the Bankruptcy Order

Issue #3 Appellant Denied Absolute Right to a Nonsuit Pursuant to TEX. R. CIV. P. Rule 91a.5(a)

Issue #4 Appellant and Appellees Nonsuited Each Other, Thus With No Remaining Parties to the Litigation, the Trial Court Illegally Continued to Rule on a Moot Controversy

Issue #5 Appellant Denied Absolute Right to a Nonsuit

Issue #6 Trial Court Violated Appellant's Due Process of Law

Issue #7 Trial Court Judge's Bias Denied Appellant's Due Process of Law and Warranted Recusal

STATEMENT OF FACTS

For the purpose of clarity and simplicity, Appellant has provided a statement of facts for each respective issue. Most of the motions set for hearing were written submission, and there are no relevant reporter records from any of the oral hearings.

Issue #1 - Appellee Lawyers' Dual Roles as Trial Lawyer and Fact Witness Caused Actual Prejudice to Appellant

Appellees' had originally filed suit against Appellant on August 27, 2012, Cause No. 2012-49262. Appellees' were represented by legal counsel of Michael Doyle and Jeff Raizner of Doyle and Raizner LLP. The last live original petition is "Plaintiffs' Second Amended Original Petition, Jury Demand, Verified Application for Temporary Restraining Order, & Request for Disclosure" (Volume I CR:11) filed February 21, 2013. Appellant's last live answer is "Defendant's Second Amended Original Answer" (Volume I CR:48) filed March 31, 2013. Appellant filed a new lawsuit against Appellees' and named their legal counsel Michael Doyle, Jeff Raizner and Doyle Raizner LLP as defendants, titled "Plaintiff's Original Petition and Request for Disclosure" (Volume I CR:231) filed February 18, 2014. Appellees answered this new lawsuit in their "Original Answer of Defendants Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:416) filed March 28, 2014. A few days later, Appellees

filed a "Motion to Consolidate of Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:419) filed March 31, 2014. Appellees reached a settlement agreement with Appellant's insurance carrier for an amount estimated by the insurance carrier as their cost of defense to defend the case to trial, thus Appellees dismissed all claims with prejudice against Appellant, as evidenced in the Order "NON-SUIT WITH PREJUDICE AND TAKE NOTHING JUDGMENT" (Volume I CR:475) signed April 2, 2014. Appellant continued to prosecute Appellant's counter-claims against Appellees in the 2012-49262 case. Appellant responded to the motion in "Plaintiff's Response to Defendant's Motion to Consolidate" (Volume I CR:513) filed April 18, 2014. In his response, (Volume I CR:517,¶6) Appellant factually conveyed that the two suits do not involve common questions of law or facts as Appellant's 20 counterclaims asserted in the first lawsuit are entirely different than Appellant's 9 claims asserted in the second lawsuit. The first suit in the 151st (Cause No. 2012-49262) arose from defamation and malicious prosecution, while the second suit in the 152nd (Cause No. 2014-07537) arose two years later for breach of contract, which are two entirely different transactions. Doyle and Raizner are attorneys who represent Appellees in the first suit in the 151st and did not withdraw their legal representation. In addition, Doyle and Raizner are defendants in the second suit in the 152nd. A consolidation of the two cases would place Appellee's attorneys

Doyle and Raizner in the position of dual roles as advocates and witnesses for Appellees. The trial court granted Appellees' motion to consolidate the two cases in the "ORDER GRANTING CONSOLIDATION" (Volume I CR:674) signed May 8, 2014.

Issue #2 - Appellee's Motion to Consolidate Violated the Bankruptcy Order

The facts in Issue #2 are identical as in the above Issue #1. In addition to the facts listed above, in "Plaintiff's Response to Defendant's Motion to Consolidate (Volume I CR:513) filed April 18, 2014, (Volume I CR:521,¶7) Appellees' and their legal counsel Doyle and Raizner entered into an agreed order to lift the automatic bankruptcy stay applicable to the 151st District Court actions on February 5, 2014 in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 13-37041-H5-13, which stated in part, "In the event Amerisure discontinues the defense of Mark Thuesen…, then no further action may be taken by or against Mark Thuesen in the state court lawsuit, and Swamplot's claims against Thuesen, if any, and Thuesen's counterclaims against Swamplot, shall NOT be prosecuted without further order of this Court," (see attached Exhibit C (Volume I CR:528)) Appellees settled all claims against Thuesen, and filed a notice of non-suit in the 151st District Court, which was apparent on its face that "Amerisure has discontinued the defense of Mark Thuesen," (see attached Exhibit B (Volume I CR:525) and D (Volume I CR:530)).

Thus the automatic-stay was once again in effect in the 151st District Court, Cause No. 2012-49262. Appellees' motion to consolidate was an action for relief against the debtor (Appellant). Appellant submitted his "Plaintiff's Reply to Defendant's Reply to Plaintiff's Response to Defendant's Motion to Consolidate" (Volume I CR:540) filed April 19, 2014. The trial court granted Appellee's motion to consolidate in the "ORDER GRANTING CONSOLIDATION (Volume I CR:674) signed May 8, 2014. Shortly thereafter, Appellant submitted his motion "Plaintiff Thuesen's Motion for Reconsideration and Motion to Vacate (Volume I CR:711) filed May 26, 2014. The trial court denied Appellant's motion for reconsideration in the "ORDER ON APPELLANT'S MOTION FOR RECONSIDERATION AND MOTION TO VACATE" (Volume I CR:757) signed June 9, 2014. A few weeks later, Appellees requested relief from Appellant's bankruptcy stay, Appellees' appeared for an oral hearing in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 13-37041-H5-13 to request Federal Bankruptcy Judge Brown to lift the automatic-stay and agreed modified order. The U.S. Bankruptcy Court granted Appellees' request for relief in the "ORDER GRANTING MOTION FOR RELIEF FROM STAY OF SWAMPLOT INDUSTRIES, LLC, LAURENCE ALBERT AND BETH BRINSDON" (1st Supplemental CR:498) signed June 26, 2014.

Issue #3 - Appellant Denied Absolute Right to a Nonsuit Pursuant to TEX. R.

CIV. P. Rule 91a.5(a)

Appellees' had originally filed suit against Appellant on August 27, 2012, Cause No. 2012-49262. The last live original petition is "Plaintiffs' Second Amended Original Petition, Jury Demand, Verified Application for Temporary Restraining Order, & Request for Disclosure" (Volume I CR:11) filed February 21, 2013. Appellant's last live answer is "Defendant's Second Amended Original Answer" (Volume I CR:48) filed March 31, 2013. Appellant filed a new lawsuit against Appellees' titled "Plaintiff's Original Petition and Request for Disclosure" (Volume I CR:231) filed February 18, 2014. Appellees answered this new lawsuit in their "Original Answer of Defendants Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:416) filed March 28, 2014. A few days later, Appellees filed a "Motion to Consolidate of Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:419) filed March 31, 2014. Appellees filed a motion to dismiss pursuant to the newly enacted TEX. R. CIV. P. Rule 91a.5(a), titled "Motion to Dismiss of Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:632) filed May 5, 2014. A few days later, the 151st district court granted Appellees' motion to consolidate the two cases in the "ORDER GRANTING CONSOLIDATION" (Volume I CR:674) signed May 8, 2014. In response to Appellees' motion to dismiss, Appellant nonsuited by amendment a few of his

2014 claims against Appellees, titled "Plaintiff's Second Amended Petition and Request for Disclosure" (Volume I CR:758) filed June 9, 2014. In addition, Appellant filed his "Response to Defendants' Motion to Dismiss of Swamplot Industries LLC, Laurence David Albert, and Beth Anne Brinsdon" (Volume I CR:742) filed June 9, 2014. In response to Appellant's nonsuit by amendment of a few of Appellant's 2014 claims, Appellees filed their "Amended Motion to Dismiss and Reply in Support of Motion to Dismiss of Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon" (Volume I CR:817) filed June 12, 2014. Shortly thereafter, Appellant filed a nonsuit of all of his 2012 and 2014 claims against Appellees, thus extinguishing all of his claims against Appellees, titled "Plaintiff's Notice of Non-Suit Without Prejudice as to Only Defendants Swamplot Industries LLC, Laurence David Albert and Beth Brinsdon" (Volume II CR:943) filed June 30, 2014. Immediately thereafter, Appellees' passed on their oral hearing for their TEX. R. CIV. P. Rule 91a.5(a) motion titled "Motion to Dismiss of Swamplot Industries LLC, Laurence David Albert, and Beth Ann Brinsdon" (Volume I CR:632) filed May 5, 2014. Likewise, the trial court immediately entered Appellees' passing of Appellees' oral hearing of their motion to dismiss setting on July 7, 2014 at 08:00 a.m. on the court's docket (see Exhibit A (Volume II CR:1230)). A few days later, Appellees continued the nonsuited litigation by filing their "Swamplot Parties' Motion to be Considered Prevailing Parties in 2014

Claims" (Volume II CR:951) filed July 3, 2014. Appellant responded by filing his "Plaintiff Thuesen's Response to Defendant Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims" (Volume II CR:1020) filed July 13, 2014. In Appellant's response (Volume II CR:1020,¶2), Appellant stated the fact that on June 26, 2014, there was an oral hearing to determine Appellees request for relief from the automatic bankruptcy stay, and Appellant's Contempt of Court against Appellees in the United States Bankruptcy Court for the Southern District of Texas, Houston Division at 2:00 p.m. The Honorable Judge Brown ruled that the automatic-stay was lifted, and that Appellant was denied his claims for attorney fees. (Volume II CR:1021,¶2) In addition, Judge Brown ruled that although Appellant was not seeking claims for his attorney fees filed in Texas District Court, that the Federal Bankruptcy Court had jurisdiction over Appellant's Texas District Court claims and was preempted by federal law, and that Judge Brown would not have granted the Texas District Court claims for damages if it had been filed in Judge Brown's Court. Thus, Appellant filed his Rule 162 nonsuit one day after Judge Brown's ruling that in effect nullified Appellant's damages in the Texas District Court litigation, which was not in response to Appellees' Rule 91a.5 dismissal motion. Appellant discovered previously unknown flaws in Appellant's claims against Appellees, through Judge Brown's ruling and legal interpretation of Federal Bankruptcy law. Appellant immediately realized through Judge Brown's

clarification of the law that Appellant's causes of action were less viable. Federal Bankruptcy Court Judge Brown clarified the law by stating on the record that Federal Bankruptcy law preempted Appellant's Texas District Court claims for damages. Appellees and their legal counsel were also unaware of the federal law preemption as evidenced by their silence to the preemption at the bankruptcy oral hearing, and Appellees' failure to plead federal preemption in any trial court document. (Volume II CR:1021,¶3) Although the temporal proximity of Appellant's nonsuit may appear to be filed in response to Appellees' motion to dismiss, that is not true as Appellees' motion was filed on May 5, 2014, almost 60 days before Appellant filed his nonsuit. Appellant filed his nonsuit only after discovering previously unknown federal legal impediments to success. Despite the facts, the trial court granted Appellees' motion to be considered prevailing parties on the 2014 claims, titled "ORDER GRANTING SWAMPLOT PARTIES MOTION ON 2014 CLAIMS (Volume II CR:1032) signed July 14, 2014. Almost a month later, Appellees filed their "Swamplot Parties' Motion for Fees and Expenses Incurred in 2014 Claims (Volume II CR:1154) filed August 13, 2014, seeking attorney fees and costs pursuant to TEX. R. CIV. P. Rule 91a.5(a). Appellant responded by filing his "Plaintiff Thuesen's Response to Swamplot Parties Motion for Fees and Expenses Incurred in 2014 Claims" (Volume II CR:1220) filed August 25, 2014. (Volume II CR:1222,¶5) The trial court's Orders

signed on July 14, 2014 and July 28, 2014 do not award any damages or costs, nor set any future hearings to determine damages or costs to be awarded to Appellees, and the court record clearly stated that Appellees passed on their Rule 91a motion to dismiss set for oral hearing on July 7, 2014 (see Exhibit A (Volume II CR:1230)). (Volume II CR:1223,¶7) Appellees filed their Rule 91a motion to dismiss on May 5, 2014. Pursuant to TEX. R. CIV. P. Rule 91a.3(c), "a motion to dismiss must be granted or denied within 45 days after the motion is filed," which deadline would be June 19, 2014. The court's record reflects that no ruling granting or denying Appellees May 5, 2014 Rule 91a motion to dismiss was issued, thus the motion was overruled by operation of law. (Volume II CR:1223,¶8) Appellees claim to have filed an "amended" Rule 91a motion to dismiss on June 12, 2014, however the TRCP rules do NOT allow the extension of deadlines by amending a Rule 91a motion to dismiss. Appellees acknowledge that certain causes of action were non-suited by amendment, however Appellees have put forth their attorney fees for these expired non-suited causes of action into their request for damages. Any new causes of action that could have been included in the June 12, 2014 Rule 91a motion to dismiss, "must be granted or denied within 45 days after the motion is filed," which 45 day deadline would be on July 27, 2014. However, as stated above, Appellees passed on their Rule 91a motion to dismiss written submission hearing set for July 7, 2014 at 8:00 a.m., (see Exhibit

A (Volume II CR:1230)) and never requested another hearing date before the July 27, 2014 deadline, thus the June 12, 2014 Rule 91a motion to dismiss was overruled by operation of law. (Volume II CR:1224,¶9) Pursuant to TEX. R. CIV. P. Rule 91a.5(a), "the court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a non-suit of the challenged cause of action…" Appellant filed a notice of non-suit on June 30, 2014, which was seven days before the date of the hearing, thus the court may not rule on a motion to dismiss. Appellees are attempting an end-around to TEX. R. CIV. P. Rule 91a.5(a) by obtaining an order that the Appellees were the prevailing parties in a July 14, 2014 Order. However, pursuant to TEX. R. CIV. P. Rule 91a.2, "a motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." Appellees titled their end around motion as, "Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims," and in violation of TEX. R. CIV. P. Rule 91a.2, Appellees did not "identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both," nor did the Order on their motion identify any of the requirements of TEX. R. CIV. P. Rule 91a.2. Furthermore, the trial court's Order signed on July 14, 2014 does not set any future hearing to determine damages or costs to be awarded to

Appellees. *(Volume II CR:1225,¶10)* Pursuant to TEX. R. CIV. P. Rule 91a.7, "the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." Appellees were never found to be the "prevailing party on the motion," Appellees were found to be the "prevailing party" on their "Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims," thus Appellees are not entitled to attorney fees incurred pursuant to TEX. R. CIV. P. Rule 91a.7, and more importantly, the trial court's Order signed on July 14, 2014 did not award Appellees any damages at all, as the Appellees did not request any damages but merely a finding that the 2014 claims be "dismissed with prejudice." Despite all the factual evidence contradicting Appellees' position, the trial court granted Appellees' motion in the order titled "ORDER GRANTING SWAMPLOT PARTIES MOTION FOR FEES AND EXPENSES INCURRED IN 2014 CLAIMS (Volume II CR:1232) signed August 26, 2014. Appellant thereafter filed his "Plaintiff's Motion for Reconsideration, Motion to Vacate and Bill of Review (1st Supplemental CR:1310) filed October 5, 2014. The trial court denied Appellant's motion for reconsideration in the order titled "ORDER DENYING MARK THUESEN'S MOTION FOR RECONSIDERATION, MOTION TO VACATE AND BILL OF REVIEW (1st Supplemental CR:1354) signed October 21, 2014.

Issue #4 - Appellant and Appellee Nonsuited Each Other, Thus With No Remaining Parties to the Litigation, the Trial Court Illegally Continued to Rule on a Moot Controversy

The facts in Issue #4 are identical as in the above Issue #3. In addition to the facts listed above, Appellant's nonsuit against Appellees was filed on the same day Appellant filed his nonsuit against the only remaining defendants in the litigation, titled "Plaintiff's Notice of Non-Suit Without Prejudice as to Only Defendants Doyle Raizner LLP, Michael Patrick Doyle, and Jeffrey Lewis Raizner" (Volume II CR:941) filed June 30, 2014. Appellant filed his "Plaintiff's Motion for Reconsideration, Motion to Vacate and Bill of Review (1st Supplemental CR:1310) filed October 5, 2014, stating the fact that there were no remaining parties to the litigation. (1st Supplemental CR:1315,¶7) The only remaining party, Amerisure Insurance Company, was never served, never made an appearance, or waiver of appearance. (1st Supplemental CR:1312,¶4) Appellant non-suited Appellees on June 30, 2014, disposing of all parties and all claims, thus ending the litigation (see Exhibit C (1st Supplemental CR:1338)). Because Appellees non-suited with prejudice all of their claims as to Appellant, and Appellant non-suited all of his claims against Appellees, and there were no remaining parties to the litigation, the litigation was rendered a moot controversy. There were no remaining controversies between the parties. Nonetheless, the trial court denied

Appellant's motion for reconsideration in the Order titled "ORDER DENYING MARK THUESEN'S MOTION FOR RECONSIDERATION, MOTION TO VACATE AND BILL OF REVIEW" (1st Supplemental CR:1354) signed October 21, 2014.

Issue #5 - Appellant Denied Absolute Right to a Nonsuit

The facts in Issue #5 are identical as in the above Issue #3 and Issue #2. Issue #5 is related to disposition of the first lawsuit in 2012, Cause No. 2012-49262, of Appellant's counter-claims in his last live answer of "Defendant's Second Amended Original Answer" (Volume I CR:48) filed March 31, 2013. Appellees filed a "Plaintiffs' Traditional and No-Evidence Motion for Summary Judgment on Defendant Mark L. Thuesen's Counter-Claims" (Volume I CR:286) filed February 24, 2014. About two weeks earlier, Appellees' and their legal counsel Doyle and Raizner entered into an agreed order to lift the automatic bankruptcy stay applicable to the 151st District Court actions on February 5, 2014 in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 13-37041-H5-13, which stated in part, "In the event Amerisure discontinues the defense of Mark Thuesen…, then no further action may be taken by or against Mark Thuesen in the state court lawsuit, and Swamplot's claims against Thuesen, if any, and Thuesen's counterclaims against Swamplot, shall NOT be prosecuted without further order of this Court," (see attached Exhibit

C (Volume I CR:528)) Appellees settled all claims against Thuesen, and filed a notice of non-suit in the 151st District Court, which was apparent on its face that "Amerisure has discontinued the defense of Mark Thuesen," (see attached Exhibit B (Volume I CR:525 filed on March 14, 2014) and formal notice of non-representation filed with the court on April 8, 2014 as evidenced in Exhibit D (Volume I CR:530)). Thus the automatic-stay was once again in effect in the 151st District Court, Cause No. 2012-49262. Appellees' traditional and no-evidence motion for summary judgment would then be an action for relief against the debtor (Appellant). Appellant sent notice via email to Appellees' attorneys of these facts in his email from Appellant (Volume I CR:398) filed March 14, 2014. Appellees responded by filing a "Notice of Abatement of Remaining Claims (Counter-Claims of Mark Thuesen) as Provided by Order Lifting Bankruptcy Stay" (Volume I CR:393) filed March 14, 2014. Three days later, on March 18, 2014, the trial court registry reflects that Appellees passed on their traditional and no-evidence motion for summary judgment oral hearing set for March 31, 2014 at 11:30 a.m., and never reset their motion for another hearing. Three months later, with no pending request for relief from Appellant's 2012 counter-claims against Appellees, Appellant nonsuited all of his claims against Appellees in his "Plaintiff's Notice of Non-Suit Without Prejudice as to Only Defendants Swamplot Industries LLC, Laurence David Albert and Beth Brinsdon (Volume II CR:943)

filed June 30, 2014. A few weeks later, Appellees filed their "Swamplot Parties Motion to be Considered Prevailing Parties in 2012 Counter-Claims" (Volume II CR:1038) filed July 17, 2014. Appellant responded by filing his "Plaintiff Thuesen's Response to Defendant Swamplot Parties Motion to be Considered Prevailing Parties in 2012 Counter-Claims (Volume II CR:1137) filed July 27, 2014. Appellant factually stated that (Volume II CR:1137,¶1) the U.S. Bankruptcy Court did not lift the automatic stay to allow for a ruling for summary judgment as there was no summary judgment relief pending before the trial court. On March 31, 2014, Appellees voluntarily passed on their motion for summary judgment, thus pursuant to TEX. R. CIV. P. 162, there was no pending claim for affirmative relief at the time Appellant filed his Rule 162 Dismissal or Non-suit. Nonetheless, the trial court granted Appellees request to be declared the prevailing parties in the "ORDER GRANTING APPELLEES' MOTION ON 2012 COUNTER-CLAIMS" (Volume II CR:1141) signed July 28, 2014.

Issue #6 - Trial Court Violated Appellant's Due Process of Law

From July 31, 2014 through October 2, 2014, the trial court Judge Engelhart issued a series of *sua sponte* Orders. These Orders are titled "ORDER" (Volume II CR:1143) signed July 31, 2014, "ORDER" (1st Supplemental CR:75) signed August 28, 2014, "ORDER" (1st Supplemental CR:1185) signed September 16, 2014, "ORDER STRIKING PLEADINGS" (1st Supplemental CR:1187) signed

September 16, 2014, and "AMENDED ORDER" (1st Supplemental CR:1307) signed October 2, 2014. Appellant was never given notice of any of these *sua sponte* Orders, no notice of any hearing set in the Orders, Appellant was not in attendance of any of these Order hearings, nor filed any response to any of these Orders. Through these *sua sponte* Orders and hearings, Judge Engelhart arbitrarily without any evidence before him illegally granted unrequested relief to Appellees. As further proof of the lack of service and notice that was never given to Appellant for these *sua sponte* Orders, the trial court's own evidence clearly illustrates their failure to give notice to Appellant in their "ORDER notice to Thuesen" (1st Supplemental CR:93) filed August 28, 2014, which states "FAILED" near the bottom of the document as the trial court tried to fax notice to Appellant's home phone number that cannot accept faxes. In addition, the trial court ordered Appellees to provide notice and service through a Constable at an address where Appellant did not reside, as evidence by "Constable Return of Individual" (1st Supplemental CR:1161) filed September 8, 2014. Although the trial court has in the past called Appellant to give oral notice of a trial court Order, no one from the trial court ever called Appellant. Appellees never called Appellant to at least give oral notice. Appellant later discovered these *sua sponte* Orders and filed his "Plaintiff's Motion for Reconsideration, Motion to Vacate and Bill of Review" (1st Supplemental CR:1310) filed October 5, 2014. Appellant stated the facts, (1st

Supplemental CR:1321,¶17), that Appellees never complained of Appellant's Star of David watermark, nor that it "hindered the readability" of Appellees' responses. Judge Engelhart stated in his *sua sponte* show cause Order, "while the Rules of Procedure do not speak to the use of watermarks on pleadings or documents filed with a court," and "insertion of such symbol into a document filed with a Court is not only inappropriate, but also irrelevant to the issues under consideration." The trial court exceeded its jurisdiction by granting unrequested relief in the absence of pleadings supporting that relief. The trial court sanctioned Appellant for out-of-court conduct without first providing notice and an opportunity to be heard. Even if the trial court was exercising its inherent power to assess sanctions for the filing of groundless pleadings, the trial court heard no evidence that the groundless pleading was filed in bad faith or for the purposes of harassment. There was no evidence that Appellant acted in bad faith or that Appellant's pleading interfered with the trial court's exercise of its core functions. The trial court acted without reference to any guiding principle that prohibits religious symbols or watermarks in pleadings. Nonetheless, the trial court denied Appellant's response to these *sua sponte* Orders in "ORDER DENYING MARK THUESEN'S MOTION FOR RECONSIDERATION, MOTION TO VACATE AND BILL OF REVIEW" (1st Supplemental CR:1354) signed October 21, 2014.

Issue #7 - Trial Court Judge's Bias Denied Appellant's Due Process of Law

and Warranted Recusal

The facts in Issue #7 are identical as in the above Issue #6. Due in part to Appellant never receiving notice of the above *sua sponte* Orders and rulings, Appellant requested recusal of Judge Engelhart in "Plaintiff's Motion to Recuse Judge Engelhart" (1st Supplemental CR:1201) filed September 23, 2014. The facts are (1st Supplemental CR:1201,¶1) that Judge Engelhart is of the Jewish faith and practices his religion on an almost extreme schedule. Appellees are of the Jewish faith. Appellees' attorney Jeff Raizner is of the Jewish faith. Appellees' Original Petition and numerous pleadings provided a non-stop barrage of alleged anti-Semitic Jewish defamation subject matter and other personal insults of Judge Engelhart that was alleged by Appellees to have been made by Appellant. Judge Engelhart was a Director of the Anti-Defamation League, an organization specifically created to pursue and extinguish defamation against the Jewish faith. Judge Engelhart's ruling of September 9, 2014, (see Exhibit R (1st Supplemental CR:1282)) was overturned on September 23, 2014, by the Fourteenth Court of Appeals, (see Exhibit S (1st Supplemental CR:1284)). In addition, (1st Supplemental CR:1204,¶8) there is no valid reason for Judge Engelhart to sign an Order of dismissal against the Doyle Raizner parties 68 days after Appellant filed a non-suit and dismissal of the Doyle Raizner parties, especially since a non-suit is effective immediately and it is a ministerial act to sign an Order of dismissal, (see

Exhibits B (1st Supplemental CR:1234) and D (1st Supplemental CR:1238)). Furthermore, (1st Supplemental CR:1210,¶22) from the day Appellant no longer had legal counsel, and was *pro se*, the record reflects that there were 11 motions and hearings held. The parties in opposition to Appellant won every motion and were granted all relief requested, and even relief not requested. In response to Appellant's motion to recuse, Judge Engelhart denied Appellant's recusal motion in the "ORDER ON MOTION TO RECUSE AND TO REFER TO PRESIDING JUDGE" (1st Supplemental CR:1292) signed September 24, 2014. Shortly thereafter, the recusal motion was assigned to another court in the "ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE" (1st Supplemental CR:1299) signed September 29, 2014. The referring trial court denied Appellant's recusal in the "ORDER ON MOTION TO RECUSE AFTER HEARING" (1st Supplemental CR:1302) signed October 1, 2014.

SUMMARY OF THE ARGUMENT

Issue #1 - Appellee lawyers' dual roles as trial lawyer and fact witness caused actual prejudice to Appellant. Even if the cases share common questions of law and fact, an abuse of discretion may be found if the consolidation results in prejudice to the complaining party. Appellees' legal counsel, Doyle Raizner LLP, Doyle and Raizner in the 151st suit will confuse the finder of fact because Doyle and Raizner are acting as an advocate, whereas in the 152nd suit Doyle and Raizner are essential witnesses. Thus, consolidation would prejudice Appellant.

Issue #2 - Appellee's Motion to Consolidate violated the Bankruptcy Order. Appellant and Appellees had an agreed Order in place that modified the automatic bankruptcy stay. It is undisputed that only a bankruptcy court has jurisdiction to terminate, annul or modify the automatic stay. The Bankruptcy Court Order conditionally modified the automatic-stay and the trial Court must strictly construe an order modifying the automatic stay. The automatic stay deprives state courts of jurisdiction over proceedings against the debtor, and any action taken against the debtor while the stay is in place is void and without legal effect. Thus, the trial court's order to consolidate the 152nd case into the 151st case modified the conditional automatic stay and is void.

Issue #3 - Appellant was denied his absolute right to a nonsuit pursuant to TEX. R. CIV. P. Rule 91a.5(a). Pursuant to TEX. R. CIV. P. Rule 91a.5(a), "the

court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a non-suit of the challenged cause of action…" Appellant filed a notice of non-suit on June 30, 2014, which was seven days before the date of the hearing, thus the court may not rule on a motion to dismiss.

Issue #4 - Appellant and Appellee nonsuited each other, thus with no remaining parties to the litigation, the trial court illegally continued to rule on a moot controversy. A nonsuit renders the merits of the nonsuited case moot. Courts are prohibited from deciding moot controversies.

Issue #5 - Appellant was denied an absolute right to a nonsuit on his 2012 counter-claims. Appellees had filed a motion for summary judgment on Appellant's 2012 counter-claims. A few days later, Appellees abated their motion and voluntarily passed on their hearing date. Appellees never set another hearing date. Three months later, Appellant filed a nonsuit of all his claims and counter-claims against Appellees. Appellant's notice of nonsuit was timely filed, which extinguished the case from the moment the motion was filed. Two weeks later, Appellees filed a motion to be declared prevailing parties claiming that Appellant only filed a nonsuit to avoid an unfavorable ruling, although no ruling was before the trial court. Nonetheless, the trial court illegally granted Appellees request to be declared prevailing parties.

Issue #6 – The trial court violated appellant's due process of law by issuing

multiple *sua sponte* Orders against Appellant. Appellant was never given notice of any of these *sua sponte* Orders, no notice of any hearing, Appellant was not in attendance of any hearing, nor filed any response, and the trial court arbitrarily without any evidence before it illegally granted unrequested relief to the Appellees. Notice is essential for the proper imposition of sanctions. The trial court is not permitted to sanction out-of-court conduct without first providing notice and an opportunity to be heard. Spontaneous imposition of sanctions without notice or hearing violated Appellant's due process.

Issue #7 – The trial court judge's bias denied Appellant's due process of law and warranted recusal. Judge Engelhart used his personal bias and prejudice to deny Appellant due process of law and to make wrongful and inappropriate rulings. One of the most fundamental components of a fair trial is a neutral and detached judge. Appellant does not have to prove what is going through the trial judge's mind, nor does Appellant have to prove actual bias. When the bias attains a level denying the movant due process of law, recusal is warranted.

ARGUMENT AND AUTHORITIES

Issue #1 - Appellee Lawyers' Dual Roles as Trial Lawyer and Fact Witness Caused Actual Prejudice to Appellant

In Appellant's motion "Plaintiff's Response to Defendant's Motion to Consolidate" (Volume I CR:513) filed April 18, 2014, beginning at (Volume I

CR:517,¶6), the two suits do not involve common questions of law or facts as the 20 counterclaims asserted in the first lawsuit are entirely different than the 9 claims asserted in the second lawsuit. The court should not consolidate the two suits because the suit in the 151st arose from defamation and malicious prosecution, while the suit in the 152nd arose two years later for breach of contract, which are two entirely different transactions. In addition, the relevant and material evidence presented in the 151st suit is entirely different and irrelevant to the 152nd suit. If "all of the facts and circumstances of the case unquestionably require a separate trial to prevent a manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion," the trial court does not have any discretion to order consolidation. *See Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W. 2d 712, 716 (Tex.App.—Dallas 1997, orig. pet.) (citing *Womack v. Berry*, 156 Tex.44, 291 S.W.2d 677, 683 (1956). Even if the cases share common questions of law and fact, an abuse of discretion may be found if the consolidation results in prejudice to the complaining party. *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d at 738 (Tex.App.-Houston [1st Dist.] 1992, writ denied). In deciding whether to consolidate, the trial court must balance the judicial economy and convenience that may be gained by the consolidation against the risk of an unfair outcome because of prejudice or jury confusion. *See Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 615 (Tex.App.—El Paso 1992, orig. proceeding). If the two

cases are consolidated, there will be jury confusion and prejudice to Appellant as the defendants in the 152nd suit, Doyle and Raizner, are attorneys who represent Appellees in the 151st suit, and Appellant would be prevented from invoking Tex.R. Civ. P. 267, "placing witnesses under the rule," during trial as Defendants Doyle and Raizner would not be able to represent their Appellee clients because Doyle and Raizner are witnesses in the 152nd suit. *(Volume I CR:518,¶6)* Not only would Doyle and Raizner's dual roles as attorneys and witnesses for Appellees prejudice Appellant, it would also prejudice Appellees by preventing them from using their counsel of choice and ultimately require them to find new counsel who would be unfamiliar with the litigation in the 151st, thus disrupting court proceedings. Consolidation will unnecessarily increase costs for all parties, create delays from the bankruptcy court, prejudice the parties with the Tex.R. Civ. P. 267, "placing witnesses under the rule," and confuse the jury as to Doyle and Raizner's roles as witnesses or counsel. When a lawyer is or may be a witness necessary to establish an essential fact, Texas Disciplinary Rule of Professional Conduct 3.08 prohibits the lawyer from acting as both an advocate and a witness in an adjudicatory proceeding. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a). Rule 3.08 was "promulgated as a disciplinary standard rather than one of procedural disqualification, but [Texas courts] have recognized that the rule provides guidelines relevant to a disqualification determination." *See In re The*

Williard Law Firm, L.P., No. 01-13-00358-CV (Tex.App.-Houston [1st Dist.] 2013) (citing *In re Sanders,* 153 S.W.3d at 56) (citing *Anderson Prod'g Inc. v. Koch Oil Co.,* 929 S.W.2d 416, 421 (Tex.1996)). Rule 3.08 is grounded principally on the notion that the finder of fact may become confused when one person acts as both advocate and witness. *See In re Guidry*, 316 S.W.3d 729,740 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding) (citing *Anderson Producing, Inc. v. Koch Oil Co*., 929 S.W.2d 416, 422 (Tex.1996). "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Tex.Disciplinary R. Prof'l Conduct 3.08 cmt. 4. The rule reflects the concern that an opposing party may be handicapped in challenging the credibility of a testifying lawyer. *Anderson*, 929 S.W.2d at 416. *(Volume I CR:519,¶6)* Other possible justifications for the rule include: (1) a testifying lawyer may be a less effective witness because he is more easily impeachable for interest; (2) a lawyer-witness may have to argue his own credibility; (3) while the role of a witness is to objectively relate facts, the role of an advocate is to advance his client's cause; and (4) an appearance of impropriety may be created when a lawyer testifies on behalf of his client. *See F.D.I.C. v. U.S. Fire Ins. Co*., 50 F.3d 1304, 1311 (5th Cir.1995). Appellees' legal counsel, Doyle Raizner LLP, Doyle

and Raizner in the 151st suit will confuse the finder of fact because Doyle and Raizner are acting as an advocate, whereas in the 152nd suit Doyle and Raizner are essential witnesses. Thus, consolidation would prejudice Appellant. Significantly, in the 151st suit, Doyle and Raizner are Appellees' attorneys, and Doyle and Raizner's testimony in this regard is material to the issue of *when* Appellees first had knowledge of facts that would have caused a reasonably prudent person to conclude that Appellees' actions would have caused the breach of the mediated settlement agreement. It is an essential fact for Appellant to depose attorneys Doyle and Raizner as witnesses to establish Appellant's evidence for breach of the mediated settlement agreement, because no other sources of proof would reveal *what* the lawyers knew and *when* they knew it, crucial elements for Appellant. Appellant is entitled to call attorneys Doyle and Raizner as witnesses to furnish testimony concerning the substance and thought processes in their actions leading up to their, and their Appellee client's breach of the mediated settlement agreement. *In re Guidry*, 316 S.W.3d 729,740 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding) (lawyer's testimony was necessary to establish an essential fact because other sources of proof would not reveal what the lawyer knew and when he knew it, crucial elements of the defense). *(Volume I CR:520,¶6)* As a matter of law, Doyle and Raizner's testimony is necessary to establish an essential fact and none of the exceptions listed in Rule 3.08(a) apply. *See U.S. Fire Ins. Co.*,

50 F.3d at 1317 (holding that plaintiff's lawyer was necessary witness under lawyer-witness rule because lawyer had knowledge of facts relating to defendant's defense based on discovery of facts that would put plaintiff on notice about its loss); *Ayus v. Total Renal Care, Inc.*, 48 F.Supp.2d 714, 715-17 (S.D.Tex.1999) (disqualifying defendant's lawyer under lawyer-witness rule because lawyer had knowledge of material facts based on his authorship of several letters that were necessary evidence in the case); *Dean Park & Const. & Real Estate Invest. Corp. v. Meredith, Donnell & Abernethy,* No. 13-03-730-CV, 2005 WL 1832046, at *3 (Tex.App.-Corpus Christi Aug. 4, 2005, no pet.) (mem.op.) (holding that trial court did not err by concluding that testimony of plaintiff's lawyer was necessary to establish essential element of his client's case); *In re Bahn*, 13 S.W.3d 865, 874 (Tex.App.-Fort Worth 2000, no pet.) (holding that trial court did not err by concluding that testimony of plaintiff's lawyer was necessary to establish essential element of his client's case). In addition, allowing Doyle and Raizner to serve as both a trial lawyer and a fact witness would cause actual prejudice to Appellant by blurring the line in the jurors' minds between Doyle and Raizner's legal arguments as counsel and their trial testimony as a fact witness, potentially inducing the jury to give undue weight to their arguments as counsel because of their extensive personal knowledge of the facts or because the jury could not recall whether statements they made during the trial were made from the counsel table or the

witness stand. If Doyle and Raizner were permitted to serve on Appellees' courtroom team, Appellant would be prejudiced in his ability to obtain Doyle and Raizner's exclusion from the courtroom under Tex.R. Civ. P. 267, "placing witnesses under the rule," the rule for exclusion of witnesses. In granting Defendant's Motion to Consolidate, the trial court will have determined that allowing Doyle and Raizner to occupy dual roles as trial lawyers and fact witnesses would not cause Appellant actual prejudice. *(Volume I CR:521,¶6)* To the extent that the trial court makes this determination, the 14th Court of Appeals has already concluded that the trial court will have clearly abused its discretion. *See In re Guidry*, 316 S.W.3d 729,740 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding) *(*citing *In re Bahn*, 13 S.W.3d at 874 (Tex.App.-Fort Worth 2000, no pet.) (concluding that lawyer's dual roles as trial lawyer and fact witness would cause actual prejudice to opposing party). The trial court erred in its view of the law and its assessment of the evidence, thus the Order to consolidate the two cases and every Order thereafter in the 151st district court are void.

Issue #2 - Appellee's Motion to Consolidate Violated the Bankruptcy Order

In Appellant's motion "Plaintiff's Response to Defendant's Motion to Consolidate" (Volume I CR:513) filed April 18, 2014, beginning at (Volume I CR:521,¶7) Appellees' and their legal counsel Doyle and Raizner entered into an agreed order to modify the automatic bankruptcy stay (see attached Exhibit

C (Volume I CR:528)). Given the facts, the automatic-stay was in effect in the 151st District Court, Cause No. 2012-49262, and the filing of Appellees' Motion to Consolidate an action into Cause No. 2012-49262 will subject all parties and causes of action to the automatic-stay, 11 U.S.C. § 362(a). Appellees' Motion to Consolidate is an action for relief against the debtor and violates the automatic-stay. (Volume I CR:522,¶9) In the 151st District Court, Appellees, including Doyle and Raizner, agreed to the federal bankruptcy order, which is clearly in effect. The order requires certain conduct, specifically, "no further action may be taken by or against Mark Thuesen in the state court lawsuit," and Appellees' and their legal counsel Doyle and Raizner have failed to comply with the order by taking an action against Appellant, namely the filing of their Motion to Consolidate. (Volume I CR:523,¶10) It is undisputed that only a bankruptcy court has jurisdiction to terminate, annul or modify the automatic stay. 11 U.S.C. § 362(d); *see In re Edwin A. Epstein, Jr. Operating Co., Inc.*, 314 B.R. 591, 598-99 (Bankr.S.D.Tex.2004) (citing *Farley v. Henson,* 2 F.3d 273 (8th Cir.1993); *Continental Cas., Co. v. Gullett,* 253 B.R. 796 (S.D.Tex.1999) (state courts lack authority to terminate the automatic stay and an erroneous determination of the inapplicability of the automatic stay would be voidable.) Thus, an action taken in violation of the automatic stay, including the ruling granting the Motion to Consolidate, would be void. The Texas Supreme Court has twice said that actions

taken in violation of an automatic stay are void. *Howell v. Thompson,* 839 S.W.2d 92, 92 (Tex.1992). Appellant responded to Appellees main argument for consolidation in Appellant's "Plaintiff's Reply to Defendant's Reply to Plaintiff's Response to Defendant's Motion to Consolidate" (Volume I CR:540) April 19, 2014, specifically at (Volume I CR:542,¶2), Appellees' second issue of trial court jurisdiction cited in *Mantas* v. *Fifth Court of Appeals, 925* S.W.2d at 658-59 (Tex.1996) is misplaced for two reasons. *Mantas,* 925 S.W.2d at 658-59 states "a claim to enforce the settlement agreement should, if possible**,** be asserted in that court under the original cause number." It was not possible for Appellant to assert a claim to enforce the settlement agreement because Appellant could not take any action against Appellees in violation of the Bankruptcy Court's Order. *Mantas,* 925 S.W.2d at 658-59 goes on to state, "However, where the dispute arises while the underlying action is on appeal, as in this case, the party seeking enforcement must file a separate breach of contract action,**"** thus Appellant's enforcement action was not only legally proper, but mandated by the Supreme Court because there was an "underlying action" in the Bankruptcy Court preventing Appellant from enforcing the settlement agreement in the 151st Cause No. 2012-49262. Appellant further argued in his "Plaintiff Thuesen's Motion for Reconsideration and Motion to Vacate (Volume I CR:711) May 26, 2014, specifically at (Volume I CR:712,¶2), the Bankruptcy Court Order conditionally modified the automatic-stay and the trial

Court must strictly construe an order modifying the automatic stay. *See Dickinson v. Dickinson*, 324 S.W.3d at 656 (Tex.App.-Fort Worth 2010, no pet.) (citing *Stephens v. Hemyari*, 216 S.W.3d at 529 (Tex.App.-Dallas 2007, pet. denied) (citing *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 114 (5th Cir.1987); *Davis v. Baker*, 29 S.W.3d 921, 924 (Tex.App.-Austin 2000, no pet.) (citing *Casperone*) (The terms of an order modifying the automatic stay must be strictly construed.) Thus, the trial Court did not strictly construe the Bankruptcy Court Order rendering the May 8, 2014 Order and the May 23, 2014 Order void. (see Exhibit D (Volume I CR:723) and E (Volume I CR:726)). Void orders may be circumvented by collateral attack or remedied by mandamus. *See Eguia v. Eguia*, 367 S.W.3d 455, 458-59 (Tex.App.-Corpus Christi 2012, no pet.) *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990) (orig. proceeding); *Sanchez v. Honorable Darrell Hester*, 911 S.W.2d 173, 176 (Tex.App.-Corpus Christi 1995, orig. proceeding). (Volume I CR:713,¶3) The trial Court's Orders have annulled or modified the automatic stay. It is undisputed that only a bankruptcy court has jurisdiction to terminate, annul or modify the automatic stay. 11 U.S.C. § 362(d); *see In re Edwin A. Epstein, Jr. Operating Co., Inc.*, 314 B.R. 591, 598-99 (Bankr. S.D. Tex.2004) (citing *Farley v. Henson*, 2 F.3d 273 (8th Cir.1993); *Continental Cas., Co. v. Gullett*, 253 B.R. 796 (S.D.Tex.1999) (state courts lack authority to terminate the automatic stay and an erroneous determination of the inapplicability

of the automatic stay would be voidable.) An automatic stay in bankruptcy prohibits the commencement or continuation of any judicial action or proceeding against the debtor and any property within the debtor's bankruptcy estate. *See* 11 U.S.C.A. § 362(a); *Eguia v. Eguia*, 367 S.W.3d 455, 458-59 (Tex.App.-Corpus Christi 2012, no pet.). Thus, an action taken in violation of the automatic stay, would be void. The Texas Supreme Court has twice said that actions taken in violation of an automatic stay are void, not voidable. *See Howell v. Thompson*, 839 S.W.2d 92, 92 (Tex.1992). *See also In re Ferrell*, No. 13-14-00130-CV, (Tex.App.-Corpus Christi March 7, 2014, writ granted) (citing *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940); *Continental Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex.1988); *Eguia*, 367 S.W.3d at 458; *In re Pegasus Funds TFN Trading Partners, LP*, 345 S.W.3d 175, 176-77 (Tex.App.-Dallas 2011, orig. proceeding); *In re De La Garza*, 159 S.W.3d 119, 121 (Tex.App.-Corpus Christi 2004, orig. proceeding)). (The automatic stay deprives state courts of jurisdiction over proceedings against the debtor, and any action taken against the debtor while the stay is in place is void and without legal effect.) The trial court erred in its view of the law and its assessment of the evidence, thus the Order to consolidate the two cases and every Order thereafter in the 151st district court are void.

Issue #3 - Appellant Denied Absolute Right to a Nonsuit Pursuant to TEX. R. CIV. P. Rule 91a.5(a)

In Appellant's motion "Plaintiff Thuesen's Response to Defendant Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims" (Volume II CR:1020) July 13, 2014, beginning at (Volume II CR:1021,¶3), although the temporal proximity of Appellant's nonsuit may appear to be filed in response to Appellees' motion to dismiss, that is not true as Appellees' motion was filed on May 5, 2014, almost 60 days before Appellant filed his nonsuit. All the evidence clearly illustrates that Appellant filed his nonsuit only after discovering previously unknown federal legal impediments to success. (Volume II CR:1022,¶3) "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Miramar Development Corp.* v. *Sisk,* No. 04-13-00777-CV, (Tex.App. San Antonio April 23, 2014) (citing *Epps* v. *Fowler, 351* S.W.3d at 868) (citing *Christiansburg Garment Co.* v. *Equal Employment Opportunity Comm'n,* 434 U.S. 412, 420-21, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)). (Volume II CR:1022,¶4) "Under Texas law, a plaintiff has an absolute right to take a nonsuit "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence." TEX. R. CIV. P. 162 (titled "Dismissal or Non-Suit"); *In re Baker,* 420 S.W.3d 405 (Tex.App. Texarkana 2014) (citing *In re Riggs*, 315 S.W.3d 613, 615 (Tex.App.-Fort Worth 2010, orig. proceeding)) (citing *Travelers Ins. Co.* v. *Joachim,* 315 S.W. 3d 860, 862 (Tex.2010); *Villafani* v. *Trejo,* 251

S.W. 3d 466, 468-69 (Tex.2008); *BHP Petroleum Co.* v. *Millard,* 800 S.W.2d 838, 840-41 (Tex.1990); *Greenberg* v. *Brookshire,* 640 S.W.2d 870, 871 (Tex.1982)). If a notice of nonsuit is timely filed, it "extinguishes a case or controversy from 'the moment the motion is filed.'" *Epps v. Fowler,* 351 S.W.3d 862, 868 (Tex.2011) (quoting *Joachim,* 315 S.W.3d at 862; *Univ. of Tex.Med. Branch at Galveston* v. *Estate of Blackmon ex rel. Shultz,* 195 S.W.3d 98, 100 (Tex.2006) (per curiam)). In Appellant's motion "Plaintiff Thuesen's Response to Swamplot Parties' Motion for Fees and Expenses Incurred in 2014 Claims" (Volume II CR:1220) filed August 25, 2014, specifically at (Volume II CR:1222,¶5) the court docket clearly states that the Appellees passed on their Rule 91a motion to dismiss on July 7, 2014 (see Exhibit A (Volume II CR:1230)). At (Volume II CR:1223,¶7), Appellees filed their Rule 91a motion to dismiss on May 5, 2014. Pursuant to TEX. R. CIV. P. Rule 91a.3(c), "a motion to dismiss must be granted or denied within 45 days after the motion is filed," which deadline would be June 19, 2014. The court's record reflects that no ruling granting or denying Appellees May 5, 2014 Rule 91a motion to dismiss was issued, thus the motion was overruled by operation of law. (Volume II CR:1223,¶8) Appellees claim to have filed an "amended" Rule 91a motion to dismiss on June 12, 2014, however the TRCP rules do NOT allow the extension of deadlines by amending a Rule 91a motion to dismiss. Appellees acknowledge that certain causes of action were non-suited by

amendment, however the Appellees have fraudulently tried to underhandedly put forth their attorney fees for these expired non-suited causes of action into their request for damages. Any new causes of action that could have been included in the June 12, 2014 Rule 91a motion to dismiss, "must be granted or denied within 45 days after the motion is filed," which 45 day deadline would be on July 27, 2014. However, as stated above, Appellees passed on their Rule 91a motion to dismiss written submission hearing set for July 7, 2014 at 8:00 a.m., (see Exhibit A (Volume II CR:1230)) and never requested another hearing date before the July 27, 2014 deadline, thus the June 12, 2014 Rule 91a motion to dismiss was overruled by operation of law. (Volume II CR:1224,¶9) Pursuant to TEX. R. CIV. P. Rule 91a.5(a), "the court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a non-suit of the challenged cause of action…" Appellant filed a notice of non-suit on June 30, 2014, which was seven days before the date of the hearing, thus the court may not rule on a motion to dismiss. Appellees are attempting an end-around to TEX. R. CIV. P. Rule 91a.5(a) by obtaining an order that the Appellees were the prevailing parties in a July 14, 2014 Order. However, pursuant to TEX. R. CIV. P. Rule 91a.2, "a motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." Appellees titled their

end around motion as, “Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims,” and in violation of TEX. R. CIV. P. Rule 91a.2, Appellees did not “identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both,” nor did the Order on their motion identify any of the requirements of TEX. R. CIV. P. Rule 91a.2. Furthermore, the trial court’s Order signed on July 14, 2014 does not set any future hearing to determine damages or costs to be awarded to Appellees, thus the court has no jurisdiction to award attorney fees, costs, or appellate fees. (Volume II CR:1225,¶10) Pursuant to TEX. R. CIV. P. Rule 91a.7, “the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court.” Appellees were never found to be the “prevailing party on the motion,” Appellees were found to be the “prevailing party” on their “Swamplot Parties Motion to be Considered Prevailing Parties in 2014 Claims,” thus Appellees are not entitled to attorney fees incurred pursuant to TEX. R. CIV. P. Rule 91a.7, and more importantly, the trial court’s Order signed on July 14, 2014 did not award the Appellees any damages at all, as Appellees did not request any damages but merely a finding that the 2014 claims be “dismissed with prejudice.” The trial court erred in its view of the law and its assessment of the evidence.

Issue #4 - Appellant and Appellee Nonsuited Each Other, Thus With No

Remaining Parties to the Litigation, the Trial Court Illegally Continued to Rule on a Moot Controversy

Appellant argued in "Plaintiff's Motion for Reconsideration, Motion to Vacate and Bill of Review" (1st Supplemental CR:1310) filed October 5, 2014, specifically at (1st Supplemental CR:1315,¶7) the only remaining party, Amerisure Insurance Company, was never served, never made an appearance, or waiver of appearance. A trial court does not have jurisdiction to enter an order or judgment against a person unless the record shows proper service of citation on that person, an appearance by the person, or a written memorandum of waiver of appearance on or before the date of entry of the order. *In re Suarez*, 261 S.W.3d 880, 882-83 (Tex.App.-Dallas 2008, orig. proceeding). (1st Supplemental CR:1312,¶4) Appellant non-suited Appellees on June 30, 2014, disposing of all parties and all claims, thus ending the litigation (see Exhibit C (1st Supplemental CR:1338)). Appellees had a pending Rule 91a Motion to Dismiss with a hearing date of July 7, 2014 at 8:00 a.m., however the record reflects that the Appellees dismissed their Rule 91a motion, (see Exhibit D (1st Supplemental CR:1340)), and did not refile, and pursuant to Tex.R. Civ. P. 91a.5(a), "the court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action." Because Appellees non-suited with prejudice all of their claims as to Appellant, and Appellant non-suited all of his

claims against Appellees, and there were no remaining parties to the litigation, the litigation was rendered a moot controversy. A nonsuit "renders the merits of the nonsuited case moot." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex.2010). Courts are prohibited from deciding moot controversies. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex.1999). "A case is moot if it cannot proceed to a final judgment that will be effective as to any right which the Court might determine." *Stewart v. Bank of Woodson*, 641 S.W.2d 230, 231 (Tex.1982). A case also becomes moot when it is impossible for a court to grant effective relief for any reason. *State v. Gibson Products Co*., 699 S.W.2d 640, 641 (Tex.App.-Waco 1985, no writ); *James v. City of Round Rock*, 630 S.W.2d 466, 468 (Tex.App.-Austin 1982, no writ). *(1st Supplemental CR:1313,¶4)* "A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex.2005). Thus, the trial court lacked subject matter jurisdiction. "The mootness doctrine implicates subject matter jurisdiction." *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex.App.-Dallas 2010, no pet.). "[W]hen a case becomes moot the only proper judgment is one dismissing the cause." *Polk v. Davidson*, 145 Tex.200, 196 S.W.2d 632, 633 (1946); *see also Woodfield*, 305 S.W.3d at 416 ("If a case is moot, the appellate court is required to vacate any judgment or order in the trial court and dismiss the case."). A nonsuit renders the

merits of the case moot. *Estate of Blackmon*, 195 S.W.3d at 101 (cited in *Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex.2008)). A moot case lacks justiciability. *Patterson v. Planned Parenthood of Houston*, 971 S.W.2d 439, 442 (Tex.1998). Jurisdiction over the underlying lawsuit depends on justiciability, and for a controversy to be justiciable, there must be a real controversy between the parties that will actually be resolved by the judicial relief sought. *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex.1994). In the absence of a controversy that is legally presented for determination, a trial court lacks jurisdiction to render a personal judgment. *Matz v. Bennion*, 961 S.W.2d 445, 449 (Tex.App.-Houston [1st Dist.] 1997, pet. denied). If a court lacks jurisdiction over the parties and the subject matter before it, any judgment it renders is void. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990); *see State ex rel. Dishman v. Gary*, 163 Tex.565, 359 S.W.2d 456, 461 (1962) (orig.proceeding) (right of nonsuit is absolute, accordingly, an order of reinstatement and ancillary injunctive orders entered after nonsuit were "nugatory and void."). A trial court's attempted grant of a new trial following nonsuit is an act beyond its jurisdiction resulting in a void order. *In re Martinez*, 77 S.W.3d 462 (Tex.App.-Corpus Christi 2002, orig. proceeding); *see Zimmerman*, 941 S.W.2d at 261 (citing *Newman Oil Co. v. Alkek*, 657 S.W.2d 915, 920 (Tex.App.-Corpus Christi 1983, no writ)) (case decided under rule 164, predecessor of current rule 162; held the trial court could not ignore a nonsuit and

lacked jurisdiction to grant a summary judgment). The trial court erred by ruling on a moot controversy, in its view of the law and its assessment of the evidence.

Issue #5 - Appellant Denied Absolute Right to a Nonsuit

Appellant argued in "Plaintiff Thuesen's Response to Defendant Swamplot Parties' Motion to be Considered Prevailing Parties in 2012 Counter-Claims (Volume II CR:1137) filed July 27, 2014, (Volume II CR:1137,¶1), the U.S. Bankruptcy Court did not lift the automatic stay to allow for a ruling for summary judgment as there was no summary judgment relief pending before the trial court. On March 31, 2014, Appellees voluntarily passed on their motion for summary judgment, thus pursuant to TEX. R. CIV. P. 162, there was no pending claim for affirmative relief at the time Appellant filed his Rule 162 Dismissal or Non-suit. (Volume II CR:1138,¶3) "Under Texas law, a plaintiff has an absolute right to take a nonsuit "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence." TEX. R. CIV. P. 162 (titled "Dismissal or Non-Suit"); *In re Baker*, 420 S.W.3d 405 (Tex.App. Texarkana 2014) (citing *In Re Riggs*, 315 S.W.3d 613, 615 (Tex.App.-Fort Worth 2010, orig. proceeding)) (citing *Travelers Ins. Co. v. Joachim*, 315 S.W. 3d 860, 862 (Tex.2010). If a notice of nonsuit is timely filed, it "extinguishes a case or controversy from 'the moment the motion is filed.'" *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex.2011). The trial court erred in its view of the law and its assessment of the evidence.

Issue #6 - Trial Court Violated Appellant's Due Process of Law

Appellant argued in "Plaintiff's Motion for Reconsideration, Motion to Vacate and Bill of Review (1st Supplemental CR:1310) filed October 5, 2014, specifically at (1st Supplemental CR:1321,¶17) Appellees never complained of Appellant's Star of David watermark, nor that it "hindered the readability" of Appellant's responses. The trial court exceeded its jurisdiction by granting unrequested relief. *See In re Office of the Attorney General of Texas*, No. 14-08-00665-CV, (Tex.App. – Houston [14th Dist.] August 19, 2008) (citing *Moreno v. Moore*, 897 S.W.2d 439, 442 (Tex.App.-Corpus Christi 1995, no writ); *Fitzgerald v. Rogers*, 818 S.W.2d 892, 895-96 (Tex.App.-Tyler 1991, orig. proceeding) (granting mandamus relief from a discovery order that, inter alia, exceeded the requested relief). A trial court cannot grant relief to a party in the absence of pleadings supporting that relief, unless the issue has been tried by consent. *In re Park Memorial Condominium Ass'n*, 322 S.W.3d 447, 450 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding) (citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex.1983)) (citing Tex.R. Civ. P. 301); *Binder v. Joe*, 193 S.W.3d 29, 32 (Tex.App.-Houston [1st Dist.] 2006, no pet.)). On September 16, 2014, the trial court issued another *sua sponte* Order concerning Appellant's watermarks on his responses to the Appellees' moot motions, (see Exhibit J (1st Supplemental CR:1352)). In this Order, the trial court unlawfully imposed

sanctions against Appellant by striking 9 of his pleadings without any evidence. *See Kennedy v. Kennedy*, 125 S.W.3d at 19 (Tex.App.-Austin 2002, pet. denied) (holding court erred by striking pleadings without evidence that complained-of conduct significantly interfered with court's legitimate exercise of traditional core function). This illegal ruling for relief was never requested by any party, Appellant was never given notice of any of Judge Engelhart's *sua sponte* Orders, no notice of any hearing, Appellant was not in attendance of any hearing, nor filed any response, and Judge Engelhart arbitrarily without any evidence before him illegally granted unrequested relief to the Appellees. Appellant's due-process was violated. (1st Supplemental CR:1323,¶18) "Notice is essential for the proper imposition of sanctions." *In re Herewereagain, Inc.*, 383 S.W.3d 703 (Tex.App.-Houston [14th Dist.] 2012) (citing *Zep Mfg. Co. v. Anthony*, 752 S.W.2d 687, 690 (Tex.App.—Houston [1st Dist.] 1988, no writ). Although a trial court has the inherent authority to impose sanctions, and may do so *sua sponte*, the trial court is not permitted to sanction out-of-court conduct without first providing notice and an opportunity to be heard. *See, e.g., Greene v. Young*, 174 S.W.3d 291, 299–300 & n.4 (Tex.App.—Houston [1st Dist.] 2005, pet. denied); *Shockey v. A.F.P., Inc.*, 905 S.W.2d 629, 630 (Tex.App.—Houston [14th Dist.] 1995, no writ). Oral notice was insufficient, as a matter of law. *In re L.A.M.*, 975 S.W.2d at 83; *see also Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex.1988) (orig.proceeding); *In re Smith*, 981

S.W.2d 909, 911 (Tex.App.-Houston [1st Dist.] 1998, orig. proceeding). *Aldine Indep. Sch. Dist. v. Baty*, 946 S.W.2d 851, 852 (Tex.App.-Houston [14th Dist.] 1997, no writ) (holding that spontaneous imposition of sanctions without notice or hearing violated due process). By sanctioning a party without notice and an opportunity to be heard, the trial court violated their due-process rights and clearly abused its discretion. *See In re Bennett*, 960 S.W.2d 35, 40 (Tex.1997) (per curiam) (noting that the right to due process limits a court's power to sanction); *In re Park Mem'l Condo. Ass'n*, 322 S.W.3d 447, 450 (Tex.App.—Houston [14th Dist.] 2010, orig. proceeding) ("Due process, on a fundamental level, requires notice and a fair opportunity to be heard."); *Kugle v. DaimlerChrysler Corp*., 88 S.W.3d 355, 361 (Tex.App.—San Antonio 2002, pet. denied) ("A trial court abuses its discretion if it violates due process by imposing sanctions without notice or a meaningful hearing."). (1st Supplemental CR:1323,¶19) Even if Appellant's due-process had not been violated, and Thuesen had an opportunity to present evidence, the sanctions award assessed here is not sustainable based on the trial court's inherent power. A trial court has inherent power to sanction bad faith conduct during the course of litigation that interferes with the trial court's legitimate exercise of its core functions or to preserve the court's dignity and integrity. *Onwuteaka v. Gill*, 908 S.W.2d 276, 280 (Tex.App.-Houston [1st Dist.] 1995, no writ); *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex.App.-Houston [1st Dist.]

1994, writ denied), cert. denied, 516 U.S. 868 (1995). (1st Supplemental CR:1324,¶19) Assessing sanctions under the trial court's inherent power requires a two-step process. *Id*. First, the trial court must rely upon the rules and statutes expressly authorizing sanctions, and second, the trial court, applying its inherent power to impose sanctions, must make factual findings to determine whether there is some evidence that the conduct complained of significantly interfered with the court's legitimate exercise of its core functions. No evidence exists in the record before us that Appellant's watermark interfered with the trial court's core functions or impugned the trial court's dignity or integrity; nor did the trial court make any such findings in its sanctions' order. Numerous courts have held that a trial court abuses its discretion by exercising its inherent power to assess sanctions for the filing of groundless pleadings in the absence of evidence that the groundless pleading was filed in bad faith or for the purposes of harassment. *See, e.g.*, *Benavides v. Knapp Chevrolet*, No. 01-08-00212-CV, 2009 WL 349813, at *6 (Tex.App.-Houston [1st Dist.] Feb. 12, 2009, no pet.) (mem. op.) (citing multiple cases that overturned sanctions awarded under trial court's inherent power because there was no evidence of bad faith conduct, including *Phillips & Akers, P.C. v. Cornwell*, 927 S.W.2d 276, 280 (Tex.App.-Houston [1st Dist.] 1996, no writ). To the extent that the trial court awarded the sanctions at issue here based on its inherent power, it abused its discretion. *See Benavides*, 2009 WL 349813, at *6

(holding trial court abused its discretion by exercising its inherent power to impose sanctions for groundless pleading because no evidence existed that appellant acted in bad faith or that appellant's pleading interfered with the trial court's exercise of its core functions). Furthermore, the Star of David is no more offensive to the Jewish religion as the Christian Cross is offensive to the Christian religion. (1st Supplemental CR:1325,¶19) For a Jewish person to find the Star of David offensive is absurd; no logical person would ever believe Judge Engelhart was offended by his own religious symbol. The trial court acted without reference to any guiding principle that prohibits religious symbols or watermarks in pleadings. "A trial court abuses its discretion only when it has acted in an unreasonable or arbitrary manner, or when it acts without reference to any guiding principle." *In re Marriage of Jeffries*, 144 S.W.3d 636, 638 (Tex.App.-Texarkana 2004, no pet.) (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex.1985)). The trial court violated Appellant's due process of law, erred in its view of the law and its assessment of the evidence.

Issue #7 - Trial Court Judge's Bias Denied Appellant's Due Process of Law and Warranted Recusal

Appellant argued in his "Plaintiff's Motion to Recuse Judge Engelhart" (1st Supplemental CR:1201) September 23, 2014, specifically at (1st Supplemental CR:1201,¶1), Appellant requested recusal because Judge Engelhart's impartiality

might be reasonably questioned from his extrajudicial extreme Jewish religious beliefs that have caused personal bias or prejudice against the alleged anti-Semitic Jewish defamation subject matter of this case and against Appellant, which has recently resulted in Judge Engelhart violating Appellant's due-process of law by granting sanctions against Appellant *sua sponte* for unrequested relief related to a Jewish religious symbol, without notice or a hearing as required by law. Judge Engelhart's deep seated antagonism has made fair judgment impossible. Judge Engelhart's ruling of September 9, 2014, (see Exhibit R (1st Supplemental CR:1282)) was overturned on September 23, 2014, by the Fourteenth Court of Appeals, (see Exhibit S (1st Supplemental CR:1284)). (1st Supplemental CR:1210,¶23) Because of Judge Engelhart's impartiality, personal bias and prejudice against the alleged anti-Semitic Jewish defamation subject matter of the case and against Appellant, Judge Engelhart has already used his personal bias and prejudice to deny Appellant due process of law and to make wrongful and inappropriate rulings. *See Simpson v. State*, No. 01-12-00380-CR, (Tex.App. – Houston [1st Dist.] June 17, 2014) (citing *Abdygapparova v. State*, 243 S.W.3d at 198 (Tex.App.-San Antonio 2007, pet. Ref'd). (holding that claims of bias and prejudice based on judicial rulings must show "deep-seated favoritism or antagonism that would make fair judgment impossible" and deny a party due process of law; noting that the rulings would have to somehow be wrongful or

inappropriate, not just unfavorable to the complaining party.)); (citing *Kemp v. State*, 846 S.W.2d 289, 306 (Tex.Crim.App.1992)) (only when the bias attains a level denying the movant due process of law is recusal warranted.); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex.Crim.App.1983) (holding that the defendant must demonstrate the court's bias denied his right to due process). Appellant demonstrated that the following trial court ruling bias denied his right to due process, thus warranting recusal. (1st Supplemental CR:1213,¶27) On July 31, 2014, Judge Engelhart issued a show cause order *sua sponte* to determine unrequested sanctions for Appellees because Judge Engelhart claimed to be offended by Appellant's insertion of a Star of David watermark in Appellant's response to the Appellees' moot motions, (see Exhibit J *(*1st Supplemental CR:1244)). The Appellees never complained of Appellant's Star of David watermark, nor that it "hindered the readability" of Appellant's responses. Judge Engelhart stated in his *sua sponte* show cause Order, "while the Rules of Procedure do not speak to the use of watermarks on pleadings or documents filed with a court," and "insertion of such symbol into a document filed with a Court is not only inappropriate, but also irrelevant to the issues under consideration." The trial court exceeded its jurisdiction by granting unrequested relief. *See In re Office of the Attorney General of Texas*, No. 14-08-00665-CV, (Tex.App. – Houston [14th Dist.] August 19, 2008) (citing *Moreno v. Moore*, 897 S.W.2d 439, 442 (Tex.App.-

Corpus Christi 1995, no writ); *Fitzgerald v. Rogers*, 818 S.W.2d 892, 895-96 (Tex.App.-Tyler 1991, orig. proceeding) (granting mandamus relief from a discovery order that, inter alia, exceeded the requested relief). A trial court cannot grant relief to a party in the absence of pleadings supporting that relief, unless the issue has been tried by consent. *In re Park Memorial Condominium Ass'n*, 322 S.W.3d 447, 450 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding) (citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex.1983)) (citing Tex.R. Civ. P. 301); *Binder v. Joe*, 193 S.W.3d 29, 32 (Tex.App.-Houston [1st Dist.] 2006, no pet.)). (1st Supplemental CR:1214,¶28) On September 16, 2014, Judge Engelhart issued a *sua sponte* Order concerning Appellant's watermarks on his responses to the Appellees' moot motions, (see Exhibit Q (1st Supplemental CR:1280)). In this Order, Judge Engelhart imposed sanctions against Appellant by striking 9 of his pleadings. This illegal ruling for relief was never requested by any party, Appellant was never given notice of any of Judge Engelhart's *sua sponte* Orders, no notice of any hearing, Appellant was not in attendance of any hearing, nor filed any response, and Judge Engelhart arbitrarily without any evidence before him illegally granted unrequested relief to Appellees. Appellant's due process was violated because of Judge Engelhart's deep seated antagonism, making fair judgment impossible. (1st Supplemental CR:1218,¶31) The due-process clauses of both the Texas and the United States Constitutions guarantee a party an impartial

and disinterested tribunal in civil cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Metzger v. Sebek*, 892 S.W.2d 20, 37-38 (Tex.App. – Houston [1st Dist.] 1994, writ denied). No matter what evidence is against a defendant, the United States Constitution guarantees the defendant the right to an impartial judge. *See Abdygapparova v. State*, 243 S.W.3d at 198 (Tex.App.-San Antonio 2007, pet. Ref'd) (citing *Blue v. State*, 41 S.W.3d 129, 138 (Tex.Crim.App. 2000) (Mansfield, J., concurring)). The United States Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *see also Cain v. State*, 947 S.W.2d 262, 264 (Tex.Crim.App.1997) (acknowledging structural errors recognized by Arizona). The "presence on the bench of a judge who is not impartial" deprives a defendant of his basic protections and infects the entire trial process from beginning to end. *Arizona*, 499 U.S. at 309-10, 111 S.Ct. 1246; *see also Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). One of the most fundamental components of a fair trial is "a neutral and detached judge." *Simon v. State*, 203 S.W.3d 581, 592 (Tex.App.-Houston [14th Dist.] 2006, no pet.) (citing *Metzger v. Sebek*, 892 S.W.2d 20, 37-38 (Tex.App.-Houston [14th Dist.] 1994, writ denied)). A judge

should be fair and impartial and not act as an advocate for any party. *Simon v. State*, 203 S.W.3d 581, 592 (Tex.App.-Houston [14th Dist.] 2006, no pet.) (citing *Delaporte v. Preston Square, Inc.*, 680 S.W.2d 561, 563 (Tex.App.-Dallas 1984, writ ref'd n.r.e.)). (1st Supplemental CR:1219,¶33) Judge Engelhart's impartiality might reasonably be questioned. Tex.R. Civ. P. 18b(b)(1); s*ee Fuelberg v. State*, 410 S.W.3d 509 (Tex.App.-Austin 2013, no pet.) (recusal is concerned not only with actual personal or pecuniary interests, but also the appearance of impartiality when all factors are reviewed as a whole.) (citing *Rogers v. Bradley*, 909 S.W.2d 872, 873 (Tex.1995) ("Declaration of Recusal" by Gammage, J.) (noting that issue is one of perception)). "[B]eyond the demand that a judge be impartial is the requirement that judges appear to be impartial so that no doubts or suspicions exist as to the fairness or integrity of the court." *Sears v. Olivarez*, 28 S.W.3d 611, 613-14 (Tex.App.-Corpus Christi 2000, no pet.). In determining whether recusal is required, "the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial." *Ex parte Ellis*, 275 S.W.3d 115-17 (Tex.App.-Austin 2008, no pet.); *Gaal v. State*, 332 S.W.3d at 459 (Tex.Crim.App. 2011) (a party moving for recusal does not have to prove what is going through the trial judge's mind: he does not have to prove "actual bias." The trial court erred in its view of the law and its assessment of the evidence.

PRAYER

For these reasons, Appellant respectfully requests the Court to grant this Appeal and order the trial court to (1) vacate the orders titled "ORDER GRANTING CONSOLIDATION" (Volume I CR:674) signed May 8, 2014, "ORDER ON PLAINTIFF THUESEN'S MOTION FOR RECONSIDERATION AND MOTION TO VACATE" (Volume I CR:757) signed June 9, 2014, "ORDER GRANTING SWAMPLOT PARTIES' MOTION ON 2014 CLAIMS" (Volume II CR:1032) signed July 14, 2014, "ORDER GRANTING SWAMPLOT PARTIES' MOTION ON 2012 COUNTER-CLAIMS" (Volume II CR:1141) signed July 28, 2014, "ORDER" (Volume II CR:1143) signed July 31, 2014, "ORDER GRANTING SWAMPLOT PARTIES' MOTION FOR FEES AND EXPENSES INCURRED IN 2014 CLAIMS" (Volume II CR:1232) signed August 26, 2014, "ORDER" (1st Supplemental CR:75) signed August 28, 2014, "ORDER" (1st Supplemental CR:1185) signed September 16, 2014, "ORDER STRIKING PLEADINGS" (1st Supplemental CR:1187) signed September 16, 2014, "AMENDED ORDER" (1st Supplemental CR:1307) signed October 2, 2014, and "ORDER DENYING MARK THUESEN'S MOTION FOR RECONSIDERATION, MOTION TO VACATE AND BILL OF REVIEW" (1st Supplemental CR:1354) signed October 21, 2014, and (2) issue a ruling and written opinion for each of Appellant's issues #1 through #7, and (3) order the

Appellees to pay Appellant's costs for filing this Appeal, and (4) upon remanding the case back to the trial court, recuse the trial court judge from further hearing and ruling on the case, and (5) if the order titled "ORDER GRANTING CONSOLIDATION" (Volume I CR:674) signed May 8, 2014 is vacated, return Appellant and Appellees to their respective positions before consolidation *ab initio* to the 152nd district court (Cause No. 2014-07537), and (6) Appellant further requests any and all other relief to which he is entitled.

Respectfully submitted,

/s/ Mark Thuesen
Mark Thuesen, *Pro se*
P.O. BOX 540365
Houston, Texas 77254
Telephone: (585) 300-5793
Email: xtraderweb@hotmail.com

Pro se for Appellant

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the computer generated word count of the Appellant's Brief is 12,473 words.

/s/ Mark Thuesen
Mark Thuesen, *Pro se*
P.O. BOX 540365
Houston, Texas 77254
Telephone: (585) 300-5793
Email: xtraderweb@hotmail.com

CERTIFICATION

As required by Texas Rule of Appellate Procedure 52.3(j), I hereby certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the record.

/s/ Mark Thuesen_____
Mark Thuesen, *Pro se*
P.O. BOX 540365
Houston, Texas 77254
Telephone: (585) 300-5793
Email: xtraderweb@hotmail.com

CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), (e), I hereby certify that the foregoing document has been filed in the office of the Clerk of the First Court of Appeals and a true and correct copy of the same has been provided to counsel listed below through the electronic filing manager, email and by U.S. mail, on this 28th day of January, 2015.

Attorney for Appellees Swamplot Industries, Albert and Brinsdon:

James A. Hemphill
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Ave., Suite 2200
Austin, Texas 78701
Telephone: 512-480-5762
Facsimile: 512-536-9907
Email: JHemphill@gdhm.com

/s/ Mark Thuesen
Mark Thuesen, *Pro se*
P.O. BOX 540365
Houston, Texas 77254
Telephone: (585) 300-5793
Email: xtraderweb@hotmail.com