

No. 14-14-00666-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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Clerk

MARK THUESEN,

Appellant,

V.

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

Appellees,

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

REPLY BRIEF OF APPELLANT

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

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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 FACTS

Appellee Beth Brinsdon has no personal knowledge of the underlying facts that support any of her allegations against Appellant. Appellee Beth Brinsdon did not identify anyone who may be a witness with personal knowledge of the underlying facts that support any of her allegations against Appellant. Appellee Beth Brinsdon made these statements under oath in her sworn deposition (*see* 1st Supplemental CR:743-746).

Appellee Lawrence Albert has no personal knowledge of the underlying facts that support any of his allegations against Appellant. Appellee Lawrence Albert did not identify anyone who may be a witness with personal knowledge of the underlying facts that support any of his allegations against Appellant. Appellee Lawrence Albert made these statements under oath in his sworn deposition (*see* 1st Supplemental CR:1093-1094).

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. Thus, Appellant is the prevailing party against Appellees’ allegations and causes of action. *See Epps v. Fowler*, 351 S.W.3d at 868 (Tex. 2011), (stating that “we have no doubt that a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party.”)

Simply stated, it has been definitively proven that Appellees' allegations, speculations and other conclusory statements are false as admitted by their sworn statements under oath. Yet with all of the publicly acknowledged facts disproving every factual statement alleged by Appellees, Mr. James Hemphill, Appellees' attorney, submits Appellees' Brief containing 49 pages of the same disproven allegations and abusive *ad hominem* attacks for no other reason than to defame Appellant with impunity. Mr. Hemphill should not have a license to practice law as it is clear that Mr. Hemphill has intentionally ignored the Texas Disciplinary Rules of Professional Conduct, specifically Rule 3.01, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous," and Rule 3.03, "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; or (5) offer or use evidence that the lawyer knows to be false." Mr. Hemphill has knowledge of these facts, or could have easily acquired knowledge of the facts with a reasonably diligent inquiry, yet Mr. Hemphill continues to assert affirmative misrepresentations to the Court. Appellees' Brief should be stricken in its entirety.

ARGUMENT AND AUTHORITIES IN REPLY

Appellant objects to Appellees' conclusory statements presented in Appellees' pleadings, exhibits, and affidavits, "an objection that an affidavit is

conclusory is an objection to the substance of the affidavit that can be raised for the first time on appeal.” *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.-Houston [1st Dist.] 1999, no pet.); *see also Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839 (Tex. 2010) (noting in summary judgment case that “conclusory statements cannot support a judgment even when no objection was made to the statements at trial.” (quoting *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004))). These conclusory allegations and subjective beliefs, and speculation are not sufficient evidence (Tex. R. Evid. 401).

Appellant objects to Appellees’ conclusory statements presented in Appellees’ Brief “Statement of Facts” at 3-10.

Issue #1 – Issue #6

Appellees’ assert multiple theories and case citations that were not part of their legal theories on which the case was tried. “Parties are restricted on appeal to the theory on which the case was tried.” *Wells Fargo Bank v. Murphy*, No. 13-0236, (Tex. October 15, 2014), (citing *Davis v. Campbell*, 572 S.W.2d 660, 662 (Tex. 1978)). Appellate courts are similarly restricted and may not overlook the parties’ trial theories. Nowhere in the Clerk’s Record of the trial court proceedings did Appellees’ present the following legal theories and case citations:

Allison v. Arkansas Louisiana Gas Co., 624 S.W.2d 566, 568 (Tex. 1981)

(See Appellees' Br. at 13.)

Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 716 (Tex. App. – Dallas 1997, no pet.) (citing *Hall v. Dorsey*, 596 S.W.2d 565, 569 (Tex. Civ. App. – Houston [1st Dist.] 1980, writ ref'd n.r.e.)). (See Appellees' Br. at 15.)

In re Bohm, 13 S.W.3d 865, 873 (Tex. App. – Fort Worth 2000, orig. proceeding) (See Appellees' Br. at 16.)

In re U.S. Abatement Corp., 39 F.3d 563, 568 (5th Cir. 1994). (See Appellees' Br. at 18.)

CTL/Thompson Texas LLC v. Starwood Homeowner's Ass'n, 390 S.W.3d 299 (Tex. 2013); *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009); *Villafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008). (See Appellees' Br. at 25.)

Nguyen v. Kosnoski, 93 S.W.3d 186, 188 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (See Appellees' Br. at 27.)

Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007). (See Appellees' Br. at 32.)

Kennedy v. Kennedy, 125 S.W.3d 14, 19 (Tex. App. – Austin 2002, pet. denied). (See Appellees' Br. at 33.)

Kniatt v. State, 239 S.W.3d 910, 912 (Tex. App. – Waco 2007, pet. ref'd) (See Appellees' Br. at 34.)

Abdygapparova v. State, 243 S.W.3d 191, 198 (Tex. App. – San Antonio 2007, pet. ref'd) (See Appellees' Br. at 34-35.)

Liteky v. United States, 510 U.S. 540, 550, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). (See Appellees’ Br. at 35.)

Kemp v. State, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (See Appellees’ Br. at 35.)

In addition, Appellees failed to provide references to the record citing the above listed cases, thus Appellees have waived these legal theories and case citations. “[A]n issue not supported by references to the record is waived.” *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (citing Tex. R. App. P. 38.1(h), which requires briefs to include record citations).

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

Appellant objects to Appellees’ conclusory statements presented in Appellees’ Brief at 33-35.

Appellees failed to provide references to the record, thus Appellees have waived these legal theories and case citations. “[A]n issue not supported by references to the record is waived.” *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (citing Tex. R. App. P. 38.1(h), which requires briefs to include record citations).

Appellees’ asserted no legal theories, arguments, or pleadings in the trial court related to Appellant’s actions to recuse the trial court judge. “Parties are

restricted on appeal to the theory on which the case was tried.” *Wells Fargo Bank v. Murphy*, No. 13-0236, (Tex. October 15, 2014), (citing *Davis v. Campbell*, 572 S.W.2d 660, 662 (Tex. 1978)).

PRAYER

For these reasons, Appellant respectfully requests the Court to grant this Appeal and (1) strike Appellees’ Brief in its entirety, and (2) remove Appellees’ Brief from public access, and (3) order Appellees to pay Appellant’s costs for filing Appellant’s Reply Brief, and (4) 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 this Reply Brief of Appellant is 1,159 words, and therefore in compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(B).

/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 Reply Brief of Appellant 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 11th day of March, 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