No. 17-0052

In the Supreme Court of Texas

LAURA PRESSLEY,
Petitioner,

v.

GREGORIO "GREG" CASAR,
Respondent.

On Petition for Review from the Court of Appeals
for the Third District of Texas, Austin
No. 03-15-00368-CV

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT REGARDING THE RECORD

The record in this case, with supplements, is comprised of two reporter's records and six clerk's records. Each reporter's record has four volumes. The first reporter's record covers the trial court proceedings through the summary judgment hearing, and the second reporter's record covers the sanctions hearing. For clarity, citations to the reporter's record are given by providing reference first to which record, then volume, and then page, and are structured as: "__RR__:__."

The clerk's record includes an original and five supplements, each of which is separately paginated. Although the volumes of the clerk's records were each filed on separate dates, there are inconsistencies in the volume designations. For clarity, in citations to the clerk's record in this brief, the "volume" for each separate electronic file is given as a number (1-6) based on the date of filing. Citations to the clerk's record are given by providing reference to the volume and then page, and are structured as: "__CR:__." The reader should also be aware that Pressley filed several of the exhibits to her Sixth Amended Contest and summary judgment response separately, and they appear throughout the first two volumes of the clerk's record, at times out of order.

STATEMENT OF THE CASE

Nature of the Case: This is an election contest arising out of a 2014 election for a two-year term on the Austin City Council. In the election, Gregorio "Greg" Casar received roughly 65% of the votes (2,854 votes), easily defeating Laura Pressley who received 35% (1,563 votes).[1] At Pressley's request, a manual recount was performed, confirming the exact same vote totals with Casar winning by a 1,291 vote margin.[2] Pressley then filed this contest. Pressley argued the courts should disregard all 3,937 electronically cast votes—over 89% of the total votes, and that doing so would make the outcome of the election unknowable. To bolster her contest, Pressley also repeatedly pleaded numerous unsupported and untrue allegations of voter disenfranchisement, election and recount irregularities and mistakes, and criminal activity by election officials.[3]

Trial Court: The Honorable Dan Mills, visiting judge for the 201st District Court, Travis County, Texas.

Trial Court's Disposition: After extensive discovery, the trial court granted a no-evidence summary judgment, declaring the true outcome of the election was that Casar won.[4] After a two-day evidentiary hearing, the Court issued a final judgment and a detailed sanctions order, awarding Chapter 10 sanctions against Pressley and her attorney for repeatedly pleading numerous unsupported and untrue allegations in an effort to strengthen her contest.[5]

Court of Appeals: Third Court of Appeals, Austin. The panel consisted of Justices Puryear, Goodwin and Field.

Court of Appeals' Disposition: In a unanimous memorandum opinion authored by Justice Goodwin, the Court affirmed the trial court's judgment.[6]

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[1] 1CR:931.

[2] 1CR:916; 2CR:3074.

[3] 1CR:60-90, 860-912; 2CR:4-29, 67-97, 339-376.

[4] June 24, 2015 Amended Summary Judgment Order. 2CR:2060.

[5] July 23, 2015 Amended Final Judgment, 4CR:52-54; July 23, 2015 Order, 4CR:19-51.

[6] *Pressley v. Casar*, No. 03–15–00368–CV, 2016 WL 7584051 (Tex. App.—Austin Dec. 23, 2016, pet. filed) (mem. op.), attached as Tab A.

STATEMENT OF JURISDICTION

This is an election contest about a term of office that long ago expired. Undeterred, instead of asking—as she did below[7]—for the election to be declared void and a new election ordered, Pressley now asks the Court to use her case simply to "opine" on various issues of election law which do not resolve any existing dispute between the parties.[8] As briefed more fully in Section I, the Court is without jurisdiction to consider Pressley's election contest.[9] As to the election, Pressley and Casar no longer have any live controversy between them, and the contest is moot. Texas appellate courts do not have continuing jurisdiction once a case has been rendered moot. Texas courts are not authorized to issue advisory opinions, and there is no jurisdiction for Pressley to ask the Court to opine on election law.

Allowing Pressley to continue her stale election contest would create a dangerous precedent, by which issues of Texas election law could be decided through contests maintained by former candidates acting as self-appointed "private attorney generals" with no government agency or authority as a party to advocate and protect the government's interest. Election contests are narrowly-focused proceedings about specific elections, not a mechanism to legislate changes to normal election procedures.

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[7] 1CR:912.

[8] Pressley Br. 65.

[9] Pressley was not sanctioned for bringing her election contest generally, only for repeatedly pleading numerous, specific unsupported claims. Pressley's arguments about the eSlate and ballots are irrelevant to the sanctions order, and should be moot.

ISSUES PRESENTED

1. Appellate courts do not have jurisdiction over cases that become moot on appeal, and an election contest is moot when it is too late for officials to act in the election. The two-year city council term at issue in this contest has expired. Is Pressley's election contest moot?

2. In the 1939 *Wood* decision, the Court held that voting machines with public counters satisfy the requirement of numbering ballots under Article VI, Section 4 of the Texas Constitution, though they do not also number votes cast. Pressley's argument about numbering ballots is directly contrary to *Wood*, as well as the plain language of the Election Code which mandates public counters in voting machines. Should the Court overrule *Wood* and its progeny, hold the use of public counters required by the Election Code violates the Texas Constitution, and require all voting machines be changed to also number and identify the votes cast by individual voters?

3. The Election Code specifically allows votes to be cast on electronic voting machines which record each vote cast as a "ballot image" or "cast vote record" that can be printed for a manual recount. Here, exactly as required by law, all votes cast in the election were printed and counted, confirming Casar won. Was Pressley entitled to have the election voided when the recount was performed according to the requirements of the Election Code?

4. After losing the election by 1,291 votes, Pressley has no evidence even a single vote should be changed or that any Election Code violation materially affected the outcome. Was Casar entitled to summary judgment on Pressley's election contest?

5. Chapter 10 allows sanctions for pleading claims that lack a factual basis. To bolster her contest, Pressley repeatedly filed unsupported and untrue claims of voter disenfranchisement, election and recount irregularities and mistakes, and criminal violations by election officials. Was the trial court was within its discretion to sanction Pressley a portion of Casar's reasonable fees for defending against these unsupported and untrue claims?

STATEMENT OF FACTS

A. Casar defeated Pressley in the election by a wide margin, and the results were confirmed by a hand recount of all the votes.

Greg Casar and Laura Pressley were among eight candidates in the 2014 election to represent District 4 on the Austin City Council. Casar received the most votes (3,272 or 38.63%), and Pressley finished second (1,826 or 21.56%). Casar and Pressley moved on to a runoff. Casar won the runoff by a wide margin. Casar received 2,854 votes (64.61%) to Pressley's 1,563 votes (35.39%), giving Casar a 1,291 vote margin.[10]

Afterward, Pressley raised numerous questions about the runoff election with Travis County Clerk Dana DeBeauvoir. To answer Pressley's questions, DeBeauvoir suggested the County conduct a full audit of the election. Instead, Pressley filed a recount petition with the Secretary of State, asking for a manual recount.[11] During the election, seven of the ten council races were decided in the runoff: three by much smaller vote margins than the Casar/Pressley race, and three had larger margins.[12] No other candidate requested a recount or raised any concerns about the election.

At Pressley's request, Travis County conducted a manual recount of all votes cast in the election. Jay Brim, Chair of the Recount Committee, and DeBeauvoir supervised the recount. The Secretary of State also had an inspector present.[13]

[10] 1CR:561-64, 931-932, 937-1172.
[11] 1CR:565-67, 2002-04.
[12] 1CR:931-932.
[13] 1CR:571, 720-21, 916.

The overwhelming majority of voters (3,937 voters) in the election cast their votes electronically,[14] using the Hart eSlate System. The eSlate is widely-used, including in more than 100 Texas counties and across the country. On the eSlate, the final screen of the electronic ballot is a list of each race with the name of the candidate chosen (or indicating no candidate was chosen). The voter confirms the vote by pushing the "CAST BALLOT" button. After the ballot is cast, the eSlate electronically stores an individual cast vote record ("CVR"), also called a "Ballot Image." The CVR of each voter records and stores the votes as shown on the final screen of the ballot.[15]

For a manual recount, the CVR for each voter is printed and counted.[16] In requesting the recount, Pressley cited a letter to Travis County from the Director of Elections for the Secretary of State, providing guidance and noting the eSlate retains "ballot images for recounts, contests, and other post-election reviews."[17] Pressley stated that, "[o]n the Hart Voting System that Travis County uses, ballot images remain . . . for recounts. We are requesting a manual recount of the results using the actual, stored, ballot images."[18] At the recount, the CVRs from the election were printed under the watch of election officials, as well as Pressley and her observers.[19]

[14] 1CR:916, 931-932; 2CR:3074.
[15] 1CR:719, 1922-32, 1945-67; 2CR:3092-93.
[16] 1CR:1983, 2002-05.
[17] 1CR:569.
[18] 1CR:565.
[19] 1CR:584-85, 720-21, 1945, 2004-05.

Despite having relied on the Secretary's guidance that the eSlate's "CVR" is a "ballot image" under the Election Code, Pressley complained during the recount to the Secretary's representative that the printed CVRs were not "images of ballots cast."[20] One of Pressley's observers, explained she had "formed an image in my mind that these 'captured images of ballots' would in fact resemble a typical ballot by showing the names of all the candidates in each race with a clear mark next to the voter's selection" but on the CVR "only one candidate's name was printed for each of the races . . . . there were no marks to indicate a voter choice between candidates."[21] Pressley believed the CVRs should show all candidates' names, with some mark to reflect the chosen candidate for each race, instead of showing the list of the candidates selected by the voter. The Secretary's representative disagreed, and refused to challenge the use of CVRs.[22]

A manual recount was conducted of all votes in the election. The numbers from the recount matched the original canvass, and the number of voters matched the number of ballots cast. The votes from the recount were identical to the original canvass. Brim signed an affidavit that the "manual recount of all early voting, election day, mailed-in, and provisional ballots found that the totals in all precincts matched those in the original canvass. The numbers of voters matched the number of ballots cast. The results of the election are unchanged, and Greg Casar remains the victor."[23]

[20] 1CR:580-83.
[21] 2CR:691.
[22] 1CR:581-82.
[23] 1CR:571, 916, 1983, 2002-05.

Pressley then lodged a series of complaints with the Secretary of State about the recount. Among them, she wrongly claimed she and her observers were denied the right to be present at the printing of the CVRs.[24] In two separate responses, the Secretary dismissed her complaints noting, as to the "ballot images (also known as 'cast vote records')" the Secretary's inspector confirmed "you and your poll watchers were able to witness the printing of all ballot images used in verifying the vote count in your race." The Secretary explained, "the scope of the recount was conducted properly."[25]

B. Unhappy with the election results, Pressley filed this contest—an attack on electronic voting, and added unfounded allegations of voter disenfranchisement, election irregularities and mistakes, and criminal acts by election officials.

After the Secretary dismissed Pressley's complaints, she filed this election contest against Casar. Pressley agrees Casar did nothing wrong.[26] Instead, Pressley's stated goal is to use this lawsuit to force Travis County to change its voting system. Pressley's preference would be to revert to paper ballots.[27] The contest argued—contrary to determinations by the Secretary of State and the U.S. Election Assistance Commission—that the eSlate storage of CVRs does not comply with Texas election law because it was alleged to insufficiently store and print "images of ballots cast."[28] But Pressley was not content to simply challenge electronic voting.

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[24] 1CR:574-75, 607-41, 1919.
[25] 1CR:572-77, 1919.
[26] 2RR2:71.
[27] 1CR:591-92.
[28] 1CR:3-25, 60-89, 860-912; 2CR:4-28, 67-96, 339-75.

Pressley also pleaded allegations of voter disenfranchisement, election and recount irregularities and mistakes, and criminal violations by election officials. She alleged Travis County "illegally" disenfranchised thousands of District 4 voters by consolidating voting locations for the runoff.[29] Pressley also alleged Travis County violated election law by failing to print Zero Tapes on voting machines (claiming the possibility votes were left on the machines) and Tally Tapes (to indicate how many votes were registered on each machine).[30] She alleged irregularities affected the outcome of the recount itself.[31] And Pressley alleged Travis County's Director of Elections committed a criminal violation of the Election Code by denying her and her poll watchers the right to watch some recount activities.[32]

Pressley added these additional allegations to bolster her contest. Presley's attorney testified to their two-prong strategy, explaining that he saw "two ways to get to overturning the election. The hard way is to find 1291 voters and flip them. . . . I thought it was a stretch." They saw the challenge to the eSlate as "the short circuit—the easy way to get there is to show that it is impossible to know the result."[33] As to the additional allegations of illegal activities and mistakes, Presley's attorney testified, "[o]ne of the things that's required in an election contest for the court to overturn the nominal verdict is that there be either illegal votes cast or that there be mistakes or that

[29] Pressley repeated this claim over five amended contests, before dropping it from the final pleading.
[30] 1CR:871-75.
[31] 1CR:883-89.
[32] 1CR:884-85.
[33] 2RR2:128.

laws be broken in the election process. So I felt that in order for there to be an election contest it was essential to allege mistakes or failure to follow the law."[34] But Pressley had no evidence to support any of these additional allegations of irregularities or wrongdoing—none of which were true.

C. After discovery produced no evidence supporting Pressley's claims, the court granted summary judgment and, following an evidentiary hearing, awarded sanctions against Pressley and her attorney for repeatedly pleading unsupported and untrue allegations to bolster her contest.

Despite recognizing the need for expedited resolution of election contests, the trial court agreed to Pressley's request for broad third-party discovery.[35] But even with extensive discovery, at the summary judgment hearing—more than six months after the runoff and five different amendments to her pleadings—Pressley still had no evidence supporting her claims.

When pressed by the court at the hearing, Pressley's lawyers agreed they had no evidence to show she could overcome the 1,291 vote deficit, arguing instead her only burden was to "just say, look with all these mistakes, how could anyone know what the true outcome was."[36] The court disagreed there was evidence of any mistakes, finding instead Pressley's arguments were "just supposition." The court granted Casar a no-evidence summary judgment.[37]

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[34] 2RR2:126-27.
[35] 1CR:475-76.
[36] 1RR4:104, 113.
[37] 1RR4:104, 113, 119; 1CR:4605; 2CR:2060.

Subsequently, the court held a two-day evidentiary hearing on possible Chapter 10 sanctions against Pressley and her attorney. At the hearing, Casar's attorney testified Casar incurred attorneys' fees of over $190,000 through the contest (over $150,000 through summary judgment and over $40,000 for the sanctions hearing). Casar's attorney proved the fees, based on the billing from the case, and broke them down by attorney and issue. Without objection, Casar's attorney submitted a chart in which he broke down the fees spent on each of Pressley's different claims. He also explained the submitted fees did not capture all of the time spent. Casar's attorney testified that, at the time of the hearing, the fees had not yet been paid, but that Casar was in debt to his attorneys for the amounts. He also submitted evidence of $7,794.44 in expenses, explaining it represented some of Casar's expenses.[38]

In the trial court, Pressley never disputed the fees and expenses were incurred by Casar. Instead, Pressley argued the standard for sanctions was not met because she alleged she had a "good faith" basis for the allegations, she thought her claims were not groundless, because she was represented by counsel, or under a Rule 11 agreement.[39]

The court awarded Chapter 10 sanctions against Pressley and her attorney, the bases for which it explained in a detailed 51-page order. They were sanctioned for making repeated unsupported and untrue allegations of: (1) voter disenfranchisement; (2) failure to print zero and results tapes; (3) errors in the recount; and (4) criminal

[38] 2RR3:10-13, 54-64, 66-67, 79, 91-92, 102-03; 2RR4:5-12, 18-32. Chart of Fees, attached as Tab B.
[39] 2CR:1940-49, 2030-36, 2046-56; 2RR2:8-13, 24-25; 2RR3:65-80.

violations by election officials. While disagreeing with Pressley's legal argument about the CVRs, the court did not sanction for those claims. Pressley was sanctioned $40,000, and her attorney was sanctioned $50,000. Pressley and her attorney were jointly sanctioned $7,794.44 for Casar's expenses. Additional sanctions were awarded for fees in the event of an unsuccessful appeal.[40]

[40] 4CR:19-51.

SUMMARY OF ARGUMENT

In 2014, the voters of District 4 overwhelming chose Greg Casar as their representative on the Austin City Council. With no evidence even a single vote was improperly cast or counted, the losing candidate Laura Pressley brought this contest, asking the courts to throw out all votes cast on electronic voting machines—over 89% of the votes. The trial court properly found Pressley had no evidence to support her contest, and Casar was the true winner of the election. The court of appeals exhaustively reviewed Pressley's claims and agreed.

More than three years after the election with the term of office expired, Pressley asks the Court to allow her to continue suing Casar. Election contests are statutory proceedings that only provide for a court to order the certificate of election or a new election. Pressley now asks for neither. Instead, she asks the Court to issue an advisory opinion on election law. With the term expired, this contest is moot. Pressley cannot act as a private attorney general and use her contest to seek an advisory opinion.

Moreover, Pressley's challenge is contrary to the plain language of the Election Code, established federal and state election practices, and the last century of Texas election law. Under the Election Code, DREs like the eSlate number ballots through the use of a public counter. Voting machines with public counters were authorized for use in Texas by the Legislature in 1930. Faced with the same arguments in 1939 in *Wood*, the Court held that the use of voting machines with public counters satisfies the numbering requirement of Article VI, Section 4 of the Texas Constitution, and

individual votes did not have to be numbered. In *Andrade* in 2011, the Court rejected a similar claim against the same DRE, noting "the eSlate numbers ballots." Courts across the country have rejected similar challenges to the use of electronic voting machines and recounts.

To bolster her contest, Pressley repeatedly filed unsupported allegations of voter disenfranchisement, election irregularities and mistakes, and criminal misconduct by election officials. Pressley had no support for these claims, and ample evidence they were untrue. Even after a manual recount and audit confirmed the absence of any problems, Pressley still repeatedly pleaded otherwise. Parties filing frivolous allegations in election contests are bound by the same rules for dismissal and sanctions as other litigants. The trial court had discretion under Chapter 10 to sanction Pressley a portion of Casar's segregated, reasonable fees caused by her improper allegations.

This election contest needs to end. Candidates for public office should not have to fear the threat that winning office will result in the expense and burden of years of frivolous litigation. There is no evidence anything wrong happened in this election, and the evidence shows Casar won by a large margin. Pressley should make her arguments, if at all, to the Legislature.

ARGUMENT

I. This election contest became moot with the end of the term, and Pressley cannot seek an advisory opinion on election law.

Pressley brought this contest asking the 2014 election be voided and a new election ordered.[41] But the election was for a two-year term that has expired. In 2016, Casar was re-elected, and Pressley was not a candidate. When Pressley filed her petition for review, the term had already ended, and the relief she had sought was moot. Recognizing this reality, Pressley altered the relief requested, instead asking the Court simply to "opine" on various issues of election law.[42] There is no jurisdiction for Pressley to continue litigating her contest against Casar.

A. Election contests are limited to challenging an election, and Pressley cannot continue to sue Casar after the contest is moot.

Election contests are legislative and not judicial proceedings. *Duncan v. Willis*, 302 S.W.2d 627, 320 (Tex. 1957). The sole purpose of an election contest is to determine whether the outcome of an election was correct and award potential injunctive relief. *Rodriguez v. Cuellar*, 143 S.W.3d 251, 260 (Tex. App.—San Antonio 2004, pet. dism'd) (en banc) (Green, J.). As the Court explained long ago:

> The primary and direct purpose and effect of the contest is to pass upon and determine the legality and fairness of the election, and, if it should not be set aside altogether, to determine whether the contestant was in fact justly entitled to the certificate of election. The power of the officer or tribunal before whom the contest is conducted, is limited to the mere award of the certificate of election to the successful contestant, or of ordering another election.

[41] 1CR:912.
[42] Pressley Br. 65.

Williamson v. Lane, 52 Tex. 335, 345 (1879). In a contest, the courts act under the authority conferred by statute, and not by virtue of any other jurisdiction. *Rogers v. Johns*, 42 Tex. 339, 341 (1874). There is no authority to challenge an election outside of the strict statutory remedy available in a contest. *Hotze v. White*, No. 01–08–00016–CV, 2010 WL 1493115, at *4 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. denied). "Elections are politically time sensitive, and legislative remedies for contested elections are to be strictly followed." *Rodriguez*, 143 S.W.3d at 260. The Legislature has created no remedy to contest an expired term of office.

Also, the "court is bound by the ordinary rules and principles of law that govern the review of cases on appeal." *Id.* "Appellate Courts are prohibited from deciding moot controversies." *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). Courts have no jurisdiction to decide a case that becomes moot during the pendency of litigation. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 162 (Tex. 2012). A case becomes moot if there ceases to be a justiciable controversy between the parties—"that is, if the issues presented are no longer 'live,' or if the parties lack a legally cognizable interest in the outcome. Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Id.* "In an election contest, time is of the essence and the moot case is no stranger to our election experience." *Duncan*, 302 S.W.2d at 630. There is no live controversy between Casar and Pressley about the expired term, and no action the courts can take will affect Casar's or Pressley's rights with respect to the election. Pressley's contest is moot.

Pressley's contest became moot after the subsequent election and start of a new term. *See Taylor v. Margo*, 508 S.W.3d 12, 17 (Tex. App.—El Paso 2015, pet. denied), *cert. denied*, 137 S.Ct. 391 (2016). In *Taylor*, the plaintiff won a 2013 election for a two-year term on the school board, but after the TEA instead appointed a board to control the district, he filed suit seeking an order he be allowed to assume office. *Id.* His lawsuit became moot when, in 2015, a new election was held and a new board, including the plaintiff, was elected and seated. *Id.* at 23-24. Pressley's contest asked to void the 2014 runoff and order another election between her and Casar for the 2015-2016 term.[43] Because the term ended, the courts have no authority to order another election. "The passage into history of the [] election makes it impossible for this or any court to grant meaningful relief with respect to that election." *Virginians Against a Corrupt Cong. v. Moran*, No. 92-5498, 1993 WL 260710, at *1 (D.C. Cir. June 29, 1993).

Pressley has no basis for equitable relief for the election. "[A] court's power to fashion equitable relief in an election case is not unrestrained." *In re Gamble*, 71 S.W.3d 313, 318 (Tex. 2002) (orig. proceeding). The power of a court to act in an election case "is constrained by the election schedule itself." *Id.* An election contest becomes moot when a final judgment is not entered in time for election officials to comply and conduct the election. *Moore v. Barr*, 718 S.W.2d 925, 926 (Tex. App.—Houston [14th Dist.] 1986, no pet.). In an election contest from a general election for a term, the question is

[43] 1CR:912.

whether the contest can be disposed of before the term expires. *Alvarez v. Laughlin*, 362 S.W.2d 915, 916 (Tex. App.—San Antonio 1962, orig. proceeding). When it is too late for officials to act in the election, there is no longer a justiciable controversy and the contest is moot. *Sterling v. Ferguson*, 53 S.W.2d 753, 760 (Tex. 1932) (orig. proceeding).

The Court has repeatedly held an election contest was rendered moot by the passage of time and the continuing election process. *In re Uresti*, 377 S.W.3d 696, 696-97 (Tex. 2012) (orig. proceeding) (holding primary election mooted dispute on ballot access of candidate); *Correa v. First Court of Appeals*, 795 S.W.2d 704, 705 (Tex. 1990) (orig. proceeding) (same); *Lund v. Alanis*, 384 S.W.2d 123, 124 (Tex. 1964) (holding general election mooted candidate's lawsuit to declare 600 residents ineligible to vote based on poll tax); *Skelton v. Yates*, 119 S.W.2d 91, 91-92 (Tex. 1938) (holding contest challenging who won election was mooted by start of voting in runoff). The same is true here: the contest is moot, and Pressley cannot litigate an expired term.

B. Pressley's election contest does not allow her to act as a private attorney general or seek advisory opinions on election law.

To keep suing Casar, Pressley argues her case falls under an exception to mootness for cases "capable of repetition yet evading review." Pressley also cites case law about an exception for inherently-transitory claims.[44] But under settled law, neither exception applies.

[44] Pet. Reply 9-12.

The mootness exception for "inherently transitory" claims is distinct from the "capable or repetition" exception, with the former only applying to class actions. *Heckman*, 369 S.W.3d at 164-65. "[C]lass actions are extraordinary proceedings with extraordinary potential for abuse." *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). Unlike other lawsuits, class actions are designed to allow law enforcement by private attorney generals. *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417, 427 (Tex. 2007). By contrast, an election contest is for the narrow purpose of challenging a particular election. *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999). If the Legislature wanted to authorize private attorney general standing in election contests, it knows how to do so. *See, e.g.*, TEX. GOV'T CODE §422.012(a) (private standing for violations of the Texas Historical Chapter or the Antiquities Code). No such authority exists.

Pressley's contest also does not fit within the very limited exception for cases "capable of repetition." This exception applies only in rare circumstances. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). The Court has only recognized the exception in cases against the government challenging alleged unconstitutional acts. *Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). Pressley criticizes the Secretary of State, but acknowledges he is not a party.[45] Instead, Pressley is suing Casar, who she admits has done nothing wrong[46] and who has no authority over Texas elections.

[45] Pressley Br. 36.
[46] 2RR2:71.

Pressley points to the El Paso Court of Appeals' *Bejarano* opinion.[47] But that case is inapposite. In *Bejarano*, before an election, a candidate sought mandamus against the city clerk to require his opponent's removal from the ballot. *Bejarano v. Hunter*, 899 S.W.2d 346 (Tex. App.—El Paso 1995, orig. proceeding). While the start of voting mooted the controversy, the court held the "capable of repetition yet evading review" exception applied because the clerk admitted to not following the law and made clear she would continue doing so. *Id.* at 351. The court noted the proceeding was not an election contest, but a mandamus against the clerk. *Id.* at 348 n.2. And the court still held that the requested relief sought—removing the opponent from the ballot—was moot and could not be granted. *Id.* at 352.

Pressley's contest is not against any government agency or officer. Pressley did not seek relief against the Clerk who oversaw the election or the Secretary of State who certified the voting machine. Instead, Pressley filed a contest against Casar. While the parties dispute the lawfulness of DREs, "that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009); *Texas A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 291 (Tex. 2011). Pressley's dislike for voting machines cannot resuscitate her contest.

Allowing Pressley to use her moot contest to challenge Texas election law creates a dangerous precedent. First, contests are meant to afford a simple and speedy means

[47] Pet. Reply 11.

of challenging an election, and "the integrity of the election process requires immediate resolution of disputes that prevent certification." 26 AM. JUR. 2D *Elections* §384, Purpose of Election Contests (2018). Election contests should not be drawn out disputes over how to legislate elections. Second, election law disputes should not be decided between parties who no longer have any interest at stake. "The Texas legal system rests on the foundation of adversary presentation, which affords a theoretical guarantee that diligent antagonists, by developing all aspects of the dispute, will prevent the court from being misled, by inadequate understanding of the facts and law, into a position unjust to the parties before it and possibly damaging to the community." 1 MCDONALD & CARLSON TEX. CIV. PRAC. §4:2 (2d. ed.). Third, election critics should not be able to make an end-run around the government officials or agencies who oversee elections. Under Pressley's approach, issues of election law could be decided in a moot contest, despite neither side having any ongoing involvement in Texas elections.

Even if the "capable of repetition" exception could apply to an election contest between private parties, Pressley's contest fails to meet its requirements. To invoke the exception, a plaintiff must prove: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Williams*, 52 S.W.3d at 184. Pressley presented no evidence of either requirement. The exception applies only if the plaintiff can show that the claim is capable of repetition *as to him*." *Heckman*, 369 S.W.3d at 164 (emphasis in original). Pressley did not run for

the current term of city council, and Pressley submitted no evidence she would ever run for office again, much less in Travis County or against Casar.

It is not enough to allege similar issues "will recur for Texas candidates."[48] The Court previously refused to consider an election contest, despite arguments the issues in dispute were likely to reoccur in future elections. *Correa*, 795 S.W.2d at 705. In *Correa*, which involved statutory and constitutional claims regarding access to the ballot, the Court held the contest was moot and it could not issue an advisory opinion when no actual controversy remained between the parties. *Id. See also, Rawlings v. Gonzalez*, 407 S.W.3d 420, 425-28 (Tex. App.—Dallas 2013, no pet.)(holding municipal judge candidates' lawsuit moot when they no longer asserted any relief to reinstate them as judges, but only sought a declaration the selection process violated law). "[T]he claimed continuing effects on subsequent election campaigns are insufficiently tangible, concrete and non-speculative to save this case from mootness." *Moran*, 1993 WL 260710, at *1. Once an election renders a prior election lawsuit moot, the Court has dismissed without deciding the merits of the election law issue. *Lund*, 384 S.W.2d at 124. The Court should do the same thing here.

Likewise, there is no evidence the merits of Pressley's claims about DREs could not be timely litigated. The Court previously held a contest moot in a primary challenge, despite recognizing the short time to have such cases resolved. *Polk v. Davidson*, 196

[48] Pet. Reply 9.

S.W.2d 632, 634 (Tex. 1946). And unlike cases applying the exception when there were only days to challenge the decision before it became moot, the doctrine should not apply when the duration is measured in years and the "claims were nevertheless reviewed—and rejected—before the issue became moot." *Hutto Citizens Grp. v. Cnty. of Williamson*, No. 03-08-00578-CV, 2009 WL 2195582, at *2 (Tex. App.—Austin July 23, 2009, no pet.). Pressley's contest became moot only after the trial and appellate courts reviewed her claims. Pressley cannot reasonably argue the courts are unable to review the merits of her claims in the time allowed, after she already received review.

Moreover, nothing prevented Pressley from challenging the use of DREs prior to the election by filing an action against the Secretary of State. "The only relevant fact unknown to Plaintiff[] before the election was its outcome." *Stein v. Cortes*, 223 F.Supp.3d 423, 437 (E.D. Pa. 2016) (denying injunctive relief on challenge of use of DREs for recount when losing presidential candidate waited until after the election to make challenge). When the potential grievance was known before the election, courts have required a party to bring their complaint in a pre-election adjudication or be barred. *Toney v. White*, 488 F.2d 310, 314 (5th Cir.1973); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir.1983). "[A] candidate or other election participant should not be allowed to ambush an adversary or subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful at the polls." *United States v. City of Cambridge*, 799 F.2d 137, 141 (4th Cir. 1986). Allowing a candidate to take a "wait and see" approach to challenge an election

prejudices the government that relied on the correctness of the ballots in expending resources on the election and "prejudiced the electorate as a whole by denying them the efficacy of their vote and undermining their faith in a free and fair election." *Ross v. State Bd. of Elections*, 876 A.2d 692, 706 (Md. 2005). Pressley should not be able to wait to challenge DREs until after the election because she is unhappy with the results. Pressley's contest is moot, and the Court should deny review.

II. Consistent with nearly a century of Texas law, ballots on DREs are numbered, but individual votes are kept secret.

The Legislature authorized DREs for elections and created procedures to recount such votes. The election and recount were carried out properly. Pressley's argument against the recount has morphed. Below, Pressley argued "the eSlate's storage of CVRs does not comply with Election Code requirements because CVRs do not constitute 'ballot images' or 'images of ballots cast.'" *Pressley*, 2016 WL 7584051, at *2. Now, Pressley argues that because CVRs are not also individually numbered, the "ballots" in the election were unnumbered and violate the Texas Constitution.[49] Pressley's argument the ballots were unnumbered is wrong and contrary to settled law.

A. The method of numbering ballots used here is specifically authorized by the Election Code, was held constitutional by the Court in 1939, and recognized as to the eSlate in 2011.

Pressley attacks the use of the eSlate, which is a paperless direct recording electronic voting machine (known as a "DRE"). A DRE is "a voting machine that is

[49] Pressley Br. xi-xiii; 6-37, 46.

designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device and that records the individual votes and vote totals electronically." TEX. ELEC. CODE §121.003(12). Pressley claims the Election Code does not address the numbering of ballots on electronic voting systems[50] and that Article VI, Section 4 of the Texas Constitution requires recounts using numbered original ballots "to separate and distinguish one cast vote record from another."[51] But the eSlate numbers ballots as specified in the Election Code, the Court already upheld the constitutionality of the same method of numbering ballots, and there is no requirement cast votes also be numbered.

The use of DREs for voting was specifically approved by the Legislature. TEX. ELEC. CODE §§129.001-.057. Contrary to Pressley's claim, the Legislature specifically provided for the numbering of ballots on all voting machines through the use of "a public counter." TEX. ELEC. CODE §122.033(3).[52] A "public counter" is "a registering device that cumulatively records the number of voters casting votes on a voting machine." TEX. ELEC. CODE §121.003(6). Voting machines using public counters were authorized for use in Texas by the Legislature in 1930. TEX. CONST. art. VI, §4 cmt. Public counters have long been used to number ballots in Texas.

With the adoption of voting machines came legal challenges, including the same constitutional challenge Pressley raises here. *Wood v. State ex rel. Lee*, 126 S.W.2d 4 (Tex.

[50] Pressley Br. 19.
[51] Pressley Br. 28.
[52] Attached as Tab C.

1939). In *Wood*, a losing mayoral candidate challenged the constitutionality of votes cast on a voting machine arguing, as Pressley does, that Article VI, Section 4 of the Texas Constitution requires each ballot be numbered. *Id.* at 6. Under the Texas Constitution, "[i]n all elections by the people, the vote shall be by ballot box, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect fraud and preserve the purity of the ballot box." TEX. CONST. art. VI, §4. In *Wood*, as here, the machine numbered each ballot through the use of a public counter and recorded the total votes for each candidate, but did not keep a record to make it possible to tell how each voter voted. *Wood*, 126 S.W.2d at 9. As Pressley does, the losing candidate argued using voting machines with public counters violated Article VI, Section 4 because it did not place a number on the vote cast by individual voters. *Id.* The Court rejected that argument, holding the public counter satisfied the constitutional requirement to number ballots, and there was no requirement to also number the recorded vote. The Court explained:

> The ballot must be numbered. If we understand this record, the election officers kept a poll list which showed the name and number of each voter. When the voter registered his vote on the machine, it (the machine) recorded the number of the ballot. To our minds, this meets the requirement of the Constitution. As we understand this machine, it is not possible from the record made by it to determine, in an election contest, how each voter voted. Be that as it may, the Constitution contains no such requirement. The Constitution simply requires that the ticket shall be numbered. The machine does that.

Id. *See also, Christy v. Oliphint*, 291 S.W.2d 406, 407-08 (Tex. App.—Galveston 1956)(rejecting constitutional claim based on numbering for machine with public

counter), *aff'd*, 299 S.W.2d 933 (Tex. 1957). This is exactly the same for numbering ballots cast on the eSlate.

In 2011, the Court rejected a similar challenge to the eSlate. *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011). In *Andrade*, voters brought a constitutional challenge to the Secretary's approval of the eSlate, arguing the numbering requirement of Article VI, Section 4 mandated a paper trail making ballots traceable to votes. *Id.* at 14-15. In rejecting the claim, the Court recognized "the eSlate numbers ballots." *Id.* at 15. The Court should reject Pressley's identical claim.

Pressley's argument is contrary to a century of law and confuses basic concepts of election law. Pressley conflates ballots with the actual votes cast. While the term "ballot" is frequently used for the term "vote," the terms are not synonymous. *Clary v. Hurst*, 138 S.W. 566, 569-70 (Tex. 1911). A ballot is the mechanism by which a voter casts a vote, but that is distinct from the actual vote.[53] Pressley presumes a "ballot" requires a physical piece of paper with an individual number. But "a ballot is not necessarily a piece of paper or other substance upon which a number can be stamped. It originally consisted of a small ball, bean, a grain of corn, a coin, or other small article which could be concealed in the hand so that others might not know how the voter cast his ballot." *Reynolds v. Dallas Cnty.*, 203 S.W.2d 320, 322 (Tex. Civ. App.—Amarillo 1947), *certified question answered on other grounds*, 207 S.W.2d 362 (Tex. 1948). Repeat

[53] 1CR:572-77, 643-46, 658, 1894-98, 1900-04, 1928-32, 3417; 2CR:565, 589, 629-630, 633, 2216.

attempts to pass legislation at the federal and state level to require DREs to provide a contemporaneous paper record of each vote cast have failed. *Andrade,* 345 S.W.3d at 5 nn.5-6. Pressley has no evidence the eSlate did not number ballots. She simply ignores the public counter and points to the cast vote records.

There is no requirement to number votes cast. The fact no number is recorded on a paper ballot or otherwise to show how each voter cast his or her vote does not violate the Texas Constitution. *Wood*, 126 S.W.2d at 9; *Christy*, 291 S.W.2d at 407-08; *Reynolds*, 203 S.W.2d at 323-24. It has long been understood that, "[i]n view of the Supreme Court's opinion on voting machines, there can be no question but that [ballots that are numbered but votes that are not] will meet the constitutional requirement." Tex. Att'y Gen. Op. V-78 (1947) (finding use of perforated ballots that numbers ballot but not the portion on which votes are cast torn off and placed in the ballot box would not violated numbering requirement of Texas Constitution).

The Court's prior rejection of constitutional challenges to the use of DREs is not alone. The federal courts have reviewed similar challenges to the eSlate and likewise rejected them. *See, e.g., Texas Dem. Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007). In fact, courts across the country have upheld DREs as constitutional despite similar arguments about their use in recounts. *Weber v. Shelley*, 347 F.3d 1101, 1105-07 (9th Cir. 2003)(holding that use of DREs without a paper trail did not violate Constitution); *Banfield v. Cortes*, 110 A.3d 155, 165-71 (Pa. 2015) (holding DREs ability to print CVRs satisfied statutory requirement for system to provide "permanent

physical record" of each vote and recount requirements); *Favorito v. Handel*, 684 S.E.2d 257, 262-63 (Ga. 2009) (holding Georgia Secretary of State properly certified DREs for use despite constitutional challenge and claim that DRE violated state recount law); *Gusciora v. Christie*, 2013 WL 5015499, at **7-13 (N.J. Sup. Ct. App. Div. Sept. 16, 2013) (holding DREs did not violate New Jersey constitution or statutory provisions governing elections and recounts); *Schade v. Maryland State Bd. of Elections*, 930 A.2d 304 (Md. 2007) (upholding certification of DRE over challenge under Maryland law); *Mills v. Shelby Cnty. Election Com'n*, 218 S.W.3d 33, 38-41 (Tenn. Ct. App. 2006) (upholding use of paperless, touchscreen voting machines over claims Tennessee Constitution required paper ballots). Pressley does not cite to a single case prohibiting the use of DREs. The use of voting machines with public counters is not unconstitutional.

B. Texas guarantees a secret ballot and the law does not require—nor even allow—a voting system that would trace how individual voters cast their votes.

Contrary to prior authority, Pressley argues the constitutional requirement ballots be numbered should also require individual cast votes be distinguishable and traceable.[54] No such requirement exists. Pressley's approach violates both the Texas Constitution and the Election Code.

Privacy in casting one's ballot is "a sacred rule of law" in Texas, and is protected by the Texas Constitution. TEX. CONST. art. VI, §4; *In re Talco-Bogata Consol. Indep. Sch. Dist. Bond Election*, 994 S.W.2d 343, 347 (Tex. App.—Texarkana 1999, no pet.). Under

[54] Pressley Br. 27-28.

the Texas Constitution, in all elections voters are "accorded a secret vote or ballot." *Wood*, 126 S.W.2d at 9. Likewise, the Election Code mandates that, "A voting system may not be used in an election unless the system . . . preserves the secrecy of the ballot." TEX. ELEC. CODE §122.001(a)(1). "The decisions throughout this country seem unanimous in holding that the requirement that the vote be by ballot, that a 'secret ballot' is meant, whether the requirement be in the Constitution or in a statute." *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933). By statute and the constitution, the votes cast by individual voters are secret.

Pressley's attempt to make discoverable how individuals vote undermines Texas elections. "Our very system of voting by ballot rests upon the principle that every voter must be absolutely at liberty to vote as he pleases, both as to men and measures, and no person or power has the right anywhere to question a legal voter's independent action, either at the time of voting or at any time thereafter." *Ex parte Henry*, 126 S.W.2d 1, 2 (Tex. 1939). Allowing discovery of how individuals voted would subject voters to improper influence and intimidation, and prevent the vote from being the real expression of public sentiment. *Carroll*, 61 S.W.2d at 1007.

The requirement for numbering ballots was not meant to make it possible to trace how individual voters cast their votes. Even in *State v. Connor*—which Pressley so heavily relies on—the Court recognized numbering ballots could not allow a reviewing party to determine how individuals voted. *State v. Connor*, 23 S.W. 1103, 1105 (Tex. 1893). As the Court explained, "suppose that the elector or other person should place

upon the ballot a mark so that the officer of the election or other person looking on while the ballots were being counted could see or determine by whom it was cast, then, in calling the ballot for counting, the vote of such person could be exposed." *Id.* Neither a recount nor an election contest gives Pressley the right to violate Texas voters' right to cast and keep their votes private.

C. The question of how to protect elections from fraud is for the Legislature to decide, not for parties to litigate.

Pressley argues her vision of numbering votes cast is the best way to detect fraud and preserve the purity of the ballot box.[55] History proves her claim to be highly-suspect. Regardless, this is not an issue for the courts. How we hold elections and best protect against fraud are questions for the Legislature.

The Legislature's decision to authorize DREs did not occur in a vacuum. The use of paper ballots in Texas is hardly free from claims of fraud.[56] "Traditional paper ballots, as became evident during the 2000 presidential election, are prone to overvotes, undervotes, 'hanging chads,' and other mechanical and human errors that may thwart voter intent." *Andrade*, 345 S.W.3d at 12. The 2000 presidential race and the problems that plagued Florida in determining the outcome through its paper ballots pushed states to focus on their election process, including matters of ballot design, voting techniques, or recount procedures. Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON

[55] Pressley Br. at 7, 10, 13-18.

[56] *See, e.g.*, Dan Balz, *The Mystery of Ballot Box 13*, WASH. POST, Mar. 4, 1990 (describing the story of Box 13 from Alice, Texas deciding the 1948 Senate race between Johnson and Stevenson as "one of the great mysteries and richest tales in American politics.").

LEGIS. 265, 265 (2007). The voting machines in use today are the most modern devices, representing the current result of "centuries of experimentation in attempting to work out some honest, tamper-proof method of elections." TEX. CONST. art VI, §4 cmt. There is no guarantee paper ballots or any additional security measures would result in a "secure" election. *Schade*, 930 A.2d at 327; *Banfield*, 110 A.3d at 168 ("Although Appellants laud paper records as a panacea to voting fraud, even paper ballots are not a completely secure system without risk as there are many opportunities for tampering to occur from the time a voter casts his or her ballot until the time a winner is declared.")

Disputes about how to best hold elections and protect against fraud are not matters for litigation—they are political questions for the Legislature. The "right to an elective office, as everyone will admit, results from the legally-expressed choice of a majority of the electors; but how this choice is to be legally expressed and ascertained is a matter of legislative discretion and determination." *Williamson*, 52 Tex. at 344. The State possesses broad power to prescribe the time, place and manner of holding elections. *King St. Patriots v. Tex. Dem. Party*, 521 S.W.3d 729, 731 (Tex. 2017). Except as provided by statute, the judiciary has no control over the election process. 31B TEX. JUR. 3D *Elections* §11 (2018). The Court has long recognized "[v]oting machines are proper and constitutional instruments to use in holding elections." *Bexar Cnty. v. Mann*, 157 S.W.2d 134, 136 (Tex. 1941). Pressley ignores the last century of election law, and tries to litigate the Legislature's approval of DREs.

No voting system is perfect, and the possibility of fraud can never be completely eliminated. *Andrade*, 345 S.W.3d at 12-13. It is the job of elected representatives to weigh the pros and cons of various balloting systems. *Id.* at 13. The Texas Constitution entrusts the Legislature with sound discretion to decide "regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot. . . . It is not for the courts to attempt to direct what laws the Legislature shall enact to comply with it." *Wood*, 126 S.W.2d at 9. Any failure of the Legislature to properly protect against fraud in the elections process, "if, indeed there was any such failure, cannot be remedied by the courts, but must be left to the legislature itself for amendment." *Carroll*, 61 S.W.2d at 1008. In *Andrade*, the Court held this included the decision of whether to allow the eSlate without requiring a contemporaneous paper record for recounts. *Andrade*, 345 S.W.3d at 16. Pressley's argument should be raised to the Legislature, not in an election contest.

III. The election and recount were conducted properly, and there is no evidence to support Pressley's contest.

To set aside the election, Pressley must prove by clear and convincing evidence a violation of the Election Code occurred and materially affected the outcome of the election. *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.—Austin 1998, no pet.). To meet this burden, Pressley must prove particular, material irregularities in the conduct of the election and either: (1) a different and correct result should have been reached by counting or not counting specific votes affected by the irregularities, or (2) the

irregularities render it impossible to determine the voters' true will. *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex. App.—Corpus Christi 1993, writ dism'd w.o.j.). Pressley does not argue a different result should be reached by counting the votes. Instead, Pressley argues the outcome of the election is unknowable. Pressley claims the state-approved method for recounts is deficient and asks the Court to invalidate legally-cast votes.

The thrust of Pressley's contest is to attack the Secretary of State's certification of the eSlate and the use of CVRs in the recount.[57] Pressley also confuses the issue by misrepresenting evidence from the Secretary and the Clerk, which shows the CVRs were properly used in this election and recount.[58] There is no dispute the CVRs from the election were electronically stored, printed, and used in the recount. Pressley just argues this common practice should be held improper.

There is no support for Pressley's attempt to redefine the standards for electronic voting, and both Texas and federal authority support the opposite view. The Legislature approved and the Secretary certified the use of CVRs in recounts. Pressley cannot have the courts change electronic voting by judicial fiat.

A. As required by law, the recount was done using printed cast vote records, which are universally recognized as electronically-stored "ballot images" for paperless DREs.

As required by statute, the manual recount was conducted by printing and counting the electronically-stored CVRs, also known as "ballot images." The results of

[57] Pressley Br. 6-7, 9-37.
[58] Pressley Br. 4, 8, 23, 30, 34, 36.

the recount matched the original canvas. Pressley has no evidence the election result is unknowable given a verified manual recount of the CVRs showing she lost by a wide margin. Pressley's challenge is simply an attack on the use of DREs, a choice made by the Legislature and certified by the Secretary.

The Legislature specifically allowed for the use of DREs in elections, and authorized the Secretary to prescribe any procedures necessary for their use. TEX. ELEC. CODE §129.002. The Secretary of State is the state's chief election officer. TEX. ELEC. CODE §31.001(a). The Secretary is charged with maintaining uniformity in the application, operation, and interpretation of the Election Code. TEX. ELEC. CODE §31.003. Before any voting system is used in the state, it must first be certified by the Secretary. *Andrade*, 345 S.W.3d at 4. The Election Code "giv[es] the Secretary of State the ultimate authority to determine whether a particular voting system meets these standards." *Texas Dem. Party*, No. A-07-CA-115-SS at 9. Not only is the Secretary charged by the Legislature with certifying voting machines, the Secretary also has the authority to modify the form and content of a ballot used on an electronic voting system. TEX. ELEC. CODE §52.075.

The eSlate at issue in this contest is one of a handful of DREs the Secretary has certified. *Andrade*, 345 S.W.3d at 5. The certification process is an in-depth, highly-involved process. After an analysis by a team of computer and election law experts, the

Secretary reviewed and certified the eSlate.[59] The Secretary found that the eSlate fully complied with the Election Code's requirements for electronic voting machines, including the fact that it was "capable of providing records from which the operation of the system may be audited."[60] Once certified, local political subdivisions may adopt a system for use in elections. *Andrade*, 345 S.W.3d at 4.

The recount was carried out exactly as required for a DRE. The Court has recognized there is a different recount methodology necessary for an election that uses DREs. *Id.* at 11, 14. "The statutory provisions governing elections provide a detailed procedure for the conduct of a recount, including . . . printing images of ballots cast using direct recording electronic voting machines." 31B TEX. JUR. 3D *Elections* §377 (2018). At the time a voter cast his or her vote, DREs store individual votes and vote totals electronically. *Andrade*, 345 S.W.3d at 4.

For votes cast on DREs, if needed for a manual recount, the CVRs, also known as "ballot images" are printed and counted. TEX. ELEC. CODE §213.016. The use of printed CVRs as "ballot images" for a recount—as certified by the Secretary—is the standard meaning of these terms for electronic voting across the United States at the federal and state level.[61] The Secretary certified the eSlate is consistent with the Election Code's requirement it have the capacity for "ballot image storage." Federal, state and local election officials have all agreed the CVR is a ballot image. The Secretary defines

[59] 1CR:643-44, 1894-98.
[60] 1CR:644.
[61] 1CR:572-77, 643-46, 658, 1894-98, 1900-04, 1928-32, 3417; 2CR:565, 589, 629-630, 633, 2216.

a "Ballot Image" as an "Electronically produced record of all votes cast by a single voter," and defines a "Cast Vote Record (CVR)" as a "[p]ermanent record of all votes produced by a single voter whether in electronic or paper copy form. Also referred to as ballot image when used to refer to electronic ballots."[62] The U.S. Election Assistance Commission uses this same language and indicates the words can be used interchangeably, defining "ballot image" as an "[e]lectronically produced record of all votes cast by a single voter," and adds "See also: cast vote record."[63] The Commission similarly defines a "cast vote record" as a "[p]ermanent record of all votes produced by a single voter whether in electronic, paper or other form. Also referred to as ballot image when used to refer to electronic ballots."[64] Uniformly, federal and state authority show the eSlate's storage of a CVR for each voter is proper "ballot image storage" for purposes of a manual recount.

Pressley argues that, under the Texas Constitution, the CVRs cannot be counted unless they are original numbered ballots. As fully briefed in Section II, the "ballots" on the eSlate are numbered, and the law does not require numbering the actual votes cast. *Wood*, 126 S.W.2d at 9; *Andrade*, 345 S.W.3d at 15-16; *Reynolds*, 203 S.W.2d at 322-24; Tex. Att'y Gen. Op. V-78 (1947). Pressley's argument is contrary to the Election Code and inconsistent with electronic voting. The Election Code specifically requires CVRs or "ballot images" be printed for a manual recount. TEX. ELEC. CODE §213.016.

[62] 1CR:658; 2CR:589.
[63] 2CR:630.
[64] 1CR:646; 2CR:633.

Moreover, Texas recount law requires "all votes cast" be included in the recount. TEX. ELEC. CODE §212.136. DREs do not produce a contemporaneous paper record of each vote, nor are they required. *Andrade*, 345 S.W.3d at 4-5. Repeat efforts to pass legislation at both the federal and state level to require DREs to provide a contemporaneous paper record of each vote cast have failed. *Id.* at 5 nn.5-6. Instead, the use of printed CVRs as "ballot images" for a recount is consistent with electronic voting at both the federal and state level. What happened in the recount—the printing and counting of the CVRs—is what the law mandates.

Pressley points to statutory language that the "original ballot, rather than the duplicate of the original ballot, shall be counted." TEX. ELEC. CODE §214.049(e). But this case does not involve "duplicate ballots," and that provision has nothing to do with the issue before the Court. A "duplicate ballot" is a copy of an existing ballot created when the original is damaged and cannot be counted by an automatic counting machine. TEX. ELEC. CODE §127.126; *Barrera v. Garcia*, No. 04–12–00469–CV, 2012 WL 4096021, at *2 (Tex. App.—San Antonio Sep. 19, 2012, no pet.) (mem. op.). Here, no duplicate ballots were created. Moreover, the Legislature directed that procedures for counting paper ballots do not apply to manual counting of votes cast on an electronic voting machine if doing so is not practicable. TEX. ELEC. CODE §127.130(c). Pressley cannot use the fact that DREs do not create original, contemporaneous ballots to avoid counting legal votes.

Pressley's argument misapplies the term "ballot" and is contrary to recount law. A "recount" is the process "for verifying the vote count in an election." TEX. ELEC. CODE §211.002(1). Recounts require "all votes cast" be counted. TEX. ELEC. CODE §212.136. The law specifically requires "ballot images" be printed for a manual recount of votes cast on a DRE. TEX. ELEC. CODE §213.016. Texas requires DREs provide "ballot image storage" for use in a recount. TEX. ELEC. CODE §128.001(a)(2). A "ballot" and a "ballot image" are not the same thing. A ballot is the mechanism by which a voter casts a vote, but a "ballot image" has always been recognized as the actual vote cast. While the term "ballot" is frequently used for the term "vote," the terms are not synonymous, and the Election Code should be construed to give effect to the Legislature's intent. *Clary*, 138 S.W. at 569-70. The Legislature intended a recount to include votes cast on an electronic voting machine, maintained on DREs as "ballot images," also known as "cast vote records." The recount was conducted properly, and Pressley's contest has no merit.

B. Pressley's novel statutory argument is not a valid basis to disenfranchise Texas voters.

Even if the Court accepted Pressley's view that the Secretary erred in certifying a DRE without requiring an "original ballot" (however that might work), Pressley's contest still must fail. There is no evidence even a single illegal vote was cast or counted, and nothing supports throwing out thousands of legal votes.

Pressley has no right to void the votes that were cast electronically. Qualified voters have a constitutionally protected right to vote and have their votes counted. *United States v. Mosley*, 238 U.S. 383 (1915). The approval and use of voting machines with public counters is not a basis to void an election. *Christy*, 291 S.W.2d at 408. The Election Code "may not be used as an instrument of disfranchisement for irregularities of procedure." *Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex. App.—San Antonio 1981, writ dism'd). When any violation or irregularity is not those of the voters, but of the election officials over which the voters had no control, then to vitiate the votes would wrongly result in a disenfranchisement of those voters who properly cast their ballots. *Id.* at 370. "[C]ourts should not disfranchise . . . voters because an official failed to follow the strict letter of the [Election] [C]ode." *Alvarez v. Espinoza*, 844 S.W.2d 238, 243 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.). Under these circumstances, the courts recognize that, even if it does not approve of an election official's violation of the Election Code, this is a situation when the sins of the official should not be visited upon the voter. *Honts*, 975 S.W.2d at 821-22 (despite finding that primary official consolidated precincts in violation of the Election Code, would not void primary when "1,048 qualified voters cast their ballots with the assumption that their votes would be counted."). Likewise, when a technical violation of the Election Code occurs, "it would frustrate the democratic process to void this entire runoff election for the sake of rigid conformity to the law." *Des Champ v. Featherston*, 886 S.W.2d 536, 541 (Tex. App.—

Austin 1994, no writ). Pressley cannot rely on her claim the Secretary wrongly certified the eSlate to void votes and disenfranchise voters.

Even if the Court held the Secretary erred in certifying the eSlate, nothing in the requirements for a computerized voting machine supports throwing out legally cast votes. TEX. ELEC. CODE §128.001. The language of the statutory provisions is insufficient to justify throwing out legally cast votes. *Barrera*, 2012 WL 4096021 at *2 (refusing to throw out votes based on statutory language requiring what election official "must" do with duplicate ballots). Such language will not be construed as mandatory absent fraud or a statutory provision requiring the voiding of any ballot for failure to comply. *Reese v. Duncan*, 80 S.W.3d 650, 658 (Tex. App.—Dallas 2002, pet. denied). There is no evidence of fraud and nothing supports invalidating legal votes.

The right to vote "should not be impaired or destroyed by strained statutory constructions. If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms." *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. App.—San Antonio 1952, no writ h.). *Sanchez* was an election contest based on a law requiring absentee voters to remove a ballot stub and place it and the ballot in separate boxes. But, because the clerk failed to put a separate stub box at the poll, all absentee ballots had been placed in the same box, stubs attached. *Id.* at 936. Like Pressley, the losing candidate tried to use the clerk's error to have the court declare either the election or absentee votes void. *Id.* The court refused, holding even though the law required the stub box, the statute did

not clearly indicate that a cast vote should be declared void for failure to follow the proper procedure. *Id.* at 938. Likewise, the statutes at issue here give no indication any cast vote should not be counted.

There is no evidence even a single vote was illegally cast or counted. It would frustrate the democratic process to void the entire election based on a rigid (and faulty) interpretation of the Election Code. The votes show Pressley lost, and the election should not be overturned by having the Court throw out legal votes.

C. Pressley has no evidence of any Election Code violation that materially affected or calls into doubt the true outcome of the election.

Pressley also claims irregularities and mistakes make it impossible to determine the true outcome of the election.[65] Some of the allegations Pressley raises are the same for which she received Chapter 10 sanctions. Regardless, Pressley does not point to any evidence an Election Code violation occurred, much less materially affected or called into doubt the election.

1. There is no evidence even a single vote was not properly cast or counted, and a full audit confirmed the results.

Pressley claims there were numerous invalid or corrupt mobile ballot boxes ("MBBs"—the device that stores ballot information) during the election. In support, she points to her expert's declaration, audit logs, the Clerk's testimony, and the text of Pressley's own pleadings.[66] None of this is any evidence of any Election Code violation.

[65] Pressley Br. 29-30, 34-45.
[66] Pressley Br. 29-30.

Pressley's computer scientist, Jacobson, begins his declaration with the unsupported conclusory statement that "[s]everal Mobile Ballot Boxes were *corrupt* and rejected by the system."[67] Unsupported conclusory statements by an expert witness are not competent summary judgment evidence. *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004). The unsupported nature of Jacobson's statement is clear by the fact that: (1) he indicates that it is based solely on the messages appearing on the log itself; and (2) he states that "[i]t is not known whether this resulted from nine individual MBBs or repeated read attempts for a smaller number of MBBs—it could have been just one MBB with nine attempted reads;" and (3) he says that it is "unclear" why a "corrupt" message appears before the beginning of a group of MBBs being read. Jacobson admits that he did not review any documents that evidenced an effort to determine whether any votes were lost due to the "corrupt" error messages.[68] The substance of Jacobson's declaration makes clear his opinions are not based on personal knowledge. An affidavit not based on personal knowledge is not competent summary judgment evidence. *Spradlin v. State*, 100 S.W.3d 372, 381 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Instead, Jacobson's entire discussion of the MBBs is unsupported, conclusory speculation and not proper evidence. *Mason*, 143 S.W.3d at 803.

There is no mystery about the MBBs or the error messages. The Clerk testified she suspected the error messages were the likely result of a problem with the reader,

[67] 1CR:2086 (emphasis in original).
[68] 1CR:2086-87.

not the MBB, adding that the MBB is connected a first time, and, if an error occurs, "you put it in a second time and it reads just fine."[69] The Clerk testified, "[i]n this election there were zero MBBs that were not successfully read and tabulated."[70]

Pressley takes the Clerk's words out of context to claim she believed there were numerous corruption errors,[71] but that is not what the Clerk testified. Pressley cannot take the Clerk's testimony out of context to try to support something it never did. *City of Keller v. Wilson*, 168 S.W.3d 802, 812 (Tex. 2005). The Clerk explained at length how, because of multiple audits her office does, there is confirmation the computer properly recorded all votes on the MBBs.[72] The Clerk also testified to the myriad of security measures in place to guard against any tampering and explained how the system was not subject to being "hacked" because it is a closed system, not attached to the internet.[73] And the Clerk testified the audits for the election showed everything balanced and "the number of ballots voted matched the number of people who were voting."[74] The Clerk testified she had "every reason to believe that the system behaved accurately and correctly. I have no indication, evidence to show anything otherwise."[75] Pressley has no evidence of any errors or malfunctions in the election equipment.

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[69] 1CR:1978-79.
[70] 1CR:4602-04.
[71] Pressley Br. 30.
[72] 1CR:1959.
[73] 1CR:1939-43, 1964-65.
[74] 1CR:1986-87.
[75] 1CR:1988.

2. Tapes for the voting machines were properly printed as instructed by the Secretary of State in accordance with the Election Code under the Countywide Polling Place Program.

There is no evidence for Pressley's argument[76] voting machine tapes were not properly printed—the evidence showed the exact opposite. Travis County participates in the Countywide Polling Place Program, created by the Legislature to allow for countywide polls in jurisdictions using DREs. TEX. ELEC. CODE §43.007. The statute gives the Secretary authority to provide for auditing of DREs "before and after the election, and during the election to the extent such an audit is practicable." TEX. ELEC. CODE §43.007(c). That is exactly what happened here.

The tapes were printed during the runoff according to standard procedures directed by the Secretary. Travis County (like all counties using countywide vote centers) uses a procedure for tapes prescribed by the Secretary. These procedures are necessary because in large jurisdictions it would take seven hours per machine to print the tape and be unworkable on election day.[77] Even before the contest, Pressley was in possession of a letter from the Secretary's Director of Elections to Travis County, authorizing these procedures for the 2014 election.[78] The Clerk testified the tapes were run for the recount in full compliance with the law.[79]

[76] Pressley Br 37-42.
[77] 1CR:1950-52, 2005-08, 4604, 2005-06; 2RR2:161-64.
[78] 1CR:568-69.
[79] 2RR2:162-63.

While Pressley repeats her claim the Clerk ordered her staff not to print zero tapes for the runoff, the Clerk specifically testified zero tapes were made for this election and produced in discovery.[80] The Clerk testified Travis County followed standard procedure and printed tapes both before and after the election.[81] Pressley even attached a zero tape to her own sixth amended contest as an exhibit.[82]

Pressley argues the Secretary had no authority to instruct the Clerk to print the tapes as were done, but in support cites only another, past advisory by the Secretary that was not specific to the Countywide Polling Place Program.[83] Pressley has admitted she did not know whether tapes were printed, where they were printed, or when.[84] There is no support for her argument tapes were not properly printed. Moreover, Pressley produced no evidence any votes were improperly tallied or that the Clerk's printing of the tapes materially affected the outcome of the election. *Pressley*, 2016 WL 7584051, at *10. The Clerk following the procedures authorized by the Secretary for printing tapes does not justify voiding the election.

[80] 1CR:1950-52.
[81] 1CR:2005-08 (tapes printed after the election are referred to as Access Code reports). See also errata sheet 1CR:4602.
[82] 1CR:1865-80.
[83] Pressley Br. 37-38; 1CR:691-711.
[84] 1CR:606.

3. As provided by the Election Code, at the recount Pressley and her supporters were allowed to watch the printing and counting of the votes.

In a recount for elections using DREs, each candidate and her representatives are "entitled to be present . . . during the printing of the images," TEX. ELEC. CODE §213.016, and to watch the recount itself. TEX. ELEC. CODE §213.013. There is no dispute Pressley and her supporters were allowed to watch the printing of the votes and the recount.[85] Pressley argues she and her supporters should have been allowed further access to the machines and votes "before they were physically printed,"[86] but the law does not support her claimed right to access.

The Election Code does not allow Pressley access to the voting machines or the electronically-stored votes. The Election Code specifically allows candidates and their representatives to be present for the printing of the ballots and the recount. TEX. ELEC. CODE §§213.013, -.016. But access to the machines, voted ballots, equipment and other materials, is limited to the official recount committee. TEX. ELEC. CODE §213.007. As the Secretary recognized, the recount committee is allowed to access these materials to prepare for the recount, and the candidate and supporters are allowed to watch the printing of the votes and the recount.[87]

In fact, before the contest was filed, the Secretary twice rejected Pressley's allegations and explained the recount was properly carried out. The Director of

[85] 1CR:572-77, 584-85, 720-21, 2003-04.
[86] Pressley Br. 43.
[87] 1CR:574-76.

Elections spelled out that the law does not allow her to monitor the retrieval of the recount data (which is reserved to the official committee), but only to view the printing of the ballot images. The Director explained that Travis County printed "the ballot images in the presence of you and your watchers," and made clear that the actions of Travis County officials were not criminal violations for obstruction of a poll watcher.[88] As the Secretary explained, the Election Code clearly states that the recount supervisor can take the steps necessary to prepare prior to the recount commencing, and that does not conflict with the statutory right of the candidates to be present for the printing of the ballots or once the recount begins.[89]

As the court of appeals recognized, even if Pressley's claim was true, it fails to carry her burden in the contest. *Pressley,* 2016 WL 7584051, at *11. Pressley has no evidence the votes were not printed properly, post-election audits showed the number of voters matched the number of ballots cast, and that the ballot images were properly maintained and printed. *Id.* Pressley's arguments for access to the voting machines and electronic votes do not support setting aside the election.

IV. The trial court had discretion to sanction Pressley for repeatedly filing unsupported and untrue allegations meant to bolster her election contest.

To bolster her attempt to void the election, Pressley dressed up her contest by repeatedly making unsupported, untrue claims of voter disenfranchisement, election and recount errors and mistakes, and criminal violations by election officials. Pressley

[88] 1CR:572-77.
[89] 1CR:575.

had no support for these claims, and ample evidence they were untrue, but repeatedly pleaded the claims nonetheless. This is exactly the conduct Chapter 10 sanctions are designed to punish and deter, and the court properly sanctioned Pressley a portion of Casar's segregated, reasonable attorneys' fees caused by the improper allegations. The sanction award should not be disturbed.

A. A party filing an election contest is subject to the same requirements under Chapter 10 as other litigants, and can be held responsible for filing frivolous allegations.

To avoid being sanctioned for filing numerous unsupported allegations, Pressley argues Chapter 10 sanctions should be unavailable in an election contest because it would chill future similar cases.[90] But election contests are bound by the same rules that govern other cases. *Rodriguez*, 143 S.W.3d at 260. Claims brought under the Election Code that lack support are subject to the same rules for dismissal and sanctions, including Chapter 10. *King St. Patriots*, 521 S.W.3d at 739-40 n.49.

Pressley was sanctioned, not for filing an election contest, but for repeatedly pleading unsupported and untrue claims. The law reflects "a balancing of individual Texans' rights to access their court system against the public's interest in protecting defendant's from individual's who abuse that system." *Clifton v. Walters*, 308 S.W.3d 94, 102 (Tex. App.—Fort Worth 2010, pet. denied). "We strive to keep elections open and encourage people to bring valid election contests to help assure free and honest elections. However, we cannot condone actions brought which tend to harass others

[90] Pressley Br. 8-9, 47, 62-64.

because of the failure to investigate facts, the law and then the failure to properly present a case." *Armond v. Fowler*, 694 So.2d 358, 361 (La. Ct. App. 1996) (upholding sanctions award in election contest when there was no evidence to support claims that use of electronic voting machine made election result unknowable).

Chapter 10 allows sanctions for pleadings filed for an improper purpose or lacking legal or factual support. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014). Chapter 10 requires that "*each* claim and *each* allegation" be supported, and "[t]he statute dictates that each claim and each allegation be individually evaluated for support." *Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007) (emphasis in original). While there is a finding Pressley acted in bad faith, Chapter 10 does not require a party to specifically show bad faith or malicious intent. *Id.* at 617. "Chapter 10 provides that a claim that lacks a legal or factual basis—without more—is sanctionable." *Nath*, 446 S.W.3d at 369.

The Court should not disturb the sanction for Pressley repeatedly attacking the election results with unsupported and untrue allegations. Election contests become problematic when political actors exploit them for their own political gain. Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1024 (Mar. 2013). Pursuing drawn out, unsupported and untrue claims in an election contest hurts the smooth running of our democracy, and threatens to damage the integrity and perceived legitimacy of the election system and the ultimate winner. *Id.* at 1018, 1024-27.

Without support, Pressley repeatedly filed pleadings that made numerous allegations designed to undermine faith in the Texas election process. The trial court recognized that, despite repeated claims and promises, Pressley never presented evidence to support the claims for which sanctions were granted. As the court explained:

> I've been waiting to see some pleadings now that you're on your sixth or seventh, it comes and says, *Well, these voters were disenfranchised and they voted over here and, you know, they really got counted as*—I haven't seen any—any of that kind of evidence. I keep seeing these generalized allegations of things which makes me get a little bit, you know, suspect of the nature of the lawsuit.[91]

The trial court was right to sanction Pressley for repeatedly asserting unsupported and untrue claims of voter disenfranchisement, election irregularities and mistakes, and crimes by elections officials—some of which she continues to assert even now. "Indeed, appellants advocated theories that ranged from pettifoggery to the bizarre. Appellants also admitted to numerous failures to conduct even rudimentary investigation regarding material facts . . . ." *Bennett v. Reynolds*, No. 03–12–00568–CV, 2014 WL 4179452, *15 (Tex. App.—Austin Aug. 22, 2014, pet. denied). This is exactly the type of conduct for which Chapter 10 sanctions were designed, and the sanctions should not be disturbed.

[91] 1RR4:97 (italics in original).

1. Pressley made repeated unsupported claims of widespread and "illegal" voter disenfranchisement in the runoff.

Through the first five iterations of her contest, Pressley pleaded there was widespread "illegal" voter disenfranchisement in the runoff as a result of consolidating voting locations. Pressley alleged a "conservative count" put the number of disenfranchised voters at 1,108.[92] At the sanctions hearing, Pressley testified she got that number just by counting voters who had historically voted, but did not vote in her election.[93] Pressley knew she had no actual support for the allegation any of these voters did not vote due to polling stations closing, but she pleaded it repeatedly.

Due to substantial drop-off in voting, it is a normal and legal practice to change and consolidate polling locations between a general election and runoff.[94] The polling stations for the runoff were set after public notice and a hearing of the Austin City Council. The city council was authorized to set the voting location. TEX. ELEC. CODE §43.004(a). The council approved an ordinance ordering the runoff, and a list of all polling locations for the runoff was attached, posted and published.[95] There is no evidence of anything nefarious about the setting of the polling stations for the runoff or that doing so caused any voter to be disenfranchised.

For the runoff, there were several polling stations within and around District 4. District 4 had nine voting centers in the district. Moreover, since 2011, Travis County

[92] 2CR:348.
[93] 2RR2:88-89.
[94] 1CR:672-74, 721.
[95] 1CR:721-22.

has used a countywide voting system allowing registered voters to vote at any county polling locations. For the 2014 runoff, 136 citywide voting locations were available to Austin voters.[96] Voters could also vote in numerous early voting centers.[97]

Pressley has not identified even one voter who claimed to be disenfranchised. Pressley's lawyer admits he never talked to any voters who indicated they were prevented from voting in the runoff because of a change in the voting locations and was "concerned about that issue."[98]

On April 16, 2015, Pressley's deposition was taken.[99] Pressley admitted she could not identify a single voter who was disenfranchised by the change in voting locations for the runoff.[100] Pressley also testified that, if a voter had to drive 20 seconds to a new voting location, to her that would constitute voter disenfranchisement.[101] Five days after her deposition, Pressley filed her fifth amended contest, again alleging widespread voter disenfranchisement due to the closing of polls.[102] Pressley had no support for this claim, which was frivolous.

2. Pressley repeatedly made unsupported claims voting machine tapes were not printed for the runoff.

Pressley repeatedly pleaded voting machine tapes were not printed for the runoff, including claiming Travis County election officers improperly instructed election

[96] 1CR:721.
[97] 1CR:839.
[98] 2RR2:114.
[99] 2RR2:148.
[100] 1CR:604-05.
[101] 1CR:598-99.
[102] 2CR:343.

officials not to print them. She then relied on these untrue allegations of "missing election records" to claim the outcome of the runoff was unknown.[103] But the tapes were properly printed, and they were produced to Pressley during discovery, who even attached them as an exhibit to her sixth amended contest.[104] Travis County participates in the Countywide Polling Place Program, created by the Legislature to allow for countywide polls in jurisdictions using DREs. TEX. ELEC. CODE §43.007. The statute gives the Secretary authority to provide for auditing of DREs "before and after the election, and during the election to the extent such an audit is practicable." TEX. ELEC. CODE §43.007(c). That is what happened here.

On May 11, 2015, the Travis County Clerk was deposed by Pressley's counsel. During the deposition, Pressley's counsel questioned the Clerk about the zero tapes for the runoff and was told that the zero tapes were done and were produced in discovery.[105] The Clerk testified that the tapes were printed during the runoff according to standard procedures. She explained that for election day, Travis County (and all counties that use vote centers) uses a procedure for tapes prescribed to them by the Secretary.[106] Even before the recount, Pressley was in possession of a letter from the Secretary's Director of Elections to Travis County, authorizing these procedures.[107] At the sanctions

[103] 1CR:861-62.
[104] 1CR:1865-80.
[105] 1CR:1950-52.
[106] 1CR:2005-08, 4604.
[107] 1CR:568-69.

hearing, the Clerk testified again the zero and results tapes were run for the recount in full compliance with the law.[108] There is no support to claim the tapes were not printed.

In her deposition, Pressley admitted she did not know whether zero tapes were printed, where they were printed, or when.[109] Despite having no basis to claim the tapes were not properly printed, having a letter from the Secretary authorizing the tapes being printed as they were, having been produced tapes, and having attached a tape as an exhibit to her contest, Pressley continually pleaded these unsupported allegations.[110]

3. Pressley repeatedly made unsupported claims that errors in the recount materially affected the outcome.

Through the contest, Pressley repeatedly asserted numerous procedural irregularities and Election Code violations occurred during the recount that materially affected the outcome.[111] For example, she claimed Travis County started the recount prior to the scheduled time, the number of votes was not reconciled with recounted ballots, CVRs were improperly used in the recount process, and the "sum total of those voting irregularities exceeds the number of votes by which the election was decided."[112] Not only are these allegations unsupported and untrue, before the contest was filed the Secretary twice rejected each of these same allegations and explained the recount was properly carried out.[113]

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[108] 2RR2:162-63.
[109] 1CR:606.
[110] 1CR:861.
[111] 1CR:861-62.
[112] 1CR:911.
[113] 1CR:572-77.

Likewise, Pressley repeatedly pleaded the election was tainted by corrupt MBBs or broken seals, despite undisputed evidence these were part of the normal election process, an audit showing everything was correct, and no evidence anything effected tabulating votes.[114] Pressley had no support for any claim recount irregularities or mistakes affected the outcome, but repeatedly included these allegations in her contest.

4. Pressley repeatedly made unsupported claims the Travis County Director of Elections committed criminal violations by obstructing poll watchers.

Pressley has no evidence of any criminal misconduct by any election official, but she repeatedly alleged criminal acts by Travis County election officials, including a specific claim the Director of Elections criminally obstructed poll watchers during the recount. Trying to be responsive to Pressley's concerns about the time and expense the recount would involve, the Clerk figured out the day before the recount a way to print the CVRs for just District 4. When Pressley arrived, she did not approve, and these printed materials were scrapped. The CVRs were then printed again in the presence of Pressley and her poll watchers.[115]

But Pressley filed a series of complaints with the Secretary about the recount, all of which were dismissed.[116] The Secretary clearly told Pressley the law does not provide for the monitoring of the retrieval of the recount data, but only to view the printing of

[114] 1CR:1941-42, 1978-79, 4602-04.
[115] 1CR:2003-04.
[116] 1CR:607-28.

the CVRs.[117] As to the printing, the Secretary explained Pressley was "entitled to be present at the printing of the ballot images, and when you raised this issue with the Travis County Elections Division, Travis County agreed to reprint the ballot images in the presence of you and your watchers."[118] Responding to Pressley's continued submissions, the Secretary again explained that the actions of Travis County employees did not equate to a criminal violation for unlawful obstruction of a poll watcher.[119] Despite being told by the chief election officer of Texas that no crime occurred and no one was obstructed, Pressley repeatedly pleaded this unsupported allegation.

B. Pressley was properly sanctioned for her role in repeatedly filing these unsupported claims.

Pressley was not sanctioned for all her claims, but only for repeatedly pleading unsupported and false claims to bolster her contest. The court correctly determined each of these claims lacked a factual basis and awarded appropriate sanctions. Pressley asserts more than a healthy dose of her own suspicion, speculation, and surmise about electronic voting and government officials. But mere suspicion is not evidence; it cannot form the basis for a legal filing, and it cannot help avoid Chapter 10 sanctions for claims that lacks a factual basis. *Softech Int'l, Inc. v. Diversys Learning, Inc.*, No. 03-07-00687-CV, 2009 WL 638203, at *4 (Tex. App.—Austin March 13, 2009, no pet.) (mem. op.). As the Court has admonished "on more than one occasion, 'some suspicion linked

[117] 1CR:572.
[118] 1CR:572.
[119] 1CR:574-77.

to other suspicion produces only more suspicion, which is not the same as evidence.'" *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002). Chapter 10 sanctions do not require a showing of "bad faith" or malicious intent, only that that some of the allegations in the petition did not have evidentiary support, or were unlikely to have evidentiary support. *Low*, 221 S.W.3d at 617. That test is clearly met here.

Pressley's lawyer admitted he relied on Pressley for the facts of this contest.[120] He testified he got "the vast majority of my facts from Ms. Pressley."[121] Pressley admitted she did a lot of the work in this lawsuit herself.[122] Pressley said that she spent hours working on voter data for the lawsuit "because my lawyers and the paralegal had no experience with voter data sets . . . ."[123] Her attorney testified Pressley was "the most active, hands-on client" he ever had, "almost like another paralegal."[124] Particularly after Pressley refused the Clerk's invitation to allow the audit to explain and resolve any questions she might have, Pressley cannot state she made a "reasonable inquiry" into the merits of her claims of election irregularities, mistakes, and illegal conduct. There is a sufficient nexus between Pressley's conduct and the sanctions awarded in this case.

[120] 2RR2:146.
[121] 2RR2:112.
[122] 2RR2:42.
[123] 2RR2:88.
[124] 2RR2:107.

C. The trial court properly sanctioned Pressley a portion of Casar's legal fees caused by the repeated pleading of these unsupported claims.

As provided by statute, the court ordered Pressley to pay Casar a portion of "the reasonable expenses incurred by [Casar] because of the filing of the pleading or motion, including reasonable attorney's fees." TEX. CIV. PRAC. & REM. CODE §10.004(c)(3). The $40,000 sanction was supported by testimony from Casar's counsel regarding segregated, reasonable fees Casar incurred defending against the frivolous allegations. The trial court had discretion to award a portion of these fees as sanctions.

Despite never raising the issue below and based on her own supposition of materials outside the record, Pressley argues Casar did not incur significant fees in defending the contest.[125] At the sanctions hearing, the undisputed evidence from Casar's attorney was that Casar incurred over $150,000 in attorneys' fees in the contest through summary judgment and remains liable for the debt.[126] Without objection, Casar's attorney provided evidence of over $85,000 in segregated fees attributed directly to defending against the allegations the court found to be sanctionable and over $47,000 in fees for pursuing the sanctions.[127]

Based on the record, it would "blink reality" to assume Casar did not incur significant attorneys' fees for this work. *Garcia v. Gomez,* 319 S.W.3d 638, 642 (Tex. 2010). An appellate court "will not hold that a trial court abused its discretion in levying

[125] Pressley Br. 60-62.
[126] 2RR3:10-13, 54-67, 79, 91-92, 102-03; 2RR4:5-12, 18-32.
[127] Tab B; 2RR3:60-62; 2RR4:30.

sanctions if some evidence supports its decision." *Nath*, 446 S.W.3d at 361. When, as here, the attorney provides uncontested evidence of services provided and reasonable fees and expenses incurred, that is some evidence to support attorneys' fees. *Garcia*, 319 S.W.3d at 641. Pressley's argument as to the amount of fees Casar incurred is contrary to the record.

Pressley's argument is pure speculation as to the meaning of officeholder account reports that are outside the record. The Court should not allow Pressley to create new issues based on speculation about materials outside the record. Parties cannot ask appellate courts to look outside the record to fabricate new fact issues, and the case must be determined on the record. *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979). Pressley's assertions about the reports are just arguments—not evidence. Moreover, by failing to raise the issue below, Pressley waived any alleged error. TEX. R. APP. P. 33.1.

Regardless, Pressley's claim about what the reports show is demonstrably false. Both Casar and Pressley sought donations to help offset the expense of the contest.[128] While not required by law, Casar indicated he would "[i]n the interest of full disclosure and transparency . . . . hold those funds in a Special Officeholder Account and report the contributions and expenditures on periodic C/OH reporting forms."[129] These

[128] *See, e.g.*, Lilly Rockwell, *Reports show how Pressley, Casar are paying for election challenge*, AUSTIN AM. STATESMAN, July 16, 2015.

[129] March 13, 2015, Filing of CTA Treasurer Appointment for Special Officeholder Account, available online at: http://www.austintexas.gov/edims/document.cfm?id=227617, last visited on April 9, 2018.

reports are not "campaign finance records" as Pressley claims and do not show all fees and expenses Casar incurred in the contest, but instead only report the "legal defense" funds raised and spent on some legal expenses related to the contest.[130]

The trial court awarded $40,000—a portion of Casar's fees and costs—as a sanction for Pressley' actions. The fees and costs incurred provide guideposts for determining the amount of the sanction. *Low*, 221 S.W.3d at 621. But Chapter 10 sanctions are not limited to fees and costs incurred, and a court's award of a portion of fees and costs as a sanction is not excessive simply based on a claim the parties did not prove an exact percentage of fault based on the wrongful conduct. *Id.* (holding "the determination of the amount of a penalty to be assessed under Chapter 10, which is not limited to attorney's fees and costs . . . ."); *John Kleas Co. Inc. v. Prokop*, No. 13–13–00401–CV, 2015 WL 1544797, at *18 (Tex. App.—Corpus Christi April 2, 2015, no pet.). The amount of the sanctions in this case is inherently reasonable. "Like the decision of whether to impose sanctions, the amount of sanctions is within the sound discretion of the trial court." *Softech Intern., Inc.*, 2009 WL 638203, at *4. The court does not abuse its discretion in determining the amount of a sanction simply because the appellate court might have exercised its discretion differently. *Low*, 221 S.W.3d at 620.

The trial court based the $40,000 sanction on a portion of the fees Casar incurred defending against the frivolous claims brought in the contest. Chapter 10 "explicitly

[130] Michael King, *Council Candidates' Campaign Finance Reports*, AUSTIN CHRON., July 22, 2016.

permits this sort of sanctions award." *Bennett*, 2014 WL 4179452, at *15; TEX. CIV. PRAC. & REM. CODE §10.004(c)(3). Pressley admitted Casar did nothing wrong, but knew her lawsuit would require Casar to incur attorneys' fees.[131] The evidence at the sanctions hearing was that Casar's fees exceeded the sanctions award.[132]

Texas courts have upheld as not excessive sanction awards for fees far higher than the $40,000 award against Pressley.[133] And the Court has recognized that, in some circumstances, it may be proper for a sanction "placing the entire cost of litigation" on the responsible party. *Nath*, 446 S.W.3d at 372. An award is not excessive when there is evidence the fees and expenses in the case exceeded the sanction award. *Wein v. Sherman*, No. 03–10–00499–CV, 2013 WL 4516013, *10 (Tex. App.—Austin Aug. 23, 2013, no pet.). The trial court did not abuse its discretion by awarding Casar a portion of his fees and expenses caused by defending against the frivolous allegations.

Both the trial and appellate courts recognized the sanction was necessary to deter repetition. The trial court found the sanction was necessary to deter comparable conduct by others. The court recognized the election contest "could have been brought against any elected official in Austin, Travis County, or the hundreds of other counties

[131] 2RR2:71-72.
[132] Tab B.
[133] *Bennett v. Grant*, 525 S.W.3d 642, 654-55 (Tex. 2017) (affirming sanction of $269,644.50 in litigation costs); *Nath v. Texas Children's Hosp.*, No. 14–15–00364–CV, 2016 WL 6767388, at **7-9 (Tex. App.—Houston [14th Dist.] Nov. 15, 2016, pet. filed) (affirming separate sanction awards of $726,000 and $644,500.16 which represented a portion of fees); *John Kleas Co. Inc.*, 2015 WL 1544797, at **16-19 (affirming sanction of $123,000 for fees); *Income Adm'r Servs., Inc. v. Payne*, No. 03-01-00283-CV, 2002 WL 220038, at *5 (Tex. App.—Austin Feb. 14, 2002, pet. denied) (affirming sanction of $165,136.95 for fees and expenses).

in Texas that use the eSlate voting machine" and it was "important to deter these types of challenges."[134] Likewise, the court of appeals held the sanction was not excessive and no more severe than necessary to secure compliance, punish violators, and deter other litigants from similar misconduct. *Pressley*, 2016 WL 7584051, at **18-20. The sanction should not be disturbed.

CONCLUSION

Pressley has turned an election for a two-year term on city council into over three years of litigation and counting. She has done so despite no evidence even a single vote was cast or counted wrong. Casar requests the Court deny the petition, and for any other relief to which he may be entitled.

[134] 4CR:50.

Dated: April 9, 2018

Respectfully submitted,

By: /s/ Kurt Kuhn

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this brief contains 14,898 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Kurt Kuhn
Kurt Kuhn

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I served a copy of this brief electronically, in accordance with the Court's rules on electronic filing, as listed below:

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Tab A

2016 WL 7584051
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Austin.

Laura PRESSLEY, Appellant
v.
Gregorio "Greg" CASAR, Appellee
David Rogers, Appellant
v.
Gregorio "Greg" Casar, Appellee

NO. 03–15–00368–CV, NO. 03–15–00505–CV
|
Filed: December 23, 2016

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT, NO. D–1–GN–15–000374, HONORABLE DANIEL H. MILLS, JUDGE PRESIDING

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Before Justices Puryear, Goodwin, and Field

MEMORANDUM OPINION

Melissa Goodwin, Justice

***1** In these related appeals, Laura Pressley and her former attorney, David Rogers, appeal the trial court's judgment in Pressley's election contest against Gregorio "Greg" Casar declaring Casar the winner in the December 16, 2014 runoff election for Austin City Council District 4 and awarding sanctions against Pressley and Rogers under Chapter 10 of the Texas Civil Practice and Remedies Code. *See* Tex. Elec. Code § 221.012(a); Tex. Civ. Prac. & Rem. Code §§ 10.001–.006.

BACKGROUND

Pressley and Casar were among eight candidates for District 4 in the November 4, 2014 general election, the first under Austin's "10–1" council structure.[1] Casar received the most votes, and Pressley finished second. A runoff election was held on December 16, 2014, in which Casar received 64.61% of the vote to Pressley's 35.39%, representing a difference of 1,291 votes. Pressley subsequently raised a number of questions concerning the election with Travis County Clerk Dana DeBeauvoir[2] and ultimately filed a petition for recount with the Texas Secretary of State,[3] requesting a manual recount. *See* Tex. Elec. Code § 212.001. On January 6, 2015, Travis County conducted a manual recount of all ballots cast in the runoff election. Jay Brim, Chair of the Recount Committee, and DeBeauvoir supervised the recount. A representative of the Secretary of State was also present to observe the recount.

1 In the "10–1" structure, the city is divided into ten districts, each of which elects a council representative, and the mayor is elected citywide.

2 The City of Austin contracts with Travis County for election services.

3 The Secretary of State is the state's chief election officer. *See* Tex. Elec. Code § 31.001(a).

Of the 4,417 votes cast in the runoff election, 480 were cast by mail, and 3,937 were cast electronically.[4] Travis County uses the Hart Intercivic eSlate System, an electronic voting system certified by the Secretary of State for use in elections and used by the County since approximately 2003. *See id.* §§ 122.001 (prescribing voting system standards), .031 (providing that Secretary of State must certify voting system before it may be used in election); 1 Tex. Admin. Code § 81.61 (2016) (Office of the Secretary of State, Conditions for Approval of Electronic Voting Systems) (requiring that voting systems meet or exceed minimum requirement established by Federal Election Commission); *see also Andrade v. NAACP of Austin*, 345 S.W.3d 1, 4 (Tex. 2011) (explaining procedure under Chapter 122 of Election Code for certification of

voting system by Secretary of State and adoption of system for use by political subdivision).

4 Pressley and Casar each received 240 of the 480 votes cast by mail.

The Hart eSlate System is a paperless direct recording electronic machine (DRE), which is "a voting machine that is designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device and that records the individual votes and vote totals electronically." *See* Tex. Elec. Code §§ 121.003(12), 129.001–.057 (setting out specific provisions relating to DREs). "DREs store individual votes and vote totals electronically, usually in several places within the unit." *Andrade*, 345 S.W.3d at 4 (internal citation omitted). Upon receipt of a DRE system from the vendor, the custodian of election records must perform additional testing, including hardware diagnostic, logic and accuracy, and security testing. *See* Tex. Elec. Code §§ 129.021–.024; *see also Andrade*, 345 S.W.3d at 4 (describing required testing of DRE system by custodian). In addition, in countywide polling place programs, the Secretary of State requires an audit of each DRE before, after, and if practicable, during each election. *See* Tex. Elec. Code § 43.007(c). The custodian must also create and maintain procedures for inventory, storage, and transport of and access to the DRE equipment. *See id.* §§ 129.051–.053; *see also Andrade*, 345 S.W.3d at 5 (describing requirement of secure access). A DRE may not be connected to any external communication device, such as the Internet, or have wireless capabilities, with limited exceptions, and the custodian must create a contingency plan in case of a DRE failure. *See* Tex. Elec. Code §§ 129.054, .056; *see also Andrade*, 345 S.W.3d at 5 (noting requirements regarding external communications and contingency plan). "Although DREs must provide contemporaneous printouts of 'significant election events,' there is no explicit statutory requirement that DREs provide a contemporaneous paper record of each vote cast," despite "repeated efforts to pass such legislation." *Andrade*, 345 S.W.3d at 5 & n.4 (quoting 1 Tex. Admin. Code § 81.62(a), (b) (2016) (Office of the Secretary of State, Continuous Feed Printer Dedicated to the Central Accumulator Audit Log) (requiring real-time audit log of significant events, defined to include error messages and users logging in and out)).

***2** A voter using the eSlate makes his choices by pressing a button to mark boxes next to the name of his chosen candidate in each race. The final screen of the electronic ballot is a list of the races on the ballot with the name of the candidate chosen by the voter (or an indication that no candidate was chosen) for each race. *See* Tex. Elec. Code § 129.002(a) (requiring DREs to provide voter with summary screen before vote is cast). The voter then confirms his vote by pressing the "CAST BALLOT" button. After the voter casts his ballot, the eSlate electronically stores an individual "cast vote record" (CVR), reflecting the votes as shown on the final summary screen before the voter cast his vote. [5] For the manual recount in this case, the CVR for each voter was printed and counted by hand. Pressley and her chosen poll watchers witnessed the printing of the CVRs and manual recount. *See id.* §§ 213.013(h) (authorizing candidate and poll watchers to observe recount activity), .016 (providing that each candidate and her poll watchers are entitled to be present during printing of images of ballots cast using DRE voting machines for purposes of recount). According to recount committee chair Brim, the result of the manual recount was that the totals of all precincts matched those in the original canvass, the number of voters matched the number of ballots cast, and the results of the election remained the same. After the recount, Pressley filed several complaints with the Secretary of State. The Secretary of State concluded that "the scope of the recount was conducted properly"; explained the statutory scope of a recount; informed Pressley that challenges based on irregularities, fraud, or mistake are properly made in an election contest; and dismissed Pressley's complaints.

5 Pressley and Rogers take issue with whether a CVR is the same thing as a ballot image, as discussed below.

Pressley then filed this election contest against Casar arguing that the eSlate's storage of CVRs does not comply with Election Code requirements because CVRs do not constitute "ballot images" or "images of ballots cast." *See id.* §§ 128.001(a)(2) (requiring that Secretary of State's procedures for use of electronic voting machines must provide for use of system with "main computer to coordinate ballot presentation, vote selection, ballot image storage, and result tabulation"), 213.016 (specifying who may be present during printing of images of ballots cast using DREs for purposes of recount), 232.001–.016 (providing for trial and disposition of election contest).

She also asserted allegations of voter disenfranchisement, election irregularities, and criminal violations by election officials. The parties engaged in substantial discovery, including the depositions of Pressley and DeBeauvoir. Casar filed a traditional motion for summary judgment, a no-evidence motion for summary judgment, and a motion for sanctions under Chapter 10 of the Civil Practice and Remedies Code against both Pressley and Rogers, based on certain repeated allegations asserted through Pressley's Sixth Amended Contest. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001–.006. After a hearing on Casar's summary judgment motions, the trial court granted his no-evidence motion for summary judgment. The trial court subsequently held a two-day hearing on Casar's motion for sanctions. The trial court granted the motion and awarded monetary sanctions against Pressley in the amount of $40,000 and against Rogers in the amount of $50,000, as well as contingent attorney's fees in the event of an unsuccessful appeal. The trial court also ordered that Pressley and Rogers were to be jointly and severally liable to Casar for expenses of $7,794.44. Incident to its order, the trial court entered findings of fact and conclusions of law and, at Pressley's request, entered amended findings of fact and conclusions of law. The trial court then signed an amended final judgment incorporating the terms of its orders granting summary judgment and sanctions. These appeals followed. [6]

6 At the request of the parties, the cases were consolidated for purposes of the briefing schedule and oral argument.

APPLICABLE LAW AND STANDARD OF REVIEW

In an election contest, the scope of inquiry by the trial court is limited. The Election Code provides:

> a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
>
> (1) illegal votes were counted; or
>
> (2) an election officer or other person officially in the administration of the election:
>
> (A) prevented eligible voters from voting;
>
> (B) failed to count legal votes; or
>
> (C) engaged in other fraud or illegal conduct or made a mistake.
>
> ***3** (b) In this title, "illegal vote" means a vote that is not legally countable.
>
> (c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

Tex. Elec. Code § 221.003. A contestant must prove by clear and convincing evidence that a violation of the Election Code occurred and that it materially affected the outcome of the election. *Woods v. Legg*, 363 S.W.3d 710, 713 (Tex. App.–Houston [1st Dist.] 2011, no pet.); *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.–Austin 1998, no pet.). The outcome of an election is "materially affected" when a different and correct result would have been achieved in the absence of the violation. *Woods*, 363 S.W.3d at 713; *Willet v. Cole*, 249 S.W.3d 585, 589 (Tex. App.–Waco 2008, no pet.). Clear and convincing evidence is that which produces in the factfinder a "firm belief or conviction" as to the truth of the allegations. *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015); *Woods*, 363 S.W.3d at 713. An election contestant's burden is a heavy one, and the declared result will be upheld unless there is clear and convincing evidence of an erroneous result. *Willet*, 249 S.W.3d at 589; *Barrera v. Garcia*, No. 04–12–00469–CV, 2012 Tex. App. LEXIS 7899, at *4 (Tex. App.–San Antonio Sept. 19, 2012, no pet.) (mem. op.).

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A movant seeking a no-evidence summary judgment motion must assert that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden at trial. *See* Tex. R. Civ. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.–Houston [1st Dist.] 2009, pet. denied). Once the motion is filed, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). When reviewing a summary judgment, we must take evidence favorable to the nonmovant as true, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts in the nonmovant's favor. *Id.*; *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A no-evidence motion should be

granted when " '(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.' " *Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 589 (Tex. 2015) (quoting *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)).

Pressley's and Rogers' issues also involve statutory construction, which is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context, unless the plain meaning leads to absurd results, or unless technical terms are used. *See* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010); *In re E.C.*, 444 S.W.3d 760, 765 (Tex. App.–Fort Worth 2014, no pet.).

Pressley's and Rogers' Issues

***4** Pressley and Rogers assert two primary erroneous rulings by the trial court: its ruling on Casar's no-evidence motion for summary judgment and its sanction award. In her first issue, Pressley challenges the summary judgment in favor of Casar, asserting three sub-issues. In his fifth issue, Rogers adopts and incorporates by reference the factual recitations, citations to the record and to authority, and arguments contained in Pressley's first issue. In her second issue, Pressley challenges the trial court's award of sanctions against her, asserting four sub-issues. In his first through fourth and sixth issues, Rogers challenges the trial court's award of sanctions against him. In his fourth and sixth issues, he adopts and incorporates by reference the factual recitations, citations to the record and to authority, and arguments contained in Pressley's second issue, with the exception of her argument concerning the third factor under *Low v. Henry*, 221 S.W.3d. 609, 621 n.5 (Tex. 2007), discussed below. In his first through third issues, Rogers asserts independent arguments and authority. We turn now to Pressley's and Rogers' issues.

Discovery from Travis County

In sub-issue one of Pressley's first issue and in sub-issue one of Rogers' fifth issue, Pressley and Rogers argue that the trial court committed reversible error in holding that nonparty Travis County was not required to provide Pressley access to eSlate information designated as proprietary in Travis County's contracts with Hart. Pressley included in her original, first amended, and second amended petitions a request for production directed to nonparty Travis County. She omitted the request from her third amended petition and served a Notice of Request for Production on Travis County. Pressley did not obtain a court order or serve a subpoena on Travis County, as is required for obtaining discovery from a nonparty. *See* Tex. R. Civ. P. 205.1. Nonetheless, Travis County agreed to provide relevant, non-privileged documents in its possession and sought a protective order seeking to limit the scope of discovery. The trial court entered a third-party discovery control plan allowing substantial discovery, but with some limitations. Concerning production of information that Travis County maintained was proprietary, the order provided that Travis County was to produce its contracts with Hart that prohibited Travis County from disclosing certain information, which formed the basis of the County's objections. Pressley and Rogers did not object to the entry of the order.

Travis County produced numerous documents, including its contracts with Hart and a number of manuals, and attached a privilege log listing certain withheld proprietary information. Although it did not produce the eSlate manual, a Travis County representative later stated on the record that it had produced all of the manuals in its possession. Subsequently, Travis County filed a second motion for protective order and, on the same day, Pressley filed a motion to compel discovery. Pressley complained that Travis County had produced no evidence of claimed privileges and had withheld documents not claimed as privileged. Travis County argued that Pressley continued to seek discovery outside the scope of the trial court's prior discovery order. Central to the discovery dispute was production of the eSlate manual and Pressley's access to various pieces of eSlate equipment "to examine them to determine if they were functioning properly." Pressley's motion to compel discovery was heard at the

same hearing as Casar's motions for summary judgment. The trial court granted Casar's no-evidence motion for summary judgment after addressing, but not ruling on, Pressley's motion to compel discovery.

Although Pressley and Rogers complain on appeal of the trial court's third party discovery order, which allowed Travis County to withhold what it considered proprietary information and to provide copies of its contracts with Hart as evidence of the basis for withholding information, Pressley did not object to the entry of that order. Rather, she later filed a motion to compel discovery seeking withheld and "missing" documents. However, when the trial court granted Casar's motion for summary judgment, Pressley did not obtain a ruling or object to the trial court's failure to rule on her motion to compel discovery. Nor did Pressley seek a continuance of the trial court's ruling on the summary judgment motion until it had ruled on her motion to compel discovery. In fact, Pressley's counsel, Mark Cohen, expressly stated, "We will not let this discovery be a cause for continuing the trial." [7]

7 By the time of this hearing, Pressley had retained additional counsel, who presented argument at the hearing on the motion to compel and all subsequent hearings. Rogers attended but did not present argument.

***5** Pressley and Rogers do not contend that the trial court expressly ruled on the motion to compel discovery but argue that by granting summary judgment without "requiring the Clerk [DeBeauvoir] to get the manual and produce it before ruling on the Motion for Summary Judgment," the trial court "in effect den[ied] the Motion to Compel." However, "[t]he granting of the motion for summary judgment does not necessarily implicitly overrule motions or objections." *Wilson v. Thomason Funeral Home, Inc.*, No. 03–02–00774–CV, 2003 Tex. App. LEXIS 6358, at *11 (Tex. App.–Austin July 24, 2003, no pet.) (mem. op.). Thus, the trial court's ruling on Casar's no-evidence motion for summary judgment did not amount to an implicit denial of Pressley's motion to compel discovery.

Pressley and Rogers also argue that the trial court "cut off the opportunity and obligations on the Clerk [DeBeauvoir] and its own obligation, with respect to the Motion to Compel, by abruptly changing course and granting the No Evidence Motion for Summary Judgment ...." They argue that Pressley objected and pointed this error out to the court, citing to a question Pressley's counsel, Cohen, asked the court: "So are you refusing to order [Travis County] to turn over the eSlate manual?" However, Cohen's question to the court challenged the trial court's statements that it considered the request for the eSlate manual moot because Travis County had complied with the trial court's previous order to turn over manuals in its possession and the County could not produce things not in its possession. Thus, Cohen questioned the trial court's *indication of how it intended to rule* on *one aspect* of Pressley's multi-faceted motion to compel discovery; he did not request a ruling on the motion to compel or object to the trial court's failure to rule on the motion. To preserve a complaint for review, a party must timely present it to the trial court with the specific grounds and obtain a ruling or object to the trial court's refusal to rule. Tex. R. App. P. 33.1(a); *Magnuson v. Mullen*, 65 S.W.3d 815, 829 (Tex. App.–Fort Worth 2002, pet. denied) ("If a party fails to [object], error is not preserved, and the complaint is waived.") (citing *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991)(per curiam)); *Mark Prods. U.S., Inc. v. InterFirst Bank Hous., N.A.*, 737 S.W.2d 389, 396 (Tex. App.–Houston [14th Dist.] 1987, writ denied) (holding that appellant waived complaint that trial court failed to compel discovery responses where motion to compel was pending at time of summary judgment hearing and appellant did not obtain ruling on motion or request continuance of summary judgment hearing so that trial court could rule on motion).

Having failed to object to the entry of the third party discovery order, Pressley and Rogers have waived their complaint on appeal as to that order. *See* Tex. R. App. P. 33.1(a); *Magnuson*, 65 S.W.3d at 829. Further, because they also failed to obtain a ruling on Pressley's motion to compel or to seek a continuance on the trial court's ruling on Casar's motions for summary judgment, to the extent Pressley's and Rogers' argument can be construed as a challenge to the trial court's failure to rule on the motion to compel discovery, they have not preserved that issue for appeal. We overrule sub-issue one of Pressley's first issue and sub-issue one of Roger's fifth issue. *See* Tex. R. App. P. 33.1(a); *Mark Prods.*, 737 S.W.2d at 396.

Trial Court's Review of Summary Judgment Evidence

In sub-issue two of Pressley's first issue and in sub-issue 2 of Rogers' fifth issue, Pressley and Rogers contend that the trial court committed reversible error by granting Casar's no-evidence motion for summary

judgment without reviewing the evidence. We do not find this argument persuasive on the facts before us. Pressley and Rogers appear to base their argument on the trial court's statement that it did not read every page of the summary judgment evidence because "there were too many pages." However, the record reflects that the trial court stated that it had read all of the pleadings, including those filed the morning of the hearing, and "tagged" them, and it specifically mentioned reading Pressley's expert report. Moreover, the trial court stated that it had read the evidence referred to by the parties in the pleadings. "[A] party submitting summary judgment evidence 'must specifically identify the supporting proof on file that it seeks to have considered by the trial court.' " *Nguyen v. Allstate Ins. Co.*, 404 S.W.3d 770, 776 (Tex. App.–Dallas 2013, pet. denied) (quoting *Arredondo v. Rodriguez*, 198 S.W.3d 236, 238 (Tex. App.–San Antonio 2006, no pet.)). "A general reference to a voluminous record that does not direct the trial court and parties to evidence relied upon is insufficient." *Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 308 (Tex. App.–Houston [1st Dist.] 2010, pet. denied). "In the absence of any guidance from the non-movant where the evidence can be found, the trial court is not required to sift through voluminous [evidence] in search of evidence to support the non-movant's argument that a fact issue exists." *Nguyen*, 404 S.W.3d at 776 (quoting *Aguilar v. Morales*, 162 S.W.3d 825, 838 (Tex. App.–El Paso 2005, pet. denied)). Because the record reflects that the trial court reviewed the evidence cited by the parties, as well as the pleadings and certain specific evidence, we conclude that Pressley's and Rogers' argument that the trial court committed error by granting summary judgment "without even reading the evidence" is without merit.[8] Further, to the extent the trial court failed to read *all* of the evidence, any such error is harmless in light of our conclusion below that summary judgment was appropriate. *See* Tex. R. App. P. 44.1(a)(1) (providing that for error to be reversible, it must have probably caused the rendition of an improper judgment). We overrule sub-issue two of Pressley's first issue and sub-issue two of Rogers' fifth issue.

[8] We also observe that in a number of instances, Pressley referred to exhibits consisting of hundred of pages without citing, quoting, or otherwise pointing out to the trial court the particular evidence on which she relied.

Summary Judgment

***6** In sub-issue three of Pressley's first issue and in sub-issue three of Rogers' fifth issue, Pressley and Rogers argue that the trial court erred in granting Casar's no-evidence motion for summary judgment because Pressley produced more than a scintilla of evidence to create a fact issue as to whether the declared result of the election was the true outcome. *See* Tex. Elec. Code § 221.003(a) (defining scope of inquiry in election contest). They challenge whether Debeauvoir complied with the Election Code's requirement to maintain "ballot images" and contend there were a number of "irregularities." We address these arguments in turn.

Ballot Images

Pressley and Rogers first argue that DeBeauvoir failed to maintain "ballot images" and print them for the election recount as required by the Election Code. Section 128.001 requires that the Secretary of State prescribe procedures to allow for the use of computerized voting systems and that the systems, among other things, have "a main computer to coordinate ballot presentation, vote selection, ballot image storage, and result tabulation." *Id.* § 128.001(a)(2). Section 213.016 refers to the printing of "images of ballots cast" for purposes of recount. *Id.* § 213.016. "Ballot image," "ballot image storage," and "images of ballots cast" are not defined in the Election Code. Pressley and Rogers maintain that construing the term "ballot image" according to common usage, it must mean a picture, reproduction, optical counterpart, visual representation, or exact likeness of the ballot cast. Therefore, they contend, a CVR, which reflects the votes as shown on the final summary screen before the voter casts his vote, is not a ballot image because it is not a picture, reproduction, or exact likeness of the screen on which a voter marks the box next to the name of his chosen candidate in each race. Pressley and Rogers also argue that CVRs cannot be ballot images because they do not have the elements of a ballot required by the Texas Constitution and the Election Code. *See* Tex. Const. art. VI, § 4 (providing that vote shall be by ballot and that legislature shall provide for numbering of tickets); Tex. Elec. Code §§ 52.003 (providing that name of each candidate be placed on ballot), .031 (prescribing form of name placed on ballot), .062 (requiring ballot to be numbered), .063 (requiring designation of election and date on each ballot), .064 (stating that words "OFFICIAL BALLOT" must be printed on each ballot), .070 (providing that voting square and instruction be placed on each ballot). They also argue that there is a fact issue as to the authority

of the Secretary of State to define "CVR" as synonymous with "ballot image."

In support of their argument, Pressley and Rogers rely on the "declaration" of Jeffrey Jacobson, Ph.D., Pressley's computer science expert witness, who stated that a CVR cannot be a ballot image because it is a data structure, which is a table or list of information, not an image file, which is a grid of pixels, and because a CVR is never large enough to hold an entire ballot image. Jacobson cited the Federal Election Commission's (FEC's) 1990 Performance and Testing Standard for Punch Card, Mark Sense, and Direct Recording Electronic Voting Systems and stated that "to the extent the FEC discuss[ed] what would later be known as 'cast vote records,' the FEC distinguishe[d] [CVRs] from ballot images." Pressley and Rogers also rely on DeBeauvoir's testimony that the CVR is a stored image of the final summary screen a voter sees before he casts his vote, and not of each screen on which a voter marks the box by the name of his chosen candidate. In support of their argument that DeBeauvoir has failed to comply with the law, they cite evidence that the Hart Voting System is capable of formatting ballot images, i.e., evidence that the eSlate formats a ballot meeting statutory requirements that the voter is shown when deciding for whom to vote and that the Hart Ballot Now System, used for voting by mail, scans each paper ballot to create an exact digital image of the ballot. Based on this evidence, Pressley and Rogers argue that because the legally required ballot images are "missing," the only legal ballots are the mail-in ballots. Consequently, they contend, the recount should have been based only on the mail-in ballots, making the true outcome of the election a tie and authorizing the ordering of a new election. *See id.* §§ 221.001, .012 (authorizing court to declare outcome if it can ascertain true outcome).

***7** We do not find these arguments persuasive. Initially, we observe that the CVR is an image of the screen that the voter sees when he presses the "CAST BALLOT" button. In that sense, the CVR *is* an image of the ballot a voter casts on the eSlate. Further, we disagree with Pressley and Rogers that we must apply the rule of "common usage" and conclude that a "ballot image" must be a picture or exact likeness *of the screen on which the voter decides how to vote*. Nor do we find the opinion of Pressley's expert that a CVR, as a data file, cannot be a ballot image to be determinative. Rather, we must apply the technical meaning the term has acquired as used by agencies in charge of election matters. *See* Tex. Gov't Code § 311.011; *In re E.C.*, 444 S.W.3d at 765. Texas election law does not define "ballot image storage" to require a picture or pixelated copy of an entire ballot, as Pressley and Rogers urge. Rather, federal, state, and local agencies that oversee elections all agree that, under the current state of the law, a CVR is equivalent to a ballot image. The Secretary of State defines a "Ballot Image" as an "Electronically produced record of all votes cast by a single voter," and defines a "Cast Vote Record (CVR)" as a "[p]ermanent record of all votes produced by a single voter whether in electronic or paper copy form. Also referred to as ballot image when used to refer to electronic ballots." [9] The U.S. Election Assistance Commission (EAC) uses this same language and indicates that the words can be used interchangeably. [10] It defines "ballot image" as an "[e]lectronically produced record of all votes cast by a single voter" and adds, "See also: cast vote record." *See Glossary of Key Election Terminology*, English to Spanish, 2007, U.S. Elections Commission (2007). The EAC defines "cast vote record" as the "[p]ermanent record of all votes produced by a single voter whether in electronic, paper or other form. Also referred to as ballot image when used to refer to electronic ballots." *See id.* DeBeauvoir testified that a CVR and a ballot image are "the same thing," that her interpretation of the terms is consistent with that of the Secretary of State and the EAC, that she had worked with that definition since late 2003 as a member of the EAC Board of Standards that developed the EAC election standards, and that it is the standard meaning of the term across the United States.

9 *See* Glossary, *Electronic Voting System Procedures*, Texas Secretary of State website, available at http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml. In its *Glossary of Elections Terminology*, the Secretary of State also defines "ballot" as "the mechanism for voters to show their vote preferences" in paper or electronic form and "ballot image" as "[t]he ballot as it appears on a direct recording electronic (DRE) voting system." *See Glossary of Elections Terminology*, available at http://sos.state.tx.us/elections/laws/glossary.shtml.

10 The EAC is an independent, bipartisan commission charged with developing guidelines to meet the requirements of the Help America Vote Act of 2002.

Further, the Secretary of State has certified the Hart eSlate system, which stores CVRs rather than each page on

which a voter makes his selection, and, significantly, the Texas Supreme Court has upheld his discretion to do so. In *Andrade*, the Supreme Court addressed complaints that the eSlate does not produce a contemporaneous paper record of each vote. 345 S.W.3d at 4. In rejecting an equal protection challenge to the use of the eSlate, the court noted that "DREs are not perfect. No voting system is" but concluded that "[t]he Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State's important regulatory interests. '[N]othing in the constitution forbids that choice.' " *Id.* at 14 (quoting *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). The Election Code prescribes certain minimum standards for voting systems, authorizes the Secretary of State to prescribe additional standards, and gives the Secretary of State the ultimate authority to determine whether a particular voting system meets those standards. *See* Tex. Elec. Code §§ 122.001 (setting out standards and in subsection (c) providing that Secretary of State may prescribe additional standards), .003 (authorizing Secretary of State, upon determination that system does not comply, to limit or prohibit its use), .031 (requiring approval by Secretary of State before voting system may be used), .032 (providing general requirements for approval and authorizing Secretary of State to prescribe more specific requirements), .033 (setting out additional standards), .0331 (same), .038 (providing for determination by Secretary of State of whether system satisfies requirements for approval). The Secretary of State is required to prescribe procedures for implementing and administering elections using computerized voting systems and may modify procedures as necessary to allow the use of an authorized system. *Id.* § 128.001(a), (c). The Secretary of State may also prescribe the form and content of a ballot for an election using a voting system, including one that uses DREs, to conform to the formatting requirements of the system. *Id.* § 52.075.

***8** As the chief election officer of the state, the Secretary of State is charged with obtaining and maintaining uniformity in the application, operation, and interpretation of the Election Code and with distributing comprehensive written directives and instructions to state and local authorities who administer election laws. *Id.* §§ 31.001, .003. In implementing this charge as it relates to the certification and use of the Hart eSlate system, the Secretary of State exercised his discretion to define CVR in a manner consistent with that of the EAC and directed election authorities, including DeBeauvoir, to apply that definition. In light of the discretion afforded the Secretary of State in the Election Code and guided by the *Andrade* court's recognition of that discretion and its deference to the legislature on policy matters such as the integrity and vulnerability of DREs, we cannot conclude that DeBeauvoir failed to comply with the Election Code or Texas Constitution when she implemented the use of the Hart eSlate system and followed the Secretary of State's directive to adopt the use of CVRs as ballot images. *See id.* §§ 52.075, 122.001, .003, .031, .032, .038, 128.001(a), (c); *Andrade*, 345 S.W.3d at 14, 16, 18.

Finally, Pressley and Rogers argue that any decision by the Secretary of State that allowed the true outcome of the election to be decided by something other than a numbered ballot would be unconstitutional and that "the evidence eSlate formats a ballot raises at least a fact issue as to whether the Secretary of State had authority under the Texas Election Code § 52.075 to imply in its instructions and definitions that a CVR is synonymous with an image of a ballot as defined in the Election Code." However, to the extent Pressley and Rogers challenge the Secretary of State's authority to adopt the eSlate or to define CVR or ballot image, the authority of the Secretary of State is beyond the scope of an election contest and is not properly before us. *See* Tex. Elec. Code § 221.003. [11] Taking the evidence favorable to Pressley and Rogers and indulging every reasonable inference and resolving any doubts in their favor, we conclude that Pressley and Rogers did not produce more than a mere scintilla of evidence that DeBeauvoir violated the Election Code by failing to maintain ballot images and print them for purposes of a recount and thus did not meet Pressley's burden to create a fact issue as to whether the outcome of the election is the true outcome. *See id.* § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Dorsett*, 164 S.W.3d 656.

11 As for Pressley's and Rogers' argument that the "Hart Systems are capable of storing images of the ballots cast," they refer to the Ballot Now System, an entirely different system, which is used only for paper ballots in voting by mail and has no bearing on the issue of CVRs as stored on the eSlate System at issue.

Irregularities

Pressley and Rogers also argue that a series of irregularities in the conduct of the election make the true outcome of the election impossible to determine. They

first argue that there were numerous "Invalid/Corrupt" mobile ballot boxes (MBBs). The record reflects that an MBB is a mobile or removable device that is inserted into a judge's controller booth (JBC) prior to voting and stores balloting in the JBC. The JBC is a device that stores the inventory of unvoted ballots, inventory of voted ballots, and access codes that are provided to voters for accessing the voting machines. At the end of voting, the MBB is removed, inserted into a reader, and used to tally votes at the central counting station. Pressley offered evidence that the Tally Audit Log, an audit report printed by Travis County, contained nine error messages reading "Invalid/Corrupt" upon insertion of the MBB into the JBC. Pressley and Rogers contend that these errors, in conjunction with other alleged irregularities, discussed below, make it impossible to say how many illegal votes were counted or how many legal votes were not counted. *See* 1 Tex. Admin. Code § 81.62(a), (b)(1) (requiring real-time audit log of significant election events, including error messages).

***9** However, Pressley produced no evidence that the "Invalid/Corrupt" error messages resulted in any legal votes not being counted, resulted in any illegal votes being counted, or otherwise materially affected the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713. Rather, Pressley's expert witness, Jacobson, stated only that it was "not known" whether the error messages reflected the insertion of nine individual MBBs, multiple insertions of several MBBs, or nine insertions of the same MBB, and he opined that "properly created MBB(s) may have contained legitimate votes, but some event made it/them unreadable" and that the fact that the error messages occurred "near the beginning of a group of MBBs being read warrants further study." This type of expert testimony is based on uncertainty and mere speculation and is therefore unreliable and irrelevant. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 350 (Tex. 2015) (concluding that expert's opinion that manufacturing process "could" have resulted in contaminated product was unreliable speculation); *see also Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (stating that opinion testimony that is speculative is not relevant). Moreover, although DeBeauvoir testified in her deposition that nine such error messages were more than she had heard of before and that she was not certain what had caused those specific errors, she also testified that "you put [the MBB] in once and ... you know, you put it in a second time and it reads just fine." In a related argument, Pressley and Rogers also contend that the "reader" that tallied the votes was broken. However, the only evidence Pressley produced in support of this allegation is DeBeauvoir's testimony that she "suspect[ed]" that the MBB error messages may have occurred because there was something wrong with the reader and not the MBBs. This evidence does not constitute evidence that any legal votes were not counted or any illegal votes were counted materially affecting the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713.

Pressley and Rogers also argue that eSlate "seals were broken[,] bringing the security and accuracy of the MBBs into question." Pressley produced affidavits from poll workers stating that certain eSlates were improperly sealed with "red seals" and that the workers re-sealed them with new "green seals." One worker reported that a seal had to be broken to disconnect the headphones, and another stated that he had to break and replace the seal to remove and replace a broken "wing" on the eSlate. Pressley produced no evidence that any seals were actually broken other than by election officials, who reported their actions, and who broke them only to replace red seals with green seals or to address hardware issues, much less any evidence that issues with the seals resulted in any legal votes not being counted or any illegal votes being counted or materially affected the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713.

Pressley and Rogers next argue that the Tally Audit Log reflected that the computer that tallies the CVRs was left open on several occasions for extended periods of time. *See* 1 Tex. Admin. Code § 81.62(a), (b)(5) (requiring real-time audit log of significant election events, including users logging in and out of system). In her Sixth Amended Contest, Pressley alleged that because the computer was left open, "anyone with physical access could use the administrator account to arbitrarily change vote information." DeBeauvoir testified that she did not agree with the characterization by Pressley's counsel, Cohen, of audit log entries as reflecting one week between a user's last activity and his logging out, that she did not know if the audit log was correct as to those entries, that she was uncertain of what the coding on the audit log meant, and that she did not believe that the tally computer

had been left open for a week. She further testified about the security measures Travis County uses to guard against tampering and explained that the system is not subject to hacking because it is a closed system, not connected to the Internet. Even assuming, however, that the tally computer remained open for periods of time, Pressley alleged only that someone "could" have accessed the computer and offered no evidence that anyone actually did access the tally computer or that the open computer resulted in any legal votes not being counted or any illegal votes being counted or materially affected the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713.

***10** The next irregularities Pressley and Rogers assert is that DeBeauvoir instructed her employees not to print zero tapes and results or tally tapes on the day of the runoff election as required by the Secretary of State. Zero tapes are printed when the eSlate is set up at the polls to establish that there are zero votes in the machine next to each name or question on the ballot and again after the election to clear them for use in the next election. Results or tally tapes are printed when the polls close and show the votes next to each name or question. The Secretary of State in the past issued an election advisory instructing election officials to print, sign, and maintain at least one zero tape from each device and at least two copies of the results or tally tape from each device. Pressley produced a letter from the Secretary of State giving Travis County, which uses countywide vote centers—where any voter from any precinct can vote—and conducts joint elections with long ballots, a special dispensation concerning zero and results or tally tapes for the November general election. To avoid delays associated with printing at countywide vote centers, the Secretary of State instructed Travis County to begin printing zero tapes before election day, to print abbreviated zero tapes on election day, and to print abbreviated results or tally tapes called "access code reports" or "access codes" after the polls closed. Pressley also produced a JBC "Judge's Envelope Cover" with the instruction, "DO NOT PRINT THE TALLY." In support of her argument that DeBeauvoir instructed her employees not to print zero tapes, Pressley cited only to allegations in her own pleadings. DeBeauvoir testified that it was because of the Secretary of State's letter instruction to print access codes in lieu of tally tapes that she directed her employees not to print tally tapes. She also testified that, in accordance with the Secretary of State's instructions, Travis County began printing zero tapes prior to election day, printed abbreviated zero tapes at each polling place on election day, and printed access codes at each polling place after the polls closed.

Pressley and Rogers argue that the special dispensation from the Secretary of State applied only to the November general election and that by following abbreviated procedures in the runoff without dispensation to do so, Travis County ignored a critical election security protocol. Thus, they contend, there is no proof that the JBCs contained zero votes when voting began and no proof of the vote totals each candidate received. However, the letter instructing Travis County to use the abbreviated procedures for the November general election was written before the election and before it was known that a runoff election would be required. In the letter, the Secretary of State pointed out that when the abbreviated procedures are used, an election is adequately auditable through various audit and review steps and that ballot images remain on the voting machines for recounts, contests, and other post-election reviews until archived for the following election. Further, even were we to assume that Travis County lacked special dispensation to print abbreviated zero and results or tally tapes, Pressley produced no evidence that there were any votes on the JBCs before voting began, that any votes were not tallied, or that the use of the abbreviated procedures materially affected the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713.

Pressley and Rogers next argue that Pressley's statistical analysis of the runoff election results indicates that the results are not believable. They contend that the analysis shows "very unusual and unique mathematical patterns and anomalies" and reveals that the results are erroneous and that the outcome of the election cannot be determined. The alleged anomalies include: (1) the top nine precincts, comprising 80% of the voters, showed exactly the same results for the general and runoff elections (65% to 35%) despite that 600 fewer voters voted in the runoff election; (2) overall results showed exactly the same results for the general and runoff elections (65% to 35%) despite that 4,000 fewer voters voted in the runoff election; and (3) no other runoff race in the past 11 years has shown as tight a distribution between a general election and a runoff election as this race, with a standard deviation of .06%. In her Sixth

Amended Contest, Pressley also alleged that there were discrepancies in early voting results, including 28 duplicate entries for ballots by mail that "appear to have been counted twice or three times," early voting reports that were inconsistent with the canvassed results, which is "evidence of systemic errors occurring in the counting," and a discrepancy between the number of voters and the number of votes cast, which is "indicative of several known and documented scenarios of errors and security breaches that can occur with the Hart Electronic Voting System."

However, as shown by the express terms of her Sixth Amended Contest, Pressley alleged only that there "appear" to have been duplicate votes and that voting reports were "indicative" of errors and did not even allege, much less offer any evidence of, any actual duplication of votes or systemic errors. To the contrary, DeBeauvoir testified the post-election audit showed that "[e]verything balanced," that is, "[t]he number of ballots voted matched the number of people who were voting, in that entire picture." Likewise, Jacobson, Pressley's expert, stated only that the "unusual mathematical patterns" were "suspicious" and "warrant[ed] further analysis and testing." As with his testimony concerning the MBBs, Jacobson offered only speculation that something might be wrong. *See Gharda*, 464 S.W.3d at 350; *Coastal Transp.*, 136 S.W.3d at 232. Even assuming that the facts Pressley alleged constitute "very unusual and unique mathematical patterns and anomalies," Pressley asserted only a suspicion of actual irregularity and produced no evidence that there were errors in counting votes or breaches in security, or that the alleged anomalies materially affected the outcome of the election. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713.

***11** The last irregularity Pressley and Rogers assert is that Travis County officials prevented Pressley's poll watchers from viewing the entire process of printing the CVRs from the tally computer for the manual recount. Election Code section 33.056 generally describes poll watchers' observing activity and provides, among other things, that a poll watcher is entitled to observe any activity conducted at the location where the poll watcher is serving and to sit or stand close enough to a member of a counting team to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly. Tex. Elec. Code § 33.056(b). Section 213.013 provides the same for a recount. *Id.* § 213.013(h). Section 213.016 provides that each candidate and her recount watchers are entitled to be present during the printing of images of ballots cast for purposes of a recount. *Id.* § 213.016. Section 33.061 provides that an official who knowingly prevents a watcher from observing an activity the watcher is entitled to observe commits a Class A misdemeanor. *Id.* § 33.061. Pressley and her recount watchers were allowed to be present during the printing of the CVRs but not during the retrieval and sorting of the CVRs on the tally computer. In her Sixth Amended Contest, under a subsection entitled "Contestant's Official Poll Watchers were Denied Access on Election Night—Four Counts of Criminal Violations Committed by Travis County Elections Officer," Pressley alleged that Michael Winn, Travis County Director of Elections, was informed multiple times that Pressley's poll watchers were being denied access and failed to correct the situation. In the next paragraph, Pressley cited section 33.061. Specifically, Pressley and Rogers complain that Pressley and her recount watchers were not allowed to monitor the integrity of where the CVRs were retrieved, the source where the retrieval occurred, or the copying of the CVR files to an aggregated pdf file, which "they were arguably allowed to do" under sections 33.056 and 213.013.

Section 33.056 provides that poll watchers may observe election activities but does not specifically apply to recounts. *See id.* § 33.056. Section 213.013 applies to recounts and provides generally that poll watchers may observe activities conducted in connection with the recount. *See id.* § 213.013(h). Section 213.016, which was enacted after sections 33.056 and 213.013, specifically addresses the printing of images of ballots cast using DREs for purposes of a recount and provides that candidates and their poll watchers are entitled to be present "during the *printing* of the images." *Id.* § 213.016 (emphasis added).

Assuming without deciding that Pressley and her recount watchers were entitled to view the retrieval, sorting, and copying of the CVR files, Pressley and Rogers have failed to explain how the inability of Pressley's poll watchers to view such activity during the recount had any effect on the results of the recount or on the outcome of the runoff election, much less a material effect. [12] *See id.* § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Woods*, 363 S.W.3d at 713; *see also* Tex. R. App.

P. 38.1(i) (stating that appellant's brief must contain clear and concise argument for contentions made with citations to authorities and record). They argue that it prevented the poll watchers and therefore the trial court from "being assured the MBBs containing the CVRs were the actual ones produced by the voting machines or the CVRs were being properly tallied." However, this argument—that the poll watchers were unable to determine whether the retrieval, sorting, and copying were done correctly—seems to invert the burden of proof. Pressley's burden was to show that this "irregularity" materially affected the outcome, and it is not sufficient for Pressley and Rogers merely to assert that they were unable to determine if procedures were performed correctly. Pressley did not produce any evidence that the poll watchers' inability to observe the retrieval, sorting, and copying of the CVR files resulted in its being done incorrectly and led to an erroneous result. *See Willet*, 249 S.W.3d at 589. Rather, DeBeauvoir testified that the post-election audit showed that the number of ballots cast matched the number of voters, and we have already concluded that Debeauvoir did not violate the Election Code in maintaining and printing CVRs as ballot images for the recount. *See Andrade*, 345 S.W.3d at 14, 16, 18. On the record before us, we conclude that the trial court did not err in determining that Pressley did not produce more than a mere scintilla of evidence that any illegal votes were counted, that any legal votes were not counted, or that the outcome of the election was materially affected as a result of these alleged irregularities taken separately or together. *See* Tex. Elec. Code § 221.003; *Emmett*, 459 S.W.3d at 589; *Mack Trucks*, 206 S.W.3d at 582; *Dorsett*, 164 S.W.3d 656; *Woods*, 363 S.W.3d at 713. We overrule sub-issue three of Pressley's first issue and sub-issue three of Rogers' fifth issue.

12 We also observe that the Chair of the Recount Committee signed a declaration that "the totals in all precincts matched those in the original canvass" and "the number of votes matched the number of ballots cast."

Sanctions

***12** In Pressley's second issue and in Rogers' first through fourth and sixth issues, Pressley and Rogers argue that the trial court abused its discretion in awarding sanctions against them. The trial court imposed sanctions against Pressley and Rogers for violations of Chapter 10 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001–.006. Chapter 10 allows sanctions, in relevant part, for pleadings that lack legal or factual support. It provides that upon signing a pleading or motion, a signatory attests that:

> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ....

Id. § 10.001(2), (3). Sanctions may be awarded against a party, the party's attorney, or both, *id.* § 10.004, except that a court may not sanction a represented party under section 10.001(2) for unfounded legal contentions, *id.* § 10.004(d). Casar filed a motion for sanctions against Pressley for violation of section 10.001(3) and against Rogers for violation of sections 10.001(2) and 10.001(3). Following a hearing at which Pressley, Rogers, and DeBeauvoir testified about the election contest and counsel for Casar testified and offered documentary evidence in support of Casar's claim for attorney's fees, the trial court awarded sanctions in the amount of $40,000 against Pressley and in the amount of $50,000 against Rogers. The trial court also awarded contingent appellate fees against Pressley and Rogers—to be paid only if they are unsuccessful on appeal—in the amount of $25,000 for appeal to the court of appeals, $10,000 for filing a petition for review in the Texas Supreme Court, $15,000 if full briefing is requested by the Texas Supreme Court, and $15,000 if oral argument is granted by the Texas Supreme Court. The trial court further ordered that Pressley and Rogers were to be jointly and severally liable to Casar for litigation expenses of $7,794.44.

We review the imposition of sanctions under Chapter 10 for an abuse of discretion. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014) (citing *Low*, 221 S.W.3d. at 614). A sanctions award will not withstand appellate scrutiny if the trial court acted without reference to guiding rules and principles to such an extent that its ruling was arbitrary or unreasonable. *Id.* (citing *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004)). In determining whether the trial court abused its discretion, we must decide whether the sanctions were appropriate

and just under a two-part inquiry. *Id.* at 363. The appellate court must ensure that (1) there is a direct nexus between the improper conduct, the offender, and the sanction imposed, and (2) less severe sanctions would not have been sufficient to promote compliance. *Id.* We do not rely only on the trial court's findings and conclusions but must independently review the entire record to determine if the trial court abused its discretion. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam). We will not hold that a trial court abused its discretion in levying sanctions if some evidence supports its decision. *Nath*, 446 S.W.3d at 361 (citing *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009)). Generally, courts presume pleadings and other papers are filed in good faith. *Id.* The party seeking sanctions bears the burden of overcoming the presumption of good faith. *Id.* With these principles in mind, we turn to the Pressley's and Rogers' issues. Where their issues and arguments coincide, we address them together; where their issues and arguments diverge, we address them separately.

Plenary Power of the Trial Court

***13** In sub-issue one of Pressley's second issue and in Rogers' fourth issue, Pressley and Rogers argue that the trial court did not have plenary jurisdiction to enter the final judgment containing sanctions, rendering the sanctions award void. The trial court signed its original summary judgment order at a hearing held on May 26, 2015. At the request of counsel for Pressley, Cohen, the trial court added "Mother Hubbard" language, indicating that the order resolved all issues and was final and appealable. At the time of the order, Casar's amended motion for sanctions was pending. On June 4, Casar filed a second amended motion for sanctions, and on June 12, he filed a third amended motion for sanctions. On June 24, at the conclusion of the hearing on the motion for sanctions, Casar offered and the trial court signed an amended summary judgment order, which expressly stated that it "amended and replaced" the prior May 26 order. The June 24 order omitted the "Mother Hubbard" finality language and stated that Casar's motion for sanctions remained pending and that the court would consider and decide that motion in a separate order. The trial court stated that it signed the amended order to extend its plenary power until it could rule on the motion for sanctions. On July 23, the trial court signed an order granting Casar's motion for sanctions and an amended final judgment, incorporating the terms of its sanctions order, including the findings of fact and conclusions of law contained therein, and its prior order granting Casar's no-evidence motion for summary judgment.

Pressley and Rogers argue that the June 24 order did not amend the May 26 order because the June 24 order was not a final judgment and that only a motion seeking substantive change will extend the deadlines and the court's plenary power under Rule 329b(g). *See* Tex. R. Civ. P. 329b(g) (providing that timely motion to modify, correct, or reform judgment extends trial court's plenary power). They also argue, without citing authority, that Casar's amended motions for sanctions were not post-judgment motions that extended the trial court's plenary power under rule 329b(g) because they related back to the original, pretrial motion and amended motion for sanctions. We do not find these arguments persuasive and find the cases cited in support of them inapposite on the facts before us. [13]

13 *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 309, 312 (Tex. 2000) (holding that timely filed post-judgment motion for sanctions qualified as motion to modify, correct, or reform judgment under Rule 329b(g) and extended trial court's plenary power); *Schroeder v. Haggard*, No. 04–06–00508–CV, 2007 Tex. App. LEXIS 3725, at *7 (Tex. App.–San Antonio May 16, 2007, pet. denied) (mem. op.) (concluding that trial court's post-judgment letter to counsel requesting hearing did not extend plenary power where trial court did not vacate judgment or issue any further rulings until after its plenary power expired); *Cavalier Corp. v. Store Enters., Inc.*, 742 S.W.2d 785, 787 (Tex. App.–Dallas 1987, writ denied) (holding that nonsubstantive nunc pro tunc correction did not extend plenary power or appellate timetable under Rule 329b(g)).

The trial court had plenary power to vacate, modify, correct, or reform its summary judgment order within thirty days after signing the May 26 order. *See id.* R. 329b(d); *Texas Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 168 (Tex. 2013). By obtaining the trial court's signature on the amended summary judgment order, which was expressly interlocutory, within thirty days of the original order, Casar prevented the summary judgment from becoming final before the trial court could rule on his motion for sanctions. *See Inglish v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997) (per curiam) (holding that to prevent finality, party was required to ask trial court to correct first summary judgment while it retained plenary power). Assuming without deciding that

the trial court's plenary power was not extended by Casar's second and third amended motions for sanctions, it was nonetheless extended by the June 24 order. The June 24 order was signed within the trial court's plenary power and expressly "replaced" the May 26 order; in other words, the trial court in essence vacated the May 26 order and replaced it with an interlocutory order, pending resolution of the motion for sanctions. *See* Tex. R. Civ. P. 329b(d) (providing that trial court may vacate judgment within thirty days after it is signed). On this record, we cannot conclude that the trial court lost its plenary power prior to entering its sanctions order and amended final judgment assessing sanctions.

***14** Pressley and Rogers also argue that because the "Mother Hubbard" language added to the original May 26 order was agreed to in open court and approved by the trial court, it constitutes a Rule 11 agreement. *See id.* R. 11. They cite no authority for this argument and have therefore waived it. *See* Tex. R. App. P. 38.1(i). Even if they had not waived this argument, we would not find it persuasive. To be enforceable under Rule 11, agreements between attorneys and parties must be signed. Tex. R. Civ. P. 11. Neither Pressley and Casar nor their attorneys signed the May 26 order, and we would not conclude that the oral agreement to add the "Mother Hubbard" language is an enforceable Rule 11 Agreement. We overrule sub-issue one of Pressley's second issue and Rogers' fourth issue.

Sanctions against Rogers

We turn next to Rogers' first and second issues, in which he argues that the trial court abused its discretion in awarding sanctions against him based on bad faith pleadings when, pursuant to Rule 8, Cohen, and not Rogers, was the attorney-in-charge when the fifth and sixth amended contests were filed. *See* Tex. R. Civ. P. 8 (providing that attorney whose signature first appears on initial pleadings shall be attorney-in-charge until designation is changed by written notice to court and parties). Rogers signed the original election contest in January 2015. He signed each amended contest through the Sixth Amended Contest. In April 2015, Pressley filed a Notice of Designation of Lead Counsel, designating Cohen as the attorney-in-charge. *See id.* Because Rogers was not the "attorney-in-charge" for filings after Cohen was designated attorney-in-charge, Rogers argues that Casar lacked standing to obtain sanctions against him.

Casar contends that Rogers waived this issue by failing to challenge the sanctions in the trial court. *See Sterling v. Alexander*, 99 S.W.3d 793, 797 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (concluding that attorney who fails to complain of sanction and ask trial court to reconsider waives complaint about sanction). Rogers concedes that he did not raise this argument below but argues that it is a jurisdictional argument that cannot be waived. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444–46 (Tex. 1993) (holding that as component of subject matter jurisdiction, standing may be raised for first time on appeal). He contends that the "real controversy" was between Casar and Cohen, not between Casar and Rogers, and that a judicial declaration about Rogers' conduct would not resolve the controversy between Casar and Cohen. *See id.* at 446 (stating that general test for standing is that there be real controversy between parties that will actually be determined by judicial declaration sought).

Although we agree that standing may be raised for the first time on appeal, we conclude that Rogers' attorney-in-charge argument has no merit. Rogers argues that under Rule 8, the attorney-in-charge is the attorney responsible for the suit to the party, responsible for the conduct of the lawsuit for that party, in control of the management of the cause, and the attorney to whom all communications shall be sent. He cites various actions Cohen took in pursuing the contest as attorney-in-charge. However, neither Rule 8 nor the cases Rogers relies on in support of this argument address sanctionable conduct under Chapter 10. *See* Tex. R. Civ. P. 8 (providing that attorney-in-charge is responsible for suit to party and that communications shall be sent to attorney-in-charge); *see, e.g.*, *In Re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 335 (Tex. 1999) (orig. proc.) (addressing whether attorney should be disqualified under Rule 4.02(a) of Texas Disciplinary Rules of Professional Conduct from continuing to represent party for meeting with opposing party whose counsel had not officially withdrawn and concluding that Rule 8 does not address client's right to terminate his counsel's representation); *Joyner v. Commission for Lawyer Discipline*, 102 S.W.3d 344, 347 (Tex. App.–Dallas 2003), no pet.) (addressing lawyer discipline and citing Rule 8 as basis for attorney's being attorney of record); *Morin v. Boecker*, 122 S.W.3d 911, 914 (Tex. App.–Corpus Christi 2003, no pet.) (holding that notice from clerk that party was to pay court costs must be served on counsel who is responsible to party

for suit under Rule 8 and that notice to party alone was insufficient); *Barnes v. Sulak*, No. 03–01–00159–CV, 2002 Tex. App. LEXIS 5727, at *16–17 (Tex. App.–Austin 2002, pet. denied) (observing that "[t]he designation of an attorney in charge serves primarily to alert the court and other parties who is responsible for the conduct of the lawsuit for that party—i.e., where documents should be sent, through whom the party should be contacted, and who is authorized to file documents and otherwise represent the party"); *Palmer v. Cantrell*, 747 S.W.2d 39, 41 (Tex. App.–Houston [1st Dist.] 1988, no writ.) (concluding that where single adverse party was represented by two attorneys who were not associated in firm, it was sufficient to serve attorney designated as lead counsel because he has "control in the management of the cause ...." (quoting Tex. R. Civ. P. 8)).

***15** Sections 10.001 and 10.004 authorize sanctions against an attorney who signs pleadings that lack any evidentiary or legal basis. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001(2), (3), .004. Section 10.004 limits sanctions to the signatory attorney and a represented party, even when another attorney's name is on the pleading. *Yuen v. Gerson*, 342 S.W.3d 824, 828 (Tex. App.–Houston [14th Dist.] 2011, pet. denied) (noting that appellate courts have held that Rule 13 limits sanctions to signatory and party, applying same rule to section 10.004, and holding there was legally insufficient evidence to support sanction against attorney whose name was on pleading but did not sign it). Rogers signed each of the contests filed on behalf of Pressley through the Sixth Amended Contest. The real controversy, then, is between Casar and Rogers, and the trial court had jurisdiction to award sanctions against Rogers. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446. Consequently, the trial court did not err in directing the sanction under Chapter 10 against Rogers. *See Yuen*, 342 S.W.3d at 828 (holding that section 10.004 limits sanctions to signatory attorney and represented party even when another attorney's name is on pleading). We overrule Rogers' first and second issues.

Chapter 10 Standard/Appropriateness and Justness of Sanction

Having concluded that Rogers was subject to sanctions, we turn to whether the trial court abused its discretion in awarding the sanctions awarded against Pressley and Rogers, and in doing so we must determine whether the sanctions were appropriate and just. *See Nath*, 446 S.W.3d at 363. [14] In the second and third sub-issues of Pressley's second issue and in Rogers' third and sixth issues, Pressley and Rogers argue that Casar did not meet his burden under Chapter 10 to show that there was no legal basis and no evidentiary support for Pressley's claims so as to overcome the presumption that Pressley's pleadings were filed in good faith. *See id.* at 361. Rogers also argues that although the trial court expressly found that Pressley acted in bad faith, it made no such finding as to Rogers. Pressley and Rogers further argue that the trial court failed to determine that there was a direct nexus between any improper conduct and the sanctions imposed, failed to tailor the sanctions to remedy any identified prejudice allegedly caused by the alleged conduct, failed to determine whether lesser sanctions were available to accomplish its goals, and misapplied the factors set out in *Low* to determine the appropriateness and amount of sanctions. *See id.* at 361; *Low*, 221 S.W.3d at 621 & n.5; *American Flood*, 192 S.W.3d at 583.

14 It is undisputed that Pressley was actively involved in preparing her case. She testified that she provided Rogers with facts, conducted research, proposed portions of draft pleadings, reviewed discovery requests and discovery documents, and attended depositions. Chapter 10 contemplates sanctions against a party where appropriate. *See* Tex. Civ. & Prac. Rem. Code § 10.004(a).

"An assessment of sanctions will be reversed only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Unifund*, 299 S.W.3d at 97. "The trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision." *Id.* Section 10.001 provides that the signer of each claim or allegation attests that it is based on the signatory's best knowledge, information, and belief, formed after reasonable inquiry. Tex. Civ. & Prac. Rem. Code § 10.001; *Low*, 221 S.W.3d. at 615. "The statute dictates that each claim and each allegation be individually evaluated for support." *Low*, 221 S.W.3d. at 615. "Each claim against each defendant must satisfy Chapter 10." *Id.*

Reviewing the entire record, we conclude that the trial court did not abuse its discretion in awarding sanctions against Pressley and Rogers under Chapter 10 for repeatedly asserting claims that lacked evidentiary and legal support. The trial court based its sanctions

award on allegations that Travis County's actions caused widespread disenfranchisement, that zero and results tapes were not printed, that irregularities in the recount materially affected the outcome, and that Travis County election officials committed criminal violations.[15] The trial court concluded that by failing to make reasonable inquiry into whether these allegations were warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law, Rogers violated section 10.001(2) and that by failing to make reasonable inquiry into whether these claims had evidentiary support, Pressley and Rogers violated section 10.001(3). *See* Tex. Civ. Prac. & Rem. Code § 10.001(2), (3).

15 The trial court made clear on the record that it was not sanctioning Pressley and Rogers for asserting the argument that CVRs are not "ballot images."

***16** Through Pressley's Fifth Amended Contest, she and Rogers alleged that there was widespread "illegal" voter disenfranchisement in the runoff election as a result of Travis County's consolidation of voting locations for the runoff election.[16] DeBeauvoir testified that it is typical for voter turnout to be lower in a runoff election than in a general election and that Travis County changes and consolidates polling locations for runoff elections primarily to save costs. She also testified that the polling locations for the runoff election were approved by the Austin City Council after notice and hearing, and a list of all polling locations was attached to the approved ordinance, posted, and published. DeBeauvoir further stated that District 4 had nine polling locations and that voters could also vote at any of the citywide voting locations.

16 Pressley and Rogers omitted this allegation from the Sixth Amended Contest.

Pressley and Rogers alleged that closing high-volume locations "prevented eligible voters from voting." In particular, they alleged receiving reports that closure of the Highland Mall location caused "confusion" and "was a problem for voters." They further alleged that "[a] conservative count of disenfranchised voters resulting from the improper/closure/moving/combining of precincts [in District 4] is 1,108." At the sanctions hearing, Pressley testified that she reached that number by counting "people who vote always, always and they were not voting in the runoff." Rogers testified that he had not talked to any voters who had been prevented from voting because of a change in polling locations and that he was "concerned about that issue." At her deposition, Pressley testified that she did not have a list of names of people who were prevented from voting, and she was unable to identify a single voter who was disenfranchised. She stated that she had spoken with people who claimed to have had difficulty in voting but was not able to obtain an affidavit from anyone who claimed to have been disenfranchised. She also testified as to her belief that any inconvenience for a voter caused by a change of voting location was disenfranchisement, including having to drive 20 seconds farther to a different polling location. Five days after Pressley's deposition, Pressley and Rogers filed the Fifth Amended Contest alleging widespread disenfranchisement as a result of closing and consolidation of polling locations. In light of this evidence, the trial court did not abuse its discretion in determining that Pressley and Rogers repeatedly filed Pressley's amended contests, including her Fifth Amended Contest, alleging voter disenfranchisement without any evidentiary support and that Rogers signed the pleadings when they were not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *See id.* § 10.001(2), (3); *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (noting that trial court abuses its discretion if it rules without reference to guiding rules or principles); *Bennett v. Reynolds*, No. 03–12–00568–CV, 2014 Tex. App. LEXIS 9345, at *51–52 (Tex. App.–Austin Aug. 22, 2014, pet. denied) (mem. op.) (concluding that trial court did not abuse discretion in awarding sanctions under Chapter 10 against party and attorney who persisted in advocating numerous legal theories that were unsupported by facts or law, including allegations of lost business where no summary judgment evidence identified any person who refused to do business with party or any contract lost).

Pressley and Rogers also repeatedly alleged that Travis County election officials committed the "violation" of "not printing" zero and tally tapes for the runoff election and "disregarded" the printing of zero and tally tapes and that "no" zero and tally tapes were printed on election day. They also included in the Sixth Amended Contest the allegation that Travis County election officers disregarded procedure and instructed officials not to print zero and tally tapes on election day. In her deposition DeBeauvoir testified that, in accordance with the letter instruction

from the Secretary of State, Travis County began printing zero tapes prior to election day and printed abbreviated zero tapes on election day at each polling place. She further testified that, in accordance with the Secretary of State's instruction, Travis County ran access codes, in lieu of lengthier results/tally tapes, and that for that reason she directed her employees not to print tally tapes. She also testified that both zero and access tapes were produced to Pressley in discovery, and the record reflects that Pressley and Rogers attached a zero tape as an exhibit to Pressley's contests. At the sanctions hearing, DeBeauvoir explained that large counties with long ballots that use countywide vote centers receive dispensation from the Secretary of State to print abbreviated tapes because it would take seven hours per machine to print the full tapes and that she obtained approval from the Secretary of State to print abbreviated tapes in the runoff election. She reiterated that Travis County had printed zero and tally tapes for the runoff election in full compliance with the law. On this record, the trial court did not abuse its discretion in determining that, although Pressley and Rogers disputed whether full, unabbreviated tapes were required for the runoff, there was no evidentiary support or legal basis for the repeated allegations that Travis County printed "no" zero or tally tapes and "disregarded" and "violated" lawful procedure. *See* Tex. Civ. Prac. &. Rem. Code § 10.001(2), (3); *Van Ness*, 461 S.W.3d at 142; *Bennett*, 2014 Tex. App. LEXIS 9345, at *51–52.

***17** Pressley and Rogers also alleged through the Sixth Amended Contest that numerous procedural irregularities in the recount materially affected the outcome of the election. The alleged irregularities included invalid/corrupt MBBs, broken seals on eSlates, the tally machine left open, statistical "anomalies," and poll watchers' being prevented from observing the "whole process" of printing CVRs for the recount. Prior to filing suit, Pressley filed multiple complaints with the Secretary of State asserting some of these irregularities and others, including that her poll watchers had been precluded from observing the retrieval, sorting, and copying of the CVRs and that there were inconsistencies between the number of voters and the number of votes cast. The Secretary of State concluded that "the scope of the recount was conducted properly" and ultimately informed Pressley that she would not consider any further complaints unless new facts were alleged. Further, as we concluded in our analysis of Pressley's and Rogers' issues challenging summary judgment, Pressley presented no evidence of these irregularities despite extensive discovery. Nonetheless, Pressley and Rogers repeated these allegations in every amended contest through the Sixth Amended Contest. On this record, we cannot conclude that the trial court abused its discretion in determining that there was no factual or legal basis for these allegations. *See* Tex. Civ. Prac. &. Rem. Code § 10.001(2), (3); *Bennett*, 2014 Tex. App. LEXIS 9345, at *51–52.

Finally, the trial court based its sanction award on Pressley's and Rogers' allegations of criminal conduct against Travis County officials for preventing Pressley's poll watchers from viewing the printing of the CVRs, preventing their access to tally tapes, not printing tally tapes, and preventing poll watchers' access to view election activities. The allegation that the poll watchers were prevented from viewing the printing of the CVRs originated from the fact that DeBeauvoir had printed them the day before the recount. Pressley was not agreeable to that procedure, so the printed CVRs were discarded and they were printed again in the presence of Pressley and her poll watchers. Nonetheless, Pressley complained that her poll watchers were not allowed to view the retrieval, sorting, and copying of the CVRs. As discussed above, Pressley included this claim in her complaints to the Secretary of State prior to filing suit. The Secretary of State explained that section 213.016 provides that Pressley and her poll watchers were entitled to be present during the printing of the CVRs but does not provide for their presence during the retrieval, sorting, and copying of the CVRs and that by allowing her and her watchers to be present for the re-printing of the CVRs, Travis County had not violated section 213.016. *See* Tex. Elec. Code § 213.016. The Secretary of State also explained that the recount had been conducted properly. As also discussed above, the repeated allegations that poll watchers were denied access to and that Travis County "did not print tally tapes" ignored the testimony and other evidence that abbreviated tally tapes, called access codes, were printed in lieu of full tally tapes and produced in discovery.

Still, Pressley and Rogers persisted in making these assertions, culminating with an allegation in the Sixth Amended Contest that "Contestant's Official Poll Watchers were Denied Access on Election Night—Four Counts of Criminal Violations Committed by Travis County Elections Officer." They alleged that these

activities violated section 33.061 of the Election Code. *See* Tex. Elec. Code § 33.061 (providing that official commits Class A misdemeanor if he knowingly prevents poll watcher from observing activity he is entitled to watch). Immediately prior to citing section 33.061, Pressley and Rogers asserted that these illegal activities had been reported to Winn, as Director of Elections, multiple times and that he had done nothing to correct the situation. On this record, we conclude that the trial court did not abuse its discretion in determining that the allegations of criminal conduct were made against Winn and were made without evidentiary or legal support. *See* Tex. Civ. Prac. &. Rem. Code § 10.001(2), (3); *Van Ness*, 461 S.W.3d at 142; *Bennett*, 2014 Tex. App. LEXIS 9345, at *51–52.

Having determined that the trial court did not abuse its discretion in awarding sanctions, we turn to a determination of whether the sanctions awarded were appropriate and just. Applying the two-part test articulated by the Texas Supreme Court, we must first determine whether there is a direct relationship between the sanctionable conduct, the offender, and the sanction imposed. *Nath*, 446 S.W.3d at 363; *American Flood*, 192 S.W.3d at 583. "[T]he sanction must be visited upon the true offender," and we are to determine "whether the offensive conduct is attributable to counsel only, to the party, or to both." *Nath*, 446 S.W.3d at 363. Pressley and Rogers both argue that they are not the true offender. However, as we have already noted, the evidence shows that Pressley was personally and actively involved in preparing and prosecuting the contest by researching and providing facts to Rogers, reviewing voter data, preparing statistical analyses, proposing portions of draft pleadings, reviewing discovery requests and discovery documents, and attending depositions. She testified that she worked on the case at least ten hours a week and that she provided information to Rogers because she "was the person who experienced the things that [they] put in the petitions." Rogers testified that she was the "most active, hands-on client [he'd] ever had."

***18** As for Rogers, he signed the original and every amended contest pleading. He testified that he was an experienced election contest attorney, but that he had never seen a successful election contest overcome as large a vote margin as in this case. He also testified that he did not talk to any voters who were disenfranchised and was "concerned about that issue." When asked the basis of a legally cognizable cause of action based on the alleged irregularities, Rogers answered only that he "felt that in order for there to be an election contest it was essential to allege mistakes or failure to follow the law." Thus, having concluded that the trial court did not about its discretion in finding that Pressley's and Rogers' conduct was sanctionable, we further conclude that there is a direct nexus between their repeated filing of allegations lacking evidentiary and legal support and the sanctions awarded against Pressley and Rogers and that the trial court therefore did not abuse its discretion in sanctioning them. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001, 004; *Nath*, 446 S.W.3d at 363; *American Flood*, 192 S.W.3d at 583; *Bennett*, 2014 Tex. App. LEXIS 9345, at *51–52.

We next consider whether the amounts of the sanctions were excessive. *See Nath*, 446 S.W.3d at 363. To be just, a sanction must not be excessive and must be no more severe than necessary to satisfy its legitimate purpose. *Id.* Legitimate purposes include securing compliance with the applicable rules, punishing violators, and deterring other litigants from similar misconduct. *Id.* (citing *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003)). Courts must consider less stringent sanctions and consider whether they would serve to promote compliance. *Id.* Pressley and Rogers assert in a single sentence that the trial court made no inquiry into or determination that lesser sanctions were available and sufficient to accomplish its goals. They offer no authority or citations to the record in support of this argument and have therefore waived it. *See* Tex. R. App. P. 38.1(i). Even if they had not waived it, we would not find this argument persuasive on this record. The Texas Supreme Court has set forth guiding rules and principles for assessing the amount of pleadings sanctions. *See Low*, 221 S.W.3d at 620 n.5. The list of nonexhaustive factors the Supreme Court enumerated is:

a. the good faith or bad faith of the offender;

b. the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;

c. the knowledge, experience, and expertise of the offender;

d. any prior history of sanctionable conduct on the part of the offender;

e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;

f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;

g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;

h. the risk of chilling the specific type of litigation involved;

i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;

j. the impact of the sanction on the offended party, including the offended person's need for compensation;

k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;

l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;

....

n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

Id. (quoting American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, *reprinted in* 121 F.R.D. 101, 104 (1988) (omission in original)). The *Low* court also noted that the determination of the amount of a penalty to be assessed under Chapter 10 should "begin with an acknowledgment of the costs and fees incurred because of the sanctionable conduct." *Id.* at 621; *see* Tex. Civ. Prac. & Rem. Code § 10.004(c)(3) (authorizing as sanction order requiring sanctioned party to pay reasonable expenses incurred as result of filing of pleading, including reasonable attorney's fees).

***19** At the sanctions hearing, Casar presented evidence of the attorney's fees he incurred, segregated by issues, amounting to more than $193,000. He also presented evidence that he had incurred almost $8,000 in expenses. His attorney testified concerning his experience with election contests and opined that the fees, which were billed at a reduced rate, were reasonable, necessary, and customary in Travis County for the type of service offered. He also testified concerning the *Low* factors and their application to the facts as they related to Pressley and Rogers. Pressley testified concerning her education and assets. She stated that she has a Ph.D. in physical chemistry. Pressley also testified that she had raised approximately $30,000 to $40,000 for the cost of pursuing the election contest, that she and her husband owned property in Wyoming with a net value of between $10,000 and $25,000, that she had sold her home approximately one and one-half years prior to the hearing for $530,000, that she was the sole owner of a business that had approximately $170,000 in its account, that annual sales from her business were approximately $50,000 to $60,000 with an approximate profit margin of 15 percent, that she had a checking account with a balance of approximately $1,000 and that her husband had a checking account with a balance of approximately $5,000, and that her husband's annual income was approximately $130,000 to $160,000. She also testified that Rogers' hourly fee was $350. Rogers testified that he is a practicing attorney experienced in election contests, that he had discounted his fees by $10,000 to $12,000 and billed Pressley a little more than $75,000, that Pressley had paid him $32,500, and that he had settled the bill, waiving the remainder of the fees Pressley owed.

The trial court found that Pressley had sufficient assets and that both she and Rogers had sufficient income potential to pay monetary sanctions, finding that Rogers had waived more than $40,000 in fees from Pressley. It also considered the *Low* factors, finding nearly all of them applicable.[17] It cited Pressley's bad faith in making false criminal allegations, the evidence showing the lack of factual and legal bases for challenging the election outcome, Rogers' experience as an election contest attorney, the out-of-pocket expenses and fees incurred by Casar, the effect of the contest on Casar and the performance of his duties as a council member, Pressley's active involvement in the case, the lack of chilling effect on election contests because the purpose of the sanction is to encourage compliance with Chapter 10, Pressley's assets and income potential and Casar's relative lesser income, Pressley's concession that Casar did nothing wrong, and the need for the magnitude of the sanctions to be sufficient to deter similar contests against the hundreds of other elected officials in counties using the eSlate.

17 The trial court determined that factor (d) was inapplicable, finding no prior sanctionable conduct,

and that factor (*l*) had minimal impact, finding no excessive burden on the court system. *See Low*, 221 S.W.3d at 620 n.5.

Pressley and Rogers argue that the trial court misapplied and disregarded the *Low* factors. We do not agree. We have reviewed the voluminous record, including the evidence presented at the sanctions hearing that Casar incurred more than $193,000 in attorney's fees, at a discounted rate. Based on the evidence and the trial court's considered analysis of the *Low* factors, we cannot conclude that sanctions in the amounts of $40,000 against Pressley and $50,000 against Rogers were excessive. *See Werley v. Cannon*, 344 S.W.3d 527, 534–35 (Tex. App.–El Paso 2011, no pet.) (concluding that sanction of $12,660 was not excessive where evidence showed party had incurred that amount in attorney's fees); *Sellers v. Gomez*, 281 S.W.3d 108, 116 (Tex. App.–El Paso 2008, pet. denied) (holding that award of $80,000 sanction was not excessive where evidence showed attorney's fees of $81,000 to $82,000); *In re M.I.L.*, No. 02–08–00349–CV, 2009 WL 1740066, at *——, 2009 Tex. App. LEXIS 4645, at *18 (Tex. App.–Fort Worth June 18, 2009, no pet.) (mem. op.), *overruled in part on other grounds by Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011) (concluding that sanction of $38,000 was not excessive where evidence showed party had incurred $38,362 in attorney's fee and $2,071.23 in expenses); *Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 817 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (upholding sanction of $68,000 in attorney's fees where evidence showed discovery abuse justified that amount). Rogers also argues that any sanction against him is unjust because, although the trial court expressly found that Pressley had acted in bad faith, it made no such finding as to him. However, sanctions under Chapter 10 do not require a finding of bad faith. Rather, as to Rogers, the standard is whether he signed pleadings certifying that he had made a reasonable inquiry into the legal and factual bases for the allegation contained in the pleading, and good or bad faith is only one of the *Low* factors to be considered in determining the amount. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001, .004. Therefore, the trial court's lack of a finding that Rogers acted in bad faith is not determinative.

***20** While we recognize that the amounts of the sanctions are substantial, we conclude that they are not excessive on the facts before us. The record reflects that Pressley and Rogers continued to assert claims after extensive discovery had shown that the claims had no legal or factual bases. Rogers himself testified that he had not talked to any voters who had been prevented from voting because of a change in polling locations and that he was "concerned about that issue," yet he continued to make allegations in the pleadings of voter disenfranchisement. In particular, the trial court noted its concern with their allegation of criminal conduct asserted late in the proceeding, in the Sixth Amended Contest, and the allegations of voter disenfranchisement based on having to drive 20 seconds farther to a polling place, asserted through the Fifth Amended Contest. Casar presented evidence that he incurred more than $193,000 in attorney's fees and almost $8,000 in expenses in defending the unsupported allegations. Considering that the sanctions were intended not only to reimburse Casar but also to punish Pressley and Rogers and to deter similar conduct in the future, *see Nath*, 446 S.W.3d at 363 (legitimate purposes of sanctions are to secure compliance with rules, punish violators, and deter similar misconduct), the trial court could have reasonably concluded that a lesser sanction would not have served to sufficiently promote compliance and deterrence, and there is some evidence to support the sanctions awards, *see id.* at 361, 363. On the record before us, we cannot conclude that the district court abused its discretion in ordering Pressley to pay Casar $40,000 in attorney's fees, in ordering Rogers to pay Casar $50,000 in attorney's fees, and in ordering them jointly and severally liable to pay $7,794.44 in expenses. *See id.* at 361 (citing *Unifund*, 299 S.W.3d at 97); *American Flood*, 192 S.W.3d at 583. We overrule sub-issues two and three of Pressley's second issue and Rogers' third and sixth issues.

Attorney's Fees on Appeal

Finally, we turn to sub-issue four of Pressley's second issue and Rogers' sixth issue, in which Pressley and Rogers argue that the trial court abused its discretion by imposing sanctions based on Casar's attorney's fees in the event of an unsuccessful appeal.[18] They contend that Casar did not request such fees; that there was no evidence of what would be reasonable and necessary attorney's fees in the event of an appeal; that a great portion of the appeal is devoted to the issue of whether a CVR satisfies the requirement of maintaining a ballot image, an allegation for which the trial court did not sanction them; and that awarding sanctions for filing a frivolous appeal is within the exclusive jurisdiction of this Court.

18 It is unclear from Rogers' briefing whether in his sixth issue, he intended to adopt and incorporate by reference the factual recitations, citations to the record and to authority, and arguments contained in sub-issue four of Pressley's second issue. Construing his briefing liberally, we conclude that he did, and we address this issue as to Rogers as well.

We do not find these arguments persuasive. The matter before us is not a motion for damages for filing a frivolous appeal under the Texas Rules of Appellate Procedure but an appeal of the trial court's sanction award under Chapter 10. *See* Tex. R. App. P. 45. Section 10.004(c)(3) provides that the trial court may award reasonable attorney's fees as a sanction, and a trial court has the discretion to award appellate attorney's fees as a sanction in the event of an unsuccessful appeal. *See* Tex. Civ. Prac. & Rem. Code § 10.004(c)(3); *Law Offices of Windle Turley, P.C. v. French*, 164 S.W.3d 487, 492–93 (Tex. App.–Dallas 2005, no pet.) (rejecting argument that Chapter 10 does not authorize appellate attorney's fees as part of sanctions award). Further, although Casar's counsel testified at the sanctions hearing that the attorney's fees incurred to date were reasonable, necessary, and customary and segregated his fees by issue, these requirements do not apply to the assessment of sanctions based on attorney's fees. *JNS Enter., Inc. v. Dixie Demolition, LLC*, 430 S.W.3d 444, 459 (Tex. App.–Austin 2013, no pet.) (observing that general rules for recovery of attorney's fees do not apply to attorney's fees awarded as sanctions and rejecting contention that attorney's fees awarded as sanctions needed to be segregated); *Scott Bader*, 248 S.W.3d at 816–17 ("In cases in which the judgment is not one for earned attorney's fees, but rather a judgment imposing attorney's fees as sanctions, it is not invalid because a party fails to prove attorney's fees. When attorney's fees are assessed as sanctions, no proof of necessity or reasonableness is required.") (internal citations and quotations omitted); *Miller v. Armogida*, 877 S.W.2d 361, 365 (Tex. App.–Houston [1st Dist.] 1994, writ denied) ("When attorney's fees are assessed as sanctions, no proof of necessity or reasonableness is required."). Instead of applying the general rules for recovery of earned attorney's fees, we review the award of attorney's fees as a sanction for abuse of discretion, reviewing the record for some evidence that supports the trial court's decision.

***21** Here, the record supports the trial court's findings that the allegations on which the sanctions were based—that Travis County's actions caused widespread disenfranchisement, that zero and results tapes were not printed, that irregularities in the recount materially affected the outcome, and that Travis County election officials committed criminal violations—had no legal or factual basis. The trial court expressly stated that it was not sanctioning Pressley and Rogers on the basis of the "legal issue with the ballot ... that [it] kn[e]w [they were] going to appeal," i.e., the ballot image issue. Thus, the record establishes that the sanction of contingent appellate fees was directed at the appeal of only those issues for which the initial sanctions were imposed. Also, although it was not required, Casar's attorney testified that his fees were reasonable, necessary, and customary, and he segregated his fees by issue so that there was some evidence of reasonable and necessary fees on appeal and of the relative time required for each issue. Further, the trial court had evidence of the rates billed by Casar's attorney, and it derived the contingent appellate fee awards based on a review of cases involving appellate fee awards. On this record, we cannot conclude that the trial court abused its discretion by awarding appellate attorney's fees in the event Pressley or Rogers filed an unsuccessful appeal in the amounts awarded. We overrule sub-issue four of Pressley's second issue and Rogers' sixth issue.

CONCLUSION

Having overruled Pressley's and Rogers' issues, we affirm the trial court's judgment.

All Citations

Not Reported in S.W.3d, 2016 WL 7584051

Tab B

Pressley v. Casar
Motion for Sanctions

Attorney	Issue				
	Ballot Images	**Voting Locations Changes**	**Recount Irregularities**	**Zero Tapes**	**Motion for Sanctions**
Chuck Herring ($525/hour)	$23,940.00 (45.6 hours)	$15,750.00 (30.0 hours)	$26,670.00 (50.8 hours)	$12,442.50 (23.7 hours)	$8,793.75 (16.75 hours)
Jessica Palvino ($300/hour)	$27,070.00 (66.9 hours)	$6,660.00 (22.2 hours)	N/A	$3,390.00 (11.3 hours)	$15,660.00 (52.2 hours)
Lauren Ross ($250/hour)	$24,150.00 (96.6 hours)	$6,850.00 (27.4 hours)	$12,725.00 (50.9 hours)	$950.00 (3.8 hours)	$14,800.00 (59.2 hours)
Kurt Kuhn ($400/hour)	N/A	N/A	N/A	N/A	$7,920 (19.8 hours)
Total	$68,160.00 (209.1 hours)	$29,260.00 (79.6 hours)	$39,395.00 (101.7 hours)	$16,782.50 (38.80 hours)	$47,173.75 (147.95 hours)

Total Case Hours:	429.20
Total Fees:	$153,597.50

Total Sanctions Hours:	147.95
Total Fees:	$47,173.75

Tab C

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 8. Voting Systems
Chapter 122. State Supervision over Voting Systems
Subchapter B. Approval of Voting System and Equipment

V.T.C.A., Election Code § 122.033

§ 122.033. Additional Requirements for Approval of Voting Machine

Effective: January 1, 2006
Currentness

In addition to other requirements for approval, a voting machine must be equipped with:

(1) a security system capable of preventing operation of the machine;

(2) registering counters that can be secured against access;

(3) a public counter; and

(4) a protective counter.

Credits
Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 484, § 4, eff. Sept. 1, 1987; Acts 2005, 79th Leg., ch. 1107, § 2.05, eff. Jan. 1, 2006.

V. T. C. A., Election Code § 122.033, TX ELECTION § 122.033
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document