

No. 17-0052

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**The Supreme Court of Texas**

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**LAURA PRESSLEY**

*Petitioner*

v.

**GREGORIO (GREG) CASAR**

*Respondent*

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*On Petition for Review from the Third Court of Appeals — Austin  
Cause No. 03-15-00368-CV*

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**PETITION FOR REVIEW**

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**LAURA PRESSLEY**

(Address redacted)

*PRO SE*

**IDENTITIES OF PARTIES AND COUNSEL**

<b><u>Petitioner:</u></b> <b>Laura Pressley</b>	Laura Pressley  (Address redacted)  <i>PRO SE</i>
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## **TABLE OF CONTENTS**

IDENTITIES OF PARTIES AND COUNSEL.....	ii
TABLE OF CONTENTS.....	iii
INDEX OF AUTHORITIES.....	iv
RECORD REFERENCES.....	ix
STATEMENT OF THE CASE.....	x
STATEMENT OF JURISDICTION.....	xi
ISSUES PRESENTED.....	xiii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT AND AUTHORITIES.....	10
PRAYER*.....	21.
CERTIFICATE OF SERVICE.....	22.
CERTIFICATE OF COMPLIANCE.....	23
APPENDIX.....	25

## INDEX OF AUTHORITIES

<u>Cases:</u>	<u>Page No.</u>
<i>Andrade v. NAACP of Austin</i> , 345 S.W.3d 1, 54 Tex. Sup. Ct. J. 1401 (Tex. 2011) .....	xi, 2, 10, 11, 12
<i>Arnold v. Anderson</i> , 93 S.W. 695-696, 41 Tex. Civ. App. 508, 93 (Tex. Civ. App. 1906) .....	xi, 2, 10
<i>Bejarano v. Hunter</i> , 899 S.W.2d 346 (Tex. App. – El Paso 1995, orig. proceeding) .....	15
<i>Cain v. Garvey</i> , 187 S.W. 1114-1116.....	xi
<i>Christy v. Oliphint</i> , 291 S.W.2d 406 (Tex. Civ. App. — Galveston), <i>aff'd on</i> <i>other grounds</i> , 299 S.W.2d 933 (Tex.1957).....	xi, .8, 11
<i>Clary v. Hurst</i> , 104 Tex. 412, (1911), 138 S.W. 566 .....	14, 15
<i>Cuellar v. Maldonado</i> , Court of Appeals Corpus Christi-Edinburg, 2015 WL 1020650.....	xii, 2, 9, 15 17, 18, 19, 20
<i>Ex parte Anderson</i> , 46 Tex. Crim. 372 (1904) 81 S.W. at 974.....	2
<i>Garcia v. Avila</i> , 597 S.W.2d 400-406 (Tex. Civ. App. – San Antonio 1980, writ dism'd) .....	xii, 2
<i>Gomer v. Davis</i> , 419 S.W.3d 470,480 (Tex. App.-Houston [1 <sup>st</sup> Dist.] 2013,	



no pet.) .....	xii, 15,17, 19
<i>Gomez v. Timon</i> , 60 Tex. Civ. App. 311, 128 S.W. 656 (1910).....	xi, 2,10
<i>Gonzalez v. Villarreal</i> , 251 S.W.3d 763-783 (Tex. App.—Corpus Christi 2008, pet. dism’d w.o.j.) .....	2, 8, 11
<i>Gray v. State</i> , 92 Tex. 396, 49 S.W. 217 (1899).....	xi, 2, 10
<i>Guerra v. Garza</i> , 865 S.W.2d 573-579 (Tex. App. – Corpus Christi 1993) .....	xii, 2
<i>Huff v. Duffield</i> , 251 S.W. 298 (Tex. Civ. App. 1923) .....	2, 10
<i>Howell v. Mauzy</i> , 899 S.W.2d 690-708 (Tex. App. – Austin 1994).....	xii, 2
<i>Karagounis v. Prop. Co. of Am.</i> , 970 S.W.2d 761, 764 (Tex. App. - Amarillo 1998, pet. den’d).....	19
<i>Low v. Henry</i> , 221 S.W.3d at 616–17 (Tex. 2007).....	xii, 15, 18, 20
<i>Ortiz v. Singleterry</i> , Court of Appeals of Texas Corpus Christi-Edinburg, 2015 WL 1020633 .....	xii, 2
<i>Overman v. Baker</i> , 26 S.W.3d 506, 509 (Tex. App. - Tyler 2000, no pet.) .....	19
<i>Prado v. Johnson</i> , 625 S.W.2d 368, 369-70 (Tex. Civ. App. – San Antonio 1981).....	8, 11
<i>R.M. Dudley Const. Co., Inc. v. Dawson</i> , 258 S.W.3d 694, 711 (Tex. App. – Waco 2008, pet. den’d).....	19

<i>Robson v. Gilbreath</i> , 267 S.W.3d 401, 407(Tex. App. – Austin 2008, pet. den’d).....	xii, 15,17,19, 20
<i>Smith v. Patterson</i> , 111 Tex. 535, 242 S.W. 749, 750 (1922).....	12
<i>State v. Connor</i> , 86 Tex. 133, 23 S.W. 1103, 1105-1106 (1893) .....	xi, 1,2,10
<i>Stotler v Fetzer</i> , 630 S.W.2d 782, 783 (Tex. App. – Houston [1 Dist.] 1982).....	11
<i>Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc.</i> , 454 S.W.2d 729, 732 (Tex. 1970).....	12
<i>Thielemann v. Kethan</i> , 372 S.W.3d 286, 294 (Tex. App. - Houston [1 <sup>st</sup> Dist.] 2012, pet. den’d ).....	xii, 19, 21
<i>Unifund CCR Partners v. Villa</i> , 299 S.W.3d 92, 97 53 Tex. Sup. Ct. J. 57 (Tex. 2009).....	xii, 18, 20
<i>Wood v. State, ex rel. Lee</i> , 133 Tex. 110, 126 S.W.2d 4, 119 A.L.R. ....	xi, 2, 10, 11

### **Constitutional Provisions:**

Tex. Const. art. VI, §4.....	xii, 1,10,11,26
------------------------------	-----------------

### **Rules and Statues:**

Tex. Elec. Code §33.056(a) .....	xi, 15, 26
Tex. Elec. Code §33.061.....	xi, 16, 26
Tex. Elec. Code §33.061(a) .....	xi, 16, 26
Tex. Elec. Code §33.061(b) .....	xi, 16, 26

..

Tex. Elec. Code §43.061 .....	19, 27
Tex. Elec. Code §52.062 .....	27
Tex. Elec. Code §52.075 .....	6, 12, 13, 27
Tex. Elec. Code §66.022 .....	xi, 4, 5, 14, 28
Tex. Elec. Code §66.024 .....	xi, 4, 5, 14, 28
Tex. Elec. Code §66.054 .....	xi, 4, 5, 14, 28
Tex. Elec. Code §122.001 .....	13
Tex. Elec. Code §128.001 .....	13
Tex. Elec. Code §213.009(d) .....	29, 30
Tex. Elec. Code §213.013(b) .....	xi, 5, 30
Tex. Elec. Code §213.013 (h) .....	16, 17, 30
Tex. Elec. Code §213.016 .....	30
Tex. Elec. Code §214.049 .....	8
Tex. Gov't Code §22.001(a)(2).....	xi, xii
Tex. Gov't Code § 22.001(a)(6).....	xi, xii
Tex. Gov't Code § 22.001(a)(6)(e).....	xi, xii
Tex. Gov't Code § 22.225(a)(6).....	xi, xii
Tex. Gov't Code § 22.225(b).....	xi, xii

Tex. Gov’t Code §22.225(c).....	xi, xii
Tex. Civ. Prac.& Rem. Code Ch. 9.....	xii
Tex. Civ. Prac. & Rem. Code Ch. 10.....	xii
Tex. Civ. Prac. & Rem. Code 10.003(b).....	xiv, xv
Tex. R. Civ.P. 13.....	xiii

## **RECORD REFERENCES**

The following Clerk's Record are cited and referred to in the form "CR[Vol#]:[Page#]."

- CR1 — Volume 1 of 2 (7/2/15) – 5228 pages
- CR2 — Volume 2 of 3 (7/29/15) – 7635 pages
- CR3 — Volume 1 of 1 (8/14/15) – 16 pages

The following Reporter's Records are cited and referred in the form "Date:RR[Vol#]:[Page#]."

- 4/6/15:RR2 – Volume 2 of 4 (7/8/15) – Discovery and Exceptions Special Hearing on 4/6/15 – 146 pages
- 5/16/15:RR3 – Volume 3 of 4 (7/8/15) – Hearing on a Motion for Summary Judgment, Motion for Sanctions, Motion to Strike Pleadings, Motion to Enforce Rule 11 Agreement, and Motion to Compel Discovery on 5/26/15 – 57 pages.
- 5/16/15:RR4 – Volume 4 of 4 (7/8/15) – Hearing on a Motion for Summary Judgment, Motion for Sanctions, Motion to Strike Pleadings, Motion to Enforce Rule 11 Agreement, and Motion to Compel Discovery on 5/26/15 – 122 pages.
- 6/18/15:RR2 – Volume 2 of 4 (8/1/15) – Hearing on Motion for Sanctions on 6/18/15 – 241 pages.
- 6/24/15:RR3 – Volume 3 of 4 (8/1/15) – Hearing on Motion for Sanctions on 6/18/15 – 237 pages.
- 6/24/15:RR4 – Volume 4 of 4 (8/1/15) – Exhibits for Hearing on Motion for Sanctions on 6/18/15 – 33 pages.

The following Supplemental Clerk's Records are cited and referred in the form "SuppRR[Vol#]:[Page#]."

- SuppCR4—Volume 4 (8/3/15) – 54 pages

## **STATEMENT OF THE CASE**

<b><i>Nature of the Case:</i></b>	<p>An election contest brought by Laura Pressley against Gregorio “Greg” Casar for the 2014 Austin City Council District 4 runoff.</p> <p>Pressley produced evidence that Travis County Elections:</p> <ol style="list-style-type: none"><li>1) authorized unnumbered illegal ballots to be counted in a manual recount (unnumbered cast vote records (CVR’s),</li><li>2) provided instructions to election judges to not retain mandated paper backup election returns from polling locations, and</li><li>3) committed other material irregularities.</li></ol> <p>Pressley asserts the sum total of the evidence is sufficient for the trial court to conclude election results cannot be ascertained, and order a new election.</p>
<b><i>Trial Court:</i></b>	Honorable Senior Judge Dan Mills, Cause No. D-1-GN-15-000374; 201st District Court of Travis County
<b><i>Trial Court Disposition</i></b>	Granted no-evidence summary judgment, and monetary sanctions in favor of Respondent: \$7,794.44 out of pocket trial expenses, \$40,000 attorney’s fees for trial, and anticipatory attorney’s fees for unsuccessful appeal to Third Court (\$25,000) and Texas Supreme Court (\$45,000). <sup>1,2,3,4</sup>
<b><i>Appellate Court</i></b>	Cause No. 03-15-00368-CV; Third Court of Appeals; Authored by Justice Goodwin, joined by Justices Puryear and Field joined,, issued on Dec. 23, 2016.
<b><i>Appellate Court Disposition</i></b>	Affirmed. <sup>5,6</sup>

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<sup>1</sup> Appendix A1: Summary Judgment Order, 5/26/15

<sup>2</sup> Appendix A2: Amended Summary Judgment Order, 6/24/15

<sup>3</sup> Appendix A3: Amended Final Judgment Order, 7/23/15

<sup>4</sup> Appendix A4: Sanction Order, 7/23/15

<sup>5</sup> Appendix B1: Third Court of Appeals Memorandum of Opinion, 12/23/16

<sup>6</sup> Appendix B2: Third Court of Appeals Rendered Judgment, 12/23/16

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal on the following grounds:

- Tex. Gov't Code §§ 22.225(b), 22.225(c), 22.001(a)(2), 22.001(a)(6), and 22.001(a)(6)(e), because the appeals court rejected the long-standing, more than 120 year precedent of this Court and appeals courts that it is mandatory for ballots to be numbered, unnumbered ballots violate the Texas Constitution Art. VI Sec. 4<sup>7,8</sup> and thus should not be counted in a recount.
- Tex. Gov't Code § 22.225(b)(2), because the appeals court's decision brings into question the *validity* of mandatory election code statutes that are so important to the integrity of Texas elections, that criminal penalties are associated with violation thereof:
  - The Court Appeals' affirmance that counties may receive waivers to law from the Texas Secretary of State, and subsequently instruct election judges to not adhere to mandatory requirements of delivery of election returns when polls close on election day per TEC §§ 66.022 and 66.024, questions the validity of those statutes and the criminal penalties for violation thereof, TEC § 66.054(a), (b), and (c).<sup>9</sup>
  - The Court of Appeals' affirmance that official recount watchers may be obstructed from monitoring any activity at a recount, questions the validity of the mandatory watcher statutes, TEC §§ 33.056(a), TEC 213.013(b) and (h) and more concerningly, questions the validity of criminal penalties for violation thereof, TEC § 33.061(a) and (b).<sup>10</sup>

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<sup>7</sup> Texas Constitution Art.VI Sec.4: AppendixC

<sup>8</sup> *State v. Connor*, 86 Tex. 133, 23 S.W. 1105-1106; *Gray v. State*, 92 Tex. 396, 49 S.W. 218; *Wood v. State, ex rel. Lee*, 133 Tex. 110, 126 S.W.2d 4, 119 A.L.R.; *Ex. Parte Anderson*, 46 Tex.Crim. 372, 81 S.W. 975; *Gomez v. Timon*, 60 Tex. Civ. App. 311, 128 S.W. 657; *Cain v. Garvey*, 187 S.W. 1114-1116; *Arnold v. Anderson*, 41 Tex.Civ.App. 508, 93 S.W. 695-696; *Huff v. Duffield*, 251 S.W. 301; *Andrade v. NAACP of Austin*, 345 S.W.3d 14-15.

<sup>9</sup> *Oliphint v. Christy*, 157 Tex 1, 299 S.W.2d 936-938.

<sup>10</sup> *Ibid.*

- Tex. Gov't Code §§ 22.225(b), 22.225(c), 22.001(a)(2), 22.001(a)(6), and 22.001(a)(6)(e),<sup>11</sup> because the Court of Appeals' decision affirming no-evidence summary judgment, attorney's fees as sanctions, and contingent attorney's fees for future appeals, conflicts with prior decisions of this Court and appeals courts in election contests<sup>12,13</sup> and other sanctions cases.<sup>14</sup>
- Tex. Gov't Code § 22.225(a)(6), because the Court of Appeals committed an error of law of such importance to the State's jurisprudence, that it must be corrected. In affirming that a county and the Texas Secretary of State may issue election waivers/advisories inconsistent with the Texas Election Code, and may obstruct official election watchers, the court committed a serious error. If the Court of Appeals decision stands, the purity of Texas elections and the people's trust in the rule of law, are at serious risk.

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<sup>11</sup> *Matthews, on behalf of M.M. v. Kountze Independent School District*, 484 S.W.3d 418-419

<sup>12</sup> *Cuellar v. Maldonado*, Court of Appeals Corpus Christi-Edinburg, 2015 WL 1020650—Election contest in which TEX. CIV. PRAC. & REM. CODE CHAPTERS 9, 10 and TEX.RULES CIV.PROC, CHAPTER 13 sanctions were reversed.

<sup>13</sup> Similar Election Contests to *Pressley v. Casar* where no attorney's fees as sanctions were awarded—*Ortiz v. Singleterry*, Court of Appeals of Texas Corpus Christi-Edinburg, 2015 WL 1020633; *Guerra v. Garza*, 865 S.W.2d 573-579, *Howell v. Mauzy*, 899 S.W.2d 690-708; *Gonzalez v. Villarreal*, 251 S.W.3d 763-783; *Garcia v. Avila*, 597 S.W.2d 400-406.

<sup>14</sup> *Low v. Henry*, 221 S.W.3d 615; *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 362; *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179 (Tex.App.-Texarkana 2011, no pet.); *Robson v. Gilbreath*, 267 S.W.3d 405 (Tex.App.-Austin 2008, pet. denied); *Gomer v. Davis*, 419 S.W.3d 481 (Tex.App.—Houston [1st Dist.] 2013, no pet.); *Unifund CCR Partners*, 299 S.W.3d 97; *Thielemann v. Kethan*, 371 S.W.3d 286, 294 (Tex.App.—Houston [1st Dist.] 2012, pet. denied).



## ISSUES PRESENTED

The key issue presented in this case is whether the Court of Appeals opinion has effect of through its opinion in *Pressley v. Casar*, intended to radically altering Texas' election laws and the power of the Texas Secretary of State. By affirming that a county may rely on waivers (verbal or written) and administrative advisories – issued by the Texas Secretary of State's Election Division that give *permission* to ignore election laws related to ballots and election returns –Texans are more susceptible to election fraud.

Under this Court of Appeals' decision, County Clerks and county Election Administrators are no longer bound by the State Constitution and rule of law with regard to elections. If an election law is perceived as cumbersome, hypertechnical, insufficient, or ministerial, this decision allows county election officers to obtain verbal or written approval from a bureaucrat in the Texas Secretary of State's office to ignore a law they consider inconvenient. There will be no impetus for the SoS to follow the requirements for posting election procedural changes to the Texas Administrative Code in the Texas Register, holding public hearings, or working with State Representatives and Senators to propose Constitutional or statutory changes through the Legislative process. The adoption of work around exceptions, to the rule of election law, will put Texas on the outer fringe of election integrity jurisprudence by giving inordinate weight to the desires of the Texas Secretary of State's Election Division and county election officers.

Broadly speaking, this Court needs to decide whether the Texas Legislature and the framers of the Bill of Rights in the Texas Constitution intended for county election officers, and election bureaucrats in the Secretary's office, to have unrestrained and potentially abusive power. More precisely, this Court needs to make clear whether the Court of Appeals decision is consistent with the powers specifically vested to the Legislature in the Article VI, Section 4 of the Texas Constitution, to “*make regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box.*” And, this Court needs to determine if this decision is consistent with the expectations of Texans that rule of law is to be respected and adhered to by all in elections.

With regard to the monetary sanctions imposed on Pressley for addressing multiple irregularities and illegalities in her 2014 election, they are far disproportionate for Texas election contests. The substantial chilling effect for candidates that venture to hold election officers accountable for irregularities, illegalities and/or criminal behavior will

certainly send shock waves through Texas and election integrity and voters will suffer immeasurably. This needs to be corrected because Pressley made good faith efforts to meet her burden that her election results could not be ascertained, this is the first election contest in Texas with sanctions to a candidate.

The specific issues briefed in the Petition are:

- 1) Did the court of appeals err in holding that an unnumbered cast vote record is a constitutional and legal ballot that shall be counted in a manual recount?
  - a) If a county counts unnumbered ballots in a manual recount, are those ballots illegal and shall they be removed from the vote totals?
  - b) Did the court of appeals err in affirming the trial court's no-evidence summary judgment when the evidence established that 3,937 unnumbered ballots were counted in the manual recount and were sufficient to void the election?
- 2) Did the court of appeals err in holding that a county may rely on waivers (verbal or written) and/or administrative advisories – from the Texas Secretary of State – that are inconsistent with the Texas Constitution and the Texas Election Code related to ballots and election returns?
- 3) Did the court of appeals err in holding that a county may prevent election watchers at a recount from monitoring any activity associated with a recount?
- 4) Did the court of appeals err in holding that Pressley was properly sanctioned under Texas Civil Practice and Remedies Code § 10.001(3) when Casar failed to overcome the presumption of good faith for each alleged offense?
  - a) When Pressley removed voter disenfranchisement allegations from her live pleadings, following discovery, was that inquiry and subsequent response sufficient to defeat Casar's claims of bad faith?
  - b) Did Casar provide competent evidence that Pressley's pleadings, regarding obstruction of poll watchers, were filed without a reasonable inquiry into the facts and requirements of the Election Code?
  - c) Was Pressley's evidence that Zero and Results Tapes for her race were not printed sufficient to defeat Casar's bad faith claims?
  - d) Did the court of appeals err when it affirmed the amount of monetary sanctions

as reasonable? [RESERVED FOR FULL BRIEFING]

e) Did the court of appeals err when it affirmed monetary sanctions for a non-existent set of sanctionable pleadings – that the trial court did not issue notice or a reasonable opportunity for Pressley to respond? [RESERVED FOR FULL BRIEFING]

5) Should the court of appeals have held that the trial court erred when the trial court entered an order for contingent, anticipatory appellate attorney’s fees for unsuccessful appeals to the Third Court and the Texas Supreme Court?

a) Were the amount of contingent attorney’s fees as monetary sanctions reasonable? [RESERVED FOR FULL BRIEFING]

B) When no motion was filed by Casar, and no direction came from the trial court was given to Pressley to respond to allegations pursuant to Tex. Civ. Prac. And Rem. Code § 10.003(b). [RESERVED FOR FULL BRIEFING]

C) When the appeals court did not provide a reasonable notice to Pressley for appellate sanctions pursuant to Tex. R. App. P. RULE 45? [RESERVED FOR FULL BRIEFING]

## INTRODUCTION

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case presents a constitutional election integrity issue that has recurred for more than a hundred years in Texas – are unnumbered ballots considered legal ballots that can be counted in a manual recount? As early as 1893 in *State v Connor*,<sup>1</sup> pursuant Tex. Const. art. VI, §4<sup>2</sup>, this Court has held that numbering of ballots is mandatory. Yet, this Court has never written on constitutionality of unnumbered paper ballots counted in a manual recount for elections using Direct Recording Electronic voting machines (DRE's) — this case provides an opportunity to revisit this constitutional question with respect to modern election technology.

More broadly, Petitioner asks this Court, “Do the Secretary of State’s Elections Division (Secretary) and county election officers (County) have powers to suspend state election laws? The Travis County Clerk’s answer is “Yes.”<sup>3</sup>

19	Q. You think the Secretary of State can tell you not to
20	follow state law?
21	A. I know exactly that they can, yes.
22	Q. Okay.
23	A. Absolutely.

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<sup>1</sup> 86 Tex. 133, 23 S.W. 1103, 1105-1106 (1893)

<sup>2</sup> Tex. Const. art. VI, §4: In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets

<sup>3</sup> 6/18/15:RR2:186,lines19-23

Specifically, this Travis County election contest involves the casting of 480 paper absentee ballots<sup>4</sup> and 3,397 electronic ballots (in the form of cast vote records (CVR's)<sup>5</sup> on Direct Recording Electronic (DRE) eSlate voting machines<sup>6</sup> and the legal disparity within those types of ballots in a recount. Though this Court, and many appeals courts, have considered similar constitutional suffrage and election law principals in the past related to ballot numbering,<sup>7</sup> election contests,<sup>8</sup> and sanctions to contestants,<sup>9</sup> the Court of Appeals court has reached conflicting conclusions<sup>10</sup> in this election contest which fundamentally alters the landscape of Texas election law — demonstrating guidance is needed from this Court.

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<sup>4</sup> Appendix D—CR1:1805, CR2:2942, 2CR:2058

<sup>5</sup> AppendixE—CR1:1803, CR1:2944

<sup>6</sup> 2CR:3074—BBM column represents paper absentee ballots, Early Voting/Election Day columns represent electronically cast ballots.

<sup>7</sup> *State v. Connor*, 86 Tex. 133, 23 S.W. 1105-1106; *Gray v. State*, 92 Tex. 396, 49 S.W. 218; *Wood v. State, ex rel. Lee*, 133 Tex. 110, 126 S.W.2d 4; *Ex. Parte Anderson*, 46 Tex.Crim. 372, 81 S.W. 975; *Gomez v. Timon*, 60 Tex. Civ. App. 311, 128 S.W. 657; *Cain v. Garvey*, 187 S.W. 1114-1116; *Arnold v. Anderson*, 41 Tex.Civ.App. 508, 93 S.W. 695-696; *Huff v. Duffield*, 251 S.W. 301; *Andrade v. NAACP of Austin*, 345 S.W.3d 14-15.

<sup>8</sup> *Cuellar v. Maldonado*, Court of Appeals Corpus Christi-Edinburg, 2015 WL 1020650; *Ortiz v. Singleterry*, Court of Appeals of Texas Corpus Christi-Edinburg, 2015 WL 1020633; *Guerra v. Garza*, 865 S.W.2d 573-579; *Howell v. Mauzy*, 899 S.W.2d 690-708; *Gonzalez v. Villarreal*, 251 S.W.3d 763-783; *Garcia v. Avila*, 597 S.W.2d 400-406.

<sup>9</sup> *Cuellar v. Maldonado*

<sup>10</sup> AppendixB1—Memorandum of Opinion

## **STATEMENT OF FACTS**

### **A. Ballot count discrepancies warranted a manual recount.**

This is an election contest for 2014 Austin City Council District 4 runoff between Laura Pressley vs. Gregorio Casar. The runoff election was held on December 16, 2014; the County reported that Casar received 64.61% to Pressley's 35.39%--representing a difference of 1,291 votes.<sup>11</sup>

After analyzing early voting list of voters names that were reported to Pressley's campaign every 24 hours during Early Voting by the County, Pressley found that 17 of 18 precincts showed discrepancies in the number voters and the number of ballots cast reported by the County.<sup>12</sup> Pressley also found repetitive statistical mathematical patterns that called computerized election results into question. As a result, Pressley petitioned for a manual recount.<sup>13</sup>

### **B. At the recount, 3,937 unnumbered<sup>14</sup> cast vote records (CVR's), were printed and manually counted.**

At the recount, Pressley had official recount recount/poll watchers assigned to monitor all recount activities of the ballot printing process such as the retrieval, sorting and copying of the ballots to ensure the integrity of the files. Pressley's poll watchers were not permitted by Travis County Election Officer, Michael Winn

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<sup>11</sup> CR1:931

<sup>12</sup> CR1:869-870,1173-1408

<sup>13</sup> CR1:933-936

<sup>14</sup> AppendixE

to monitor the retrieval, sorting, and copying of cast vote records, that were cast electronically on DRE's, represented as CVRs.<sup>15</sup>

At the recount, Pressley informed the County, the recount committee members, and the Texas Secretary of State's representative, Christina Adkins, of Pressley's understanding of the law and that ballots that met all legal requirements, in the form of images of legal ballots, were to be printed and counted at the recount. What the County printed and counted were legally insufficient as ballots (i.e. unnumbered, and not meeting other mandatory requirements for legal ballots).<sup>16</sup>

Recount results showed the 480 manually counted paper absentee/mail ballots<sup>17</sup> (exactly 50% for Pressley) were statistically different from the 3,937 manually counted *unnumbered* illegal ballots (as cast vote records)<sup>18</sup> that were electronically cast on eSlate DRE's (represented as CVRs) during early voting and election day (33.4% and 33.8%, for Pressley).<sup>19</sup>

**C. Pressley files an election contest; discovery reveals material illegalities and irregularities: i) mandated paper backup election returns from polling locations were missing, and ii) corrupt memory cards were repeatedly inserted in the main tabulation computer on election night.**

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<sup>15</sup> AppendixB1,p.44.

<sup>16</sup> CR1:899paragraph146; AppendixN,p.26; AppendixO,p.26-27

<sup>17</sup> AppendixD

<sup>18</sup> AppendixE

<sup>19</sup> CR1:916

Pressley filed an election contest citing multiple material irregularities, illegalities, and legally insufficient ballots should be removed from the final election result, and that the only ballots legally countable were the 480 absentee ballots which were exactly tied.<sup>20</sup> Pressley petitioned for a new election.<sup>21</sup>

The parties engaged in discovery limited by the trial court,<sup>22</sup> including depositions of Pressley and the Travis County County Clerk, Dana DeBeauvoir.<sup>23</sup> Discovery revealed numerous material illegalities and irregularities. The County

- i) instructed election judges to not retain official paper backup election returns<sup>24</sup> as mandated by Tex.Elec.Code §§ 66.022 and 66.024, and
- ii) repeatedly inserted corrupt CVR memory cards into the main Tally computer on election night<sup>25</sup> further impugning the credibility of the unnumbered and illegal CVRs used at the recount.<sup>26</sup>

**C. The Court of Appeals affirms Casar’s no evidence summary judgment and motion for monetary sanctions.**

After discovery, Casar filed a no-evidence summary judgment,<sup>27</sup> and motion for sanctions.<sup>28</sup> Trial court granted his no-evidence motion for summary judgment,

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<sup>20</sup> CR1:916

<sup>21</sup> CR1:860-915—Pressley’s Sixth Amended Petition

<sup>22</sup> CR1:4493-94

<sup>23</sup> 1CR:1881

<sup>24</sup> CR1:1865,AppendixJ

<sup>25</sup> 1CR:2118,2135,2136,2139,2140,2142,2155.

<sup>26</sup> 1CR:1978,lines16-20,

<sup>27</sup> CR2:377

<sup>28</sup> CR2:1934



awarded monetary sanctions against Pressley for \$40,000, and held Pressley jointly liable, with her attorney, to Casar for expenses of \$7,794.44 and further awarded unsolicited, un-briefed anticipatory attorney's fees, in the event Pressley sought an unsuccessful appeal to the Court of Appeals (\$25,000) and Texas Supreme Court (\$45,000).<sup>29</sup>

**D. The Court of Appeals court affirmed without reaching the merits of Pressley's primary constitutionality issue – that she produced more than a scintilla of evidence that unnumbered, legally insufficient ballots should not be counted at a recount.**

Pressley's Appellant's Brief argued "the Legislature did not permit this election to be decided by counting CVRs in a recount which do not resemble or contain the components of an official ballot in any respect."<sup>30</sup> But the court of appeal failed to reach the constitutional merits of the ballot numbering issue and made conflicting statements regarding the only statute that is possibly valid to void that ballots must be numbered to be counted, TEC 52.075. The appeals court initially makes an argument citing the Secretary's authority under 52.075 to authorize unnumbered ballots to be counted :

"In light of the discretion afforded the Secretary in the Election Code... we cannot conclude that DeBeauvoir failed to comply with the Election Code or Texas Constitution...when she followed the Secretary's directive to adopt the use of CVRs as ballot images. *See id.* §§ 52.075"<sup>31</sup>

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<sup>29</sup> CR1:4605, SuppCR4:16,32-54,19-51, Appendices A1,A2,A3,A4

<sup>30</sup> Pressley Brief, p. 26.

<sup>31</sup> Appendix B1-p.20

Later, the court makes a contradictory argument that 52.075 is not valid for the scope of election contests:

“to the extent Pressley and Rogers challenge the Secretary’s authority to ... define CVR or ballot image, the authority of the Secretary is beyond the scope of an election contest.”<sup>32</sup> Referring to 52.075.

Also, the court also refused to vacate the monetary sanctions award on the question if Casar’s burden was met under Chapter 10.

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<sup>32</sup> *Id.*

## SUMMARY OF THE ARGUMENT

As technology has evolved over the last one hundred years, Texas courts have consistently examined the constitutionality of voting systems and procedures in the context of what will “preserve the purity of the ballot box” and “[detect] any fraud, irregularity or illegality in the election.” *Reynolds v. Dallas County*, 203 S.W.2d at 323; *Christy v. Oliphint*, 291 S.W.2d at 408. *See also Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex.App.—Corpus Christi 2008, pet. dismiss’d) (“The purpose of the election code is to ensure that the true will of the voters is ‘fairly expressed’ and that the evidence of that expression ‘is properly preserved.’”); *Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex.Civ.App.—San Antonio 1981, writ dismiss’d) (“The purpose of the [Election] Code is to prohibit error, fraud, mistake and corruption...”).

Consistent with this history and the constitutional requirement that the vote in Texas be by ballot, the Legislature requires computerized voting systems store ballot images (Tex. Elec. Code § 128.001(a)(2)), and that the *original ballot* be counted in a manual recount of an electronic voting system ballot (Tex. Elec. Code § 214.049(e)).

Pressley provided summary judgment evidence that 3,937 unnumbered, legally insufficient ballots were counted at the recount at issue. The trial court erred in granting Casar’s no-evidence motion for summary judgment on that point,

and the Court of Appeals erred, not only in affirming the trial court, but also in holding that a cast vote record, which is unnumbered and does not contain the required elements of a ballot pursuant to the Election Code, is a legally sufficient ballot that can be counted in a election recount.

The Court of Appeals further erred in allowing the Secretary to authorize election administrators, including Travis County, to ignore certain requirements of the Election Code on the basis of convenience, to ignore that ballots counted in a recount do not meet constitutional and statutory requirements (numbered, etc.), to ignore that election returns, including Zero Tapes and Results Tapes, must be printed and delivered, and ignore that poll watchers must be allowed to observe all election and recount activities. The Court of Appeals did not address how this authorization is contradictory to mandatory provisions of the Election Code.

Finally, the award of sanctions against Pressley was improper because Casar did not overcome the presumption of good faith by Pressley in her pleadings. Additionally, the record contains evidence of Pressley's good faith, further highlighting the error committed by the Court of Appeals in affirming the trial court's sanctions award against Pressley.

## **ARGUMENT AND AUTHORITIES**

### **I.**

#### **UNNUMBERED ILLEGAL BALLOTS WERE COUNTED AT THE MANUAL RECOUNT**

**A. Pressley provided evidence that 3,937 unnumbered and legally insufficient ballots (CVR's)<sup>33,34</sup> were counted at the recount – it was enough to defeat the no evidence summary judgment and have the appeals court reverse.**

This Court has held that the first two parts of the Texas Constitution Article VI, Section 4<sup>35</sup> are mandatory that a ballot be numbered, “the purpose to have ballots numbered was again expressed and was commanded to be observed.” *State v. Connor*, 86 Tex. at 139. For more than 100 years, this Court has affirmed elections shall be by ballot and have clarified the non-synonymous election terms, “ballot” and “vote.”

“‘Ballot’ and ‘vote’ are sometimes confused...the ‘ballot’ is, in fact, under our form of voting, the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his ‘vote’ is his choice or election, as expressed by his ballot.”<sup>36</sup>

There are numerous cases that affirm the mandatory requirement that ballots be numbered.<sup>37</sup> These cases set a precedent that legal ballots must be numbered.

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<sup>33</sup> AppendixE

<sup>34</sup> CR1:899paragraph146; AppendixN,p.26; AppendixO,p.26-27

<sup>35</sup> Texas Constitution Article VI Section4:AppendixC

<sup>36</sup> *Clary v. Hurst*, 104 Tex. at 429

<sup>37</sup> *State v. Connor*, 86 Tex. 133(1893);*Gray v. State*, 92 Tex. 396;*Wood v. State, ex rel. Lee*, 133 Tex. 110;*Gomez v. Timon*, 60 Tex. Civ. App.311; *Cain v. Garvey*, 187 S.W.1111;*Arnold v. Anderson*, 41 Tex.Civ.App.508;*Huff v. Duffield*, 251 S.W. 298;*Andrade v. NAACP of Austin*, 345 S.W.3d. 1(2011).

In 1893 hand counted paper ballots existed and today hand/manual counting of paper ballots still occurs for DRE recounts. We need direction from this Court if physically numbered absentee ballots are legally equivalent to physically unnumbered ballots (in the form of CVRs for DRE's) and shall be counted in a recount.

Guidance is presented by the following cases: *Stotler v Fetzer* 630 S.W.2d 782, 783, “It appears that only those statutes, which from their very nature are deemed absolutely essential to accomplish the purposes of constitutional suffrage, are deemed mandatory. *Christy v. Oliphint*, 291 S.W.2d 406 (Tex.Civ.App. — Galveston), *aff'd on other grounds*, 299 S.W.2d 933 (Tex.1957).” *Gonzalez v. Villarreal*, 251 S.W.3d 763, “The purpose of the election code is to ensure that the true will of the voters is ‘fairly expressed’ and that the evidence of that expression is ‘properly preserved.’ *Prado*, 625 S.W.2d at 369-70.”

Some may consider that *Wood v. State*<sup>38</sup> does not support the mandatory numbering requirement for paper ballots in a recount. Close evaluation of *Wood* reveals the case is related to limitations of lever type voting machines—outlawed in 2006— and were not technically capable of producing a paper ballot for a recount as are computerized DRE's of today. Though, *Wood* is not comparable to

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<sup>38</sup> *Wood v. State ex rel. Lee*, 133 Tex. 110 (1939)

this case, *Wood* sets a precedent that numbering is mandatory and “ticket,” in Article VI Sec. 4, does equate to “ballot.”<sup>39</sup>

In the most recent election related case, *Andrade v. NAACP* in 2011, this Court addressed the mandatory ballot numbering issue in the specific voting system used in Pressley’s election and recount, the eSlate – this Court declared “the eSlate numbers ballots.”<sup>40</sup> This Court did not affirm that the eSlate numbers CVRs. Pressley agrees with this Court the eSlate must meet constitutional and statutory official ballot requirements. Pressley’s use of “ballot” throughout her trial court petitions, and appeal briefs is consistent with the Secretary’s Glossary of Elections Terminology in its definition of the term “ballot” and clearly equates with “ballot image” as “the ballot” as it appears on a direct recording electronic (DRE) voting system.”<sup>41</sup>

**B. Does Secretary have authority to authorize counting of unnumbered ballots (CVRs) in a manual recount?**

**1. County and Secretary claim TEC 52.075 and 221.001 provide authority to ignore numbering for CVR’s.**

When possible, “courts are to interpret legislative enactments in a manner to avoid constitutional infirmities.” *See Texas State Bd. of Barber Examiners*, 454 S.W.2d at 732; *Smith v. Patterson*, 111 Tex. 535, 242 S.W. 749, 750 (1922). The

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<sup>39</sup>*Wood*, 133 Tex. at 119

<sup>40</sup>*Andrade*, 345 S.W.3d at 15

<sup>41</sup>CR1:1410

appeals court initially makes an argument for the Secretary's authority under 52.075 to authorize unnumbered ballots to be counted :

“In light of the discretion afforded the Secretary in the Election Code ... we cannot conclude that DeBeauvoir failed to comply with the Election Code or Texas Constitution ... when she followed the Secretary's directive to adopt the use of CVRs as ballot images. *See id.* §§ 52.075”<sup>42</sup>

Later, the court makes a contradictory argument that 52.075 is not valid for election contests:

“to the extent Pressley and Rogers challenge the Secretary's authority to ... define CVR or ballot image, the authority of the Secretary is beyond the scope of an election contest.”<sup>43</sup> Referring to TEC 52.075.

Pressley concedes the Texas Secretary has authority, under TEC 52.075, to modify ballot content *as long as* the mandatory numbering and other mandatory ballot requirements in TEC Chapter 52 are preserved. Pressley has properly argued a constitutional injury<sup>44</sup> under 52.075.

Note a cast vote record (CVR) or vote image has never been referenced directly in the Texas Constitution or the Texas Election Code. The appeals court cited TEC 122.001<sup>45</sup> to support statutory authority of the Secretary to designate an

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<sup>42</sup> AppendixB-p.20

<sup>43</sup> *Id.*

<sup>44</sup> CR1:899paragraph146; AppendixN,p.26; AppendixO,p.26-27

<sup>45</sup> TEC 221.001 updated 6/1/2015



unnumbered CVR equivalent to a legal ballot.<sup>46</sup> Yet, the U.S. Election Assistance Commission's Glossary of Key Election Terminology provided by Casar and referenced by the appeals court, provides no distinction if the CVR shall be numbered.<sup>47</sup>

## II. APPEALS COURT DECISION QUESTIONS THE VALIDITY OF ELECTION CODES AND CRIMINAL PENALTIES ASSOCIATED WITH VIOLATION THEREOF

### **A. County requested/received permission from Secretary to instruct election judges to conduct activities inconsistent with the Texas Election Code**

The Texas Election Code requires that polling location election officers *must* deliver election returns to County pursuant to TEC §§ 66.022(1) and 66.024(1) and appear to be mandatory given TEC § 66.054 defines criminal penalties, for knowingly failing to deliver them. Pressley thoroughly documented the 2014 public advisories the Secretary promulgates regarding procedures for closing polls/printing of election returns/Results tapes<sup>48</sup> and definition of Results Tapes<sup>49,50</sup>

County, based on verbal permission<sup>51</sup> from the Secretary, instructed election judges<sup>52</sup> to not print and deliver election returns. The Legislature has charged the

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<sup>46</sup> AppendixC

<sup>47</sup> CR2:633

<sup>48</sup> AppendixI-CR2:700,707

<sup>49</sup> AppendixI-CR2:711

<sup>50</sup> AppendixN-pp.3,8,19

<sup>51</sup> 6/18/15:RR2--p.225 line20–p.225 line 6.

<sup>52</sup> AppendixJ- CR1:1865, AppendixK-CR2:7620

Secretary with assisting and advising in regard to the application, operation, and interpretation of the Election Code. Tex. Elec. Code § 31.004. The Secretary's interpretation must be reasonable and not conflict with the language of the statute it is interpreting. *See, e.g., Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). It plainly has not given the Secretary authority to render sections of the Election Code invalid.

This Court has clarified election returns must be completed at polling locations according to law and be delivered to the county clerk:

“the returns together with the poll list and tally lists of the election shall be delivered to...the clerk of the county court.” *Clary v. Hurst* 104, Tex. at 430 (1911).

“it must have occurred to any thoughtful mind that in the returns made from the many boxes, where both sides would ordinarily be represented and where their fidelity was to some extent assured by heavy penalties for any violation of duty” *Clary* 104, Tex. at 431.

Election laws mean something, “meticulous adherence to the law is not to deprive willing candidates from their place on the ballot; the purpose is to ensure equal treatment of all candidates and to protect voters from fraud.” *Bejarano v. Hunter*, 899 S.W.2d at 352 (1995).

Affirming the Secretary may issue waivers to mandatory statutes, calls the validity of those statutes – and the criminal penalty associated with violation thereof – into question. Texas needs this Court's guidance. With regard to

sanctioning Pressley for claiming election returns/Results Tapes/Tally Tapes for her *race* were not printed, the appeals court erred by not applying standards of competent evidence to prove Pressley did not have evidentiary support or she failed to make a reasonable inquiry.<sup>53</sup>

**B. Recount election activity – watchers not allowed to specifically view the retrieval, sorting, and copying of 3,937 CVRs used in the manual recount.**

The Texas Election Code entitles official watchers to monitor election and recount activities – with criminal penalties when election officers knowingly prevent a watcher from observing an activity the watcher is entitled to observe – TEC §§ 33.056(a), 213.013(h), 33.061(a) and (b). There is agreement from all sides that at the recount, Pressley and her official watchers were not permitted by the Travis County Elections Director, Mr. Michael Winn, to monitor the activities associated with “...the retrieval, sorting, and copying of the CVRs”<sup>54</sup> before they were printed.

Pressley filed multiple pre-suit complaints with the Secretary<sup>55</sup> claiming her watchers were entitled to monitor any activity conducted in connection with her

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<sup>53</sup> *Gomer v. Davis*, 419 S.W.3d 470,480(Tex.App.-Houston[1<sup>st</sup> Dist.] 2013, no pet.;*Cuellar v. Maldonado*, Court of Appeals Corpus Christi-Edinburg, 2015 WL 1020650; *Low v. Henry*, 221 S.W.3d 616-617; *Nath v. Tex. Children’s Hosp.*, 446 S.W.3d 362; *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179 (Tex.App.-Texarkana 2011, no pet.); *Robson v. Gilbreath*, 267 S.W.3d at 407.

<sup>54</sup> AppendixB-p.29

<sup>55</sup> Appendix L-CR1:572, AppendixM-CR1:575

recount, such as the retrieval, sorting, and copying of the CVRs. The Secretary responded, “*none of the activities you listed equate to commencing a recount.*”<sup>56,57</sup>

Pressley disagreed with the Secretary’s interpretation of the code.

The appeals court wrote,

“Assuming without deciding that Pressley and her recount watchers were entitled to view the retrieval, sorting, and copying of the CVR files, Pressley ... 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 ...”<sup>58</sup>

Pressley was not asking to monitor basic activities like loading printer paper into a printer. Pressley expected to view material recount activities no different than in days of old, when locked ballot boxes were publically unlocked, and opened to remove ballots for recounts. In this day of technology, Pressley expected and asked to monitor the retrieval, opening and extraction of electronic ballot files to ensure no fraud occurred with the CVR pdf file.

The appeals court’s failure to cite TEC § 213.013(h) and decide merits of the watcher statutes and the criminal penalties associated with violation thereof into question for future elections. Further, with regard to sanctioning Pressley for the criminal allegations of obstructing poll watchers, the appeals court erred by not applying standards of competent evidence to prove Pressley did not make a

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<sup>56</sup> 1CR:572 paragraph

<sup>57</sup> 1CR:575 paragraph 3

<sup>58</sup> AppendixB-p.29

reasonable inquiry before filing. *Gomer v. Davis*, 419 S.W.3d 470,480(Tex.App.-Houston[1<sup>st</sup> Dist.] 2013, no pet.;*Cuellar v. Maldonado*, Court of Appeals Corpus Christi-Edinburg, 2015 WL 1020650; *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179 (Tex.App.-Texarkana 2011, no pet.); *Robson v. Gilbreath*, 267 S.W.3d at 407.

### **.III.**

#### **SANCTIONS AGAINST PRESSLEY – PURSUANT TO CHAPTER 10 – WERE NOT SUPPORTED WITH COMPETENT EVIDENCE**

##### **A. Casar did not provide competent proof for each alleged sanctionable offense and appeals court should have reversed.**

Pressley was sanctioned pursuant to Chapter 10 for pleading:

- 1) Disenfranchisement of “die hard” and Republican voters,
- 2) Zero Tapes and Results Tapes for Pressley’s race were not printed,
- 3) Irregularities in recount – obstruction of poll watchers

Casar must support his motion for sanctions with competent proof that Pressley showed bad faith under two s: (1) making claims that had no evidentiary support or was not likely to have evidentiary support, and (2) not making a reasonable inquiry before filing suit<sup>59</sup> and that “incompetent evidence, surmise, or speculation will not suffice for the proof required.” *Cuellar*, 2015 WL 1020650.

##### **1. Disenfranchisement of voters**

Under 1, Pressley’s evidence, in her Fifth Amended Petition, for the disenfranchisement of voters was a statistical voter analysis list of “die hard” and

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<sup>59</sup> *Unifund CCR Partners v Villa*, 299 S.W.3d at97; *Low*, 221 S.W.3d at 617.

Republican voters that always vote in runoffs and did not vote.<sup>60</sup> Casar did not prove that Pressley's list of voters were *not* disenfranchised. Casar did not provide competent evidence Pressley's disenfranchised list was falsely prepared, was not statistical, and they never produced one voter from the list that said they were *not* disenfranchised.

Instead, Casar and the trial court shifted the burden of proof to Pressley – asking her to recite names of disenfranchised voters without access to her list, and chastising her opinions about distances between various polls.<sup>61</sup> In a bit of support that her allegations were non-frivolous, the trial judge eventually agreed with Pressley that “die hard voters” always vote.<sup>62</sup> The court of appeals erred in application of the burden of proof Casar was required to meet (*Unifund* and *Cuellar*).

Under 2, Casar did not provide competent evidence that Pressley did not make a reasonable inquiry before filing suit. Pressley pleaded she had received reports from voters<sup>63</sup> and phone bankers,<sup>64</sup> that there was confusion about where to vote, and felt disenfranchised.<sup>65</sup> Pressley had reason to believe County had not placed notices directing voters to alternate polling locations per TEC 43.061.

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<sup>60</sup> CR2:1542-1547, 1580-1629

<sup>61</sup> Sanctions Hearing Part 2, p. 187-188, 191

<sup>62</sup> 6/18/14RR2:99, lines 10-20

<sup>63</sup> CR2:1543

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Once the County produced copies of notices, Pressley removed the disenfranchisement claim immediately in the 6<sup>th</sup> Amended Petition. It is clear “In determining whether a party conducted a reasonable inquiry, the facts and evidence available to the party and the circumstances existing when the party filed the pleading must be examined.” *Cuellar*, reaffirmed and cited *Robson*, 267 S.W.3d at 407.<sup>66</sup> “A party acts in bad faith if she has been put on notice that her understanding of the facts may be incorrect and she does not make reasonable inquiry before pursuing the claim further.” Pressley responded appropriately per *Robson*, 267 S.W.3d at 407.

The appeals court erred in affirming sanctions to pleadings that were timely removed in good faith, “bad faith does not exist when a party merely exercises bad judgment or is negligent.” See *Thielemann v. Kethan*, 372 S.W.3d 286, at 294 (Tex.App.-Houston[1<sup>st</sup> Dist.]2012,pet.denied). *Cuellar* at 9, also noted, “Sanctions for frivolous or groundless pleadings do not apply to the pursuit of an action later determined to be groundless after pleadings were filed.”<sup>67</sup>

## **2. Zero Tapes Tapes Were Not Printed for Pressley’s Race**

Under 1, Pressley’s key evidence that full zero tapes, as defined by the

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<sup>66</sup> *Robson*, 267 S.W.3d at 407.

<sup>67</sup> See *Gomer*, 419 S.W.3d at 481; *R.M. Dudley Const. Co.*, 258 S.W.3d at 711; *Overman v. Baker*, 26 S.W.3d 506, 509 (Tex.App.—Tyler 2000, nopet.); *Karagounis*, 970 S.W.2d at 764.

Secretary in public advisories,<sup>68</sup> for Pressley's race were not printed or produced.<sup>69</sup> There was conflicting testimony by the Clerk on this topic. The *partial and abbreviated* Zero Tapes produced by County were difficult to read.<sup>70</sup> The Clerk testified that Pressley's name was *not included on the partial or abbreviated* Zero Tapes that were produced.<sup>71</sup> Pressley's pleadings made no claims related to *partial or abbreviated* zero tapes.<sup>72</sup> The Clerk produced *partial* zero tapes for other races, and *abbreviated* zero tapes showing no specific races.

Under 2, Casar did not provide competent evidence that Pressley did not make a reasonable inquiry about zero tapes before filing suit. Pressley made a reasonable inquiry and placed the Secretary's definitions thereof, "all contests...with zero votes next to each name" in her pleadings.<sup>73</sup>

### **Sanctions related to Results Tapes and Obstruction of Recount Watchers**

The appeals court erred in not recognizing the evidentiary support Pressley provided in her petitions related to election returns/Results Tapes/Tally Tapes and obstruction of her poll watchers at the recount as discussed above.

Overall, the appeals court erred in affirming Chapter 10 sanctions, on all counts, against Pressley because the Court of Appeals erred in applying burden of

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<sup>68</sup> AppendixG-CR1:700,711

<sup>69</sup> AppendixH- 1CR:1875

<sup>70</sup> *Id.*

<sup>71</sup> 6/18/15:RR2 p. 224, lines3-12.

<sup>72</sup> CR1:4619

<sup>73</sup> AppendixG1-CR2:734, CR1:4619



proof standards sustained by this Court and appeals courts, in *Low, Unifund, Cuellar, Robson, Thielman, et al.*

**CONCLUSION AND PRAYER**

Pressley prays for this Honorable Court to grant this petition, allow full briefing, reverse the court of appeals decision and award Pressley all relief to which she is entitled.

Respectfully submitted,

By:   
LAURA PRESSLEY

(Address redacted)

*PRO SE*


## **CERTIFICATE OF SERVICE**

By my signature below, I hereby certify a true and correct copy of this  
Petition for Review was served via electronic services on the following counsel of  
record on April 7, 2017:

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**ATTORNEYS FOR RESPONDENT GREGORIO (GREG) CASAR**

  
\_\_\_\_\_  
LAURA PRESSLEY  
*PRO SE*

### **CERTIFICATE OF COMPLIANCE**


Based on a word count run in Microsoft Word 2007, this brief contains than 4,433 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).



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LAURA PRESSLEY

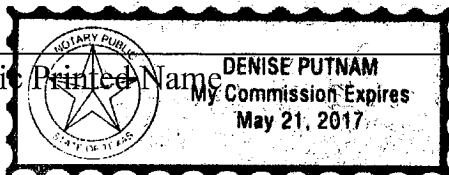
STATE OF TEXAS   §  
COUNTY OF Williamson   §       SS.

  
LAURA PRESSLEY, Affiant

Signed and sworn to before me on this the \_\_\_\_\_ day of ~~January, 2017~~, for which witness my seal and signature. **April 7, 2017**

Denise Putnam  
Notary Public Signature

Notary Public Printed Name \_\_\_\_\_



NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

v.

GREGORIO "GREG" CASAR  
Contestee§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICTFiled in The District Court  
of Travis County, Texas

MAY 26 2015

At  
Velva L. Price, District ClerkORDER

The Court has considered Contestee Casar's Amended Motion for Summary Judgment, Contestee's Supplement to his Amended Motion for Summary Judgment, Contestee's No-Evidence Motion for Summary Judgment, Contestant's Response to Contestee's Amended and Supplemented Motion for Summary Judgment, the exhibits cited in those documents, and the parties' arguments, and the Court rules as follows:

1. ~~Casar's Amended Motion for Summary Judgment is GRANTED.~~
2. Casar's No-Evidence Motion for Summary Judgment is GRANTED.
3. Under Texas Election Code § 221.012(a), the Court declares that the true outcome of the December 16, 2014 runoff election is that Contestant Gregorio "Greg" Casar was elected to the Austin City Council District 4 seat.
4. This action is hereby dismissed in its entirety.

IT SO ORDERED.

SIGNED this the 26 day of May, 2015.

004046416

  
PRESIDING DISTRICT JUDGE

*This Order Resolves All the Issues Between  
ALL the Parties and is Appealable*



JUL - 2 2015

At 9:50 A.M.  
Valva L. Price, District Clerk

NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

§

IN THE DISTRICT COURT

§

v.

§

TRAVIS COUNTY, TEXAS

§

GREGORIO "GREG" CASAR  
Contestee

§

§

§

201<sup>ST</sup> JUDICIAL DISTRICTAmended Summary Judgment Order

The Court has considered Contestee Casar's Amended Motion for Summary Judgment, Contestee's Supplement to his Amended Motion for Summary Judgment, Contestee's No-Evidence Motion for Summary Judgment, Contestant's Response to Contestee's Amended and Supplemental Motion for Summary Judgment, the exhibits cited in those documents, and the parties' arguments, and the Court FINDS and ORDERS as follows:

1. Casar's No-Evidence Motion for Summary Judgment is GRANTED.
2. Under Texas Election Code § 221.012(a), the Court DECLARES that the true outcome of the December 16, 2014 runoff election is that Contestee Gregorio "Greg" Casar was elected to the Austin City Council District.
3. Contestee Casar's motion for sanctions against Contestant Laura Pressley and her Counsel remains pending before the Court and will be considered and decided by the Court in a separate order.
4. This Order amends and replaces the Court's prior May 26, 2015 Order.

IT SO ORDERED.

SIGNED this the 24 day of June, 2015.
  
 JUDGE DAN MILLS


JUL 23 2015

At 10:53 AM.  
Velva L. Price, District Clerk

NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

v.

GREGORIO "GREG" CASAR  
Contestee§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICTAmended Final Judgment

On May 26, 2015, the Court entered a final summary judgment order granting Contestee Casar's No-Evidence Motion for Summary Judgment. On June 12, 2015, Contestee Casar timely filed his Third Amended Motion for Sanctions to amend the May 26, 2015 Order to include an award of sanctions. On June 24, 2015, the Court entered an Amended Summary Judgment Order that amended and replaced the May 26, 2015 Order. The Court now enters this Amended Final Judgment and FINDS and ORDERS as follows:

1. Contestee Casar's Third Amended Motion for Sanctions is GRANTED.
2. Pursuant to Texas Civil Practice and Remedies Code § 10.005, the Court entered an order on July 23, 2015 that describes the conduct the Court has determined violated Texas Civil Practice and Remedies Code § 10.001, and explains the basis for the sanctions imposed. The Court incorporates by reference that Order herein.
3. Contestee Casar's No-Evidence Motion for Summary Judgment is GRANTED.
4. The Court incorporates by reference the June 24, 2015 Order granting Casar's No-Evidence Motion for Summary Judgment.



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5. Under Texas Election Code § 221.012(a), the Court DECLARES that the true outcome of the December 16, 2014 runoff election is that Contestee Gregorio “Greg” Casar was elected as the Austin City Council District 4 member.
6. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant Laura Pressley individually monetary sanctions in the amount of \$ 40,000.00, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
7. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant’s counsel David Rogers individually monetary sanctions in the amount of \$ 50,000.00, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
8. Pursuant to Texas Civil Practice and Remedies Code §§ 10.002 and 10.004, Contestee Casar shall recover from Contestant Laura Pressley and Contestant’s counsel David Rogers jointly and severally his out-of-pocket expenses in the amount of \$7,794.44, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
9. If either Contestant Laura Pressley or Contestant’s counsel David Rogers unsuccessfully appeals this Amended Final Judgment, pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall



also recover from Contestant Laura Pressley, if unsuccessful on appeal, and Contestant's counsel David Rogers, if unsuccessful on appeal, additional monetary sanctions in the amount of \$ 25,000.00, if appealed to the Court of Appeals; \$10,000.00, if a petition for review is filed in the Supreme Court of Texas; \$15,000.00, if full briefing is requested by the Supreme Court of Texas; and \$15,000.00, if oral argument is granted at the Supreme Court of Texas. These additional monetary sanctions shall be imposed jointly and severally on Contestant Laura Pressley and Contestant's counsel David Rogers, if both are unsuccessful on appeal.

10. Court costs are awarded in favor of Contestee Casar and against Contestant Laura Pressley, together with post-judgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
11. This order finally disposes of all claims and all parties and is appealable.
12. All relief not expressly granted in this Amended Final Judgment is denied.

IT SO ORDERED.

SIGNED this the 23<sup>rd</sup> day of July, 2015.

  
JUDGE DAN MILLS

JUL 23 2015

At 10:53 A.M.  
Velva L. Price, District Clerk

NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

v.

GREGORIO "GREG" CASAR  
Contestee§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

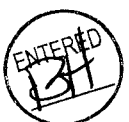
201<sup>ST</sup> JUDICIAL DISTRICTOrder

The Court has considered Contestee Casar's Third Amended Motion for Sanctions, Contestant Laura Pressley's ("Pressley") Response to Contestee's Third Amended Motion for Sanctions, Attorney David Rogers' ("Rogers") Response to Contestee's Motion for Sanctions, Contestee's Reply to Rogers' Response, Rogers' Sur-Reply to Rogers Response to Contestee's Third Amended Motion for Sanctions, the pleadings and evidence in the record, and all of the evidence and argument offered at the evidentiary hearings on June 18, 2015 and June 24, 2015. The Court FINDS and ORDERS as follows:

1. Contestee Casar's Motion for Sanctions is GRANTED.
2. The Court finds that sanctions against David Rogers are justified and proper under Chapter 10 of the Civil Practices and Remedies Code.
3. The Court finds that sanctions against Laura Pressley are justified and proper due to her participatory role in this litigation under Chapter 10 of the Civil Practices and Remedies Code.
4. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant Laura Pressley individually monetary sanctions in the amount of \$ 40,000.00.



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5. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant's counsel David Rogers individually monetary sanctions in the amount of \$ 50,000.00.

6. If either Contestant Laura Pressley or Contestant's counsel David Rogers unsuccessfully appeal this Order, pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall also recover from Contestant Laura Pressley, if unsuccessful on appeal, and Contestant's counsel David Rogers, if unsuccessful on appeal, additional monetary sanctions in the amount of \$ 25,000.00, if appealed to the Court of Appeals; \$10,000.00; if a petition for review is filed in the Supreme Court of Texas; \$15,000.00 if full briefing is requested by the Supreme Court of Texas; and \$15,000.00 if oral argument is granted at the Supreme Court of Texas. Contestant Laura Pressley shall pay these additional monetary sanctions only if she is unsuccessful on appeal, and David Rogers shall pay these additional monetary sanctions only if he is unsuccessful on appeal. These costs were derived from reviewing similar awards for cost of appeals in the following cases. *Marsalise v. Wallace*, 2005 WL 1116010 (Tex. App.—Austin, May 12, 2005, no pet.); *R&R Resources Corp. v Echelon Oil & Gas, LLC.*, 2010 W L 5575919 (Tex. App.—Austin, Jan 14, 2011, pet denied) ; *John Kleas Co., Inc, v Prokop*, 2015 WL 1544797 (Tex. App.—Corpus, April 2, 2015, no pet.)

7. Pursuant to Texas Civil Practice and Remedies Code §§ 10.002 and 10.004, Contestee shall recover from Contestant Laura Pressley and Contestant's counsel David Rogers his reasonable expenses of \$ 7,794.44. Contestant Laura Pressley and Contestant's counsel David Rogers shall be jointly and severally liable for these expenses.

8. In compliance with Section 10.005 of the Civil Practice and Remedies Code, the Court makes the following Findings of Fact and Conclusion of Law supporting this Order of sanctions:

**FINDINGS OF FACT**

9. In November 2002, Travis County began using the Hart Intercivic eSlate system (the “Hart eSlate System”) as an electronic voting system.

10. Since November 2011, Travis County has used a countywide voting system that employs central voting centers. Instead of requiring voters to vote at their home precinct polling locations, vote centers allow all registered voters in Travis County the option of voting at any of the county’s polling locations on Election Day.

11. Pressley and Casar were among eight candidates for the District 4 seat of the Austin City Council at the November 4, 2014 general election. In the general election, Casar received the highest number of votes (3,272 or 38.63%), Pressley received the second-highest (1,826 or 21.56%), and the remaining votes were distributed among the other six candidates.

12. Some voting locations in the City of Austin were changed between the general and the runoff elections as is normal practice for a runoff election. For the December 16, 2014 runoff, there were 136 citywide voting locations available to all City of Austin voters. The City of Austin gave the public notice of the voting locations for the runoff election and an opportunity to comment on the proposed locations. On November 13, 2014, the Austin City Council posted the agenda of the November 18, 2014 Special Called Meeting of the Austin City Council. The agenda included setting the run-off election and making provisions for the runoff election. On Tuesday, November 18, 2014,

the Austin City Council held the special called meeting and approved an ordinance ordering the runoff election. A list of all polling locations for the runoff was attached to the City Council's approved ordinance. The locations were also posted at City Hall and in the office of the City Clerk, as well as published in the newspaper. Additionally, the City of Austin and the Travis County Clerk websites both posted information about the runoff election and a list of polling locations.

13. At the November 18, 2014 Austin City Council meeting, neither Pressley nor any of her ten campaign workers attended the meeting to lodge any complaint or objections about the changes in voting locations. Pressley could have attended the meeting but did not. Over the years, she has attended and commented at 30 or more Austin City Council Meetings. She knows where the agendas are posted, knows how to read them in advance, and is familiar with the process for commenting at a Council meeting.

14. Casar won the December 16, 2014 runoff election by a margin of almost 65% to 35%; the difference in their vote totals was 1,291 votes. 4,417 votes were cast in the District 4 runoff election. Of those votes, 480 were mail-in ballots. The remaining 3,937 ballots were cast using Travis County's chosen electronic voting system, the Hart eSlate System.

15. As required by Chapter 122 of the Election Code, and after an analysis of the Hart eSlate System by a team of computer and election law experts, the Secretary of State reviewed, approved, and certified the Hart eSlate System. The Secretary of State found that the Hart eSlate System fully complied with Election Code requirements and, of particular relevance in this case, was "capable of providing records from which the operation of the system may be audited[.]"

16. On January 5, 2015, the day before Casar was to be sworn-in, Pressley filed a recount petition with the Secretary of State. Before the recount took place, County Clerk Dana DeBeauvoir offered to run an audit of the election results for Pressley. An audit would have provided much more detailed information about the electronic votes than a recount, including many of the questions Pressley has presented in this lawsuit. Pressley refused DeBeauvoir's offer and demanded a recount. An audit would have provided a reasonable opportunity to view issues raised in the lawsuit and would have allowed for a reasonable inquiry into many of the allegations alleged by the Contestant in this lawsuit to determine if there was merit to any of such claims.

17. On January 6, 2015, Travis County conducted a manual recount of all early, election day, mail-in, and provisional ballots. The recount confirmed the election result. Jay Brim, the Chair of the Recount Committee, and Dana DeBeauvoir, the Travis County Clerk, supervised the recount. For votes cast electronically, the recount team printed off the Cast Vote Records (CVRs), also called Ballot Images. Pressley witnessed the printing of the Cast Vote Records. All votes were then manually recounted. Mr. Brim found that the totals in all precincts matched those in the original canvas, and that the number of voters matched the number of ballots cast. He declared that Casar remained the victor of the election.

18. The Secretary of State had a representative present at the recount—Christina Adkins. During the recount, Pressley complained to Ms. Adkins that the Cast Vote Records were not “images of ballots cast,” and pointed to the specific provisions of the Election Code that she believed were germane. Ms. Adkins witnessed the County's use of

the Cast Vote Records for the recount, disagreed with Pressley's interpretation of the Election Code, and refused to challenge the use of the Cast Vote Records in the recount.

19. After the recount, Pressley lodged several complaints regarding the recount with the Secretary of State. One of Pressley's complaints was that she and her poll watchers were not allowed to be present at the printing of the ballots as Pressley believed she was entitled to view the source, properties, retrieval and counting of the ballots. In its January 20, 2015 response letter to Pressley, the Secretary of State dismissed this complaint and confirmed that Pressley had been present when the "ballot images (also known as 'cast vote records')" were printed:

You state that Travis County conducted activities such as extracting data from the Hart electronic voting system, compiling ballot images onto a centralized system, printing ballot images (also known as "cast vote records"), and sorting by mail ballots before the recount was scheduled to begin . . . . [W]e agree with you that you and your representatives under Section 213.013(b) were 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 re-print the ballot images in the presence of you and your watchers.

20. Responding to a subsequent complaint from Pressley, the Secretary of State again made the same point in another letter, dated January 27, 2015. That letter also noted that an inspector from the Secretary of State's office had confirmed the printing of the ballot images:

You have stated that upon your arrival, you discovered that ballot images had already been printed. You alerted Travis County to the issue and reminded them that you and your watchers were entitled to be present at the printing. In response, Travis County began anew with the printing of the ballot images in the presence of you and your watchers, and only the ballot images printed in your presence were used in the recount. This information is confirmed by the

inspector sent by our office to attend the recount. Therefore, our office believes you and your watchers were able to witness the printing of all ballot images used in verifying the vote count in your race.

21. With the Hart eSlate System, the permanent record of the vote cast is known as a Cast Vote Record or CVR. A CVR is a data field representation depicting which votes were cast on each voting device. The Cast Vote Records are used for counting votes and a visual representation of the CVR can be printed in the event of a recount.

22. The U.S. Election Assistance Commission is an independent, bipartisan commission charged with developing guidance to meet the requirements of the Help America Vote Act of 2002. It is charged by statute with adopting voluntary voting system guidelines and to serve as a national clearinghouse of information on election administration. In its Glossary of Key Election Terminology, the U.S. Election Assistance Commission defines “Cast Vote Record” as “a ballot image when used to refer to electronic ballots.”

23. The Texas Secretary of State defines “Cast Vote Record” as a Ballot Image. Ten days before Pressley filed this lawsuit, the Secretary of State expressly stated in its January 20, 2015 letter to Pressley that “ballot images” are also known as “cast vote records.”

24. As required by the Election Code, Travis County and the City of Austin used the Secretary of State’s definitions when interpreting the Election Code in this case.

25. On January 31, 2015, Pressley filed her Original Contest of Election against Casar, seeking to overturn the results of the runoff election for the Austin City Council District 4 seat. Pressley’s Original Contest was signed by her counsel David Rogers.

26. In paragraphs 32 through 38, the Original Contest alleged that the Hart eSlate



System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code. In paragraph 13, the Original Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 14 and 15, the Original Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 26 through 44, the Original Contest alleged that procedural irregularities occurred during the recount.

27. On February 18, 2015, Pressley filed her Second Amended Contest. In paragraphs 31 through 37, the Second Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code. In paragraph 13, the Second Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 11 and 14, the Second Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 26 through 44, the Second Amended Contest alleged that procedural irregularities occurred during the recount.

28. On February 27, 2015, Pressley filed her Third Amended Contest. In paragraphs 43 through 53, the Third Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code.

In paragraphs 12 through 23, the Third Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Third Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 41 through 66, the Third Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

29. On March 12, 2015, Pressley filed her Fourth Amended Contest. In paragraphs 43 through 53, the Fourth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code. In paragraphs 12 through 23, the Fourth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Fourth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 41 through 66, the Fourth Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

30. On April 16, 2015, the deposition of Pressley took place. At her deposition, Pressley admitted that she could not identify a single voter who was disenfranchised by the change in voting locations for the runoff election. Pressley did testify she had spoken with people who claimed they had difficulty in voting, but she was not able to obtain even one affidavit from one voter who claimed to have been disenfranchised. Pressley

also admitted that she did not know what a Cast Vote Record was and that the U.S. Election Assistance Commission, the Texas Secretary of State, Travis County, and the City of Austin all reject her definition of “ballot image.” Pressley also testified that she did not know if zero tapes had been printed, where they may have been printed, or when.

31. On April 20, 2015, Pressley filed her Fifth Amended Contest. In paragraphs 49 through 59, the Fifth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code. In paragraphs 12 through 29, the Fifth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 41 and 43, the Fifth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 47 through 74, the Fifth Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

32. Pressley filed her final and Sixth Amended Contest on May 19, 2015. In paragraphs 3, 13, 82, 84, and 97 through 138, the Sixth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not “images of ballots cast” under the Texas Election Code. In paragraphs 3, 4, 8, 42 through 52, and 64, the Fifth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 82 through 101, the Fifth Amended Contest alleged that procedural irregularities occurred during the recount that

materially affected the election results. In paragraphs 93 and 94, Pressley alleged that Travis County Director of Elections Michael Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the CVR files during the recount. Pressley dropped from her Sixth Amended Contest her allegations that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election.

33. Travis County produced documents in this case on April 22 and 23, 2015. County Clerk Dana DeBeauvoir was deposed on May 11, 2015. The due date for the Motion for Summary Judgment response was May 19, 2015. On May 22, 2015, County Clerk Dana DeBeauvoir made changes to her deposition testimony.

34. On May 26, 2015, after briefing and a hearing, this Court granted Casar's no-evidence summary judgment motion, which establishes that Pressley failed to raise any genuine issue of material fact in response to Casar's motion.

35. Rogers had prior experience working on election contest cases. According to Rogers, most successful election contests involved a margin of victory of less than 50 votes.

36. Before filing the Contests, Rogers had never heard of an election contest case in which a contestant had overcome a margin of victory of 1,291 votes.

37. Before filing the Contests, Rogers was aware of the Texas Supreme Court decision in *Andrade v. NAACP*, 345 S.W.3d 1 (Tex. 2011), in which the Texas Supreme Court rejected an equal-protection challenge to the Hart eSlate System and held that "[t]he Secretary [of State] made a reasonable, nondiscriminatory choice to certify the

eSlate, a decision justified by the State's important regulatory interests.”

38. The Cast Vote Record is a “ballot image” as that term is used in the Texas Election Code.

39. The U.S. Election Assistance Commission and Texas Secretary of State have consistently stated that for electronic voting, the Cast Vote Record is the Ballot Image. The Secretary of State stated this to Pressley explicitly in its January 20, 2015 letter to her.

40. The City of Austin and Travis County define a Cast Vote Record as a Ballot Image.

41. Texas Election Code § 52.075 gives the Secretary of State authority to prescribe the form and content of ballots for electronic voting machines.

42. Texas Election Code § 129.002 of the Election Code gives the Secretary of State the authority to implement Direct Recording Electronic voting systems that utilize Cast Vote Records.

43. Pressley and Rogers did not cite the 1990 Federal Election Commission Performance and Test Standards until the Sixth Amended Contest, and these standards do not distinguish a Ballot Image from a Cast Vote Record. The 2002 Federal Election Commission Report entitled “Voting Systems Standards Volume I – Performance Standards” defines Ballot Image as “an electronic record of all votes cast by the voter.”

44. Pressley and Rogers did not cite the 2007 Source Code Review of the Hart Intercivic Voting System until the Sixth Amended Contest, and this report does not distinguish a Ballot Image from a Cast Vote Record.

45. The allegation that the consolidation or changing of voting locations for the runoff

election disenfranchised District 4 voters is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.).

46. There is no evidentiary support for the allegation that the consolidation or changing of voting locations for the runoff election disenfranchised District 4 voters.

47. The Texas Secretary of State repeatedly rejected Pressley's complaints regarding alleged irregularities at the recount, including both at the recount itself and in multiple subsequent letters responding to Pressley's complaints.

48. The allegation that irregularities allegedly occurred during the recount materially affected the outcome of the runoff election is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

49. There is no evidentiary support for the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.).

50. The allegations that Travis County Director of Elections Michael Winn committed a criminal violation are not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law.

51. There is no evidentiary support for the allegation that Travis County Director of Elections Michael Winn committed a Class A misdemeanor criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the

CVR files at the recount. The Election Code provides that at a recount, the candidate and her representatives are entitled to be present “during the printing of the images [of ballots cast].” Pressley and her poll watchers were present while the Travis County recount team printed all of the CVRs for the recount. The Secretary of State confirmed this in its January 27, 2015 letter to Pressley, stating “Travis County began anew with the printing of the ballot images in the presence of you and your watchers, and only the ballot images printed in your presence were used in the recount. This information is confirmed by the inspector sent by our office to attend the recount. Therefore, our office believes you and your watchers were able to witness the printing of all ballot images used in verifying the vote count in your race.”

52. Pressley and Rogers failed to exercise due diligence in investigating the evidentiary support for each of the allegations in the Contests before filing them.

53. Pressley testified that she does not know what a “Cast Vote Record” is.

54. Pressley acknowledged that the U.S. Election Assistance Commission, the Texas Secretary of State, Travis County, and the City of Austin all reject her definition of “ballot image.”

55. Over 100 counties in Texas use the Hart eSlate System. County Clerk DeBeauvoir testified that, before this lawsuit, she had never heard anyone ever allege that CVRs are not ballot images for purposes of electronic voting. She also serves on the Standards Board for the U.S. Election Assistance Commission.

56. County Clerk DeBeauvoir fully complied with the Texas Election Code and Secretary of State procedures in conducting the general and runoff elections.

57. Pressley failed to exercise her right to comment on or object to any of the voting

location changes at the Austin City Council meeting.

58. Consolidating voting locations between a general election and a runoff election is a routine and entirely legal and proper practice. Such changes occur for a variety of legitimate reasons, including to achieve cost and staffing efficiencies due to the lower voter turnout and fewer number of candidates generally associated with runoffs. In this election, a total of 304 candidates were on the ballot countywide at the November 4, 2014 general election. By contrast, in the runoff election in District 4, only four races were on the ballot: this Council race, the Mayor's race, and 2 school district races—a total of eight candidates.

59. Because Travis County uses countywide voting centers, any voter in Travis County could vote at any one of the 136 voting locations across the county for the runoff election. In District 4 alone, there were 9 voting centers within the district, as well as 7 centers located within a five-minute drive of the district and 17 centers located within a ten-minute drive of the district.

60. Pressley testified if a voter had to drive as little as 20 seconds to a new voting location, that voter was disenfranchised.

61. Rogers did not identify a single witness who could or would testify that changes in voting locations had disenfranchised District 4 voters.

62. When Pressley was deposed on April 16, 2015, she could not identify a single voter who was disenfranchised as a result of the changes in voting locations. Four days later, on April 20, 2015, she filed her Fifth Amended Contest, which alleged in Paragraph 29 that 1,108 voters, at least, were disenfranchised as a result of the change in voting location.



63. There is no evidentiary support for the allegation that the Austin City Council changed the voting locations for the runoff to disenfranchise any District 4 voters.

64. There is no evidentiary support for the allegation that the changes in the voting locations for the runoff resulted in the disenfranchisement of any District 4 voters.

65. There is no evidentiary support that any voter was actually prevented from voting at the new locations.

66. Paragraph 42 of Pressley's Sixth Amended Contest states that "[r]eview of Discovery documents provided by Travis County [shows that] no Zero Tapes (showing the number of votes present on the Hart Voting equipment for each candidate when the polls open) were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff." Similar allegations are contained in ¶¶ 3, 8, 43, & 64 of the Sixth Amended Contest and in prior Contests.

67. Zero Tapes were produced to Pressley and Rogers by Travis County during their document production on April 22 and 23, 2015. Pressley's Sixth Amended Contest was filed on May 19, 2015.

68. Travis County printed zero tapes both before the runoff election and on the day of the runoff election. There is no evidentiary support for the allegation that zero tapes were not printed on the day of the runoff election.

69. Pressley and Rogers attached as Exhibit C to the Sixth Contest a zero tape that was printed on December 16, 2014, the day of the runoff election.

70. Results tapes were printed the day of the runoff election. There is no evidentiary support for the allegation that results tapes were not printed as required by the Texas Secretary of State.

71. Pressley took a personal and participatory role in this lawsuit. Pressley testified she personally authored portions of the Contests and their appendices. She estimated that she spent hours and hours working on the lawsuit and that she had worked until 3:00 a.m. drafting the Contests. Pressley was present at the deposition of County Clerk DeBeauvoir, as well as the two-day document production by the County Clerk's office.

72. Pressley testified at least three people assisted her in drafting discovery and with various other aspects of this election contest.

73. Pressley testified Contestee Casar has done nothing wrong in the conduct of the election.

74. Pressley testified she has assets and income sufficient to be able to pay a monetary sanction. Specifically, Pressley has: (1) approximately \$30,000 to \$40,000 that she has raised for the cost of pursuing this Contest and the appeal; (2) at least \$170,000 in her business account for Pure Rain LLC, which is a Limited Liability Company of which she is the only owner; (3) real estate in Wyoming with a net value of between \$10,000 and \$25,000; (4) profit from a home that she and her husband recently sold for approximately \$530,000; (5) annual sales of \$50,000 to \$60,000 per year from Pure Rain LLC; (6) annual income of approximately \$130,000 to \$160,000 from her husband's job as an engineer at Applied Materials; (7) a personal checking account valued at approximately \$1,000; (8) her husband's personal account which is valued at approximately \$5,000; and (9) savings of approximately \$51,500 in legal fees which were owed to her attorney David Rogers. Additionally, Pressley has income earning capacity of over \$100,000 per year based on her previous jobs.

75. Rogers has assets and income sufficient to be able to pay a monetary sanction.

Specifically, Rogers is a practicing attorney who charges approximately \$350/hour. Additionally, Rogers testified he has the financial ability to be able to forgo legal fees of approximately \$51,500 from Pressley.

### **Findings of Fact Supporting Attorneys Fees**

76. During this litigation, Casar retained Charles Herring, Jr. and Lauren Ross of Herring & Irwin LLP and Jessica Palvino of McGinnis Lochridge & Kilgore LLP.

77. The services rendered by Charles Herring, Jr., Lauren Ross, and Jessica Palvino in defending Casar in this litigation were reasonable and necessary for these types of services in Travis County.

78. The fees charged by Herring & Irwin LLP and McGinnis Lochridge & Kilgore LLP in defending Casar in this litigation were \$ 150,000.00.

79. The fees and rates charged by Charles Herring, Jr., Lauren Ross, and Jessica Palvino in defending Casar in this litigation were reasonable and customary for these types of services in Travis County.

### **CONCLUSIONS OF LAW**

80. Irregularities that allegedly occurred during the recount **did not materially affect** the outcome of the runoff election. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dism'd w.o.j.) (headnotes 10 and 11).

81. At the time the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers certified that to his best knowledge, information, and belief, formed after reasonable inquiry, that the allegation that irregularities that occurred during the recount materially affected the outcome of the runoff election was warranted by existing law or by a non-frivolous argument for the

extension, modification, or reversal of existing law or the establishment of new law.

82. There is no evidentiary support for the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss’d w.o.j.).

83. Rogers failed to conduct a reasonable inquiry into whether each allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

84. Rogers knew or should have known this allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) was not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

85. A reasonable inquiry would have revealed irregularities that allegedly occurred during the recount **did not materially affect** the outcome of the runoff election.

86. The allegations that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election were not supported by existing law and there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

87. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

88. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

89. This Court has authority to impose a sanction on David Rogers because of this violation of Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

90. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contests had evidentiary support, including the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election.

91. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether their allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) had evidentiary support.

92. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley knew or should have known their allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election did not have

evidentiary support.

93. The allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election has no evidentiary support.

94. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

95. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

96. This Court has authority to impose a sanction on David Rogers and on Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

97. Travis County Director of Elections Michael Winn did not commit a criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the CVR files during the recount.

98. At the time the Sixth Amended Contest was filed, Rogers certified that to the best of his knowledge, information, and belief, formed after reasonable inquiry, that the allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

99. Rogers failed to conduct a reasonable inquiry into whether this allegation (that Michael Winn committed a criminal violation) was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

100. Rogers knew that this allegation (that Michael Winn committed a criminal violation) was not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

101. A reasonable inquiry would have revealed that Mr. Winn did not violate Texas Election Code § 33.061 by not allowing Pressley and her poll watchers to view the source and properties of the CVR files during the recount; that, under Election Code § 213.016, Pressley and her poll watchers were allowed to be and were present for the printing of the CVRs; and that nothing in the Election Code authorized Pressley or her poll watchers to view the source and properties of the CVR files, such as dates of the CVR files and origination.

102. The allegations that Mr. Winn committed criminal violations were not supported by existing law and there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

103. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

104. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

105. This Court has authority to impose a sanction on David Rogers because of this violation of Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

106. At the time the Sixth Amended Contest was filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contests had evidentiary support, including the allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files.

107. At the time that the Sixth Amended Contest was filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether their allegation (that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files) had evidentiary support.

108. At the time that the Sixth Amended Contest was filed, Rogers and Pressley knew that their allegation (that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files) did not have evidentiary support.

109. The allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files has no evidentiary support.



110. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

111. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

112. This Court has authority to impose a sanction on David Rogers and on Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

113. No credible evidence exists to prove that any Travis County voters were disenfranchised by the consolidation of voting locations between the general election, held on November 4, 2014 and the runoff election held on December 16, 2014.

114. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers certified that to his best knowledge, information, and belief, formed after reasonable inquiry, that the allegation that Travis County illegally disenfranchised District 4 voters by consolidating voting locations was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

115. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers failed to conduct a reasonable inquiry in whether this allegation (that Travis County illegally disenfranchised District 4

voters by consolidating voting locations) was supported by existing law or a non-frivolous argument for extension, modification, or reversal of existing law or the establishment of new law.

116. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers knew or should have known that this allegation (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) was unsupported by existing law or a non-frivolous argument for extension, modification, or reversal of existing law or the establishment of new law.

117. A reasonable inquiry would have revealed that existing law did not support the allegation that voters had been illegally disenfranchised by the consolidation of voting locations, and that there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

118. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

119. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

120. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry,

each allegation or other factual contention in the Contest had evidentiary support, including the allegations that Travis County illegally disenfranchised District 4 voters by consolidating voting locations.

121. At the time that the Original, Second Amended, Third Amended, and Fourth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether these factual allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) had evidentiary support.

122. At the time that the Original, Second Amended, Third Amended, and Fourth Amended Contests were filed, Rogers and Pressley knew that these factual allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) had no evidentiary support.

123. At the time that the Fifth Amended Contest was filed, Rogers and Pressley knew that these allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) did not have evidentiary support. Pressley testified four days prior to filing the Fifth Amended Contest that she could not identify a single voter who was disenfranchised due to the change in voting locations. Pressley testified that regardless of the fact that she could not obtain one affidavit from one voter attesting to disenfranchisement of voters, she made her claims based on statistical analysis of prior voting patterns and conversations she had with persons she could not identify.

124. The allegation that Travis County illegally disenfranchised thousands of District 4 voters by consolidating voting locations has no evidentiary support.

125. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the

Civil Practices and Remedies Code.

126. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

127. This Court has authority to impose a sanction on David Rogers and Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

128. Travis County printed zero tapes and results tapes for the runoff election as required by the Texas Secretary of State. Some of the zero tapes were printed prior to the date of the run-off election held on December 16, 2014.

129. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State’s requirements.

130. At the time that the Sixth Amended Contest was filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that “discovery documents provided by Travis County [shows that] no Zero Tapes (showing the number of votes present on the

Hart Voting equipment for each candidate when the polls open) were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff.”

131. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley knew that these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State’s requirements) lacked evidentiary support.

132. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State’s requirements) had evidentiary support.

133. At the time that the Sixth Amended Contest was filed, Rogers and Pressley knew that these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State’s requirements and that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff) lacked evidentiary support. Zero Tapes were produced by Travis County during their document production on April 22 and 23, 2015. Pressley’s Sixth Amended Contest was filed on May 19, 2015. Pressley and Rogers attached as Exhibit C to the Sixth Contest a zero tape that was printed on December 16, 2014, the day of the runoff election. County Clerk Dana DeBeauvoir testified in her deposition on May 11, 2015 that zero tapes and results tapes were printed.

134. The allegations that Travis County failed to print zero tapes and results tapes in

accordance with the Texas Secretary of State's requirements have no evidentiary support. Some of the zero tapes were not printed on December 16, 2014, the date of the runoff election.

135. The allegations that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff has no evidentiary support.

136. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

137. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

138. This Court has authority to impose a sanction on David Rogers and Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

139. The factors articulated by the Texas Supreme Court in *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), support an award of sanctions in this case.

140. The first *Low* factor, the good faith or bad faith of the offender, weighs in favor of awarding sanctions. Pressley's conduct during the case, including making false allegations of criminal activity against the Travis County Director of Elections Michael Winn, indicate that she was not acting in good faith.

141. The second *Low* factor, the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense, weighs heavily in favor of sanctions. Pressley lost the election by a margin of 1,291 votes, a margin far greater than Rogers had ever seen and greater than has been overcome in the history of reported Texas jurisprudence. The Hart eSlate system, which Pressley alleges violated the Texas Election Code, was certified by the Texas Secretary of State and variations of the system have been used in other counties in Texas. There are two court decisions rejecting attacks on the Hart eSlate system. In the *Andrade v. NAACP* case, 345 S.W.3d 1 (Tex. 2011), the Texas Supreme Court found that “[t]he Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State’s important regulatory interests.” In *Texas Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007), the Western District of Texas noted that the Secretary of State “made a reasonable, politically neutral, and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice.” Rogers was either aware of or failed to adequately investigate the legal and factual bases for Pressley’s allegations.

142. The third *Low* factor, the knowledge, experience, and expertise of the offender, also weighs in favor of awarding sanctions. Rogers is an experienced attorney who has handled election contests previously and holds himself out as being knowledgeable regarding election contests. Pressley has a PhD in Chemistry, is actively involved in her community, and has appeared before Austin City Council at least thirty times. She was personally involved in drafting portions of the Contests and discovery.

143. The fourth *Low* factor, any prior history of sanctionable conduct on the part of the offender, is not applicable in this case.

144. The fifth *Low* factor, the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct, weighs in favor of awarding sanctions. Contestee Casar seeks the reasonable and necessary attorney's fees incurred in defending this election contest, and his attorneys are charging a reduced hourly rate. Casar has not yet paid any of his attorney fees.

145. The sixth *Low* factor, the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct, also weighs in favor of awarding sanctions. Contestee Casar is now a Council Member for the City of Austin, and has been required to divide his time between his duties as a Council Member and responding to Pressley's Election Contests. His city council annual salary is approximately \$70,000.00.

146. The seventh *Low* factor, the relative culpability of client and counsel, also weighs in favor of awarding sanctions. Pressley took a personal and participatory role in this lawsuit. She testified she drafted portions of the Contests, drafted discovery questions to Travis County for Rogers to decide how to use, and was, according to Rogers, the most hands-on client he's ever had.

147. The eighth *Low* factor, the risk of chilling the specific type of litigation involved, also weighs in favor of awarding sanctions. There should not be a chilling effect from awarding sanctions in this case, as the purpose of sanctions in this case would be to encourage compliance with Chapter 10.

148. The ninth *Low* factor, the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction, also weighs in favor of awarding sanctions. Pressley has assets and income potential due to her high level of education sufficient to



justify the award of sanctions. Rogers has the ability to earn income sufficient to justify the award of sanctions.

149. The tenth *Low* factor, the impact of the sanction on the offended party, including the offended person's need for compensation, also weighs in favor of awarding sanctions. Pressley testified she knew of nothing Contestee Casar did wrong in the conduct of the election. Because of Pressley's election contest, Contestee Casar has incurred more than \$150,000 in attorney's fees and has been unable to fully devote himself to his role as City Councilmember. His annual income as a council member is far less than Ms. Pressley's.

150. The eleventh *Low* factor, the relative magnitude of sanction necessary to achieve the goal or goals of the sanction, also weighs in favor of awarding sanctions. The goals in awarding sanctions, according to the Texas Supreme Court in *Remington Arms v.*

*Caldwell* are compensation, punishment, and deterrence. 850 S.W.2d 167 (Tex. 1993).

The Texas Civil Practices and Remedies Code Section 10.004 states that the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. The same challenge to the Hart eSlate voting system that was brought by Pressley in this Election Contest could have been brought against any elected official in Austin, Travis County, or the hundreds of other counties in Texas that use the eSlate voting machine. It is important to deter these types of challenges to the Hart eSlate voting system, which has been fully approved and certified by the Texas Secretary of State.

151. The twelfth *Low* factor, burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs, have to date minimal impact in favor of awarding sanctions.

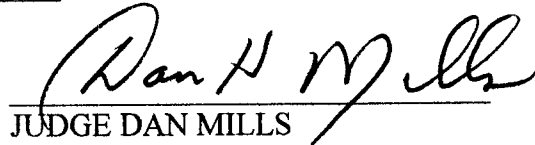
152. The thirteenth *Low* factor, the degree to which the offended person's own behavior caused the expenses for which recovery is sought, also weighs in favor of awarding sanctions. Pressley admits that Casar did nothing wrong in the conduct of the election.

153. Rogers and Pressley failed to show due diligence in violation of Section 10.002 of the Civil Practices and Remedies Code.

154. All Conclusions of Law shall also be deemed to be Findings of Fact. To the extent any Conclusion of Law is a Finding of Fact or is a mixed question of law and fact, the same is found as a fact.

IT SO ORDERED.

SIGNED this the 23<sup>rd</sup> day of July, 2015.

  
JUDGE DAN MILLS

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-15-00368-CV**

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**Laura Pressley, Appellant**

**v.**

**Gregorio “Greg” Casar, Appellee**

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**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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**NO. 03-15-00505-CV**

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**David Rogers, Appellant**

**v.**

**Gregorio “Greg” Casar, Appellee**

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**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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**MEMORANDUM OPINION**

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.<sup>1</sup> 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<sup>2</sup> and ultimately filed a petition for recount with the Texas Secretary of State,<sup>3</sup> 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.

Of the 4,417 votes cast in the runoff election, 480 were cast by mail, and 3,937 were cast electronically.<sup>4</sup> Travis County uses the Hart Intercivic eSlate System, an electronic voting

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<sup>1</sup> 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.

<sup>2</sup> The City of Austin contracts with Travis County for election services.

<sup>3</sup> The Secretary of State is the state’s chief election officer. *See* Tex. Elec. Code § 31.001(a).

<sup>4</sup> Pressley and Casar each received 240 of the 480 votes cast by mail.

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).

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)).

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.<sup>5</sup> For the manual recount in this case, the CVR for each voter was

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

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.

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.<sup>6</sup>

### **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:

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



- (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.
- (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**

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."<sup>7</sup>

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

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<sup>7</sup> 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.

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.<sup>8</sup> 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

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<sup>8</sup> 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.



an improper judgment). We overrule sub-issue two of Pressley's first issue and sub-issue two of Rogers' fifth issue.

### **Summary Judgment**

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 distinguish[ed] [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).

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.”<sup>9</sup> The U.S. Election Assistance Commission (EAC) uses this same language and indicates that the words can be used interchangeably.<sup>10</sup> 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.

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

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<sup>9</sup> *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>.

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

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.

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.<sup>11</sup> 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.

### ***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

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<sup>11</sup> 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.

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).

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.

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.

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.<sup>12</sup> *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

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<sup>12</sup> 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.”

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.

## **Sanctions**

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***

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.<sup>13</sup>

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<sup>13</sup> *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 English 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.

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)).

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.<sup>14</sup> 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

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<sup>14</sup> 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).



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.

“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.<sup>15</sup> 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

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<sup>15</sup> 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.”

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).

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.<sup>16</sup> 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.

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,

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<sup>16</sup> Pressley and Rogers omitted this allegation from the Sixth Amended Contest.

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.

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.”

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 abuse 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).

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.<sup>17</sup> 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.

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,

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<sup>17</sup> 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.

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 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.

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.<sup>18</sup> 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.

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,

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<sup>18</sup> 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.

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.

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.

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: December 23, 2016



## TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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**JUDGMENT RENDERED DECEMBER 23, 2016**

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**NO. 03-15-00368-CV**

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**Laura Pressley, Appellant**

**v.**

**Gregorio “Greg” Casar, Appellee**

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**APPEAL FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY  
BEFORE JUSTICES PURYEAR, GOODWIN, AND FIELD  
AFFIRMED -- OPINION BY JUSTICE GOODWIN**

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This is an appeal from the amended final judgment signed by the trial court on July 23, 2015, which incorporated the terms of its orders granting summary judgment and sanctions. Having reviewed the record and the parties’ arguments, the Court holds that there was no reversible error in the trial court’s amended final judgment. Therefore, the Court affirms the trial court’s amended final judgment. The appellant shall pay all costs relating to this appeal, both in this Court and in the court below.

## **Appendix C – Constitutional Provisions, Statutes, and Rules**

### **Texas Constitution, Article VI, Sec. 4:**

ELECTIONS BY BALLOT; NUMBERING, FRAUD, AND PURITY OF ELECTIONS; REGISTRATION OF VOTERS. In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

(Amended Aug. 11, 1891, and Nov. 8, 1966.)

### **TEC 33.056(a)**

OBSERVING ACTIVITY GENERALLY. (a) Except as provided by Section 33.057, a watcher is entitled to observe *any activity conducted at the location* at which the watcher is serving. A watcher is entitled to sit or stand conveniently near the election officers conducting the observed activity.

(b) A watcher is entitled to sit or stand near enough to the member of a counting team who is announcing the votes to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly.

(c) A watcher is entitled to inspect the returns and other records prepared by the election officers at the location at which the watcher is serving.

(d) A watcher may not be prohibited from making written notes while on duty. Before permitting a watcher who made written notes at a precinct polling place to leave while the polls are open, the presiding officer may require the watcher to leave the notes with another person on duty at the polling place, selected by the watcher, for retention until the watcher returns to duty. (emphasis added)

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

### **TEC 33.061(a) and (b)**

UNLAWFULLY OBSTRUCTING WATCHER.

(a) A person commits an offense if the person serves in an official capacity at a location at which the presence of watchers is authorized and knowingly prevents a watcher from observing an activity the watcher is entitled to observe.

(b) An offense under this section is a Class A misdemeanor.  
Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

#### **TEC 43.061**

##### **NOTICE OF CHANGE OF LOCATION OF POLLING PLACE.**

(a) This section applies only to a general or special election that is ordered by the governor or the county judge.

(b) If the location of a polling place changes after notice of an election is given under Section 4.003, the county clerk shall give notice of the change not later than the earlier of:

(1) 24 hours after the location is changed; or

(2) 72 hours before the polls open on election day.

(c) Notice required by Subsection (b) must be given by:

(1) notifying each candidate whose name appears on the ballot in the election or, in the case of an office filled by voters of more than one county, notifying the county chair or, for an independent candidate, the county judge of the county in which the change occurs; or

(2) posting the notice in a listing used specifically to inform the public of changes to the location of a polling place on any Internet website that the county clerk maintains to provide information on elections held in the county.

Added by Acts 2001, 77th Leg., ch. 802, Sec. 1, eff. Sept. 1, 2001.

Amended by: Acts 2005, 79th Leg., Ch. 709 (S.B. 427), Sec. 2(a), eff. September 1, 2005.

#### **TEC 52.062**

**NUMBERING OF BALLOTS.** The ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number "1."

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

#### **TEC 52.075**

##### **MODIFICATION OF BALLOT FORM FOR CERTAIN VOTING**

**SYSTEMS.** The secretary of state may prescribe the form and content of a ballot for an election using a voting system, including an electronic voting system or a voting system that uses direct recording electronic voting machines, to conform to the formatting requirements of the system.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1178 (S.B. 910), Sec. 7, eff. September 1, 2013.

**TEC 66.022**

CONTENTS OF ENVELOPE NO. 1. Envelope no. 1 must contain:

- (1) the original of the election returns for the precinct; and
- (2) a tally list

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

**TEC 66.024**

CONTENTS OF ENVELOPE NO. 3. Envelope no. 3 must contain:

- (1) a copy of the precinct returns;
- (2) a copy of the poll list; and
- (3) a copy of the ballot register.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

**TEC 66.054**

FAILURE TO DELIVER ELECTION RETURNS AND VOTED BALLOTS.

(a) An election officer responsible for delivering precinct election returns or voted ballots commits an offense if the officer:

- (1) fails to make the delivery to the appropriate authority;
- (2) fails to make the delivery by the deadline prescribed by Section 66.053(c); or
- (3) fails to prevent another person from handling in an unauthorized manner the returns or voted ballots that the officer is responsible for delivering while they are in the officer's custody.

(b) If the officer is an election clerk, it is an exception to the application of Subsection (a)(2) that the election clerk did not receive the returns from the presiding judge in time to permit a timely delivery.

(c) An offense under this section is a Class B misdemeanor.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

**TEC 122.001**

VOTING SYSTEM STANDARDS.

(a) A voting system may not be used in an election unless the system:

- (1) preserves the secrecy of the ballot;
- (2) is suitable for the purpose for which it is intended;
- (3) operates safely, efficiently, and accurately and complies with the voting system standards adopted by the Election Assistance Commission;
- (4) is safe from fraudulent or unauthorized manipulation;

- (5) permits voting on all offices and measures to be voted on at the election;
  - (6) prevents counting votes on offices and measures on which the voter is not entitled to vote;
  - (7) prevents counting votes by the same voter for more than one candidate for the same office or, in elections in which a voter is entitled to vote for more than one candidate for the same office, prevents counting votes for more than the number of candidates for which the voter is entitled to vote;
  - (8) prevents counting a vote on the same office or measure more than once;
  - (9) permits write-in voting;
  - (10) is capable of permitting straight-party voting; and
  - (11) is capable of providing records from which the operation of the voting system may be audited.
- (b) A voting system may not be used in an election in which straight-party voting is permitted unless the system permits or prevents, as applicable, counting votes in accordance with Sections 65.007(c) and (d).
- (c) The secretary of state may prescribe additional standards for voting systems consistent with this title. The standards may apply to particular kinds of voting systems, to particular elements comprising a voting system, including operation procedures, or to voting systems generally.
- (d) Effective January 1, 2006, a voting system may not be used in an election if the system uses:
- (1) mechanical voting machines; or
  - (2) a punch-card ballot or similar form of tabulating card.
- (e) For an election for federal office in which a state or federal court order has extended the time for voting beyond the time allowed by Subchapter B, Chapter 41, a voting system must provide a separate count of the votes cast after the time allowed by that subchapter.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 484, Sec. 2, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 728, Sec. 30, eff. Sept. 1, 1993; Acts 2003, 78th Leg., ch. 1315, Sec. 49, eff. Jan. 1, 2004. Amended by: Acts 2015, 84th Leg., R.S., Ch. 298 (H.B. 2900), Sec. 1, eff. June 1, 2015.

## **TEC 213.009(d)**

### **NOTICE OF RECOUNT.**

- (d) Except as provided by Section 213.010, the notice shall be given at least 18 hours before the recount begins.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

**TEC 213.013(b) and (h)**

**REPRESENTATION OF PARTIES AND POLITICAL PARTIES AT RECOUNT.**

(a) Each person entitled to notice of the recount under Section 213.009 is entitled to be present at a recount.

(b) In a recount of an election on an office, each candidate for the office is entitled to be present at the recount and have watchers present...

(h) Each person entitled to be present at a recount is entitled to observe *any activity conducted in connection with the recount. The person is entitled to sit or stand conveniently near the officers conducting the observed activity and near enough to an officer who is announcing the votes or examining or processing the ballots to verify that the ballots are counted or processed correctly or to an officer who is tallying the votes to verify that they are tallied correctly. Rules concerning a watcher's rights, duties, and privileges are otherwise the same as those prescribed by this code for poll watchers to the extent they can be made applicable.*(emphasis added).

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., 2nd C.S., ch. 59, Sec. 13, eff. Oct. 20, 1987; Acts 1993, 73rd Leg., ch. 728, Sec. 75, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 864, Sec. 218, eff. Sept. 1, 1997. Amended by: Acts 2009, 81st Leg., R.S., Ch. 1235 (S.B. 1970), Sec. 21, eff. September 1, 2009. Acts 2011, 82nd Leg., R.S., Ch. 1164 (H.B. 2817), Sec. 37, eff. September 1, 2011.

**TEC 213.016**

**PRINTING IMAGES OF BALLOTS CAST USING DIRECT RECORDING ELECTRONIC VOTING MACHINES.** During any printing of images of ballots cast using direct recording electronic voting machines for the purpose of a recount, the full recount committee is not required to be present. The recount committee chair shall determine how many committee members must be present during the printing of the images. Each candidate is entitled to be present and to have representatives present during the printing of the images in the same number as Section 213.013(b) prescribes for watchers for a recount.

Added by Acts 2003, 78th Leg., ch. 583, Sec. 2, eff. Sept. 1, 2003.

Amended by: Acts 2009, 81st Leg., R.S., Ch. 1235 (S.B. 1970), Sec. 22, eff. September 1, 2009.

## **Tex. Civ. Prac. & Rem Code Chapter 10**

### **SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS**

Sec. 10.001. **SIGNING OF PLEADINGS AND MOTIONS.** The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(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;

(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; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.002. **MOTION FOR SANCTIONS.** (a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.003. **NOTICE AND OPPORTUNITY TO RESPOND.** The court shall provide a party who is the subject of a motion for sanctions under

Section 10.002 notice of the allegations and a reasonable opportunity to respond to the allegations.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.004. VIOLATION; SANCTION. (a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.005. ORDER. A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.


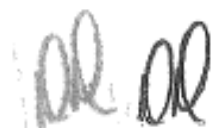
Sec. 10.006. CONFLICT. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.



## Appendix D

Travis County Runoff - Paper Absentee/Mail-in-Ballot  
CR1:1805, CR2:2942, 2CR:2058

Vote Both Sides		Vote en Ambos Lados de la Página	
Exhibit AE			
<p>December 16, 2014 Joint Special Runoff Election  <i>16 de diciembre, 2014 Elecciones Especiales Secundarias Conjuntas</i>            Travis County  <i>Condado de Travis</i>            December 16, 2014 - 16 de diciembre, 2014      Precinct <i>Precinto</i> 156-B</p>			
<p>CITY OF AUSTIN RUNOFF ELECTION  <i>ELECCIÓN SECUNDARIA CIUDAD DE AUSTIN</i></p>		<p>AUSTIN INDEPENDENT SCHOOL DISTRICT            SCHOOL BOARD TRUSTEE RUNOFF ELECTION  <i>ELECCIÓN SECUNDARIA PARA JUNTA DE            REGENTES DISTRITO ESCOLAR INDEPENDIENTE            DE AUSTIN</i></p>	
<p>MAYOR, CITY OF AUSTIN  <i>ALCALDE, CIUDAD DE AUSTIN</i></p> <p><input checked="" type="checkbox"/> Mike Martinez</p> <p><input type="checkbox"/> Steve Adler</p>		<p>AT LARGE POSITION 9, AISD  <i>PUESTO EN GENERAL 9, AISD</i></p> <p><input checked="" type="checkbox"/> Kendall Pace</p> <p><input type="checkbox"/> Hillary Procknow</p>	
<p>DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF            AUSTIN  <i>DISTRITO 4, CIUDAD DE AUSTIN CONSEJO, CIUDAD            DE AUSTIN</i></p> <p><input checked="" type="checkbox"/> Laura Pressley</p> <p><input type="checkbox"/> Gregorio "Greg" Casar</p>		<p>To continue voting press the NEXT button.  <i>Para continuar votando, presione el botón Siguiente            (NEXT).</i></p>	
<p>To continue voting press the NEXT button.  <i>Para continuar votando, presione el botón Siguiente            (NEXT).</i></p>		<div style="text-align: center;">    </div>	
Vote Both Sides		Vote en Ambos Lados de la Página 805	

## Appendix E

### Travis County Runoff - Paper Cast Vote Record CR1:1803, CR1:2944

Votes by Precinct JBCs Election Day GR14	
Precinct: 133-C	Device: JBC - C009EB
Party: NP	Polling Place: ED (38) Memorial United Methodist Church - Election Day
<u>Contest Title</u>	<u>Candidate/Option</u>
PLACE 2, ACC TRUSTEE, AUSTIN COMMUNITY COLLEGE DISTRICT	Jade Chang Sheppard
MAYOR, CITY OF AUSTIN	Mike Martinez
DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN	Gregorio 'Greg' Casar
DISTRICT 1, SINGLE MEMBER TRUSTEE, AISD	David 'D' Thompson
AT LARGE POSITION 9, AISD	Hilary Procknow

1/6/2015 10:00:06AM

Page 52 of 1804

1803

## Appendix F

### Texas Secretary of State's Definition of Ballot Image – CR1:1410 Glossary of Election Terminology

1409

Glossary of Elections Terminology

<http://www.sos.state.tx.us/elections/laws/glossary.shtml>

**Ballot Envelope:** The envelope, usually white, in which a voter places his marked ballot when voting by mail; also called a ballot secrecy envelope. This envelope is in turn placed in the Carrier Envelope.

**Ballot Image:** The ballot as it appears on a direct recording electronic (DRE) voting system.

**Ballot Instructions:** The wording found at the top of the ballot, but below the words "OFFICIAL BALLOT," that instructs a voter on how to mark the ballot. Examples of statutory ballot instructions include: "Vote for the candidate of your choice in each race by placing an "X" in the square beside the candidate's name." Or, if more than one candidate is to be elected in any race on the ballot, "Vote for none, one, two, . . . or " (in the numerical sequence appropriate for the number of candidates to be elected). There are also specific instructions for straight-party voting, propositions, and for electronic voting machine ballots. See Secs. 52.070 – 52.072, 124.063.

## Appendix G1 – Zero Tape Evidence

2014 Texas Secretary of State's Election Definition of Zero Tape – CR2:700, 712  
Must have all contests and names with zero votes next to them.

699

3/8/2015Electronic Voting System ProceduresExhibit J

TEXAS SECRETARY OF STATE

CARLOS CASCOS

Don't have a photo ID for voting? [Election Identification Certificates](#) are available from [DPS offices](#).

---

Note - Navigational menus along with other non-content related elements have been removed for your convenience. Thank you for visiting us online.

### Electronic Voting System Procedures

**To:** County Election Officers and City, School and Other Political Subdivision Officials  
**From:** Keith Ingram, Director of Elections  
**Date:** April 1, 2014  
**RE:** Electronic Voting System Procedures

Pursuant to Section 122.001(c) of the Texas Election Code, the Office of the Secretary of State prescribes the following procedures for use of Electronic Voting Systems:

711  
12/13

<a href="http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml">http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml</a>	
3/8/2015	Electronic Voting System Procedures
Voting System	The integrated mechanical, electromechanical, or electronic equipment and software required to program, control, and support the equipment that is used to define ballots; to cast and count votes; to report and/or display election results; and to maintain and produce all audit log information.
Zero Tape	A Zero Tape is the tape that is printed when the voting machine is first set up at the polls. It is called a Zero Tape since all contests or propositions should have zero votes next to each name or question.

Appendix G2 - 6/18/15:RR2 – Volume 2 of 4 (8/1/15) – Hearing on Motion for Sanctions on 6/18/15 224

1 break, did you have a chance to examine the exhibit?

2 A. Yes.

3 Q. And can you tell us if it has Dr. Pressley's name on

4 that zero tag?

5 A. No, it's not on this zero tape. If we were to --

6 well, this is why we have the dispensation from the Secretary

7 of State's office because she wouldn't appear on this tape if

8 we had done all 36 rolls of it. This is a shortened version.

9 This is what we have permission to print. If you'll notice --

10 well, it's kind of hard to tell but the top of it has the

## Appendix H

Zero Tape Produced by Travis County – Is not a Zero Tape for Pressley’s race. Pressley’s name is absent and does not show 0 votes for Pressley when polls open on Election Day 12/16/14.

CR1:1875

Zero Tape Produced  
(1CR 1875)

# Zero Tape Produced Text Deciphered

[illegible]

Travis County

December 16, 2014 Joint  
Special Run off Election

December 16, 2014  
(36) Memorial United  
Methodist Church  
Zero Tape Report

Date: 11-26-2014  
Time: 09:11:31

Precinct:  
101-A

PLACE 2 ACC TRUSTEE  
AUSTIN COMMUNITY COLLEGE  
DISTRICT

- Gigi Edwards Bryant	0
- Jade Chang Shepard	0

Precinct Ballot summary  
Total Ballots voted in  
this Precinct 0

Precinct:  
101-B

PLACE 2 ACC TRUSTEE  
AUSTIN COMMUNITY COLLEGE  
DISTRICT

- Gigi Edwards Bryant 0
- Jade Chang Shepard 0

Mayor, City of Austin

- Mike Martinez	0
- Steve Adler	0

District 1, Austin City

Council, City of Austin

- DeWayne Lofton	0
- Ora Houston	0

Precinct Ballot summary  
Total Ballots voted in  
this Precinct 0

Precinct:  
102-A

PLACE 2 ACC TRUSTEE  
AUSTIN COMMUNITY COLLEGE  
DISTRICT

- Gigi Edwards Bryant 0
- Jade Chang Shepard 0

Mayor, City of Austin


- Mike Martinez	0
- Steve Adler	0

## Appendix I

2014--Texas Secretary of State's Election Advisory – Results tapes – CR2:700,707

699

3/8/2015
Electronic Voting System Procedures
Exhibit J



Don't have a photo ID for voting? [Election Identification Certificates](#) are available from [DPS offices](#).

---

Note - Navigational menus along with other non-content related elements have been removed for your convenience. Thank you for visiting us online.

### Electronic Voting System Procedures

**To:** County Election Officers and City, School and Other Political Subdivision Officials  
**From:** Keith Ingram, Director of Elections  
**Date:** April 1, 2014  
**RE:** Electronic Voting System Procedures

Pursuant to Section 122.001(c) of the Texas Election Code, the Office of the Secretary of State prescribes the following procedures for use of Electronic Voting Systems:

3/8/2015
Electronic Voting System Procedures

b. A presiding election judge or election clerk shall deliver the voting device to the curbside voter.  
c. Make sure to allow the curbside voter the same privacy as a voter in the polling place.

11. Closing the Polls:

- a. Verify and document the public count on applicable devices.
- b. Verify that the public count(s) match the number of voters on the register.
- c. After the polls have been closed on election day, the precinct election officials shall print out, at a minimum, two copies of the results tape from each applicable device, and secure the voting device against further use. (WARNING: Do not print out the results tape during Early Voting; this includes the last day of Early Voting).
  1. The presiding election judge, an election clerk, and not more than two watchers, if one or more

<http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml>

707  
8/13

Texas Secretary of State's Election Definition of Results Tape – CR2:711

Results Tape	A Results Tape is the tape that is printed when the polls close. It is called a Results Tape since all contests and propositions are listed and have the resulting votes next to each name or question.
Voting Device	Any apparatus by which votes are registered electronically.

[www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml](http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml)

711  
12/13



## Appendix J

Election Judges Envelope for Election Day, 12/16/14 – CR1:1865  
Showing

- a) Instructions to judges, 7. DO NOT PRINT THE TALLY
- b) Access Code Report of total votes cast of 354.
- c) Access Code Reports are not election returns. Election returns include the with the number of votes each candidates receives at that polling location.

<b>JBC REPORT ENVELOPE</b>																					
Precinct: <u>130-133-118</u>	Date: <u>12-16-2014</u>																				
Beginning Public Count: <u>2</u>																					
To be completed after the last voter in line at 7:00 pm has voted																					
<ol style="list-style-type: none"><li>1. After the last voter has voted, print an Access Code Report. (Leave it attached to the JBC.)<ol style="list-style-type: none"><li>a. Press "OTHER"</li><li>b. Press "Access Code Report"</li><li>c. Press "Polls Open Menu"</li></ol></li><li>2. Using the Access Code Report, fill out the "Access Code Report" section on the right.</li><li>3. Press "Close Polls" on the JBC.</li><li>4. Press "CONTINUE" to confirm that you want to close the polls.</li><li>5. Enter the Close Polls Password and press ACCEPT.</li><li>6. The Close Polls Report Prints. Tear off the whole tape and place it inside Envelope #1.</li><li>7. <b>DO NOT PRINT THE TALLY.</b></li><li>8. Record the Public Count in the section on the right. The Public Count is found on the JBC screen in the lower right hand corner.</li><li>9. Count the number of signatures on the Combo Forms and enter the number in the section on the right. Place the Combo Forms in this envelope.</li><li>10. Place the EDay Poll List tape (printed from the laptop) in Pink Envelope #3.</li><li>11. Count the number of Provisional Voters listed on the "Lists of Provisional Voters" and enter the number in the section on the right.</li><li>12. Count the number of paper ballots loaded on the</li></ol>	<table border="1" style="width: 100%; border-collapse: collapse;"><thead><tr><th colspan="2" style="text-align: center; padding: 5px;"><b>ACCESS CODE REPORT</b></th></tr></thead><tbody><tr><td colspan="2" style="padding: 5px;"><b>NUMBER OF ACCESS CODES:</b></td></tr><tr><td style="padding: 5px;"><b>ISSUED:</b></td><td style="padding: 5px;"><u>354</u></td></tr><tr><td style="padding: 5px;"><b>VOTED:</b></td><td style="padding: 5px;"><u>353</u></td></tr><tr><td style="padding: 5px;"><b>EXPIRED:</b></td><td style="padding: 5px;">_____</td></tr><tr><td style="padding: 5px;"><b>CANCELED:</b></td><td style="padding: 5px;"><u>1</u></td></tr><tr><td style="padding: 5px;"><b>ACTIVE:</b></td><td style="padding: 5px;">_____</td></tr><tr><td style="padding: 5px;"><b>PUBLIC COUNT:</b></td><td style="padding: 5px;"><u>353</u></td></tr><tr><td style="padding: 5px;"><b># OF SIGNATURES ON COMBO FORMS:</b></td><td style="padding: 5px;"><u>353</u></td></tr><tr><td style="padding: 5px;"><b># OF PROVISIONALS:</b></td><td style="padding: 5px;"><u>0</u></td></tr></tbody></table>	<b>ACCESS CODE REPORT</b>		<b>NUMBER OF ACCESS CODES:</b>		<b>ISSUED:</b>	<u>354</u>	<b>VOTED:</b>	<u>353</u>	<b>EXPIRED:</b>	_____	<b>CANCELED:</b>	<u>1</u>	<b>ACTIVE:</b>	_____	<b>PUBLIC COUNT:</b>	<u>353</u>	<b># OF SIGNATURES ON COMBO FORMS:</b>	<u>353</u>	<b># OF PROVISIONALS:</b>	<u>0</u>
<b>ACCESS CODE REPORT</b>																					
<b>NUMBER OF ACCESS CODES:</b>																					
<b>ISSUED:</b>	<u>354</u>																				
<b>VOTED:</b>	<u>353</u>																				
<b>EXPIRED:</b>	_____																				
<b>CANCELED:</b>	<u>1</u>																				
<b>ACTIVE:</b>	_____																				
<b>PUBLIC COUNT:</b>	<u>353</u>																				
<b># OF SIGNATURES ON COMBO FORMS:</b>	<u>353</u>																				
<b># OF PROVISIONALS:</b>	<u>0</u>																				

1865

Exhibit C

## Appendix K

### Affidavit of Pressley's Official Poll Watcher, Paul Williams – CR2:7620

Exhibit U		
STATE OF TEXAS	§	
	§	
COUNTY OF TRAVIS	§	
	§	

**AFFIDAVIT OF PAUL WILLIAMS**

BEFORE ME, the undersigned authority, personally appeared Paul Williams, who being on her oath sworn, stated:

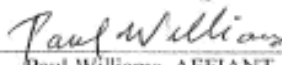
"My name is Paul Williams. I am above the age of eighteen years, and I am fully competent to make this affidavit. My date of birth is June 29, 1956. I reside at 9504 N. Crank Dr., Austin, TX. I have not been convicted of a felony or a crime of moral turpitude. The following facts are within my personal knowledge and are true and correct."

"I was an official poll watcher for the Laura Pressley campaign on Election Day, December 16, 2014, for the Runoff election for City Council at the Gus Garcia Recreation Center at 1201 East Rundberg Lane, Austin, TX 78753."


"I was present and observed that official Poll/Tally tapes were not printed when the polls were closed at the Gus Garcia Center polling location and I was present and observed that Results/Tally tapes were not printed before the election materials and equipment were removed from the Gus Garcia Center polling location."


"I was prevented from signing the official Results/Tally tapes because the election officials at Gus Garcia Center were instructed to not print the Results/Tally tapes and they, in turn, did not print them."

"Further affiant sayeth not."

  
Paul Williams, AFFIANT

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, this the 19 day of May, 2015.





7620





## Appendix L

1/20/15--Texas Secretary of State's Response to Pressley's official complaints regarding poll watchers being prevented from monitoring any recount activity. – CR1:572

<b>The State of Texas</b>		
<small>Elections Division P.O. Box 12060 Austin, Texas 78711-2060 www.sos.state.tx.us</small>	 <b>Nandita Berry</b> Secretary of State	<small>Phone: 512-463-5650 Fax: 512-475-2811 Dial 7-1-1 For Relay Services (800) 252-VOTE (8683)</small>
 January 20, 2015		
 Mrs. Laura Pressley 10203 Woodglen Cove Austin, Texas 78753		
 Via Email: <a href="mailto:PureRainLaura@aol.com">PureRainLaura@aol.com</a>		
 Dear Mrs. Pressley,		
 This letter is in response to the two complaints you submitted to our office regarding the recount of the council race in District 4 for the City of Austin.		
 First, you state that the City of Austin did not provide "personal notice" as required by the Texas Election Code (hereinafter referred to as the "Code"). TEX. ELEC. CODE § 213.009(a) (West 2013). In regards to this allegation, the Code does not define "personal notice," and our office cannot determine whether or not the method of delivery of notice met the requirements of the Code.		
 Next, you allege that while the City of Austin provided 18 hours' notice, Travis County began the recount before the scheduled time in violation of the Code. TEX. ELEC. CODE §§ 213.009(d), 213.010 (West 2013). You state that Travis County conducted activities such as extracting data from the Hart electronic voting system, compiling ballot images onto a centralized system, printing ballot images (also known as "cast vote records"), and sorting by mail ballots before the recount was scheduled to begin at 11 a.m. on January 6, 2015. A recount supervisor should "make the arrangements necessary for conducting the recount," and none of the activities you listed equate to commencing a recount. TEX. ELEC. CODE § 213.008 (West 2013). You also state that you and your official watchers were "entitled monitor the retrieval, sorting and counting of recount data and to monitor the printing of data." However, Section 213.016 relates only to the "printing of ballot images," and does not include the retrieval and sorting of ballots. TEX. ELEC. CODE § 213.016 (West 2013). Nevertheless, we agree that you and your representatives under Section 213.013(b) were 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 re-print the ballot images in the presence of you and your watchers.		
 Next, you allege that the Travis County Elections Division did not properly prepare returns at the conclusion of the recount. You state Section 214.049 requires that returns for a recount be prepared "in the same manner as original election returns," and therefore, the recount committee should have included the total number of voters who voted at each polling place as required by		
		<div style="border: 1px solid black; padding: 5px; display: inline-block;"><b>EXHIBIT</b> <b>6</b></div> 572

## Appendix M

1/27/15--Texas Secretary of State's Response to Pressley's official complaints regarding poll watchers being prevented from monitoring any recount activity. – CR1:575

The State of Texas		
<p>Elections Division P.O. Box 12060 Austin, Texas 78711-2060 www.sos.state.tx.us</p>		<p>Phone: 512-463-5630 Fax: 512-475-2811 Dial 7-1-1 For Relay Services (800) 252-VOTE (8683)</p>
Secretary of State		
January 27, 2015		
Mrs. Laura Pressley 10203 Woodglen Cove Austin, Texas 78753		
Via Email: <a href="mailto:PureRainLaura@aol.com">PureRainLaura@aol.com</a>		
Dear Mrs. Pressley,		
<p>On January 14, 2015 you submitted to our office two complaints. Our office provided a response to you on January 20, 2015, and informed you that your proper legal remedy is an election contest. The Texas Legislature has provided that for alleged criminal violations, our office may refer an election complaint to the Texas Attorney General if there is "reasonable cause" to suspect a crime occurred. TEX. ELEC. CODE § 31.006 (West 2013). Oftentimes, violations of the Election Code do not carry a criminal penalty and are referred to as "election irregularities." Election irregularities cannot be referred to the Texas Attorney General for investigation and criminal prosecution, but they may serve as a basis for an election contest. TEX. ELEC. CODE §§ 31.006, 221.003 (West 2013). These rights and legal remedies are explained on page 6 of the election complaint form that you completed and filed with our office, and you may wish to review that page for more information.</p> <p>Subsequently, on January 22, 2015, you submitted an email to our office requesting a reconsideration of your complaint, and challenging our interpretation of the Texas Election Code. As you did not allege any criminal violations, or provide any additional facts, our office declined to reconsider referring your complaint to the Texas Attorney General. Once again, our office informed you of your proper legal remedy as provided by the Texas Legislature, which is an election contest. A court of law may review our interpretation of statutes, and may make findings of fact and legal determinations. We have further advised you that if you have concerns about Texas' statutes regarding recounts that you speak with your state legislators as they (1) have the right to request an Attorney General Opinion to interpret existing law, and (2) can file legislation to change the law. It is important to note that obtaining an Attorney General Opinion is the correct method for guidance on the intent of the law, not the referral of an election complaint by our office as that is solely used to determine if a criminal violation has occurred.</p> <p>On January 23, 2015, you submitted an email again requesting a reconsideration of your complaint. You stated that "the public has some trust issues with our voting systems and procedures," and requested our office address the alleged election irregularities. In response, our office stated that as there were no additional facts, our response of January 20, 2015 was sufficient.</p>		
<div style="text-align: right;"> 574</div>		

NO. 03-15-00368-CV

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IN THE COURT OF APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AT AUSTIN

---

**LAURA PRESSLEY,  
APPELLANT  
VS.  
GREGORIO "GREG" CASAR,  
APPELLEE**

---

APPEAL FROM THE 201ST DISTRICT COURT  
TRAVIS COUNTY, TEXAS  
CAUSE NO. D-1-GN-15-000374

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**APPELLANT'S BRIEF**

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**ATTORNEY FOR APPELLEE**

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**ORAL ARGUMENT REQUESTED**

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Appellee in the trial court:	Gregorio "Greg" Casar
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## **TABLE OF CONTENTS**

IDENTITY OF PARTIES AND COUNSEL.....	ii-iv
TABLE OF CONTENTS .....	v-vii
INDEX OF AUTHORITIES.....	viii-xi
STATEMENT OF ISSUES PRESENTED.....	2
<b>Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE’S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT? .....</b>	<b>2</b>
<b>Sub Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PREVENTING APPELLANT FROM OBTAINING DISCOVERABLE DOCUMENTS? .....</b>	<b>2</b>
<b>Sub Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING A NO EVIDENCE MOTION FOR SUMMARY JUDGMENT WITHOUT READING THE SUMMARY JUDGMENT EVIDENCE? .....</b>	<b>2</b>
<b>Sub Issue 3. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE’S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT BECAUSE APPELLANT PRODUCED MORE THAN A SCINTILLA OF EVIDENCE? ..</b>	<b>2</b>
<b>Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY AWARDING SANCTIONS AGAINST APPELLANT PRESSLEY? .....</b>	<b>2</b>
<b>Sub Issue 1. WAS THE RIGHT TO SEEK SANCTIONS FORECLOSED AND BARRED BY THE LANGUAGE OF THE ONLY FINAL JUDGMENT DURING THE COURT’S PLENARY POWER OR THE RULE 11 AGREEMENT THAT ALL ISSUES BETWEEN THE PARTIES WERE RESOLVED? .....</b>	<b>2</b>
<b>Sub Issue 2. WAS CHAPTER 10 OF THE CIVIL PRACTICES AND REMEDIES CODE VIOLATED? .....</b>	<b>2</b>

**Sub Issue 3. IF APPELLANT PRESSLEY WAS SUBJECT TO SANCTIONS, WERE THE SANCTIONS IMPOSED JUSTIFIED AND APPROPRIATE? .....2**

**Sub Issue 4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING SANCTIONS BASED ON ATTORNEY’S FEES IN THE EVENT OF AN UNSUCCESSFUL APPEAL WITHOUT ANY EVIDENCE? ...2**

STATEMENT OF CASE.....	3
STATEMENT REGARDING ORAL ARGUMENT.....	5
STATEMENT OF FACTS.....	6
SUMMARY OF THE ARGUMENT.....	10
ARGUMENT.....	14

**Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE’S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT? .....14**

**Sub Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PREVENTING APPELLANT FROM OBTAINING DISCOVERABLE DOCUMENTS? .....14**

**Sub Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE’S MOTION FOR NO EVIDENCE SUMMARY JUDGEMENT WITHOUT REVIEWING THE EVIDENCE ATTACHED TO THE OPPOSITION TO THE MOTION? .....17**

**Sub Issue 3. DID APPELLANT PRODUCE MORE THAN A SCINTILLA OF EVIDENCE TO DEFEAT APPELLEE’S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT? .....18**



<b>Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY AWARDING SANCTIONS AGAINST APPELLANT PRESSLEY? .....</b>	<b>36</b>
---	-----------

<b>Sub Issue 1. WAS THE RIGHT TO SEEK SANCTIONS FORECLOSED AND BARRED BY THE LANGUAGE OF THE ONLY FINAL JUDGMENT DURING THE COURT’S PLENARY POWER OR THE RULE 11 AGREEMENT THAT ALL ISSUES BETWEEN THE PARTIES WERE RESOLVED? .....</b>	<b>36</b>
---	-----------

<b>Sub Issue 2. WAS CHAPTER 10 OF THE CIVIL PRACTICES AND REMEDIES CODE VIOLATED?.....</b>	<b>39</b>
--	-----------

<b>Sub Issue 3. IF APPELLANT PRESSLEY WAS SUBJECT TO SANCTIONS, WERE THE SANCTIONS IMPOSED JUSTIFIED AND APPROPRIATE? .....</b>	<b>53</b>
---	-----------

<b>Sub Issue 4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING SANCTIONS BASED ON ATTORNEY’S FEES IN THE EVENT OF AN UNSUCCESSFUL APPEAL WITHOUT ANY EVIDENCE? ...</b>	<b>65</b>
--	-----------

<b>CONCLUSION.....</b>	<b>67</b>
<b>PRAYER.....</b>	<b>67</b>
<b>CERTIFICATE OF COMPLIANCE.....</b>	<b>68</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>69</b>

## INDEX OF AUTHORITIES

CASES	PAGE(S)
<i>Alvarez v. Espinoza</i> , 844 S.W.2d 238, 249 (Tex. App.--San Antonio 1992, writ dism'd w.o.j.).....	35
<i>Andrade v. NAACP of Austin</i> , 345 S.W.3d 1 (Tex. 2011).....	28, 29
<i>Bader, Inc. v. Sandstone Prods. Inc.</i> , 248 S.W.3d 802, 812 (Tex.App.—Houston [1st. Dist.] 2008, no pet.) .....	40, 45
<i>Baize v. Scott and White Clinic</i> , 2007 Tex.Lexis 366 (Tex.App.—Austin, 2007 pet. den'd) .....	18, 20
<i>Brozynski v. Kerney</i> , 2006 Tex. App. LEXIS 6817, 2006 WL 2160841, at *4 (Tex. App.—Waco Aug. 2, 2006, pet. denied) (citing Mattly v. Spiegel, Inc., 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2002, no pet.)) .....	49
<i>Dallas Indep. Sch. Dist. v. Finlan</i> , 27 S.W.3d 220, 228-229, 2000 Tex. App. LEXIS 5773, 13-14 (Tex. App.—Dallas 2000, writ cert. den.) .....	23, 41
<i>Duncan-Hubert v. Mitchell</i> , 310 S.W.3d 92, 98 (Tex. App. Dallas 2010, pet. denied) .....	31
<i>Foust v. Hefner</i> , 2014 Tex. App. LEXIS 8880, page 3 2014 WL 3928781 (Tex. App. Amarillo Aug. 12, 2014 no pet.) .....	40, 41, 44, App.29
<i>Garcia v. Avila</i> , 597 S.W.2d 400, 403 (Tex. Civ. App. -San Antonio 1980, no writ).....	32
<i>Garcia v. Peeples</i> , 734 S.W.2d 343 (Tex 1987).....	16
<i>Gonzalez v. Villarreal</i> , 251 S.W.3d 763, 773, 777-78 (Tex.App—Corpus Christi 2008, pet. denied).....	32, 35
<i>Goode v. Shoukfeh</i> ,	

943 S.W.2d 441, 448, 40 Tex. Sup. Ct. J. 487 (Tex. 1997).....	15
<i>Great American Reserve Ins. Co. v. Britton</i> ,	
406 S.W.2d 901, 907; (Tex. 1966) .....	66
<i>Griffin Indus. v. Grimes</i> ,	
2003 Tex. App. LEXIS 3439, 2003 WL 1911993 (Tex. App. San	
Antonio, 2003, no pet.) .....	41
<i>Guerra v. Avila</i> ,	
597 S.W.2d 400, 403 (Tex.Civ.App.—San Antonio 1980, no writ) ...	25
<i>Herring v. Welborn</i> ,	
27 S.W.3d 132, 2000 Tex. App. LEXIS 4567 (Tex. App.	
San Antonio 2000 no Pet.).....	41
<i>In re: Bass</i> ,	
113 S.W.3d 735, 743 (Tex 2003) .....	16
<i>In re: Continental General Tire, Inc.</i> ,	
979 S.W.2d 609, 613, 615 (Tex 1998) .....	14, 15, 16
<i>In re: Dupont de Nemours &amp; Co.</i> ,	
136 S.W.3d 218, 223 (Tex 2004).....	15
<i>In re: Reynolds</i>	
2014 Tex. App. Lexis 7105 (no pet.) .....	38
<i>Jampole v. Touchy</i> ,	
673 S.W.2d 869 (Tex 1984).....	16
<i>Jobe v. Lapidus</i> ,	
874 S.W.2d 764, 767 (Tex. App. Dallas 1994, no pet.) .....	38
<i>Johnson v. Fourth Court of Appeals</i> ,	
700 S.W.2d 916, 917, 29 Tex. Sup. Ct. J. 101 (Tex. 1985)	
(quoted in <i>In re: Dupont</i> , supra at 223) .....	15
<i>Lane Bank Equip. Co. v. Smith S. Equip., Inc.</i> ,	
10 S.W.3d 308, (Tex. 2000).....	37
<i>Lesikar v. Rappeport</i> , 33 S.W.3d 282, 308 (Tex. App.—Texarkana	
2000, no pet.) .....	66
<i>Low v. Henry</i> ,	
221 S.W.3d 609 - 622 (Tex. 2007).....	40-42, 53-65, 67
<i>R.M. Dudley Constr. Co. v. Dawson</i> ,	
258 S.W.3d 694, 708(Tex. App.- Waco 2008, pet denied) .....	49

<i>Rogers v. Walker</i> , 2013 Tex. App. LEXIS 6452, Court of Appeals (Corpus Christi, 2013 (pet. den.) .....	40
<i>Schroeder v. Haggard</i> , 2007 Tex. App. LEXIS 3725 ,7  2007 WL 1423968 ( Ct. App.- San Antonio 2007 no pet.) .....	37
<i>Texas Democratic Party v. Williams</i> , No. A-07-CA-115-SS (W.D. Tex. August 16, 2007) .....	30
<i>Thottumkal v. McDougal</i> , 251 S.W.3d 715, 717 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing <i>Cire v. Cummings</i> , 134 S.W.3d 835, 838 (Tex. 2004) .....	42, 49, 53
<i>Valence Operating Co. v. Donell</i> , 164 S.W.3d 656, 661 (Tex. 2004) .....	19, 20

## STATUTES

## PAGE(S)

Texas Civil Practice and Remedies Code § 10 .....	40
Texas Civil Practice and Remedies Code § 10.001(3) .....	13, 45
Texas Civil Practice and Remedies Code § 10.001, et seq.....	13
Texas Civil Practice and Remedies Code § 10.004 .....	63
Texas Civil Practice and Remedies Code § 10.004(b) .....	49
Texas Civil Practice and Remedies Code § 10.004(d) .....	41
Texas Constitution, Article VI, Section 4 .....	26, 27, 51
Texas Election Code § 2.001 .....	25
Texas Election Code § 33.056 .....	34
Texas Election Code § 33.061 .....	34, 56
Texas Election Code § 52, Subchapter C .....	26
Texas Election Code § 52.001 .....	25
Texas Election Code § 52.003 .....	23, 26
Texas Election Code § 52.031 .....	23, 26
Texas Election Code § 52.062 .....	26
Texas Election Code § 52.063 .....	26
Texas Election Code § 52.064 .....	26
Texas Election Code § 52.070 .....	23, 26, 27
Texas Election Code § 52.075 .....	30

Texas Election Code § 66.051-.054 .....	45, 47
Texas Election Code § 128.001 .....	21, 25
Texas Election Code § 213.013 .....	25, 34
Texas Election Code § 213.016 .....	22, 25
Texas Election Code § 214.049(e) .....	26
Texas Election Code § 221.003 .....	3
Texas Election Code § 221.003(1) .....	25
Texas Election Code § 221.003(3) .....	25
Texas Election Code § 221.012 .....	19
Texas Election Code § 221.013 .....	43
Texas Election Code § 231.009 .....	3

## **RULES**

## **PAGE(S)**

Texas Rules of Appellate Procedure, Rule 45 .....	66
Texas Rules of Civil Procedure, Rule 11 .....	10, 38
Texas Rules of Civil Procedure, Rule 192.3(a) .....	15
Texas Rules of Civil Procedure, Rule 192.3(d) .....	15
Texas Rules of Civil Procedure, Rule 193.4 .....	15

NO. 03-15-00368-CV

IN THE COURT OF APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AT AUSTIN

---

**LAURA PRESSLEY,**

**APPELLANT**

**VS.**

**GREGORIO “GREG” CASAR,**

**APPELLEE**

---

**APPELLANT’S BRIEF**

## **STATEMENT OF ISSUES PRESENTED TO APPELLANT**

### **Issue 1. DID THE TRIAL COURT COMMIT REVERSABLE ERROR BY GRANTING APPELLEE'S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT?**

**Sub Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PREVENTING APPELLANT FROM OBTAINING DISCOVERABLE DOCUMENTS?**

**Sub Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING A NO EVIDENCE MOTION FOR SUMMARY JUDGMENT WITHOUT READING THE SUMMARY JUDGMENT EVIDENCE?**

**Sub Issue 3. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE'S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT BECAUSE APPELLANT PRODUCED MORE THAN A SCINTILLA OF EVIDENCE?**

### **Issue 2. DID THE TRIAL COURT COMMIT REVERSABLE ERROR BY AWARDING SANCTIONS AGAINST APPELLANT PRESSLEY?**

**Sub Issue 1. WAS THE RIGHT TO SEEK SANCTIONS FORECLOSED AND BARRED BY THE LANGUAGE OF THE ONLY FINAL JUDGMENT DURING THE COURT'S PLENARY POWER OR THE RULE 11 AGREEMENT THAT ALL ISSUES BETWEEN THE PARTIES WERE RESOLVED?**

**Sub Issue 2. WAS CHAPTER 10 OF THE CIVIL PRACTICES AND REMEDIES CODE VIOLATED?**

**Sub Issue 3. IF APPELLANT PRESSLEY WAS SUBJECT TO SANCTIONS, WERE THE SANCTIONS IMPOSED JUSTIFIED AND APPROPRIATE?**

**Sub Issue 4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING SANCTIONS BASED ON ATTORNEY'S FEES IN THE EVENT OF AN UNSUCCESSFUL APPEAL WITHOUT ANY EVIDENCE?**

## **STATEMENT OF CASE**

The original Clerk's Record is not sequentially numbered by volume. There is one filed on July 2, 2015 that has volume 1 and 2 with pages numbered from 1 to 5228 and there is another filed on July 29, 2015 which is not designated as a supplemental record and has volumes 1, 2 and 3 with pages numbered from 1 to 7635. In order for the court to be able to locate the place in the record cited in this brief, Appellant will refer to the Clerk's Record filed on July 2, 2015 as 1 CR and the one filed on July 29, 2015 as 2 CR.

This is an election contest case. It is therefore to be expedited by this Court. Tex. Elec. Code § 231.009. App.30. Appellant asserted below that the Travis County Clerk failed to comply with state law to maintain image of a ballot and there were so many mistakes and irregularities and illegal votes counted and legal votes not counted that, although the exact vote change is not capable of proof, nevertheless the Court should invalidate the election because the true outcome of the election cannot be ascertained, Tex. Elec. Code § 221.003. (1 CR 862). App.22.

The trial court granted Appellee's No Evidence Motion for Summary Judgment and entered a final judgment. (1 CR 4605; App.1) Appellant filed a Notice of Accelerated Appeal.(1 CR 5224; App.4) Subsequently, on June



24, 2015, the trial court entered an order that stated it was an amended order, but omitted a Mother Hubbard clause or a declaration that it was final, and stated it was going to award sanctions against Pressley and her attorney David Rogers. 2 CR 2060; App.2. Out of an abundance of caution, Pressley filed an amended Notice of Appeal including the June, 24, 2015 order. 2 CR 2062. App.5. After the hearings on the Third amendment to the original Sanctions Motion, Suppl. IV CR 16, that had been filed before the first final judgment on May 26, 2015, the Court entered another judgment on July 23, 2015 Suppl. IV CR 52, App.3 that granted Casar's No Evidence Motion for Summary Judgment, assessed sanctions based on Casar's attorney fees in the amount of \$90,000 (\$50,000 against Appellant's attorney and \$40,000 against Appellant) and an additional sanction award in the event of an unsuccessful appeal, First Suppl. IV CR 52; App.3. The trial court entered a separate order awarding sanctions supported by findings of fact and conclusions of law. Suppl. IV CR 19. App.3. Appellant filed a request for additional and amended findings of fact and conclusions of law. Suppl. III CR 45; App.6. Appellant filed a Second Amended Notice of Appeal. Suppl. III CR 38. App.8. The trial court made amended findings of fact and conclusions of law, Second Suppl. IV CR 3 filed on August 14, 2015; App.7.

## STATEMENT REGARDING ORAL ARGUMENT

This case warrants and indeed demands that the Court order oral argument which is hereby requested.

This case is one of first impression as to whether an election can be determined by counting cast vote records only without maintaining an image of what the electronic voting system formats as a ballot despite state law requiring it to do so. If a cast vote record alone is held not to constitute a ballot that can be counted, other election officials in the state using electronic voting systems may be required to modify their equipment and procedures to comply with the Election Code. Therefore, the issues and facts in this case need to be presented orally and the attorney's permitted to address the Court's concerns regarding this complicated and important case.

## **STATEMENT OF FACTS**

Appellant Pressley sued to set aside the results of the run-off election for Place 4 on the Austin City Council. CR 860.

The County Clerk determined the outcome of the election at the Recount by counting cast vote records (“CVRs”). 1 CR 1983, lines 8-25, and 1 CR 1984, lines 1-11. CVRs do not have the elements of a ballot required by the Texas Constitution and Texas Election Code. (Compare the appearance of a paper ballot 1 CR 1805, 2 CR 2058, and 1 CR 1927, lines 14-18 with the CVR 1 CR 1803 and Ballot by Mail 2 CR 2058). The Hart electronic voting system, used in the election, formats the electronic ballot a Travis County voter sees when he votes that satisfies most of the statutory requirements of a ballot. 1 CR 1925, line 22 to 1928, line 24; 1 CR 1805; 2 CR 2058; (2 CR 7334, lines 16 and 17. These ballot images were not maintained by the Clerk for the run-off election (1 CR 1925, line 22 to 1928, line 24; 2 CR 7333, 2 CR 2058) except for the run-off mail in ballots which were retained. The result of the mail in ballots was a tie. (2 CR 3074 column “BBM [Ballot by Mail]”; 1 CR 1938, line 23 to 1939, line 4) There were numerous “Invalid/Corrupt MBB [Mobile Ballot Box] errors. 1 CR 2118, 2135, 2136, 2139, 2140, 2142, 2155 and 2 CR 1880, 1897, 1898, 1901, 1902, 1904, 1917. The MBB are the Hart voting system

flash memory cards that stores votes as CVRs. 1 CR 2196, 1 CR 2203 and there were more Invalid/Corrupt MBBs than the County Clerk had seen in all her years of conducting elections 1 CR 1978, lines 9-20; the “reader” tallying the votes was broken 1 CR 1979, lines 4-5; also security seals of the voting machines were broken and had to be resealed 1 CR 917, 922, 923, 924, 925, 926, 927, 929, 930.

The Hart voting system computer, which tallies the electronic votes, the CVRs, was left open on several occasions and for extended periods of time during the election and recount CR 1876, 2 CR 1883, 2 CR 1932, 2 CR 1932.

The County Clerk did not believe the Tally Audit Logs which recorded and tabulated the MBB results and all of the other events in the election in order to verify the results were reliable 1 CR 1995, lines 7-13. In addition, the County Clerk ordered her employees not to print Result/Tally tapes on the day of the run-off election (1 CR 1865) as required by the Secretary of State (2 CR 707, 711, 726, 734). Appellant was told that election backup tapes, Zero tapes and Results/Tally tapes would not be printed on the day of the election by Mr. Winn, the Clerk’s Director of Elections; 1 CR 872, ¶ 42; 874, ¶ 48. Images of the ballots cast were missing; 1 CR 1982, lines 19-21; A statistical analysis of the reported results of the run-off election

indicated that the electronic tabulated results may not be believable (1 CR 861, ¶ 3, 1 CR 863, ¶ 10, 1 CR 865 ¶ 17 through 868 ¶ 26, 1 CR 933-936). During the Recount, the County Clerk's employees refused to allow the poll watchers to witness the whole process of the printing of the CVRs from the tally computer. 2 CR 7602. Specifically, Appellant and her official 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. 1 CR 886 ¶ 93-96; 1 CR 1807

There were other irregularities and mistakes made in the conduct of this election. Although Appellant's phone bank received reports from voters who were angry that the voting locations were moved from the general election locations and did not vote, and a statistical analysis was done that showed voters from District 4 who were "die-hard voters" who consistently voted did not vote in this run-off (2 Suppl. RR 99, line 10 through 100 line 22.) When no one wanted to get involved as a witness showing a disenfranchising affect the change in voting locations had on them and the Clerk in discovery at least had some evidence the new locations were posted at the old locations, Appellant amended her pleading (1 CR 860) and dropped the change in voting locations as a mistake that

may have affected the outcome of the election. 2 Suppl. RR 88, lines 6 through 100.

The only property that Pressley had that could be subject to execution to recover a sanctions award was \$1,000.00. All other property owned by Pressley was either membership interests in an LLC, which cannot be seized or its assets used because they belong to an independent legal entity, or in her husband's bank account and retirement account. 2 Suppl. R.R. 65, line 12 through 66, line 19.

All facts Pressley alleged in her pleading were true.

## **SUMMARY OF THE ARGUMENT**

This case challenges the failure to follow Election Code provision in the conduct of an Austin City Council election. Because the Clerk did not maintain images of ballots and counted only CVRs all votes except mail-in ballots which were tied were counted illegally. In addition there were numerous other irregularities, mistakes and violations of the Election Code that could lawfully allow a court to decide it was impossible to ascertain the true outcome of the election. For either reason supported by summary judgment evidence, the trial court committed reversible error by granting the no evidence summary judgment and imposing sanctions for raising such issues.

In addition, at the request of counsel for Appellant the trial court hand wrote in the first judgment it entered that the judgment disposed of all the issues between all of the parties. Counsel for Appellee consented to and agreed to this language being inserted into the first judgment. The trial court then approved of this agreement and signed the first final judgment. Therefore, the parties read into the record in open court that the issue of whether sanctions should be imposed had been resolved by agreement satisfying the requirements of the Tex. R. Civ. P., Rule 11, and the later

actions taken related to sanctions violated Rule 11 and it was reversible error to impose sanctions. There was another “order” entered within the court’s plenary power but it did not satisfy requirements for extending its plenary jurisdiction. The last judgment entered by the court which imposed sanctions was entered after expiration of its plenary power. This means that the only final Judgment in this case is the first one and the only issue is whether the trial court erred in granting Appellee’s No Evidence Motion for Summary Judgment. By arguing the sanctions issues Appellant is not waiving the argument that the only valid final judgment did not impose sanctions and sanction were barred by the Rule 11.

In addition, the trial court erroneously deprived Appellant of discovery to which she was entitled and without examining the documents claimed to be exempt as “Proprietary” thereby preventing Pressley from obtaining evidence crucial and relevant to her claims and then ruled there was no evidence without even reading the evidence attached to the Opposition to the Motion The trial court’s failure to follow accepted process for producing proprietary evidence and its failure to read the evidence attached to the opposition to the motion before granting a No Evidence Motion was an arbitrary abuse of discretion and caused reversible error.



Appellant provided enough evidence in opposition to Appellee's No Evidence Motion for Summary Judgment to require that it be denied. A canvass of an election can be overturned if the court cannot ascertain the true outcome of the election because of illegal conduct, inaccuracies or mistakes. It can also be overturned if illegal votes were counted. In this case there was evidence of many irregularities that if taken as true could lead a court to validly exercise its discretion to determine it cannot ascertain the true outcome of the election.

The Election Code requires that images of the ballots be preserved and counted in a manual recount. It is undisputed that images of the ballots voters see when deciding who to vote for were not maintained or available for the recount. Despite evidence presented in opposition to the No Evidence Motion for Summary Judgment showing that a CVR did not have any of the items on it that the Election Code required a ballot to have, the court erroneously granted a no evidence summary judgment. The mail-in ballots were tied and therefore a new election was required to be called. The county clerk elected to conduct this election either using an electronic voting system that did not comply with the Election Code or the system did comply with the Election Code and she neglected to preserve images of the ballots as required by law. The fact that there no images of the ballots kept

requires the calling of a new election keeping images of ballots either by getting the system that can do so or by programing the current system to keep the images of the ballots it formats for voters to decide who to vote for when they make that decision.

Finally, the trial court ordered sanctions under of the Texas Civil Practices & Remedies Code § 10.001, et. seq. There was no evidence that any fact pled both had “...no evidentiary support or, for a specifically identified allegation or factual contention, was not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery” Texas Civil Practices & Remedies Code § 10.001(3). App.10.

Because Pressley supplied the trial court with more than a scintilla of evidence that would in itself justify voiding the election and because the evidence in support of thereof was true and the cause of actions asserted were recognized in law or in a good faith extension thereof, this Court should reverse the trial court judgment rendering judgment that the sanctions were not warranted and remand this case for trial.

## **ARGUMENT**

### **Issue 1. DID THE TRIAL COURT COMMIT REVERSABLE ERROR BY GRANTING APPELLEE'S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT?**

#### **Sub Issue 1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PREVENTING APPELLANT FROM OBTAINING DISCOVERABLE DOCUMENTS?**

On April 13, 2015, the Court held that the County Clerk was not required to produce to Appellant access to what the Clerk's contract with the computerized voting system manufacturer called its proprietary information or inspection of direct computerized voting system used in the election, eSlate voting program, Judge's booth controllers, software or hardware used in conjunction with eSlate. 1 CR 333, 475 and 4501.

The documents and items the Court allowed the County Clerk to withhold from direct unprotected production and inspection were not privileged except to the extent they may have constituted trade secrets. There is no privilege for evidence termed "proprietary." Indeed, everything is "proprietary" to somebody. *In re: Continental General Tire, Inc.*, 979 S.W.2d 609, 613 (Tex 1998).

To the extent such information and items for inspection may have constituted trade secrets; they still may have contained information relevant and material to the issues in this case. The proper procedure was for such

items to be tendered to the Court *in camera* by the County Clerk for the Court's determination whether they were indeed trade secrets and with respect to any trade secrets for the court to determine if they contain information that could lead to the discovery of admissible evidence. Texas Rules Civil Procedure, Rules 192.3 (a) and (d) App.27 and 193.4 App.28. If they contain such discoverable information, they should still have been ordered to be disclosed subject to a protective order designed to protect their secrecy consistent with their need for use in this proceeding. *In re: Continental General Tire, Inc.*, 979 S.W.2d 609, 613 (Tex 1998)( it is an abuse of discretion to fail to conduct an *in camera* inspection under claim that documents are proprietary and decide if they can be produced under protective order). See also *In re: Dupont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex 2004) (The trial court abuses its discretion in refusing to conduct an *in camera* inspection when such review is critical to the evaluation of a privilege claim). "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion" *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917, 29 Tex. Sup. Ct. J. 101 (Tex. 1985)(quoted in *In re: Dupont*, supra at 223) See *Goode v. Shoukfeh*, 943 S.W.2d 441, 448, 40 Tex. Sup. Ct. J. 487 (Tex. 1997)(court is required to conduct *in camera* inspection before restricting production)

See also *In re: Bass*, 113 S.W.3d 735, 743 (Tex 2003). See Civil Practices and Remedies Code § 134A.006. *Jampole v. Touchy*, 673 S.W.2d 869 (Tex 1984), *Garcia v. Peebles*, 734 S.W.2d 343 (Tex 1987). “Trade Secrets and confidential information are not necessarily “privileged” matters within the meaning of Rule 186a. If the information is material and necessary to the litigation and unavailable from any other source, a witness may be required to make disclosure.” *In re: Continental General Tire, Inc.*, *supra*. at 615.

The court’s refusal to let Plaintiff’s expert examine the manuals, the eSlate machines, the Judge’s boxes and the MBB’s to determine if they were functioning properly on the date of the election and during early voting and other material identified in the expert’s affidavit, severely prejudiced Pressley’s ability to present reliable evidence and expert testimony. See CR 2087-2088 and CR 4506 ¶¶ 17-18. Especially in light of all the corrupt MBBs identified in the Tally Audit log, 1 CR 2118, 2135, 2136, 2139, 2140, 2142, 2155 and 2CR 1880, 1897, 1898, 1901, 1902, 1904, 1917. 1 CR 2088 and other irregularities identified in Appellant’s Opposition to the Motions for Summary Judgment (1 CR 2043) and the absence of ballot images that the voters used to make their decisions on who to vote for, the items the Court refused to allow Appellant to have were vital not only for

the expert but also for use in presenting all of the evidence Appellant had to defeat the No Evidence Summary Judgment that is on appeal here.

Therefore, the Court should have ordered the withheld documents produced to it *in camera* and ordered all non-trade secret items produced and the trade secret items to be produced subject to a protective order. Failure to follow the settled procedure for handling these discovery requests was an abuse of discretion. It was harmful error because it deprived Appellant of evidence that could have been added to the Opposition to the Motion for Summary Judgment. Essentially, the trial court prevented Appellant from obtaining relevant evidence to support her claims and then held she did not have sufficient evidence to support her claims. This was a clear abuse of discretion that contributed to the erroneous judgment appealed from herein.

**Sub Issue 2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLE'S MOTION FOR NO EVIDENCE SUMMARY JUDGEMENT WITHOUT REVIEWING THE EVIDENCE ATTACHED TO THE OPPOSITION TO THE MOTION?**

The trial court admitted at the hearing on the Summary Judgment that it had not read the evidence 3 RR 20-21. Granting a Motion for No Evidence Summary Judgment without even reading the evidence attached

to the Opposition to a No Evidence Motion is clearly arbitrary and capricious.

Because the trial court acted arbitrarily and capriciously in entering the judgment on appeal, this Court should reverse the judgment and remand the case for trial so that the trial court can follow the law and review the documents claimed to privileged *in camera* and order the production of all material which may lead to the discovery of admissible evidence and order production of material that is subject to trade protection subject to an adequate protective order. The trial court should also be instructed to review all evidence before granting or denying a summary judgment.

**Sub Issue 3. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GRANTING APPELLEE'S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT BECAUSE APPELLANT PRODUCED MORE THAN A SCINTILLA OF EVIDENCE?**

**A.**

### **STANDARD OF REVIEW ON NO-EVDIENCE MOTION**

This Court has clearly stated that it applies the *de novo* standard of review on appeals from no-evidence summary judgments. *Baize v. Scott and White Clinic*, 2007 Tex. Lexis 366, p. 3 (Tex.App.—Austin, 2007 pet. den'd). In the same case, the Court held that once a movant for no-evidence summary judgment asserts the non-movant has no evidence on a specific required element of her case, the burden shifts to the non-movant

to raise a genuine issue of material fact on the challenged elements. In making such review, the appellate court considers as true all evidence favorable to the non-movant and indulges any reasonable inferences and resolve doubts in favor of the non-movant. *Valence Operating Co. v. Donell*, 164 S.W.3d 656, 661 (Tex. 2004).

Since this an appeal of a judgment granting a No-Evidence Summary Judgment, 1 CR 4605, this standard applies to the disposition of this case. The Argument under the issue will presume that this Court is conducting a *de novo* review accepting the evidence attached to Appellant's Opposition to the Summary Judgment in the trial court, 1 CR 2043, as true and indulging every reasonable inference in Appellant's favor and resolving all doubts in favor of Appellant.

The cause of action in this election contest is provided by statute:

"The tribunal shall declare the election void if it cannot ascertain the true outcome of the election." Texas Election Code § 221.012 App.4.

The election code also states what evidence the Court can look to in exercising its discretion that it cannot ascertain the true outcome of the election:

"Sec. 221.003. SCOPE OF INQUIRY. (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 involved 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.” App.27.

Therefore, if Appellant has produced in opposition to the No Evidence Summary Judgment more than a scintilla of evidence including all inferences in her favor and regardless of any evidence to the contrary urged by Appellee that the County Clerk failed to follow the requirements of the election code counting CVRs only while not maintaining images of ballots cast or that illegal conduct, irregularities, or mistakes in the conduct of the election process occurred, Appellee was not entitled to a no evidence summary judgment and the trial court committed reversible error in granting it. In reviewing the evidence submitted to determine whether it is more than a scintilla the Court must accept Appellant’s evidence as true regardless of evidence to the contrary submitted by Appellee and give all reasonable inferences raised by the evidence to Appellant, ignoring contrary evidence offered by Appellee. *Valence Operating Co. v. Donell*, 164 S.W.3d 656, 661 (Tex. 2004); *Baize v. Scott and White Clinic*, 2007 Tex.Lexis 438 (Tex.App.—Austin, 2007 pet. den’d).

**1. Appellant offered evidence that the County Clerk did not comply with the Election Code’s requirement to maintain ballot images**

Texas Election Code § 128.001, App.19, proscribes the requirements for use of computerized voting system. The statutes of Texas provided the Hart system could not have been used to conduct this election unless it had:

**“(2)** a main computer to coordinate ballot presentation, vote selection, ballot image storage, and result tabulation. and **(b)** Notwithstanding Chapter 66, a system under this section may allow for the storage of processed ballot materials in an electronic form on the main computer..

The evidence presented by Appellant’s Opposition to the No Evidence Motion for Summary Judgment (1 CR 2043) was more than a scintilla of evidence (raised a genuine issue of material fact) that the Travis County Clerk either did not use a system that complied with the foregoing statute or, if she did, she failed store images of ballots and did not store those images in compliance with law. While relying on all of the evidence attached to the Opposition to the Motion for Summary Judgment, 1 CR 2043 the following appears to be sufficient in itself:

1. The affidavit of Contestant’s computer science expert that a CVR is not a ballot image and that some federal reports and other studies require the image of the ballot in addition to a CVR be maintained as a check on the computer. 1 CR 2087, 2088.

2. The clerk's testimony that her office did not maintain images of the ballot presented to voters by the computerized voting system when they decide who to vote for 1 CR 1925, line 22 to 1928, line 24; 2 CR 2058 and the exhibits showing the appearance of that ballot and the CVR 1 CR 1982, Lines 19 -21; 2 CR 2058 which was the only item stored and relied on to count votes 1 CR 1984, lines 9 -11. It is clear from this evidence and that of the Appellant's expert 1 CR 2087 and 2088 that a CVR is not an official ballot and does not contain the legal components required of a Texas ballot (1 CR 899 ¶ 146). Because "ballot image storage" was not used by Travis County, as the statute requires, the required ballot images from the run-off election are missing election records and there are no official ballots that can be counted other than the Absentee/Mail in Ballots which resulted in a tie (2 CR 3074 column BBM). Failing to print and produce the legally required "images of ballots cast" for the election recount is a violation of Texas Election Code § 213.016, App.20, by itself. Therefore, the only true outcome that can be ascertained is a tie which requires a new election. (2 CR 3074, column "BBM" 1 CR 1938, line 23 to 1939, line 4).

"Election records' also include ballot boxes (containing voted ballots), tally sheets, absentee ballots, Results/Tally tapes, and items like them, also constitute "precinct election records," as defined and used in chapter 66 of

the code. In addition, Section 273.003 lists election returns, voted ballots, and the signature roster as specific types of election records. TEX. ELEC. CODE ANN. § 273.003 (Vernon 1986). Based on the uses of the term ‘election records’ and the examples listed within the code, we conclude ‘election records’ are those which memorialize the actual election and the actual conduct of the election”. *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 228-229, 2000 Tex. App. LEXIS 5773, 13-14 (Tex. App. Dallas 2000). Therefore Ballot images are election records which memorialize the actual election and the actual conduct of the election. *Id.* When the Texas Constitution and statutes that define what a ballot must contain (1 CR 899, ¶ 146) is compared with what appears on the CVR (1 CR 1803, 1 CR 2944, 2 CR 613), it is clear that a CVR is not an image of a ballot as defined by the Election Code. See Texas Election Code §§ 52.003 App.14, 52.070 App.31, and 52.031. App.17.

3. The affidavit of Appellant’s expert stating that a CVR is a data file, not an image file. 1 CR 2087 and 2088.

4. Evidence that was presented that supports the Hart Voting System is capable of formatting ballot images and Travis County did not retain them:

- a) The Clerk's testimony that the Hart computerized voting system formats an image of a ballot meeting statutory requirements that the voter is shown when deciding who to vote for on the eSlate program 1 CR 1925, line 22 to 1828, line 24;
- b) The Ballot by Mail (1 CR P. 1805 and 2 CR P. 2058) is formatted and saved using the Hart Ballot Now system's Ballot Now Image Processor (1 CR 2055, ¶ 34, 1 CR 2633, 2656, 2659, 2664, 2666, 2774, 2781, 2782, 2791, 2792, 2794, 2829, 2830);
- c) The Secretary of State's letter to Travis County that the Hart Voting System used by Travis County Clerk preserves "ballot images" (2 CR 7619). 1 CR 643; 3 RR 52, line 6 through 53, line 8;
- d) The eSlate displays ballot styles that are presented to voters when they are making their decision who to vote for show the various components of a legal ballot (name of the Election, date of the election, voting squares, instructions, all candidate names, etc. 1 CR 2942, 1 CR 1927, lines 14-19). The ballot styles are formatted and saved on a MBB using a ballot image program in the Ballot Origination Software System (BOSS) as

defined by the Ballot Now Manual. 1 CR 2664. Therefore, Hart does have a program that is apparently capable of combining a flash card with a ballot image onto an MBB which can plugged into the Tally system (1 CR 2656).

Texas Election Code § 52.001 App.13 is clear that “the vote in an election is by official ballot” and Texas Election Code § 2.001 App.11 states, “...to be elected to a public office, a candidate must receive more votes than any other candidate for office.” Since the legally required “images of ballots cast” (Texas Election Code § 128.001 App.19 and § 213.016 App.20) are missing, the election should have been recanvassed with the only legal and official ballots, the mail in ballots, (1 CR 4667, ¶¶ 186 – 187) and the recount should have been recanvassed as an exact tie. CVRs are not mentioned in any part of the Texas Constitution or the Texas Election Code and are not official ballots. If there are missing election records that are material in determining the true outcome of the election, the Court is authorized to void the election. *Guerra v. Avila*, 597 S.W.2d 400, 403 (Tex.Civ.App.—San Antonio 1980, no writ). If the Clerk counts illegal votes, those votes are cancelled under Texas Election Code § 221.003 (1) and (3) App.22. This leaves the election tied because the only images of ballots the computerized voting system kept were the eScan program’s

mail-in ballots and those resulted in a tie, authorizing the ordering of a new election as requested by Appellant. 2 CR 3074, Column “BBM”; 1 CR 1938, line 23 to 1939, line 4.

Ballots are defined in Texas Election Code, Chapter 52, Subchapter C. For the purposes of this suit, the most salient portions of that subchapter are Sec. 52.003 App.14 and Sec. 52.070 App.31.

It is clear from these provisions that the Legislature did not permit this election to be decided by counting or recounting CVRs which do not resemble or contain the components of an official ballot in any respect. See also Texas Election Code § 214.049 (e).

Note that the Travis County CVR 1 CR 2994; 2 CR 613. does not contain:

- a. a unique serial/ticket number (Texas Constitution, Article 6, Section 4, App.9 and Texas Election Code § 52.062, App.15.)
- b. the election name and candidate (Texas Election Code § 52.063), of Joint Special Runoff Election, Travis County, App.16; 52.031. App. 17.
- c. the election date (Texas Election Code § 52.063), of December 16, 2014
- d. the designation of Official Ballot (Texas Election Code § 52.064), App.33.
- e. a voting square to the left of each candidate's name (Texas Election Code § 52.070), App.32, and

f. voting instructions (Texas Election Code § 52.070). App.32.

The CVR does not meet the Constitution's minimum requirement that an election be conducted by a numbered ballot since the CVR is not numbered. Texas Constitution, Article VI, Section 4 App.9. Therefore, any decision by a state official like the Secretary of State or the Travis County Clerk that allowed the true outcome of an election to be decided by something other than a numbered official ballot would be unconstitutional. Indeed, the Clerk confessed that a ballot image and a CVR are not the same thing 2 Suppl. RR 189, lines 2 - 9.

Thus, Appellant's evidence attached to her Opposition to Contestee's No Evidence Motion for Summary Judgment showing that a CVR is not a ballot and the outcome of this election was not determined by counting ballots or images of ballots which were not preserved and therefore missing creates more than a scintilla of evidence that the true outcome of this election cannot be determined. The trial court could not grant this motion by relying on any contrary evidence that Appellee attached to a Motion for Traditional Summary Judgment which was not granted and is not involved in this appeal. 1 CR 4605; 2 C.R. 2060.

The CVR has been around a long time. If the Legislature wanted to make it permissible to determine the true outcome of an election by



counting CVRs instead of ballots as it has defined them it could have done so (subject to the Constitution's mandatory requirement that elections be by numbered ballots).

The question in this case is whether absent specific statutory authority this court will allow our elected officials to be determined by a computer data tally only of what the voter's ballot says without the backup of an actual ballot or an image of one. In this day and age with computer crashes, errors and hacks, the wisdom of our Legislature in requiring the system to maintain images of the actual ballots is clearly good public policy and should be presumed to be its intention.

Appellees have asserted that the issues raised in this case have been decided in *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011). That case has nothing to do with issues raised in this case. *Andrade, supra*, dealt solely with standing and equal protection. The issue in that case was whether the voters who alleged that they were denied equal protection of laws under the constitution because they were required to use the Hart electronic voting system and other voters in statewide elections were not required to do so. The Court first held these voters had standing to raise the equal protection claims and then held there was no violation of equal protection by use of different voting systems in different counties in a

statewide election. The Court then held that the voters did not have standing to attack the lack of ballot verification and therefore never reached the merits of anything like the issues involved in this case. Here there is no challenge to Appellant's standing. *Andrade, supra*, is very instructive in its description of how the Hart system worked when an election is held: "Voters arriving at the polls in counties using the eSlate are given a unique access code. The voter enters the code into the eSlate, which then displays the ballot. Voters turn a dial to highlight their ballot choice and then press "enter" to make a selection. After a voter completes his selections, the eSlate displays a ballot summary page. If the voter's choices are correctly displayed, the voter presses the "cast ballot" button, and the vote is recorded. See *Voter Instructions*, TRAVIS COUNTY, purchased the eSlate system in 2001 and has used it since 2003." *Id.* at 5. (emphasis added)

The critical aspects of this description for this appeal are the Supreme Court's acknowledgement that the system used by Travis County "displays the ballot" (emphasis added). This is the only relevant part of *Andrade, supra* and actually makes Appellant's point that this ballot is not printed and not preserved even though it is formatted 1 CR 1927, lines 13 -18 and 1 CR 1805 for every voter to see by the Hart voting system. As a result, 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 App.37 to imply in its instructions and definitions that a CVR is synonymous with an image of a ballot as defined in the Election Code.

The other case Appellee has relied on is *Texas Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. August 16, 2007). In that case, voters complained that the eSlate deprived them of the ability to "emphasis vote"; that is, to cast a straight party vote and then also again vote for a particular candidate within that party—to make sure their votes count for these particular candidates. The voters argued that, if they attempted to emphasis vote, the eSlate would de-select, rather than register a vote for, the individual candidate. The trial court held that even assuming that the eSlate impacted voters' ability to cast emphasis votes, the use of DREs was constitutionally permissible. Therefore, neither case dealt with either of the issues involved in this case (does a CVR satisfy the election code requirement to maintain an image of a ballot and can several irregularities and mistakes in the conduct of an election permit a court to void the election by making it impossible to ascertain the true outcome?).

The trial court conceded that if a CVR is not an image of a ballot then Appellant would be entitled to a new election, 4 RR 60, line 13 to 62, line 20, then erroneously granted a no evidence summary judgment that

Appellant did not produce more than a scintilla of evidence that a CVR is not an image of a ballot.

**2. APPELLANT PRODUCED MORE THAN A SCINTILLA OF EVIDENCE THAT THERE WERE IRREGULARITIES AND MISTAKES IN THE CONDUCT OF THE ELECTION TO DEFEAT APPELLEE'S MOTION FOR NO EVIDENCE SUMMARY JUDGMENT.**

“A court trying an election contest shall attempt to ascertain whether the outcome shown by the final canvass was not the true outcome because illegal votes were counted or because an election official or other person officially involved in the administration of the election (1) prevented eligible voters from voting, (2) failed to count legal votes, or (3) engaged in other fraud or illegal conduct or made a mistake. Texas Election Code Ann. § 221.003(a) (Vernon 2010). To set aside the outcome of an election, the contestant must prove by clear and convincing evidence that a violation of the election code occurred and such violation materially affected the outcome of the election. *McCurry v. Lewis*, 259 S.W.3d 369, 372-73 (Tex. App.--Amarillo 2008, no pet.). The outcome of an election is ‘materially affected’ when a different and correct result would have been reached in the absence of irregularities or ‘irregularities in the conduct of the election render it impossible to determine the majority of the voters’ true will.’ *Id.* at 373, see also *Gonzalez v. Villarreal*, 251 S.W.3d 763, 773, 777-78 (Tex. App.--Corpus Christi 2008, pet. denied) ; *Ware v. Crystal City Indep. Sch. Dist.*, 489 S.W.2d 190, 191-92 (Tex. Civ. App.-San Antonio 1972, writ dism'd).” *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 98 (Tex. App. Dallas 2010, pet. den.) (emphasis added).

In *Duncan-Hubert*, *supra* the court reversed the grant of a no evidence summary judgment based on the affidavit of an expert showing that there were so many mistakes and irregularities that it could be impossible to

ascertain the true outcome of the election even though the Contestant could not point to actual votes affected. This is strikingly similar to the case at bar except Appellant presented much more evidence of mistakes, irregularities and counting of illegal ballots.

In the case of *Gonzalez v. Villarreal*, 251 S.W.3d 763, 773, 777-78 (Tex. App.--Corpus Christi 2008, pet. denied) the Court also held after a trial that mistakes and irregularities were enough to overturn an election. It held:

“{T}he election code does not require a trial court to rely solely on ‘illegal votes’ in attempting to ascertain the true outcome of an election. As is evident from section 221.003, the outcome of an election can be muddled not just by the counting of illegal votes or the failure to count legal votes, but also by mistakes made by election officers. TEX. ELEC. CODE ANN. § 221.003(a)(2)(C) See *Alvarez*, 844 S.W.2d at 242. A contestant may allege and prove that ‘irregularities rendered impossible a determination of the majority of the voters’ true will.’ *Guerra*, 865 S.W.2d at 576.”

*Gonzalez v. Villarreal*, 251 S.W.3d 763, 773, 777-78 (Tex. App.--Corpus Christi 2008, pet. denied).

In *Garcia v. Avila*, 597 S.W.2d 400, 403 (Tex. Civ. App. -San Antonio 1980, no writ), the Court held that missing election records alone could justify overturning an election. In this case, the trial court clung to the erroneous belief that appellant was required to identify specific vote

changes caused by the mistakes 4 RR 104, lines 3-17. The missing images of items that met the statutory definition of a ballot and satisfied the Texas Constitution's minimum requirements of what must be on a ballot that is counted to determine the outcome of an election was more than enough to void the election and appellant provided ample proof of this to avoid summary judgment.

In addition, Appellant produced evidence that there were numerous Invalid/Corrupt MBBs, 1 CR 2086 - 2087, 1 CR 2118, 2135, 2136, 2139, 2140, 2142, 2155 and 2 CR 1880, 1897, 1898, 1901, 1902, 1904, 1917; 1 CR 2056 paragraph 41 through 2059 paragraph 48; that there were more Invalid/Corrupt MBBs than the County Clerk had seen in all her years of conducting elections (MBBs contain the CVRs from a voting machine) 1 CR 1978 lines 9-20; that the "reader" tallying the votes was broken 1 CR 1979 line 4-5; that seals were broken bringing the security and accuracy of the MBBs into question 1 CR 917, 922, 923, 924, 925, 926, 927, 929, 930; that the computer that tallies the CVRs was left open on several occasions and for extended period of time that the County Clerk did not believe the tally log which recorded the MBBs and all of the other events in the election in order to verify the results were reliable 1 CR 1995 lines 7-13; that the County Clerk ordered her employees not to print zero tapes and result

tapes on the day of the run-off election as required by the Secretary of State 1 CR 1865 and Appellant was told the same by Mr. Winn, the Clerk's Director of Elections 1 CR 872 paragraph 42; 874, paragraph 48; that images of the ballots cast were missing; 1 CR 1982 lines 19-21; that a statistical analysis of the reported results of the run-off election indicated that the results were not believable and that the county clerk's employees refused to allow the poll watchers to witness the whole process of the printing of the CVRs from the tally computer 1 CR 886 paragraph 93..

Specifically, Appellant and her official 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. 1 CR 886, ¶ 93. Since they were arguably allowed to do so by Texas Election Code § 33.056 App.12 and § 213.013 App.33 that obstruction may have violated Texas Election Code § 33.061. App.35

These errors relate to the counting of votes and the scope of their effect on the vote count is significant even though that by their nature and the court's erroneous discovery order it is impossible to say how many illegal votes were counted or how many legal votes were not counted. Based on the cases cited above, Appellant's Opposition to the No Evidence Motion for Summary Judgment produced much more than a scintilla of

evidence that would have allowed a court to exercise its discretion at a trial and decide that the cumulative effect of these violations of the election code, irregularities and mistakes “rendered impossible a determination of the majority of the voter’s true will” *Gonzalez v. Villarreal, supra*. Therefore, the Court erred in granting Appellee’s no evidence motion for summary judgment and this court should reverse the judgment below and remand it for trial.

The court in *Alvarez, supra* said it best:

“But perceptions of fairness are also important. The public must have confidence that the election process is fair for all candidates. It is therefore imperative that election officials comply with code procedures. Those who have studied history and have observed the fragility of democratic institutions in our own time realize that one of our country’s most precious possessions is the commitment of our public officials to the rule of law -- fair and evenhanded application of rules known in advance -- and the widespread acceptance of election results. Repeated abuse of power by election officials can chip away at public respect for our legal institutions and undermine the willingness of losing candidates to accept the results. Cases may arise in which official disregard of the election laws is so pervasive that the courts could not let the election stand, even though the contestant might not be able to prove that the violations caused an incorrect outcome.” *Alvarez v. Espinoza*, 844 S.W.2d 238, 249 (Tex. App.--San Antonio 1992, writ dismiss’d w.o.j.)

The Court in *Alvarez, supra* did not believe there were enough errors to exercise its discretion to void the election but it did analyze a much less



compelling bed of evidence in making that decision. It did not hold the evidence of errors and missing records was no evidence. It just said it was enough to reverse the trial court's exercise of discretion at trial. Therefore, the evidence submitted by appellant in opposition to the no evidence motion for summary decision entitled her to a trial and the judgment should be reversed and the case remanded to afford her the trial the law affords her.

**Issue 2. DID THE TRIAL COURT COMMIT REVERSABLE ERROR BY AWARDING SANCTIONS AGAINST APPELLANT PRESSLEY?**

**Sub Issue 1. WAS THE RIGHT TO SEEK SANCTIONS FORECLOSED AND BARRED BY THE LANGUAGE OF THE ONLY FINAL JUDGMENT DURING THE COURT'S PLENARY POWER OR THE RULE 11 AGREEMENT THAT ALL ISSUES BETWEEN THE PARTIES WERE RESOLVED?**

At the conclusion of the summary judgment hearing Appellant's counsel asked the court to rule that the judgment it was about to enter resolved all issues between all parties. Appellee's counsel agreed to this language and the court wrote it in at the bottom of the judgment. 4 RR 12, lines 18 -21; 1 CR 4605; App.1. This Judgment was entered on May 26, 2015. The next time the court entered a final judgment amending the May 26, 2015 final judgment was on July 23, 2015 App.3, CR Suppl. IV 52, well beyond the court's 30 day plenary authority which expired on June 25,

2015. The order entered on June 24, 2015 App.2. CR Suppl. IV 16 did not amend the earlier judgment in that it was not a final judgment in itself because it affirmatively showed it was not intended to resolve all issues and it did not include the finality language the first judgment had. "...Only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g) App. 36. See *Cavalier Corp. v. Store Enter, Inc.*, 742 S.W.2d 785, 786 (Tex. App.—Dallas 1987, writ denied)." *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, (Tex. 2000); ; See *Schroeder v. Haggard*, 2007 Tex. App. LEXIS 3725 (Ct. App.- San Antonio 2007 no pet.) In *Schroeder*, *supra* the Court held that a document filed in the record and issued by the Court that anticipated further action by the Court did not extend the Court's plenary power past 30 days. This June 24, 2015 order did not amend a judgment by entering a different final judgment or by modifying the existing judgment and it did not order a new trial. Therefore, it did not qualify as an order extending the plenary jurisdiction of the Court for another 30 days. There was no post judgment motion filed (the second amended and third amended motions for sanctions were filed after the final judgment was signed on May 26, 2015, but both related back to a pretrial motion filed on April 23, 2015, (1 CR 479) which had already been resolved by the finality

language in the May 26, 2015 judgment that all issues between the parties pending at that time had been resolved as of that date. 1 CR 4605. The Court's plenary jurisdiction was not extended to entertain a sanctions motion that was pending at the time the Court entered a final judgment. *Jobe v. Lapidus*, 874 S.W.2d 764, 767 (Tex. App. Dallas 1994, no pet.). Therefore, the Court did not have plenary jurisdiction to enter the July 23, 2015 final judgment containing sanctions and same was void. *Id.*; *In re: Reynolds* 2014 Tex. App. Lexis 7105 (no pet. h.) voiding post judgment sanction requested pretrial.

In addition, the language that Appellee agreed to in the first judgment that resolved all pending issues (the Motion for Sanctions was pending at the time) (1 CR 479) was made in open court and approved by the Court. The agreement between the parties on the record and approved by the Court constituted a binding agreement enforceable pursuant to Texas Rules of Civil Procedure, Rule 11, App.26 that no other issues, including the sanctions motion, could be taken up by the trial court after the agreement was approved by the Court. Therefore, the first judgment and the Rule 11 Agreement approved by the Court, precluded the Court under settled principals of law from conducting a hearing and entering a sanctions

order. Doing so was therefore a clear abuse of discretion and reversible error.

**Sub Issue 2. WAS CHAPTER 10 OF THE CIVIL PRACTICES AND REMEDIES CODE VIOLATED?**

**A.**

**Standard of Review**

In the event this Court does not decide that it was an abuse of discretion to take up the Motion for Sanctions and the Court's sanction order was within its plenary power, the following is the case law describing the standard of review for deciding whether to reverse a sanction order.

"A trial court's ruling on a motion for sanctions is reviewed under an abuse of discretion standard. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted without reference to any guiding rules and principles. *Id.* at 838-39. The trial court's ruling should be reversed only if it was arbitrary or unreasonable. *Downer*, 701 S.W.2d at 242, *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). A trial court abuses its discretion when its ruling is arbitrary and unreasonable without reference to any guiding rules and principles. *Id.* at 838-39. In conducting

our review, we are not limited to a review of the ‘sufficiency of the evidence’ to support the trial court's findings; rather, we make an independent inquiry of the entire record to determine if the court abused its discretion by imposing the sanction.” *Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 812 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

“Generally, courts presume that pleadings and other papers are filed in good faith. *Low*, 221 S.W.3d at 614; *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993). The party seeking sanctions bears the burden of overcoming this presumption of good faith. *Low*, 221 S.W.3d at 614.” *Rogers v. Walker*, 2013 Tex. App. LEXIS 6452, 13th Court of Appeals, 2013; *Foust v. Hefner*, 2014 Tex. App. LEXIS 8880, page 3 (Tex. App. Amarillo Aug. 12, 2014 no pet.). App.30.

## **B.**

### **Appellee's Burden Below**

It seems clear that to carry its burden, Appellee must have presented enough evidence to overcome the presumption that the Appellant has not violated Texas Civil Practice and Remedies Code, Chapter 10. *App.10*. “In order for a party seeking sanctions to prevail, there must be little or no

basis for claims, no grounds for legal arguments, a misrepresentation of law or facts, or a legal action that is sought in bad faith. *Herring*, 27 S.W.3d at 143. It is the movant's burden to establish there was no evidentiary support for the allegations in plaintiffs' petition. See *Id.*" *Griffin Indus. v. Grimes*, 2003 Tex. App. LEXIS 3439, 2003 WL 1911993 (Tex. App. San Antonio, 2003, no pet.); *Herring v. Welborn*, 27 S.W.3d 132, 2000 Tex. App. LEXIS 4567 (Tex. App. San Antonio 2000 no Pet.) See on rehearing, *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 228 (Tex. App. -Dallas 2000). In addition with regard to monetary sanctions against a party the entire record must show that the pleading contains factual allegations that have no evidentiary basis (See the limitation against the imposition of monetary sanctions against a party in Texas Civil Practice and Remedies Code, Section 10.004 (d)) App.10. See also *Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007). Appellant did not sign a pleading and given her status as a party the court abused its discretion by imposing monetary sanctions against her in light of Texas Civil Practice and Remedies Code, Section 10.004 (d), App.10, unless the entire record shows the particular factual allegation challenged by the motion has no evidentiary basis or was not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. See *Foust, supra* at page 3. Since there

was no evidence at the sanction hearing that any allegation met the test for imposition of monetary sanctions against a party the trial court's sanction order was arbitrary and unreasonable without reference to guiding rules and principles that by ignoring that:

1. There is a presumption that the allegations were not subject to sanctions that was not overcome;
2. There was no evidence or it was against the great weight and preponderance of the evidence enabling the trial court to reach a conclusion that factual allegations challenged by the motion has no evidentiary basis or was not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery either was evidence or was against the great weight of the evidence after a review of the entire record;
3. The trial court made no determination or inquiry into whether lesser sanctions than \$40,000 plus expenses and appellate attorney's fees were available and sufficient to accomplish its goals;
4. The trial court misapplied the *Low* factors in determining the appropriateness and amount of the sanctions;
5. There trial court did not determine that and there was a direct nexus between any improper conduct and the sanctions imposed. *Low*, 221 S.W.3d at 614; and
6. The sanctions imposed were not tailored to remedy any identified prejudice allegedly caused by the alleged conduct. *Thottumkal v. McDougal*, 251 S.W.3d 715, 717 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)).

C.  
Argument

Appellant incorporates herein her argument under Issue 1 which shows record references that her allegations had evidentiary support and valid legal arguments that were sufficient to render a sanction order arbitrary and capricious and reversible error.

It is clear from the court's conclusions of law that it imposed sanctions for assertion of facts on the following:

1. Zero tapes were not printed on the day of the election (contained in all seven contest pleadings) 3 Suppl. RR 222, line 17 – 223, line 2.
2. Some voter's did not vote because the voting location they went to in the general election were closed and consolidated elsewhere. (not in the 6<sup>th</sup> amended final pleading) 3 Suppl. RR 219, line 2 – 220, line 9.
3. Michael Winn and Dana DeBeauvoir violated the criminal statute prohibiting interference with poll watchers. 3 Suppl. RR 221, lines 2-10. Election Code 221.013, App. 24

It is also clear the Court imposed sanctions for making the legal contention that the above-referenced facts were evidence that could be used to void an election. See also discussion in 3 Suppl. RR 223, lines 11-24.



Although there are findings of fact related the allegation that the Clerk violated the election code by counting and maintain only CVRs when she was required to maintain and count images of ballots cast, the trial court made it clear that it was not sanctioning for those allegations, 3 Suppl. RR 223, lines 8-10 and made no conclusion of law that doing so was sanctionable. Suppl. III CR 36 – 51. App.3.

The trial court's view of the factual and legal allegations in the various incarnations of the Contest Petitions is totally contrary to the clear great weight and preponderance of the evidence in the record as a whole. The fact that plaintiff lost the no evidence Motion for Summary Judgment (especially when that was an erroneous ruling) or that Appellant attempted to pursue an unpopular claim or one that someone else would not have pursued cannot form the basis of a sanctions order. *Foust, supra*, at page 3. App.29. In *Foust* the Court overturned a sanctions order based on the failure to produce evidence of causation at trial when there was no evidence of improper motive at the time the allegation was made.

Indeed, Appellant went through the unusual effort of attaching almost all of the evidence upon which the factual allegations of mistakes and irregularities in the election were based to each version of the Contest and

did several statistical analyses before filing this Contest. Other than the allegation that voting locations were changed this court need only look at the 6th Amended Contest, 1 CR 863, since the allegations therein were developed after “further investigation and discovery” and therefore obviously complied with Section 10.001(3), App.10. *Bader, Inc. v. Sandstone Prods. Inc., Supra*. The pleading should be read as a whole for a complete listing of evidence attached to it.

The pleading included evidence showing the following and more with respect to the evidentiary basis for its allegations:

1. Tally Audit logs showing multiple missing Logout entries 1 CR 1807, 1CR 1814, 1 CR 1863, 1 CR 1863.6;

2. Tally Audit Logs showing multiple "Invalid/Corrupt MBB Mobile Ballot Box errors (1 CR 1811, 1828, 1829, 1832, 1833, 1835, 1848, 1978 line 4 - 20, 1979 line 4.);

3. Judges' Booth Controller (JBC), Judge's Envelope cover states, "DO NOT PRINT THE TALLY" (1 CR 1865); Election Code § 66.051-054. App.18

4. Travis County Clerk, Dana DeBeauvoir's Deposition regarding no Results Tapes, (1 CR 2008, lines 13-15). Tally Audit Logs, 1967, 1968, 1974, 1975, 1976, 1977, 1978) Election Code § 66.051-.054. App.18

5. There were no zero tapes printed on the day of the election. As noted in the Sixth Amended Petition, p. 12-13 ¶¶ 38 – 41, (1 CR 871-872), the Texas Secretary of State requires the printing of Zero Tape Reports during Early Voting and on Election Day at each precinct/polling location. Zero Tape Reports are defined by the Texas Secretary of State as: “A Zero Tape is the tape that is printed when the voting machine is first set up at the polls. It is called a Zero Tape since *all contests* or propositions should have zero votes next to each name or question.” (2 CR 712; 2 Suppl. RR 78, line 9 to 79, line 13). Also, according to the Texas Secretary of State’s Election Advisory No. 2012-03(6)(g)(vi), 2 CR 707 and 726 related to Zero Tapes:

“Opening the Polls:

1. At a minimum print one zero tape from each applicable device, as follows: The presiding judge, an election clerk, and not more than two watchers, if one or more watchers are present, *shall* sign the zero tape. 2. Maintain zero tapes in a secure location to be returned with election materials (i.e. Ballot Box #4 or other secure means designated by the general custodian of election records).” (*emphasis added*)(Exhibit J, p. 8 (2 CR 707))

In Contestee’s Third Amended Motion for Sanctions, it is claimed that Appellant actually produced a zero tape as an Exhibit. (IV Suppl. CR 9)

The document referred to is not a Zero Tape, 1 CR 1875, and App.36, because it does not contain all of the information required to be in a Zero tape in order for it to perform its function. It does not contain the following information required by the Texas Secretary of State for Zero Tapes (2 CR 710):

“All contests should have zero votes next to each name” In fact, Contestant and Contestee’s District 4 is not listed on the partial tape and neither Pressley nor Casar is listed with zero votes next to their respective names,

“Zero Tape is printed when voting machine is first set up at polls” 1 CR 710. In fact, the partial tape Travis County produced was not printed when the voting machines were set up at the polls during Early Voting (December 1) or during Election Day (December 16). The partial tape was printed on November 26<sup>th</sup>, a week prior to Early Voting,

“The presiding judge...shall sign the Zero Tape” 1 CR 703, item vi.1.

The partial tape produced by Travis County and attached to Appellant’s pleading was not signed by an election judge. (1 CR 1875) See larger version App.36; Election Code § 66.051-.054. App. 18

Travis County Clerk testified at the Sanctions Hearing on June 18, 2015 that tapes were not printed on Election Day. 2 Suppl. RR 224, lines 3-8. She also testified that a letter exempting her from printing Zero tapes for the general election (2 CR 7618-7619) applied to the run-off even though she did not have a similar letter referring to the run-off. 2 Suppl.

RR 183 lines 5 - 16 which implies that the Clerk did not print zero tapes on the day of the election. As noted in the Sixth Amended Petition, P. 13 ¶ 42 (1 CR 872 ¶ 42), Appellant communicated with the Travis County Elections Division Director and was told no Zero Tapes would be printed for the run-off. In addition the testimony at the sanctions hearing made clear that Appellant had a lot of evidentiary support for her allegations that Zero tapes were not printed on the day of the election. 2 RR 48 to 50, line 5.

6. The allegation that voters were disenfranchised because their voting location was changed from the locations at which they voted in the general election was likely to have evidentiary support after a reasonable opportunity for further investigation and discovery given the statistical evidence indicating voters who always vote in run-offs did not vote in this one and numerous complaints to Pressley's phone bank and the likelihood that voters would be willing to testify about their disenfranchisement. 2 Suppl. RR 88, line 6 to 96, line 10, line 20. When it became clear that the voters who the statistical study indicated did not vote because of a change in voting locations would not be willing to testify and other expected reasonably likely evidentiary support would not materialize, Pressley dropped that claim from her final pleading since it turned out to be a

“hairball”. 2 Suppl. RR 88, line 6 to 96, line 10, line 20. This is precisely what the sanctions power is designed to encourage. To use removing an allegation after the anticipated evidence did not materialize, which should be rewarded not sanctioned, is an abuse of discretion. *Thottumkal v. McDougal*, 251 S.W.3d 715, 717 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)) and Texas Civil Practice and Remedies Code § 10.004(b). App.10. This evidence proves Appellant had the appropriate state of mind when she made this allegation and was not subject for sanctions for doing so. “The party moving for sanctions must prove the pleading party's subjective state of mind.” *Brozynski v. Kerney*, 2006 Tex. App. LEXIS 6817, 2006 WL 2160841, at \*4 (Tex. App.--Waco Aug. 2, 2006, pet. denied) (citing *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.--Houston [14th Dist.] 2002, no pet.)). “In the case of Section 10.001(1), the movant must show, and the Court must describe and explain, that the pleading was filed for the improper purpose of harassment. See TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1) ; *id.* § 10.005 (“A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.”)”. *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 708

(Tex. App.—Waco 2008, pet denied). Since Appellant clearly had an evidentiary basis for making the allegation or reasonably expected she would obtain witness statements or proof there were no signs posted redirecting voters from their original vote locations, the presumption of good faith was not overcome. Therefore, it was an abuse of discretion to sanction Appellant for making this allegation.

7. Appellee's counsel, in an effort to prejudice the trial court, continuously accused Pressley and Rogers of directly accusing Dana DeBeauvoir and Michael Winn of criminal conduct. 3 Suppl. RR 25, line 21 to 26, line 4. The pleadings do not directly accuse any particular election official of committing a crime. 1 CR 877, ¶¶ 60 - 62 and 886, ¶ 93 to 887, ¶ 96. The allegations of interference with poll watchers was supported by affidavit (2 CR 7620) and was only included because illegal conduct is one of the grounds a court looks at in deciding to overturn an election. Nowhere in these allegations is Dana DeBeauvoir even mentioned, and all that Mr. Winn is directly accused of doing is not answering phone calls. Indeed, there is no direct allegation that either had any personal involvement in the illegal activities. 1 CR 875-878. Therefore, sanctions based on the totally erroneous proposition that Appellant had no evidence or legal basis to accuse Dana DeBeauvoir and Michael Winn of criminal

conduct is arbitrary and capricious. To the extent there may have been some innuendo (which is denied) that the actions regarding the obstructing the poll watchers from viewing of printing of the CVRs, the pleading merely makes true allegations supported by affidavit and cites election code provisions and criminal statutes that arguably could apply to those facts. They certainly can be said to reasonably argue for an extension or interpretation of legal principals. The trial court and the Appellee never pointed out any cases holding that Rogers' application of the factual affidavits to the criminal code was erroneous. Put another way, there are no cases that hold that it is not a violation of the cited as criminal provision to commit the acts verified by the affidavits as having been committed.

Since there was some evidentiary support or such was reasonably likely to be obtained for each of the sanctioned allegations, the Court abused its discretion by sanctioning Pressley for making them.

In summary, Appellant conducted her own reasonable inquiry before filing the lawsuit. She looked at the Texas Constitution, Article VI and Election Code provisions defining an official ballot (Chapter 52) and requiring a computerized voting system to maintain images of them and compared that to the information appearing on the CVRs obtained at the recount (2 CR 5116). She looked into reports from other states about the



need for maintaining a cross check on the CVR consisting of the ballot that voters looked at when deciding who to vote for (2 CR 7515). She did a statistical analysis which indicated many voters did not vote in the run-off whose voting location was changed when they have always voted in run-offs in the past, and had reports from voters who refused to go to the consolidated location (2 CR 1580-1614), She was told by the Director of Elections that zero tapes and result tapes would not be printed on the day of the election (1 CR 872, ¶ 42) and obtained affidavits for poll watchers that were told the same thing (2 CR 7620). She saw instructions from the Clerk instructing election personnel not to print result tapes (1 CR 1865). She had information from her poll watchers stating they were denied access to certain parts of the process of printing the CVRs for the run-off and was present when it occurred (1 CR 886, ¶ 93). The trial court's holding that she did not make a reasonable inquiry is an abuse of discretion given the entire record in this case some of which is cited above. For the same reason, the trial court's holding that there was no evidentiary basis for these allegations and it was not reasonably likely discovery would produce any evidence was likewise arbitrary, capricious and unreasonable. Since Appellant did not engage in any conduct for which the court had the authority to impose sanctions, it committed reversible error in doing so.

As the Texas Supreme Court noted in *Low, supra* at 621: “We recognize that in some cases, a party may not have evidence that proves each specific factual allegation at the time a lawsuit is filed. Certainly, the law does not require proof of a case without reasonable time for discovery.” All of the allegations made in the first 5 contests had evidentiary support by the time discovery was over and the 6<sup>th</sup> amended contest was filed. This is not like *Low* when an examination of medical records showed undisputable evidence that the allegations made and sanctioned were untrue.

**Sub Issue 3. IF APPELLANT PRESSLEY WAS SUBJECT TO SANCTIONS, WERE THE SANCTIONS IMPOSED JUSTIFIED AND APPROPRIATE?**

Introduction

“When determining if the trial court abused its discretion, the appellate court engages...” in a two-part inquiry. First, we must ensure that the punishment was imposed on the true offender and tailored to remedy any prejudice caused. *Id.* at 839; see also *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 319 (Tex. App.--Texarkana 2006, pet. denied). Second, we must make certain that less severe sanctions would not have been sufficient. *Cire*, 134 S.W.3d at 839; *Save Our Springs*, 198 S.W.3d at 319-320.” *Thottumkal v. McDougal*, 251 S.W.3d 715, (Tex. App. Houston 14th Dist. 2008).

The trial court made findings and conclusions in a futile effort to show it had applied the factors the Texas Supreme Court recommended sanctioning courts to look at in its decision in *Low v. Henry*, 221 S.W.3d 609, 622 f/n 5 (Tex. 2007). However, the trial court misapplied the *Low* factors to the actual evidence in this case. It followed lock step with the unusual testimony of Appellee's attorney (unusual because he was clearly testifying to contested facts that were really his argument for sanctions and not evidence) even though he was not designated as an expert on sanctions over Appellant's counsel's objection. It is clear that this Court did not consider Mr. Herring's testimony on the *Low* factors and this Court should not either. 3 Suppl. RR 48, line 16 to 49, line 2.

By imposing sanctions in disregard of the basis for the considerations it was required by the Supreme Court in *Low, supra* to look at the trial court abused its discretion. Therefore, even if the Court could enter the sanctions order and even if sanctionable conduct had occurred, the factor's in *Low* required the court not to impose monetary sanctions and certainly not in the amounts it ordered.

## 2. The *Low* Factor

The first *Low* factor, the good faith or bad faith of the offender, weighs against awarding sanctions for alleging that certain actions of the Clerk's

office violated a criminal sanction in the Election Code under this factor. The trial court found Appellant is only responsible under this factor for the factual allegation that the clerk's employees did not let them see the entire process of printing the ballots. There is absolutely no evidence that this factual allegation was without evidentiary support. There is a presumption that the allegations and the pleadings were made in good faith. There was no evidence at the sanctions hearing or elsewhere that even tended to overcome this presumption. The complaint the trial court points to is about characterizing the interference truthfully alleged as having occurred as a criminal violation. Doing so was purely a legal conclusion drawn by Mr. Rogers from the true facts reported and alleged by Appellant. There is no evidence either Appellant or Rogers acted in bad faith. Indeed, Appellant's factual and legal positions in this case were made in good faith. The allegations that there was some interference with Poll Watcher's request to view the entire process involved in printing the CVRs for the recount was true and there was no evidence they were fake. Most importantly, Contestant and her official Recount Watchers were not allowed to monitor the integrity of where the CVRs were retrieved (1 CR 1803) the source where the retrieval occurred, or the copying of the CVR files to an aggregated pdf file. (1 CR 886 ¶¶ 93-96). The Election Code makes it

illegal to knowingly prevent a watcher from observing an activity the watcher is entitled to observe Election Code Section 33.061, App.34. Therefore, there was interference with poll watchers' activities and arguably this was a criminal violation of the Election Code.

It was Appellee's contention that the law does not empower poll watchers to observe anything except the printer's regurgitation of CVRs. The law is not clear on this point and it certainly was not sanctionable to allege the restrictions that actually did occur violated the law. Sanctions based on the first *Low* factor were an abuse of discretion.

The second *Low* factor weighs against imposing sanctions against Appellant. There was no evidence Appellant or Rogers acted willfully or negligently with vindictiveness in asserting that the clerk failed to print zero tapes on the day of the election since Michael Winn reported the same to Pressley and the Clerk had admitted she did not in her testimony. There is no evidence Appellant or Rogers acted willfully or negligently with vindictiveness in asserting or in relying on a statistical analysis and reports from irate potential voters in alleging what Pressley reasonably believed would develop convincing evidence that voters were disenfranchised by change in voting locations and when the discovery evidence did not develop as she hoped dropping that allegation. While she did allege true

occurrences, supported by third party affidavits that illegal activity did occur 2 CR 7620, 7333; a factor in determining whether the true outcome could be ascertained, she did not directly accuse any particular person responsible for that activity". (See earlier discussion not repeated here.)

Appellant conducted her own reasonable inquiry which evidences this case was filed in good faith and not out of the kind of ill will or bad motive which is the inquiry in the second *Low* factor. Since Appellant did not engage in any conduct for which the court had the authority to impose sanctions, it committed reversible error in doing so.

The third *Low* factor, the knowledge, experience, and expertise of the offender, may weigh slightly but insignificantly in favor of awarding sanctions against Rogers. Rogers is an experienced attorney who has handled election contests previously and holds himself out as being knowledgeable regarding election contests. This knowledge supports his use of the true facts alleged showing no images of ballots and numerous irregularities and mistakes could legally permit a court to exercise discretion to hold that the true outcome of the election could not be ascertained. In any event Roger's knowledge experience and expertise cannot justify sanctions against Pressley who justifiably relied on the ability of her lawyer. Although Pressley has a PhD in Chemistry, a business

owner and is actively involved in her community, and has appeared before Austin City Council at least thirty times. She was personally involved in proposing drafts to her attorney for portions of the Contests and discovery. This does not mean that Pressley had the knowledge, expertise and experience in election law and contests that would make any of her actions in this case sanctionable. The focus of this factor is clearly did the sanctioned person know the conduct was sanctionable? Clearly Pressley's resume does not fit into this factor. At best, it shows that she is not stupid and is active in her community. Chemists and business owners who are active in their community should not be more likely to be sanctioned for those reasons. Indeed her PhD in Chemistry weighs against sanction of any kind because it gives credibility to the statistical analysis she did as part of her reasonable inquiry before hiring Rogers to file this case since a chemistry doctorate clearly requires intimate knowledge of statistics.

The fourth *Low* factor, any prior history of sanctionable conduct on the part of the offender weighs against the imposition of sanctions. There is no evidence of such a prior history.

The fifth *Low* factor, the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct weighs against the imposition of sanctions because Appellee

has not paid any attorney's fees and will not be sued for them. 3 Suppl. RR 79, line 6 through 80, line 6. Appellee is not out of pocket for attorney's fees and will never be required to pay any attorney's fees. 3 Suppl. RR 79, line 6 through 80, line 6. There was no evidence at the sanctions hearing of the reasonableness of Appellee's out of pocket expenses or that they were incurred as the result of any particular misconduct by Appellant or Rogers.

The sixth *Low* factor, the nature and extent of prejudice, apart from out-of-pocket expenses weighs against the imposition of sanctions. There was no evidence of this at the hearing. The only relevant evidence was that he was never accused of any personal misconduct so he could not have been prejudiced.

The seventh *Low* factor, the relative culpability of client and counsel, is relevant as to which person to assess how much of the sanctions if sanctions were appropriate, the evidence of Appellant proving assistance to her attorney has little if any significance since many clients assist their attorneys for various reasons including their better familiarity with the facts and a hope of saving money. Her involvement was not much more than any client of providing information of the facts to the attorney and being sure they were accurately represented in the pleadings. (2 Suppl. RR 42



line 23 to 43, line 25). These normal activities by Appellant should not weigh in favor of sanctions in the *Low* analysis of sanction imposition. There was no evidence of any action by Appellant contributed to the pleading found by the trial court to be sanctionable (zero tapes, voting locations or refusing to allow poll watchers and the candidate to see various aspects of the printing of the CVRs). Indeed all of Appellant's factual allegations were true and had some evidentiary support as outlined and attached to the various Contest pleadings and as testified to at the sanctions hearing.

The eighth *Low* factor, the risk of chilling the specific type of litigation involved, also weighs heavily against awarding sanctions. This factor weighs against awarding sanctions of \$90,000.00 for filing an election contest 44.44% of which are assessed against the Candidate because doing so will obviously have a chilling effect on any decision by another candidate to exercise their statutory right to file an election contest for fear that a court who holds they failed to prove their case by clear and convincing evidence at trial or in response to a Motion for Summary Judgment will impose crippling sanctions on them. The consequences of chilling a candidate from even attempting to prove the wrong candidate is guiding our public policy is so consequential that the huge monetary

sanctions awarded in this case would allow a person to serve as an elected official no matter how many election laws were violated and no matter how many mistakes and irregularities occurred. The trial court's award is designed to prevent a litigant from making true allegations that a court eventually decides do not persuade the court to call for a new election without incurring huge sanctions should the court rule against the candidate. What lawyer will ever take an election contest case if he will expose himself and his firm to \$50,000 in sanctions? This case, if it stands, will ring the death knoll of the right to contest elections provided by our Legislature. This factor is designed to be sure sanctions will not have the effect of discouraging citizens from exercising their constitutional, statutory or common law rights of access to courts. The trial court's action has the precise effect sought to be prevented by proper consideration of this factor.

The ninth *Low* factor, the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction, also weighs against awarding sanctions. Appellant has very few assets that can be used to pay sanctions and Appellee offered no evidence of the extent to which she needs her assets to pay normal living expenses. This Court can see that what she has and her husband earns is needed to start a business (the LLC assets), and to live on. There is no evidence she still has any of

the \$40,000 she raised to pay expenses in this case. The undisputed evidence is that her costs have greatly exceeded that amount already. 2 Suppl. 68, line 20 through 70, line 16. The \$170,000 that belongs to an independent entity is not hers and could not be subject to seizure to pay the sanctions. 2 Suppl. RR 67, line 23 – 68, line 13. Here there is no evidence that she has any of the profit from the sale of her home or how much of the sales price was profit. 2 Suppl. RR 63, line 14 through 64, line 14. She is no longer making a salary. 2 Suppl. RR 70, lines 11 - 14. Her husband's earning capacity is not an asset that can be currently liquidated to pay sanctions and does make her more able to pay monetary sanctions. She has basically has \$1,000 in assets, \$6,000 counting her husband's assets. (2 Suppl. RR 65, line 12 to 66, line 19) The \$40,000 award is greatly in excess of the assets she has available to pay the sanctions. Appellee did not identify or prove Appellant's existing liabilities and therefore, a full accounting of her net assets could not be assessed by the Court. Appellee accepted the burden of proving liabilities to show net worth (2 Suppl. RR 61, lines 7-11) and never did it. (2 Suppl. RR 61 line 1 to 62, line 19). The focus of this *Low* factor is to be sure the trial court does not impose sanctions in an amount absent proof there are current assets of the person being sanctioned to pay them without bankrupting her. The court

did not have enough evidence to ascertain whether or not it was complying with this *Low* factor before imposing the sanctions imposed in this case.

The tenth *Low* factor, the impact of the sanction on the offended party, including the offended person's need for compensation, also weighs against awarding sanctions. There is no evidence of Appellee's need for compensation nor that the sanction would have a positive impact on him. Since it has been made clear that he is not accused of any wrongdoing, he does not point to an award of sanctions as evidence of vindication.

The eleventh *Low* factor, the relative magnitude of sanction necessary to achieve the goal or goals of the sanction, also weighs against awarding sanctions. The Texas Civil Practice and Remedies Code Section 10.004 states that the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. There cannot be any more challenges before the court of appeals rules so either there will be no more suits because the CVR only practice violates the election code or everyone will know this is not a winnable argument and will not go through the unnecessary expense of litigation. Furthermore, an award of sanctions of \$90,000 is manifestly greater than is necessary to deter the conduct in this case while not chilling future election contest proceedings. The award of sanctions calculated by attorney's fees

requires that there was no reasonable inquiry made. As discussed above, Pressley made a reasonable inquiry into the truth of her allegations and Rogers asserted causes of action based on those facts described by the election code and several cases holding that mistakes, illegal conduct and irregularities alone could be relied on by a trial court in calling for a new election without abusing its discretion. In addition, the amount of sanctions was manifestly excessive since this case involved responses to written discovery (erroneously cut off by the court) and two depositions followed by the granting of summary judgement. It was not a jury trial or even a trial before the Court. As described above, the magnitude of the sanctions in this case will chill future candidates from exercising their statutory, constitutional and common law rights and lawyers from representing them and clearly not warranted by the actions found by the Court to be sanctionable.

The twelfth *Low* factor, burdens on the court system attributable to the misconduct, weighs against awarding sanctions. There is no evidence that this no evidence Summary Judgment burdened the Court system any more than any other election contest. The judge would have to be appointed and hear the case even if allegations of criminal conduct, voter

disenfranchisement and failure to print CVRs on the day of the election were not issues in this case.

The thirteenth *Low* factor, the degree to which the offended person's own behavior caused the expenses for which recovery is sought, weighs insignificantly against awarding sanctions. Appellant admits that Appellee did nothing wrong in the conduct of the election and has never accused him of any misconduct.

A review of the *Low* factors that the Court was required to look to as guiding rules and principals in deciding whether to impose sanctions and if so how much shows the court abused its discretion in imposing the sanctions of \$90,000 for a case at the point of granting a summary judgment (\$40,000 against Pressley and \$50,000 against her lawyer).

**Sub Issue 4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING SANCTIONS BASED ON ATTORNEY'S FEES IN THE EVENT OF AN UNSUCCESSFUL APPEAL WITHOUT ANY EVIDENCE?**

The trial court, in another exhibition of arbitrary and capricious action and in a total disregard of guiding principles imposed conditional sanctions on Appellant if she was not successful in pursuing her appeal. Suppl. IV CR 54 App.3. There was no request for these sanctions and absolutely no evidence of what would be reasonable necessary attorney's fees that would be incurred in the event of appeal.

Awarding attorney's fees without any evidence to support them is a clear abuse of discretion. *Great American Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907; (Tex. 1966); *Lesikar v. Rappeport*, 33 S.W.3d 282, 308 (Tex. App.—Texarkana 2000 no pet.) In addition as pointed out above Appellee would not be pressed to pay any attorney's fees. Furthermore, a great portion of the appeal is devoted to the issue of whether a CVR satisfies the statutory requirement of maintaining an image of the ballot for which no sanctions were found warranted.

Finally sanctions for filing a frivolous appeal is within the exclusive jurisdiction of this Court. Texas Rules of Appellate Procedure, Rule 45. While a trial court may award attorney's fees for a losing appeal when the law allows it to award attorney's fees, (there is no statutory authority for awarding attorney's fees in an election contest) a trial court is not vested with jurisdiction or discretion to award sanctions for appealing its decision. The trial court in this case therefore abused its discretion in awarding sanctions measured by attorney's fees on appeal without any evidence of that amount or reasonableness thereof and contingent on what happens in the future with respect to the disposition of an appeal.

## **CONCLUSION**

The trial court committed reversible error by granting Appellee's No Evidence Motion for Summary Judgment because there was more than a scintilla of evidence that the clerk counted CVRs instead of and without images of ballots and that there were mistakes, irregularities, and other evidence that tended to prove that the true outcome of the election could not be ascertained. Therefore, this Court should reverse the trial court's judgment and remand it to the trial court for trial. The trial court also committed reversal error in awarding sanctions in the absence of evidence that sanctionable conduct occurred and in violation of the *Low* factors and appellate sanctions measured by attorney's fees without any evidence. Therefore, the sanctions order of the court should be reversed and rendered that Appellee take nothing by his request for sanctions.

## **PRAYER**

Based on the record and the law cited herein, Appellant prays this honorable Court to reverse the trial courts judgment granting Appellee a summary judgment and to remand it with instructions to permit requested discovery of the ESlate manual, and the JBC and to examine the eSlate program and its functioning in tallying the votes in this election and conduct further proceedings consistent with the holding that CVRs do not satisfy the



statutory requirement of maintaining a ballot image and that the trial court may void the election if it believes in its discretion that irregularities and mistakes makes it impossible to ascertain the true outcome of the election without requiring appellant to identify particular votes that were affected. Appellant also asks the court to reverse and render that Appellee take nothing by its Motion for Sanctions.

Respectfully Submitted,

/s/ Mark A. Cohen

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***ATTORNEY FOR APPELLANT  
DR. LAURA PRESSLEY***

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the requirements of Texas Rules of Appellate Procedure 9.4(i)3 for type-volume limitation because this brief contains 14,315 words, excluding the parts of the brief exempted by Texas Rules of Appellate Procedure 9.4(i)3. This brief complies with the typeface requirements of Texas Rules of Appellate Procedure 9.4(i)3 because this brief has been prepared in a proportionally spaced sans serif typeface using Microsoft Word 2010 in 14 pt. Arial.

/s/ Mark A. Cohen

Mark A. Cohen

Attorney for Laura Pressley, Appellant

Dated: September 16, 2015

## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 16th day of September, 2015.

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**PRO SE**

/s/ Mark A. Cohen  
Mark A. Cohen

# APPENDIX

## APPENDIX TABLE OF CONTENTS

1. Original Final Judgment 5/26/15
2. Amended Summary Judgment Order 6/24/15
3. 7/23/15 Judgment with Sanctions
4. Notice of Accelerated Appeal
5. First Amended Notice of Accelerated Appeal
6. Request for Amended Findings of Fact and Conclusions of Law
7. Order on Request for Amended and Additional Findings
8. Second Amended Notice of Accelerated Appeal
9. Texas Constitution, Art VI. § 4
10. Ch 10 Civil Practice and Remedies Code
11. Texas Election Code § 2.001
12. Texas Election Code § 33.056
13. Texas Election Code § 52.001
14. Texas Election Code § 52.003
15. Texas Election Code § 52.062
16. Texas Election Code § 56.063
17. Texas Election Code § 52.031
18. Texas Election Code § 66.051-054
19. Texas Election Code § 128.001
20. Texas Election Code § 213.016
21. Texas Election Code § 214.049 e
22. Texas Election Code § 221.003
23. Texas Election Code § 221.012
24. Texas Election Code § 221.013
25. Texas Rule of Appellate Procedure 45
26. Texas Rule of Civil Procedure 11
27. Rules of Civil Procedure 192
28. Texas Rules of Civil Procedure 193.4
29. Foust case
30. Texas Election Code § 231.009
31. Texas Election Code § 52.070

- 32. Texas Election Code § 52.064
- 33. Texas Election Code § 213.013
- 34. Texas Election Code § 33.061
- 35. Texas Rules of Civil Procedure 329b
- 36. Big Version of Tape Attached to Contest
- 37. Texas Election Code § 52.075

NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

v.

GREGORIO "GREG" CASAR  
Contestee

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

MAY 26 2015

At  
Value Price District Clerk

ORDER

The Court has considered Contestee Casar's Amended Motion for Summary Judgment, Contestee's Supplement to his Amended Motion for Summary Judgment, Contestee's No-Evidence Motion for Summary Judgment, Contestant's Response to Contestee's Amended and Supplemented Motion for Summary Judgment, the exhibits cited in those documents, and the parties' arguments, and the Court rules as follows:

1. ~~Casar's Amended Motion for Summary Judgment is GRANTED.~~
2. Casar's No-Evidence Motion for Summary Judgment is GRANTED.
3. Under Texas Election Code § 221.012(a), the Court declares that the true outcome of the December 16, 2014 runoff election is that Contestant Gregorio "Greg" Casar was elected to the Austin City Council District 4 seat.
4. This action is hereby dismissed in its entirety.

IT SO ORDERED.

SIGNED this the 26 day of May, 2015.

  
PRESIDING DISTRICT JUDGE

*This Order Resolves All the Issues Between  
ALL the Parties and is Appealable*

*DHMY*

LAURA PRESSLEY  
Contestant

v.

GREGORIO "GREG" CASAR  
Contestee

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICT

Amended Summary Judgment Order

The Court has considered Contestee Casar's Amended Motion for Summary Judgment, Contestee's Supplement to his Amended Motion for Summary Judgment, Contestee's No-Evidence Motion for Summary Judgment, Contestant's Response to Contestee's Amended and Supplemental Motion for Summary Judgment, the exhibits cited in those documents, and the parties' arguments, and the Court FINDS and ORDERS as follows:

1. Casar's No-Evidence Motion for Summary Judgment is GRANTED.
2. Under Texas Election Code § 221.012(a), the Court DECLARES that the true outcome of the December 16, 2014 runoff election is that Contestee Gregorio "Greg" Casar was elected to the Austin City Council District.
3. Contestee Casar's motion for sanctions against Contestant Laura Pressley and her Counsel remains pending before the Court and will be considered and decided by the Court in a separate order.
4. This Order amends and replaces the Court's prior May 26, 2015 Order.

IT SO ORDERED.

SIGNED this the 24 day of June, 2015.

  
JUDGE DAN MILLS

JUL 23 2015

At 10:50 A.M.  
Velva L. Price, District Clerk

NO. D-1-GN-15-000374

LAURA PRESSLEY

Contestant

v.

GREGORIO "GREG" CASAR

Contestee

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICTAmended Final Judgment

On May 26, 2015, the Court entered a final summary judgment order granting Contestee Casar's No-Evidence Motion for Summary Judgment. On June 12, 2015, Contestee Casar timely filed his Third Amended Motion for Sanctions to amend the May 26, 2015 Order to include an award of sanctions. On June 24, 2015, the Court entered an Amended Summary Judgment Order that amended and replaced the May 26, 2015 Order. The Court now enters this Amended Final Judgment and FINDS and ORDERS as follows:

1. Contestee Casar's Third Amended Motion for Sanctions is GRANTED.
2. Pursuant to Texas Civil Practice and Remedies Code § 10.005, the Court entered an order on July 23, 2015 that describes the conduct the Court has determined violated Texas Civil Practice and Remedies Code § 10.001, and explains the basis for the sanctions imposed. The Court incorporates by reference that Order herein.
3. Contestee Casar's No-Evidence Motion for Summary Judgment is GRANTED.
4. The Court incorporates by reference the June 24, 2015 Order granting Casar's No-Evidence Motion for Summary Judgment.



5. Under Texas Election Code § 221.012(a), the Court DECLARES that the true outcome of the December 16, 2014 runoff election is that Contestee, . . . . .  
Gregorio "Greg" Casar was elected as the Austin City Council District 4 member.
6. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant Laura Pressley individually monetary sanctions in the amount of \$ 40,000.00, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
7. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant's counsel David Rogers individually monetary sanctions in the amount of \$ 50,000.00, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
8. Pursuant to Texas Civil Practice and Remedies Code §§ 10.002 and 10.004, Contestee Casar shall recover from Contestant Laura Pressley and Contestant's counsel David Rogers jointly and severally his out-of-pocket expenses in the amount of \$7,794.44, together with postjudgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
9. If either Contestant Laura Pressley or Contestant's counsel David Rogers unsuccessfully appeals this Amended Final Judgment, pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall

also recover from Contestant Laura Pressley, if unsuccessful on appeal,

and Contestant's counsel David Rogers, if unsuccessful on appeal,

additional monetary sanctions in the amount of \$ 25,000.00, if appealed to the Court of Appeals; \$10,000.00, if a petition for review is filed in the Supreme Court of Texas; \$15,000.00, if full briefing is requested by the Supreme Court of Texas; and \$15,000.00, if oral argument is granted at the Supreme Court of Texas. These additional monetary sanctions shall be imposed jointly and severally on Contestant Laura Pressley and Contestant's counsel David Rogers, if both are unsuccessful on appeal.

10. Court costs are awarded in favor of Contestee Casar and against Contestant Laura Pressley, together with post-judgment interest from the date of this Amended Final Judgment until paid at the rate of five percent (5.0%) per annum.
11. This order finally disposes of all claims and all parties and is appealable.
12. All relief not expressly granted in this Amended Final Judgment is denied.

IT SO ORDERED.

SIGNED this the 23<sup>rd</sup> day of July, 2015.

  
JUDGE DAN MILLS

Filed in The District Court  
of Travis County, Texas

JUL 23 2015

At 10:50 AM.  
Velva L. Price, District Clerk

NO. D-1-GN-15-000374

LAURA PRESSLEY

Contestant

v.

GREGORIO "GREG" CASAR

Contestee

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICTOrder

The Court has considered Contestee Casar's Third Amended Motion for Sanctions, Contestant Laura Pressley's ("Pressley") Response to Contestee's Third Amended Motion for Sanctions, Attorney David Rogers' ("Rogers") Response to Contestee's Motion for Sanctions, Contestee's Reply to Rogers' Response, Rogers' Sur-Reply to Rogers Response to Contestee's Third Amended Motion for Sanctions, the pleadings and evidence in the record, and all of the evidence and argument offered at the evidentiary hearings on June 18, 2015 and June 24, 2015. The Court FINDS and ORDERS as follows:

1. Contestee Casar's Motion for Sanctions is GRANTED.
2. The Court finds that sanctions against David Rogers are justified and proper under Chapter 10 of the Civil Practices and Remedies Code.
3. The Court finds that sanctions against Laura Pressley are justified and proper due to her participatory role in this litigation under Chapter 10 of the Civil Practices and Remedies Code.
4. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant Laura Pressley individually monetary sanctions in the amount of \$ 40,000.00.

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5. Pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall recover from Contestant's counsel ~~David Rogers individually monetary~~ sanctions in the amount of \$ 50,000.00.

6. If either Contestant Laura Pressley or Contestant's counsel David Rogers unsuccessfully appeal this Order, pursuant to Texas Civil Practice and Remedies Code § 10.004(c)(3), Contestee Casar shall also recover from Contestant Laura Pressley, if unsuccessful on appeal, and Contestant's counsel David Rogers, if unsuccessful on appeal, additional monetary sanctions in the amount of \$ 25,000.00, if appealed to the Court of Appeals; \$10,000.00; if a petition for review is filed in the Supreme Court of Texas; \$15,000.00 if full briefing is requested by the Supreme Court of Texas; and \$15,000.00 if oral argument is granted at the Supreme Court of Texas. Contestant Laura Pressley shall pay these additional monetary sanctions only if she is unsuccessful on appeal, and David Rogers shall pay these additional monetary sanctions only if he is unsuccessful on appeal. These costs were derived from reviewing similar awards for cost of appeals in the following cases. *Marsalise v. Wallace*, 2005 WL 1116010 (Tex. App.—Austin, May 12, 2005, no pet.); *R&R Resources Corp. v Echelon Oil & Gas, LLC*, 2010 WL 5575919 (Tex. App.—Austin, Jan 14, 2011, pet denied) ; *John Kleas Co., Inc, v Prokop*, 2015 WL 1544797 (Tex. App.—Corpus, April 2, 2015, no pet.)

7. Pursuant to Texas Civil Practice and Remedies Code §§ 10.002 and 10.004, Contestee shall recover from Contestant Laura Pressley and Contestant's counsel David Rogers his reasonable expenses of \$ 7,794.44. Contestant Laura Pressley and Contestant's counsel David Rogers shall be jointly and severally liable for these expenses.

8. In compliance with Section 10.005 of the Civil Practice and Remedies Code, the Court makes the following Findings of Fact and Conclusion of Law supporting this Order of sanctions:

#### **FINDINGS OF FACT**

9. In November 2002, Travis County began using the Hart Intercivic eSlate system (the "Hart eSlate System") as an electronic voting system.

10. Since November 2011, Travis County has used a countywide voting system that employs central voting centers. Instead of requiring voters to vote at their home precinct polling locations, vote centers allow all registered voters in Travis County the option of voting at any of the county's polling locations on Election Day.

11. Pressley and Casar were among eight candidates for the District 4 seat of the Austin City Council at the November 4, 2014 general election. In the general election, Casar received the highest number of votes (3,272 or 38.63%), Pressley received the second-highest (1,826 or 21.56%), and the remaining votes were distributed among the other six candidates.

12. Some voting locations in the City of Austin were changed between the general and the runoff elections as is normal practice for a runoff election. For the December 16, 2014 runoff, there were 136 citywide voting locations available to all City of Austin voters. The City of Austin gave the public notice of the voting locations for the runoff election and an opportunity to comment on the proposed locations. On November 13, 2014, the Austin City Council posted the agenda of the November 18, 2014 Special Called Meeting of the Austin City Council. The agenda included setting the run-off election and making provisions for the runoff election. On Tuesday, November 18, 2014,

the Austin City Council held the special called meeting and approved an ordinance ordering the runoff election. A list of all polling locations for the runoff was attached to the City Council's approved ordinance. The locations were also posted at City Hall and in the office of the City Clerk, as well as published in the newspaper. Additionally, the City of Austin and the Travis County Clerk websites both posted information about the runoff election and a list of polling locations.

13. At the November 18, 2014 Austin City Council meeting, neither Pressley nor any of her ten campaign workers attended the meeting to lodge any complaint or objections about the changes in voting locations. Pressley could have attended the meeting but did not. Over the years, she has attended and commented at 30 or more Austin City Council Meetings. She knows where the agendas are posted, knows how to read them in advance, and is familiar with the process for commenting at a Council meeting.

14. Casar won the December 16, 2014 runoff election by a margin of almost 65% to 35%; the difference in their vote totals was 1,291 votes. 4,417 votes were cast in the District 4 runoff election. Of those votes, 480 were mail-in ballots. The remaining 3,937 ballots were cast using Travis County's chosen electronic voting system, the Hart eSlate System.

15. As required by Chapter 122 of the Election Code, and after an analysis of the Hart eSlate System by a team of computer and election law experts, the Secretary of State reviewed, approved, and certified the Hart eSlate System. The Secretary of State found that the Hart eSlate System fully complied with Election Code requirements and, of particular relevance in this case, was "capable of providing records from which the operation of the system may be audited[.]"

16. On January 5, 2015, the day before Casar was to be sworn-in, Pressley filed a recount petition with the Secretary of State. Before the recount took place, County Clerk

Dana DeBeauvoir offered to run an audit of the election results for Pressley. An audit would have provided much more detailed information about the electronic votes than a recount, including many of the questions Pressley has presented in this lawsuit. Pressley refused DeBeauvoir's offer and demanded a recount. An audit would have provided a reasonable opportunity to view issues raised in the lawsuit and would have allowed for a reasonable inquiry into many of the allegations alleged by the Contestant in this lawsuit to determine if there was merit to any of such claims.

17. On January 6, 2015, Travis County conducted a manual recount of all early, election day, mail-in, and provisional ballots. The recount confirmed the election result. Jay Brim, the Chair of the Recount Committee, and Dana DeBeauvoir, the Travis County Clerk, supervised the recount. For votes cast electronically, the recount team printed off the Cast Vote Records (CVRs), also called Ballot Images. Pressley witnessed the printing of the Cast Vote Records. All votes were then manually recounted. Mr. Brim found that the totals in all precincts matched those in the original canvas, and that the number of voters matched the number of ballots cast. He declared that Casar remained the victor of the election.

18. The Secretary of State had a representative present at the recount—Christina Adkins. During the recount, Pressley complained to Ms. Adkins that the Cast Vote Records were not "images of ballots cast," and pointed to the specific provisions of the Election Code that she believed were germane. Ms. Adkins witnessed the County's use of

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the Cast Vote Records for the recount, disagreed with Pressley's interpretation of the Election Code, and refused to challenge the use of the Cast Vote Records in the recount.

19. After the recount, Pressley lodged several complaints regarding the recount with the Secretary of State. One of Pressley's complaints was that she and her poll watchers were not allowed to be present at the printing of the ballots as Pressley believed she was entitled to view the source, properties, retrieval and counting of the ballots. In its January 20, 2015 response letter to Pressley, the Secretary of State dismissed this complaint and confirmed that Pressley had been present when the "ballot images (also known as 'cast vote records')" were printed:

You state that Travis County conducted activities such as extracting data from the Hart electronic voting system, compiling ballot images onto a centralized system, printing ballot images (also known as "cast vote records"), and sorting by mail ballots before the recount was scheduled to begin . . . . [W]e agree with you that you and your representatives under Section 213.013(b) were 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 re-print the ballot images in the presence of you and your watchers.

20. Responding to a subsequent complaint from Pressley, the Secretary of State again made the same point in another letter, dated January 27, 2015. That letter also noted that an inspector from the Secretary of State's office had confirmed the printing of the ballot images:

You have stated that upon your arrival, you discovered that ballot images had already been printed. You alerted Travis County to the issue and reminded them that you and your watchers were entitled to be present at the printing. In response, Travis County began anew with the printing of the ballot images in the presence of you and your watchers, and only the ballot images printed in your presence were used in the recount. This information is confirmed by the



inspector sent by our office to attend the recount. Therefore, our office believes you and your watchers were able to witness the printing of all ballot images used in verifying the vote count in your race.

21. With the Hart eSlate System, the permanent record of the vote cast is known as a Cast Vote Record or CVR. A CVR is a data field representation depicting which votes were cast on each voting device. The Cast Vote Records are used for counting votes and a visual representation of the CVR can be printed in the event of a recount.

22. The U.S. Election Assistance Commission is an independent, bipartisan commission charged with developing guidance to meet the requirements of the Help America Vote Act of 2002. It is charged by statute with adopting voluntary voting system guidelines and to serve as a national clearinghouse of information on election administration. In its Glossary of Key Election Terminology, the U.S. Election Assistance Commission defines "Cast Vote Record" as "a ballot image when used to refer to electronic ballots."

23. The Texas Secretary of State defines "Cast Vote Record" as a Ballot Image. Ten days before Pressley filed this lawsuit, the Secretary of State expressly stated in its January 20, 2015 letter to Pressley that "ballot images" are also known as "cast vote records."

24. As required by the Election Code, Travis County and the City of Austin used the Secretary of State's definitions when interpreting the Election Code in this case.

25. On January 31, 2015, Pressley filed her Original Contest of Election against Casar, seeking to overturn the results of the runoff election for the Austin City Council District 4 seat. Pressley's Original Contest was signed by her counsel David Rogers.

26. In paragraphs 32 through 38, the Original Contest alleged that the Hart eSlate

System did not comply with the Texas Election Code because it could print only Cast

Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas

Election Code. In paragraph 13, the Original Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 14 and 15, the Original Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 26 through 44, the Original Contest alleged that procedural irregularities occurred during the recount.

27. On February 18, 2015, Pressley filed her Second Amended Contest. In paragraphs 31 through 37, the Second Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas Election Code. In paragraph 13, the Second Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 11 and 14, the Second Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 26 through 44, the Second Amended Contest alleged that procedural irregularities occurred during the recount.

28. On February 27, 2015, Pressley filed her Third Amended Contest. In paragraphs 43 through 53, the Third Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas Election Code.

In paragraphs 12 through 23, the Third Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Third Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 41 through 66, the Third Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

29. On March 12, 2015, Pressley filed her Fourth Amended Contest. In paragraphs 43 through 53, the Fourth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas Election Code. In paragraphs 12 through 23, the Fourth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Fourth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 41 through 66, the Fourth Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

30. On April 16, 2015, the deposition of Pressley took place. At her deposition, Pressley admitted that she could not identify a single voter who was disenfranchised by the change in voting locations for the runoff election. Pressley did testify she had spoken with people who claimed they had difficulty in voting, but she was not able to obtain even one affidavit from one voter who claimed to have been disenfranchised. Pressley

also admitted that she did not know what a Cast Vote Record was and that the U.S.

~~Election Assistance Commission, the Texas Secretary of State, Travis County, and the~~

City of Austin all reject her definition of "ballot image." Pressley also testified that she did not know if zero tapes had been printed, where they may have been printed, or when.

31. On April 20, 2015, Pressley filed her Fifth Amended Contest. In paragraphs 49 through 59, the Fifth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas Election Code. In paragraphs 12 through 29, the Fifth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 41 and 43, the Fifth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 47 through 74, the Fifth Amended Contest alleged that procedural irregularities occurred during the recount that materially affected the election results.

32. Pressley filed her final and Sixth Amended Contest on May 19, 2015. In paragraphs 3, 13, 82, 84, and 97 through 138, the Sixth Amended Contest alleged that the Hart eSlate System did not comply with the Texas Election Code because it could print only Cast Vote Records, which Pressley claimed were not "images of ballots cast" under the Texas Election Code. In paragraphs 3, 4, 8, 42 through 52, and 64, the Fifth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State. In paragraphs 82 through 101, the Fifth Amended Contest alleged that procedural irregularities occurred during the recount that

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materially affected the election results. In paragraphs 93 and 94, Pressley alleged that

~~Travis County Director of Elections Michael Winn committed a criminal violation by not~~

allowing Pressley and her poll watchers to view the source, properties, and copying of the CVR files during the recount. Pressley dropped from her Sixth Amended Contest her allegations that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election.

33. Travis County produced documents in this case on April 22 and 23, 2015. County Clerk Dana DeBeauvoir was deposed on May 11, 2015. The due date for the Motion for Summary Judgment response was May 19, 2015. On May 22, 2015, County Clerk Dana DeBeauvoir made changes to her deposition testimony.

34. On May 26, 2015, after briefing and a hearing, this Court granted Casar's no-evidence summary judgment motion, which establishes that Pressley failed to raise any genuine issue of material fact in response to Casar's motion.

35. Rogers had prior experience working on election contest cases. According to Rogers, most successful election contests involved a margin of victory of less than 50 votes.

36. Before filing the Contests, Rogers had never heard of an election contest case in which a contestant had overcome a margin of victory of 1,291 votes.

37. Before filing the Contests, Rogers was aware of the Texas Supreme Court decision in *Andrade v. NAACP*, 345 S.W.3d 1 (Tex. 2011), in which the Texas Supreme Court rejected an equal-protection challenge to the Hart eSlate System and held that "[t]he Secretary [of State] made a reasonable, nondiscriminatory choice to certify the

eSlate, a decision justified by the State's important regulatory interests.”

38. The Cast Vote Record is a “ballot image” as that term is used in the Texas Election Code.

39. The U.S. Election Assistance Commission and Texas Secretary of State have consistently stated that for electronic voting, the Cast Vote Record is the Ballot Image. The Secretary of State stated this to Pressley explicitly in its January 20, 2015 letter to her.

40. The City of Austin and Travis County define a Cast Vote Record as a Ballot Image.

41. Texas Election Code § 52.075 gives the Secretary of State authority to prescribe the form and content of ballots for electronic voting machines.

42. Texas Election Code § 129.002 of the Election Code gives the Secretary of State the authority to implement Direct Recording Electronic voting systems that utilize Cast Vote Records.

43. Pressley and Rogers did not cite the 1990 Federal Election Commission Performance and Test Standards until the Sixth Amended Contest, and these standards do not distinguish a Ballot Image from a Cast Vote Record. The 2002 Federal Election Commission Report entitled “Voting Systems Standards Volume I – Performance Standards” defines Ballot Image as “an electronic record of all votes cast by the voter.”

44. Pressley and Rogers did not cite the 2007 Source Code Review of the Hart Intercivic Voting System until the Sixth Amended Contest, and this report does not distinguish a Ballot Image from a Cast Vote Record.

45. The allegation that the consolidation or changing of voting locations for the runoff

election disenfranchised District 4 voters is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.).

46. There is no evidentiary support for the allegation that the consolidation or changing of voting locations for the runoff election disenfranchised District 4 voters.

47. The Texas Secretary of State repeatedly rejected Pressley's complaints regarding alleged irregularities at the recount, including both at the recount itself and in multiple subsequent letters responding to Pressley's complaints.

48. The allegation that irregularities allegedly occurred during the recount materially affected the outcome of the runoff election is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

49. There is no evidentiary support for the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.).

50. The allegations that Travis County Director of Elections Michael Winn committed a criminal violation are not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law.

51. There is no evidentiary support for the allegation that Travis County Director of Elections Michael Winn committed a Class A misdemeanor criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the

CVR files at the recount. The Election Code provides that at a recount, the candidate and her representatives are entitled to be present “during the printing of the images [of ballots cast].” Pressley and her poll watchers were present while the Travis County recount team printed all of the CVRs for the recount. The Secretary of State confirmed this in its January 27, 2015 letter to Pressley, stating “Travis County began anew with the printing of the ballot images in the presence of you and your watchers, and only the ballot images printed in your presence were used in the recount. This information is confirmed by the inspector sent by our office to attend the recount. Therefore, our office believes you and your watchers were able to witness the printing of all ballot images used in verifying the vote count in your race.”

52. Pressley and Rogers failed to exercise due diligence in investigating the evidentiary support for each of the allegations in the Contests before filing them.

53. Pressley testified that she does not know what a “Cast Vote Record” is.

54. Pressley acknowledged that the U.S. Election Assistance Commission, the Texas Secretary of State, Travis County, and the City of Austin all reject her definition of “ballot image.”

55. Over 100 counties in Texas use the Hart eSlate System. County Clerk DeBeauvoir testified that, before this lawsuit, she had never heard anyone ever allege that CVRs are not ballot images for purposes of electronic voting. She also serves on the Standards Board for the U.S. Election Assistance Commission.

56. County Clerk DeBeauvoir fully complied with the Texas Election Code and Secretary of State procedures in conducting the general and runoff elections.

57. Pressley failed to exercise her right to comment on or object to any of the voting



location changes at the Austin City Council meeting.

..... 58. ~~Consolidating voting locations between a general election and a runoff election is~~.....

a routine and entirely legal and proper practice. Such changes occur for a variety of legitimate reasons, including to achieve cost and staffing efficiencies due to the lower voter turnout and fewer number of candidates generally associated with runoffs. In this election, a total of 304 candidates were on the ballot countywide at the November 4, 2014 general election. By contrast, in the runoff election in District 4, only four races were on the ballot: this Council race, the Mayor's race, and 2 school district races—a total of eight candidates.

59. Because Travis County uses countywide voting centers, any voter in Travis County could vote at any one of the 136 voting locations across the county for the runoff election. In District 4 alone, there were 9 voting centers within the district, as well as 7 centers located within a five-minute drive of the district and 17 centers located within a ten-minute drive of the district.

60. Pressley testified if a voter had to drive as little as 20 seconds to a new voting location, that voter was disenfranchised.

61. Rogers did not identify a single witness who could or would testify that changes in voting locations had disenfranchised District 4 voters.

62. When Pressley was deposed on April 16, 2015, she could not identify a single voter who was disenfranchised as a result of the changes in voting locations. Four days later, on April 20, 2015, she filed her Fifth Amended Contest, which alleged in Paragraph 29 that 1,108 voters, at least, were disenfranchised as a result of the change in voting location.

63. There is no evidentiary support for the allegation that the Austin City Council ,  
~~changed the voting locations for the runoff to disenfranchise any District 4 voters.~~

64. There is no evidentiary support for the allegation that the changes in the voting  
locations for the runoff resulted in the disenfranchisement of any District 4 voters.

65. There is no evidentiary support that any voter was actually prevented from voting  
at the new locations.

66. Paragraph 42 of Pressley's Sixth Amended Contest states that "[r]eview of  
Discovery documents provided by Travis County [shows that] no Zero Tapes (showing  
the number of votes present on the Hart Voting equipment for each candidate when the  
polls open) were printed during Early Voting and no Zero Tapes were printed on Election  
Day of the Runoff." Similar allegations are contained in ¶¶ 3, 8, 43, & 64 of the Sixth  
Amended Contest and in prior Contests.

67. Zero Tapes were produced to Pressley and Rogers by Travis County during their  
document production on April 22 and 23, 2015. Pressley's Sixth Amended Contest was  
filed on May 19, 2015.

68. Travis County printed zero tapes both before the runoff election and on the day of  
the runoff election. There is no evidentiary support for the allegation that zero tapes were  
not printed on the day of the runoff election.

69. Pressley and Rogers attached as Exhibit C to the Sixth Contest a zero tape that  
was printed on December 16, 2014, the day of the runoff election.

70. Results tapes were printed the day of the runoff election. There is no evidentiary  
support for the allegation that results tapes were not printed as required by the Texas  
Secretary of State.

71. Pressley took a personal and participatory role in this lawsuit. Pressley testified she personally authored portions of the Contests and their appendices. She estimated that she spent hours and hours working on the lawsuit and that she had worked until 3:00 a.m. drafting the Contests. Pressley was present at the deposition of County Clerk DeBeauvoir, as well as the two-day document production by the County Clerk's office.

72. Pressley testified at least three people assisted her in drafting discovery and with various other aspects of this election contest.

73. Pressley testified Contestee Casar has done nothing wrong in the conduct of the election.

74. Pressley testified she has assets and income sufficient to be able to pay a monetary sanction. Specifically, Pressley has: (1) approximately \$30,000 to \$40,000 that she has raised for the cost of pursuing this Contest and the appeal; (2) at least \$170,000 in her business account for Pure Rain LLC, which is a Limited Liability Company of which she is the only owner; (3) real estate in Wyoming with a net value of between \$10,000 and \$25,000; (4) profit from a home that she and her husband recently sold for approximately \$530,000; (5) annual sales of \$50,000 to \$60,000 per year from Pure Rain LLC; (6) annual income of approximately \$130,000 to \$160,000 from her husband's job as an engineer at Applied Materials; (7) a personal checking account valued at approximately \$1,000; (8) her husband's personal account which is valued at approximately \$5,000; and (9) savings of approximately \$51,500 in legal fees which were owed to her attorney David Rogers. Additionally, Pressley has income earning capacity of over \$100,000 per year based on her previous jobs.

75. Rogers has assets and income sufficient to be able to pay a monetary sanction.

Specifically, Rogers is a practicing attorney who charges approximately \$350/hour.

Additionally, Rogers testified he has the financial ability to be able to forgo legal fees of approximately \$51,500 from Pressley.

#### **Findings of Fact Supporting Attorneys Fees**

76. During this litigation, Casar retained Charles Herring, Jr. and Lauren Ross of Herring & Irwin LLP and Jessica Palvino of McGinnis Lochridge & Kilgore LLP.

77. The services rendered by Charles Herring, Jr., Lauren Ross, and Jessica Palvino in defending Casar in this litigation were reasonable and necessary for these types of services in Travis County.

78. The fees charged by Herring & Irwin LLP and McGinnis Lochridge & Kilgore LLP in defending Casar in this litigation were \$ 150,000.00.

79. The fees and rates charged by Charles Herring, Jr., Lauren Ross, and Jessica Palvino in defending Casar in this litigation were reasonable and customary for these types of services in Travis County.

#### **CONCLUSIONS OF LAW**

80. Irregularities that allegedly occurred during the recount **did not materially affect** the outcome of the runoff election. See *Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.) (headnotes 10 and 11).

81. At the time the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers certified that to his best knowledge, information, and belief, formed after reasonable inquiry, that the allegation that irregularities that occurred during the recount materially affected the outcome of the runoff election was warranted by existing law or by a non-frivolous argument for the

extension, modification, or reversal of existing law or the establishment of new law.

82. ... There is no evidentiary support for the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election. *See Gonzalez v Villarreal*, 251 S.W.3d 763, 777-778 (Tex. App.—Corpus Christi 2008, pet. dismiss'd w.o.j.).

83. Rogers failed to conduct a reasonable inquiry into whether each allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

84. Rogers knew or should have known this allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) was not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

85. A reasonable inquiry would have revealed irregularities that allegedly occurred during the recount **did not materially affect** the outcome of the runoff election.

86. The allegations that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election were not supported by existing law and there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

87. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

88. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

89. This Court has authority to impose a sanction on David Rogers because of this violation of Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

90. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contests had evidentiary support, including the allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election.

91. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether their allegation (that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election) had evidentiary support.

92. At the time that the Original, Second Amended, Third Amended, Fourth Amended, Fifth Amended, and Sixth Amended Contests were filed, Rogers and Pressley knew or should have known their allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election did not have

evidentiary support.

93. The allegation that irregularities that allegedly occurred during the recount materially affected the outcome of the runoff election has no evidentiary support.

94. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

95. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

96. This Court has authority to impose a sanction on David Rogers and on Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

97. Travis County Director of Elections Michael Winn did not commit a criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the CVR files during the recount.

98. At the time the Sixth Amended Contest was filed, Rogers certified that to the best of his knowledge, information, and belief, formed after reasonable inquiry, that the allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

99. Rogers failed to conduct a reasonable inquiry into whether this allegation (that Michael Winn committed a criminal violation) was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

100. Rogers knew that this allegation (that Michael Winn committed a criminal violation) was not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

101. A reasonable inquiry would have revealed that Mr. Winn did not violate Texas Election Code § 33.061 by not allowing Pressley and her poll watchers to view the source and properties of the CVR files during the recount; that, under Election Code § 213.016, Pressley and her poll watchers were allowed to be and were present for the printing of the CVRs; and that nothing in the Election Code authorized Pressley or her poll watchers to view the source and properties of the CVR files, such as dates of the CVR files and origination.

102. The allegations that Mr. Winn committed criminal violations were not supported by existing law and there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

103. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

104. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

105. This Court has authority to impose a sanction on David Rogers because of this violation of Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

106. At the time the Sixth Amended Contest was filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contests had evidentiary support, including the allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files.

107. At the time that the Sixth Amended Contest was filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether their allegation (that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files) had evidentiary support.

108. At the time that the Sixth Amended Contest was filed, Rogers and Pressley knew that their allegation (that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files) did not have evidentiary support.

109. The allegation that Mr. Winn committed a criminal violation by not allowing Pressley and her poll watchers to view the source, property, and copying of the CVR files has no evidentiary support.

110. By failing to make a reasonable inquiry into whether factual claims in the ~~Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the~~ Civil Practices and Remedies Code.

111. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

112. This Court has authority to impose a sanction on David Rogers and on Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

113. No credible evidence exists to prove that any Travis County voters were disenfranchised by the consolidation of voting locations between the general election, held on November 4, 2014 and the runoff election held on December 16, 2014.

114. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers certified that to his best knowledge, information, and belief, formed after reasonable inquiry, that the allegation that Travis County illegally disenfranchised District 4 voters by consolidating voting locations was warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

115. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers failed to conduct a reasonable inquiry in whether this allegation (that Travis County illegally disenfranchised District 4

voters by consolidating voting locations) was supported by existing law or a non-frivolous argument for extension, modification, or reversal of existing law or the establishment of new law.

116. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers knew or should have known that this allegation (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) was unsupported by existing law or a non-frivolous argument for extension, modification, or reversal of existing law or the establishment of new law.

117. A reasonable inquiry would have revealed that existing law did not support the allegation that voters had been illegally disenfranchised by the consolidation of voting locations, and that there was not a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

118. By failing to conduct a reasonable inquiry into whether the legal contentions in the Contests 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) of the Civil Practices and Remedies Code.

119. By asserting legal contentions in the Contests that were not 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) of the Civil Practices and Remedies Code.

120. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry,

each allegation or other factual contention in the Contest had evidentiary support, including the allegations that Travis County illegally disenfranchised District 4 voters by consolidating voting locations.

121. At the time that the Original, Second Amended, Third Amended, and Fourth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether these factual allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) had evidentiary support.

122. At the time that the Original, Second Amended, Third Amended, and Fourth Amended Contests were filed, Rogers and Pressley knew that these factual allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) had no evidentiary support.

123. At the time that the Fifth Amended Contest was filed, Rogers and Pressley knew that these allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) did not have evidentiary support. Pressley testified four days prior to filing the Fifth Amended Contest that she could not identify a single voter who was disenfranchised due to the change in voting locations. Pressley testified that regardless of the fact that she could not obtain one affidavit from one voter attesting to disenfranchisement of voters, she made her claims based on statistical analysis of prior voting patterns and conversations she had with persons she could not identify.

124. The allegation that Travis County illegally disenfranchised thousands of District 4 voters by consolidating voting locations has no evidentiary support.

125. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the

Civil Practices and Remedies Code.

126. By asserting factual claims in the Contests that Pressley and Rogers knew were  
without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

127. This Court has authority to impose a sanction on David Rogers and Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

128. Travis County printed zero tapes and results tapes for the runoff election as required by the Texas Secretary of State. Some of the zero tapes were printed prior to the date of the run-off election held on December 16, 2014.

129. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State's requirements.

130. At the time that the Sixth Amended Contest was filed, Rogers and Pressley certified that, to the best of their knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that "discovery documents provided by Travis County [shows that] no Zero Tapes (showing the number of votes present on the

Hart Voting equipment for each candidate when the polls open) were printed during

Early Voting and no Zero Tapes were printed on Election Day of the Runoff."

131. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley knew that these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State's requirements) lacked evidentiary support.

132. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers and Pressley failed to conduct a reasonable inquiry into whether these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State's requirements) had evidentiary support.

133. At the time that the Sixth Amended Contest was filed, Rogers and Pressley knew that these allegations (that Travis County failed to print zero tapes and results tapes in accordance with the Texas Secretary of State's requirements and that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff) lacked evidentiary support. Zero Tapes were produced by Travis County during their document production on April 22 and 23, 2015. Pressley's Sixth Amended Contest was filed on May 19, 2015. Pressley and Rogers attached as Exhibit C to the Sixth Contest a zero tape that was printed on December 16, 2014, the day of the runoff election. County Clerk Dana DeBeauvoir testified in her deposition on May 11, 2015 that zero tapes and results tapes were printed.

134. The allegations that Travis County failed to print zero tapes and results tapes in

accordance with the Texas Secretary of State's requirements have no evidentiary support.

Some of the zero tapes were not printed on December 16, 2014, the date of the runoff election.

135. The allegations that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff has no evidentiary support.

136. By failing to make a reasonable inquiry into whether factual claims in the Contests had evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

137. By asserting factual claims in the Contests that Pressley and Rogers knew were without evidentiary support, Pressley and Rogers violated Section 10.001(3) of the Civil Practices and Remedies Code.

138. This Court has authority to impose a sanction on David Rogers and Laura Pressley because of this violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that "a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both."

139. The factors articulated by the Texas Supreme Court in *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), support an award of sanctions in this case.

140. The first *Low* factor, the good faith or bad faith of the offender, weighs in favor of awarding sanctions. Pressley's conduct during the case, including making false allegations of criminal activity against the Travis County Director of Elections Michael Winn, indicate that she was not acting in good faith.

141. The second *Low* factor, the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense, weighs heavily in favor of sanctions. Pressley lost the election by a margin of 1,291 votes, a margin far greater than Rogers had ever seen and greater than has been overcome in the history of reported Texas jurisprudence. The Hart eSlate system, which Pressley alleges violated the Texas Election Code, was certified by the Texas Secretary of State and variations of the system have been used in other counties in Texas. There are two court decisions rejecting attacks on the Hart eSlate system. In the *Andrade v. NAACP* case, 345 S.W.3d 1 (Tex. 2011), the Texas Supreme Court found that "[t]he Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State's important regulatory interests." In *Texas Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007), the Western District of Texas noted that the Secretary of State "made a reasonable, politically neutral, and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice." Rogers was either aware of or failed to adequately investigate the legal and factual bases for Pressley's allegations.

142. The third *Low* factor, the knowledge, experience, and expertise of the offender, also weighs in favor of awarding sanctions. Rogers is an experienced attorney who has handled election contests previously and holds himself out as being knowledgeable regarding election contests. Pressley has a PhD in Chemistry, is actively involved in her community, and has appeared before Austin City Council at least thirty times. She was personally involved in drafting portions of the Contests and discovery.

143. The fourth *Low* factor, any prior history of sanctionable conduct on the part of the offender, is not applicable in this case.



144. The fifth *Low* factor, the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct, weighs in favor of awarding sanctions. Contestee Casar seeks the reasonable and necessary attorney's fees incurred in defending this election contest, and his attorneys are charging a reduced hourly rate. Casar has not yet paid any of his attorney fees.

145. The sixth *Low* factor, the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct, also weighs in favor of awarding sanctions. Contestee Casar is now a Council Member for the City of Austin, and has been required to divide his time between his duties as a Council Member and responding to Pressley's Election Contests. His city council annual salary is approximately \$70,000.00.

146. The seventh *Low* factor, the relative culpability of client and counsel, also weighs in favor of awarding sanctions. Pressley took a personal and participatory role in this lawsuit. She testified she drafted portions of the Contests, drafted discovery questions to Travis County for Rogers to decide how to use, and was, according to Rogers, the most hands-on client he's ever had.

147. The eighth *Low* factor, the risk of chilling the specific type of litigation involved, also weighs in favor of awarding sanctions. There should not be a chilling effect from awarding sanctions in this case, as the purpose of sanctions in this case would be to encourage compliance with Chapter 10.

148. The ninth *Low* factor, the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction, also weighs in favor of awarding sanctions. Pressley has assets and income potential due to her high level of education sufficient to

justify the award of sanctions. Rogers has the ability to earn income sufficient to justify the award of sanctions.

149. The tenth *Low* factor, the impact of the sanction on the offended party, including the offended person's need for compensation, also weighs in favor of awarding sanctions. Pressley testified she knew of nothing Contestee Casar did wrong in the conduct of the election. Because of Pressley's election contest, Contestee Casar has incurred more than \$150,000 in attorney's fees and has been unable to fully devote himself to his role as City Councilmember. His annual income as a council member is far less than Ms. Pressley's.

150. The eleventh *Low* factor, the relative magnitude of sanction necessary to achieve the goal or goals of the sanction, also weighs in favor of awarding sanctions. The goals in awarding sanctions, according to the Texas Supreme Court in *Remington Arms v. Caldwell* are compensation, punishment, and deterrence. 850 S.W.2d 167 (Tex. 1993). The Texas Civil Practices and Remedies Code Section 10.004 states that the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. The same challenge to the Hart eSlate voting system that was brought by Pressley in this Election Contest could have been brought against any elected official in Austin, Travis County, or the hundreds of other counties in Texas that use the eSlate voting machine. It is important to deter these types of challenges to the Hart eSlate voting system, which has been fully approved and certified by the Texas Secretary of State.

151. The twelfth *Low* factor, burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs, have to date minimal impact in favor of awarding sanctions.

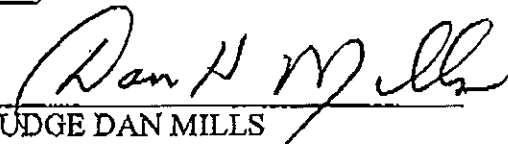
152. The thirteenth *Low* factor, the degree to which the offended person's own behavior caused the expenses for which recovery is sought, also weighs in favor of awarding sanctions. Pressley admits that Casar did nothing wrong in the conduct of the election.

153. Rogers and Pressley failed to show due diligence in violation of Section 10.002 of the Civil Practices and Remedies Code.

154. All Conclusions of Law shall also be deemed to be Findings of Fact. To the extent any Conclusion of Law is a Finding of Fact or is a mixed question of law and fact, the same is found as a fact.

IT SO ORDERED.

SIGNED this the 23<sup>rd</sup> day of July, 2015.

  
JUDGE DAN MILLS

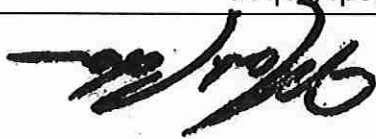
LAURA PRESSLEY, Contestant,	§	IN THE DISTRICT COURT
V.	§	OF TRAVIS COUNTY, TEXAS
GREGORIO "GREG" CASAR, Contestee.	§	201 <sup>st</sup> JUDICIAL DISTRICT

**NOTICE OF ACCELERATED APPEAL**

TO THE HONORABLE COURT:

NOW COMES, Laura Pressley, Contestant herein and give notice of her intent to appeal the trial court's judgment rendered on May 26, 2015 by accelerated appeal. This accelerated appeal is taken to the Third Court of Appeals, in Austin, Texas. This appeal does not pertain to a parental termination or child protection case as defined in Appellate 28.4.

Respectfully Submitted,



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**ATTORNEY FOR CONTESTANT**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 15th day of June, 2015.

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Jess Irwin

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Mark Cohen



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Veiva L. Price  
District Clerk  
Travis County

D-1-GN-15-000374

No. D-1-GN-15-000374

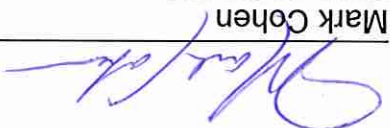
LAURA PRESSLEY, Contestant,	§ § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 201 <sup>st</sup> JUDICIAL DISTRICT
V.		
GREGORIO "GREG" CASAR, Contestee.		

**FIRST AMENDED NOTICE OF ACCELERATED APPEAL**

TO THE HONORABLE COURT:

NOW COMES, Laura Pressley, Contestant herein and give notice of her intent to appeal the trial court's judgment rendered on May 26, 2015 and the trial court's amended judgment filed on June 24, 2015 by accelerated appeal. This accelerated appeal is taken to the Third Court of Appeals, in Austin, Texas. This appeal does not pertain to a parental termination or child protection case as defined in Appellate 28.4.

Respectfully Submitted,



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**ATTORNEY FOR CONTESTANT**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 10th day of July, 2015.

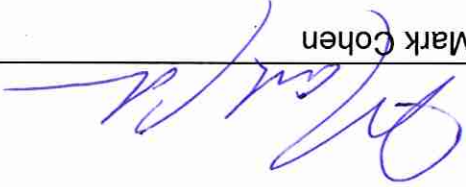
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Mark Cohen



**NO. D-1-GN-15-000374**

**LAURA PRESSLEY,**  
**Contestant,**

**v.**

**GREGORIO "GREG" CASAR,**  
**Contestee,**

§  
§  
§  
§  
§  
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§

**IN THE DISTRICT COURT**

**TRAVIS COUNTY, TEXAS**

**201ST JUDICIAL DISTRICT**

**FORMAL REQUEST FOR AMENDED AND ADDITIONAL FINDINGS**  
**OF FACT AND CONCLUSIONS OF LAW**

Now comes Contestant Laura Pressley and subsequent to the court's entry of its order granting sanctions and its Findings of Fact and Conclusions of law related thereto on July 23, 2015 requests the court to amend them as follows and to make the following additional Findings of Fact and Conclusions of Law:

1. Finding of Fact number 1 be amended as follows:

"Contestee Casar's Motion for Sanctions is DENIED."

2. Finding of Fact number 2 be amended by deleting it.

3. Finding of Fact number 3 be amended by deleting it.

4. Finding of Fact number 4 be amended by deleting it.

5. Finding of Fact number 5 be amended by deleting it.

6. Finding of Fact number 6 be amended by deleting it.

7. Finding of Fact number 7 be amended by deleting it.

8. Finding of Fact number 9 be amended by deleting it.

9. Finding of Fact number 15 be amended by deleting it.

10. Finding of Fact number 16 be amended to read as follows:



“16. On January 5, 2015, the day before Casar was to be sworn-in, Pressley filed a recount petition with the City of Austin. Before the recount took place, County Clerk Dana DeBeauvoir offered to run an audit of the election results for Pressley. The County Clerk testified that at the audit she would have told Pressley that a cast vote record satisfied statutory requirements of maintaining an image of the ballot cast which would not have prevented Pressley from filing this contest. Pressley refused DeBeauvoir’s offer and demanded a recount.”

11. Finding of Fact number 17 be amended by deleting it.

12. Finding of Fact number 18 be amended by deleting it.

13. Finding of Fact number 19 be amended by deleting it.

14. Finding of Fact 20 be amended to read as follows:

“After the recount, Pressley lodged several complaints regarding the recount with the Secretary of State.”

15. Finding of Fact number 21 be amended by deleting it.

16. Finding of Fact number 22 be amended by deleting it.

17. Finding of Fact number 23 be amended by deleting it.

18. Finding of Fact number 24 be amended by deleting it.

19. Finding of Fact number 25 is amended by deleting it.

20. Finding of Fact number 26 be amended to read as follows:

“26. In paragraph 13, the Original Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 14 and 15, the Original Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State.”

21. Finding of Fact number 27 be amended to read as follows:

“27. In paragraph 13, the Second Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 11 and 14, the Second Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State.”

22. Finding of Fact number 28 be amended to read as follows:

“28. In paragraphs 12 through 23, the Third Amended Contest alleged that Travis County disenfranchised District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Third Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State.”

23. Finding of Fact number 29 be amended to read as follows:

“29. On March 12, 2015, Pressley filed her Fourth Amended Contest. In paragraphs 12 through 23, the Fourth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 35 and 37, the Fourth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State.”

24. Finding of Fact number 30 be amended to read as follows:

“30. On April 16, 2015, the deposition of Pressley took place. At her deposition, Pressley admitted that she could not identify a single voter who was disenfranchised by the change in voting locations for the runoff election. Pressley also testified that she did not know if zero tapes had been printed, where they may have been printed, or when but that she was told by the County Clerk’s representative Michael Winn that no Zero tapes would be printed on the day of the run-off election.”

25. Finding of Fact number 31 be amended to read as follows:

“31. On April 20, 2015, Pressley filed her Fifth Amended Contest. In paragraphs 12 through 29, the Fifth Amended Contest alleged that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election. In paragraphs 41 and 43, the Fifth Amended Contest alleged that Travis County did not print zero tapes and results tapes on Election Day as required by the Texas Secretary of State.”

26. Finding of Fact number 32 be amended to read as follows:

“32. Pressley filed her final and Sixth Amended Contest on May 19, 2015. In paragraphs 3, 4, 8, 42 through 52, and 64, the Sixth Amended Contest alleged that Travis County did not produce or print zero tapes (per the definition of the Texas Secretary of State, showing the number of votes present on the Hart Voting equipment for each candidate when the polls open on Election Day,) and results tapes on Election Day as required by the Texas Secretary of State. What Travis County produced, and what was included in the Sixth Amended Contest as Exhibit C was a tape from Pct 133, a Pressley/Casar District 4 Precinct, that was printed on 11/26/15 and in the title indicated the date of the election, 12/16/15. The tape did not meet the definition of a Zero Tape in that it was not printed when the polls opened on Election Day (12/16/15 and it did not have all candidates names listed with zero votes next to each name. In the sanctions hearings the Travis County Clerk testified Pressley’s name was not listed on it. In paragraphs 93 and 94, Pressley alleged that some unnamed election workers committed a criminal violation by not allowing Pressley and her poll watchers to view the source, properties, and copying of the CVR files during the recount. Pressley dropped from her Sixth Amended Contest her allegations that Travis County disenfranchised thousands of District 4 voters because certain voting locations were changed between the general election and the runoff election.”

27. Finding of Fact number 34 be amended to read as follows:

“On May 26, 2015, after briefing and a hearing, the Court granted Casar’s No-Evidence Summary Judgment Motion.”

28. Finding of Fact number 36 be amended by deleting it.
29. Finding of Fact number 37 be amended by deleting it.
30. Finding of Fact number 38 be amended by deleting it.
31. Finding of Fact number 39 be amended by deleting it.
32. Finding of Fact number 40 be amended by deleting it.
33. Finding of Fact number 41 be amended by deleting it.
34. Finding of Fact number 42 be amended by deleting it.
35. Finding of Fact number 43 be amended by deleting it.
36. Finding of Fact number 44 be amended by deleting it.
37. Finding of Fact number 45 be amended by deleting it.
38. Finding of Fact number 46 be amended by deleting it.
39. Finding of Fact number 47 be amended by deleting it.
40. Finding of Fact number 48 be amended by deleting it.
41. Finding of Fact number 49 be amended by deleting it.
42. Finding of Fact number 50 be amended by deleting it.
43. Finding of Fact number 51 be amended to read as follows:

“51. Pressley and her poll watchers were present while the Travis County recount team printed all of the CVRs for the recount. Pressley and her poll watchers were prevented from seeing any aspect of the selection of the CVRs other than the printer’s act of regurgitating copies of CVRs.”

44. Finding of Fact number 52 be amended by deleting it.

45. Finding of Fact number 53 be amended by deleting it.
46. Finding of Fact number 54 be amended by deleting it.
47. Finding of Fact number 55 be amended by deleting it.
48. Finding of Fact number 56 be amended by deleting it.
49. Finding of Fact number 57 be amended to read as follows:

“57. Pressley did not comment on or object to any of the voting location changes at the Austin City Council meeting”
50. Finding of Fact number 59 be amended by deleting it.
51. Finding of Fact number 60 be amended by deleting it.
52. Finding of Fact number 62 be amended to read as follows:

62. When Pressley was deposed on April 16, 2015, she could not identify a single voter who was disenfranchised as a result of the changes in voting locations. Pressley testified she had spoken with people while phone banking on Election Day who claimed they had difficulty.”
53. Finding of Fact number 63 be amended to read as follows:

"63. Other than the statistical analysis described in the pleadings and bank discussions with irate potential voters there is no other evidentiary support for the allegation that the Austin City Council changed the voting locations for the runoff to disenfranchise any District 4 voters.”
54. Finding of Fact number 64 be amended to read as follows:

“64. Other than the statistical analysis described in the pleadings and the phone bank discussions with irate potential voters there is no other there is no evidentiary support for the

allegation that the changes in the voting locations for the runoff resulted in the disenfranchisement of any District 4 voters.”

55. Finding of Fact number 65 be amended to read as follows:

“65. Other than the statistical analysis described in the pleadings and the phone bank discussions with irate potential voters there is no other irate potential voters there is no evidentiary support for the allegation that the Austin City Council changed the voting locations for the runoff to disenfranchise any District 4 voters. There is no evidentiary support that any identified voter was actually prevented from voting at the new locations.”

56. Finding of Fact number 68 be amended by deleting it.

57. Finding of Fact number 69 be amended by deleting it.

58. Finding of Fact number 70 be amended by deleting it.

59. Finding of Fact number 71 be amended to read as follows:

“71. Pressley took a personal and participatory role in this lawsuit. She estimated that she spent hours and hours working on the lawsuit and that she had worked until 3:00 a.m. helping with the drafting the Contests on one occasion. Pressley was present at the deposition of County Clerk DeBeauvoir, as well as the two-day document production by the County Clerk’s office.”

60. Finding of Fact number 72 be amended to read as follows:

“72. Pressley testified at least three people assisted her in drafting proposed discovery and with various other aspects of this election contest.”

61. Finding of Fact number 74 be amended to read as follows:

62.“74. Pressley testified (1) she raised approximately \$30,000 to \$40,000 for the cost of pursuing this Contest and the appeal,

there was no evidence that any of that amount was unspent and available to pay monetary sanctions; (2) she owns all of the membership interest in an independent legal entity that at the time of her testimony had at least \$170,000 in its business account named Pure Rain LLC, which is an Limited Liability Company; (3) she and her husband owned real estate in Wyoming with a net value of between \$10,000 and \$25,000, but did not testify it could be liquidated for that amount to pay monetary sanctions; (4) she and her husband had made a profit from a home that she and her husband recently sold for approximately \$530,000 but there was no evidence that she still had any of that available to pay monetary sanctions; (5) the annual sales from Pure Rain, LLC were of \$50,000 to \$60,000 per year, but there was no evidence what the net profit was currently nor that there was any money from such sales were in her possession or that there would be any in the future to use to pay monetary sanctions; (6) her husband had an annual income of approximately \$130,000 to \$160,000 from her husband's job as an engineer at Applied Materials, but there was no evidence that any of that was in the form of cash available to pay monetary sanctions; (7) she had a personal checking account valued at approximately \$1,000; (8) her husband had a personal account which was valued at approximately \$5,000; and (9) that David Rogers had forgiven \$ legal fees which but not that she had the money to pay him that anyhow. Contestee did not identify or prove Pressley's existing liabilities and therefore, a full accounting of her assets could not be assessed by the Court."

63. Finding of Fact number 75 be amended to read as follows:

"75. Rogers is a practicing attorney who charges approximately \$350/hour. Additionally, Rogers testified he has the financial ability to be able to forgo legal fees from Pressley."

#### **Findings of Fact Supporting Attorney's Fees**

64. Finding of Fact number 78 be amended to read as follows:

"78. The fees charged by Herring & Irwin LLP and McGinnis

Lochridge & Kilgore LLP in defending Casar in this litigation were \$150,000.00. Casar has not paid any of these fees and his attorneys will not take any action to collect them.”

**CONCLUSIONS OF LAW”**

65. Conclusion of Law number 80 be amended by deleting it.
66. Conclusion of Law number 81 be amended by deleting it.
67. Court Conclusion of Law number 82 be amended to read as follows:

“82. There was some evidence that there were irregularities in the conduct of the election.”
68. Conclusion of Law number 83 be amended by deleting it.
69. Court Conclusion of Law number 84 be amended by deleting it.
70. Court Conclusion of Law number 85 be amended by deleting it.
71. Court Conclusion of Law number 86 be amended by deleting it.
72. Court Conclusion of Law number 87 be amended by deleting it.
73. Conclusion of Law number 88 be amended by deleting it.
74. Conclusion of Law Number 89 be amended to reads as follows:

“89. This Court has authority to impose a sanction on David Rogers if he violated Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”
75. Conclusion of Law number 90 be amended by deleting it.
76. Conclusion of Law number 91 be amended by deleting it.



- 77. Conclusion of Law number 92 be amended by deleting it.
- 78. Conclusion of Law number 93 be amended by deleting it.
- 79. Conclusion of Law number 94 be amended by deleting it.
- 80. Conclusion of Law number 95 be amended by deleting it.
- 81. Conclusion of Law number 96 be amended to read as follows:

“96. This Court has authority to impose a sanction on David Rogers and on Laura Pressley if they violated Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

- 82. Conclusion of Law number 97 be amended to read as follows:

“97. Travis County Director of Elections Michael Winn did not commit a criminal violation by not answering or returning phone calls to Pressley.”

- 83. Conclusion of Law number 98 be amended by deleting it.
- 84. Conclusion of Law number 99 be amended by deleting it.
- 85. Conclusion of Law number 100 be amended by deleting it.
- 86. Conclusion of Law number 101 be amended by deleting it.
- 87. Conclusion of Law number 102 be amended by deleting it.
- 88. Conclusion of Law number 103 be amended to read as follows:

“103. If Rogers had failed to conduct a reasonable inquiry into whether the legal contentions in the Contests that were warranted by existing law or by a non-frivolous argument for the extension,

modification or reversal of existing law, Rogers would have violated Section 10.001(2) of the Civil Practices and Remedies Code.”

89. Conclusion of Law number 104 be amended to read as follows:

“104. If Rogers had asserted legal contentions in the Contests that were not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law, Rogers would have violated Section 10.001(2) of the Civil Practices and Remedies Code.”

90. Conclusion of Law number 105 be amended to read as follows:

“105. This Court has authority to impose a sanction on David Rogers if he violated Section 10.001(2). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.””

91. Conclusion of Law number 106 be amended to read as follows:

“106. At the time the Sixth Amended Contest was filed, Rogers certified that, to the best of his knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contests had evidentiary support.”

92. Conclusion of Law number 107 be amended by deleting it.

93. Conclusion of Law number 108 be amended by deleting it.

94. Conclusion of Law number 109 be amended by deleting it.

95. Conclusion of Law number 110 be amended by deleting it.

96. Conclusion of Law number 111 be amended by deleting it.

97. Conclusion of Law number 112 be amended to read as follows:

“112. This Court has authority to impose a sanction on David Rogers

and on Laura Pressley if there had been a violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001(3) may impose a sanction on the person, a party represented by the person, or both.”

98. Conclusion of Law number 113 be amended to read as follows:

“113. The only evidence that Travis County voters were disenfranchised by the consolidation of voting locations between the General Election held on November 4, 2014 and the Runoff Election held on December 16, 2014 was the statistical analysis done of voting trends and discussions with irate potential voters to Pressley while she was phone banking.”

99. Conclusion of Law number 115 be amended to read as follows:

“115. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers conducted an inquiry in whether this allegation (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) was supported by existing law or a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law by relying on *Gonzales v. Villareal*, supra.”

100. Conclusion of Law number 116 be amended to read as follows:

“116. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers knew or should have known this allegation (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) was unsupported by existing law or a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law other than *Gonzales v. Villareal*, supra.”

101. Conclusion of Law number 117 be amended to read as follows:

“117. A reasonable inquiry would have revealed that existing law did not support the allegation that voters had been illegally

disenfranchised by the consolidation of voting locations, and that there was not a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law other than *Gonzales v. Villareal*, supra.”

102. Conclusion of Law number 118 be amended to read as follows:

“118. By failing to conduct an inquiry into whether the legal contentions in the Contests that were warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law other than *Gonzales v. Villareal*, supra, Rogers violated Section 10.001(2) of the Civil Practices and Remedies Code.”

103. Conclusion of Law number 119 be amended to read as follows:

“119. By asserting legal contentions in the Contests that were not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law, Rogers would have violated Section 10.001(2) of the Civil Practices and Remedies Code.”

104. Conclusion of Law number 121 be amended to read as follows:

“121. At the time that the Original, Second Amended, Third Amended, and Fourth Amended Contests were filed, Rogers failed to conduct a reasonable inquiry into whether these factual allegations (that Travis County illegally disenfranchised District 4 voters by consolidating voting locations) had evidentiary support other than the statistical analysis of voting trends and calls from irate potential voters to Pressley’s phone bank.”

105. Conclusion of Law number 122 be amended by deleting it.

106. Conclusion of Law number 123 be amended to read as follows:

“123. Pressley testified that the evidentiary support for the allegation that consolidating voting locations was an irregularity in the conduct of the run-off election was her statistical analysis and reports from voters and her poll workers.”

- 107. Conclusion of Law number 124 be amended by deleting it.
- 108. Conclusion of Law number 125 be amended by deleting it.
- 109. Conclusion of Law number 126 be amended by deleting it.
- 110. Conclusion of Law number 127 be amended to read as follows:

“127. This Court has authority to impose a sanction on David Rogers and Laura Pressley if there had been a violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

- 111. Conclusion of Law number 128 be amended by deleting it.
- 112. Conclusion of Law number 129 be amended to read as follows:

“129. At the time that the Original, Second Amended, Third Amended, Fourth Amended, and Fifth Amended Contests were filed, Rogers certified that, to the best of his knowledge, information, and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that Travis County failed to print zero tapes.”

- 113. Conclusion of Law number 130 be amended to read as follows:

“130. At the time that the Sixth Amended Contest was filed, Rogers certified that, to the best of his knowledge, information and belief, formed after reasonable inquiry, each allegation or other factual contention in the Contest had evidentiary support, including the allegations that “discovery documents provided by Travis County shows that no Zero Tapes ((per the definition of the Texas Secretary of State, showing the number of votes present on the Hart Voting equipment for each candidate when the polls open on Election Day, 12/16/15)) were printed on the date of the run-off election.”

- 114. Conclusion of Law number 131 be amended by deleting it.
- 115. Conclusion of Law number 132 be amended by deleting it.
- 116. Conclusion of Law number 133 be amended by deleting it.
- 117. Conclusion of Law number 134 be amended by deleting it.
- 118. Conclusion of Law number 135 be amended to read as follows:

“135. The allegations that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff has evidentiary support. The undisputed testimony is that the County Clerk instructed her employees not to print Zero Tapes on the day of the run-off election and that Mr. Winn, the Clerk’s director of elections, told several people Zero tapes would not be printed on the day of the election.”

- 119. Conclusion of Law number 136 be amended by deleting it.
- 120. Conclusion of Law number 137 be amended by deleting it.
- 121. Conclusion of Law number 138 be amended to read as follows:

“138. This Court has authority to impose a sanction on David Rogers and Laura Pressley if there had been a violation of Section 10.001(3). This authority arises from Texas Civil Practice and Remedies Code Section 10.004, which states that “a court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.”

- 122. Conclusion of Law number 139 be amended to read as follows:

“139. Even if there had been a basis for sanctions under Section 10.001, et. Seq. of the Texas civil Practices and Remedies Code, the factors articulated by the Texas Supreme Court in *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), insignificantly, at best, would support an award of sanctions in this case, but taken as a whole these factors do

not support an award of sanctions.”

123. Conclusion of Law number 140 be amended to read as follows:

“140. The first *Low* factor, the good faith or bad faith of the offender, weighs against awarding sanctions. Pressley is only responsible for the factual allegation that the clerk’s employees did not let them see the entire process of printing the ballots. That was true. The complaint is about calling that a criminal violation and doing so was purely a legal conclusion drawn by Mr. Rogers from the true fact reported and alleged by Dr. Pressley. Also Pressley’s 6th amended does not accuse Mr. Winn of criminal activity here is no evidence either Pressley or Rogers acted in bad faith. Indeed, their positions in this case were made in good faith.”

124. Conclusion of Law number 141 be amended to read as follows:

“141. The second *Low* factor is not applicable. There was no evidence Pressly or Rogers acted willfully or negligently with vindictiveness in asserting that the clerk failed to print zero tapes on the day of the election since Michael Winn reported the same to Pressley and the Clerk had admitted she did not in her testimony. There is no evidence Pressley or Rogers acted willfully or negligently with vindictiveness in asserting or in relying on a statistical analysis and reports from irate potential voters in alleging what Pressley reasonably believed would develop convincing evidence that voters were disenfranchised by change in voting locations and when the discovery evidence did not develop as she hoped dropping that allegation. While she did allege true occurrences, supported by third party affidavits that illegal activity did occur, a factor in determining whether the true outcome could be ascertained, she did not name any particular person responsible for that activity.”

125. Conclusion of Law number 142 be amended to read as follows:

“142. The third *Low* factor, the knowledge, experience, and expertise of the offender, also weighs slightly but insignificantly in favor of awarding sanctions against Rogers. Rogers is an experienced attorney who has handled election contests previously and holds himself out as

being knowledgeable regarding election contests. Although Pressley has a PhD in Chemistry, a business owner and is actively involved in her community, and has appeared before Austin City Council at least thirty times. She was personally involved in drafting portions of the Contests and discovery. This does not mean that Pressley had the knowledge, expertise and experience in election law and contests that would make any of her actions in this case sanctionable. At best, it shows that she is not stupid and is active in her community. Chemists and business owners who are active in their community should not be more likely to be sanctioned for those reasons.”

126. Conclusion of Law number 143 be amended to read as follows:

“143. The fourth *Low* factor, any prior history of sanctionable conduct on the part of the offender weighs against the imposition of sanctions. There is no evidence of such a prior history.”

127. Conclusion of Law number 144 be amended to read as follows:

“144. The fifth *Low* factor, the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct weighs against the imposition of sanctions because he has not paid any attorney’s fees and will not be sued for them. Casar is not out of pocket for attorney’s fees and will never be required to pay any attorney’s fees.”

128. Conclusion of Law number 145 be amended to read as follows:

“145. The sixth *Low* factor, the nature and extent of prejudice, apart from out-of-pocket expenses, is not applicable in this case. There was no evidence of this at the hearing.”

129. Conclusion of Law number 146 be amended to read as follows:

“146. The seventh *Low* factor, the relative culpability of client and counsel, is relevant as to which person to assess how much of the sanctions if sanctions were appropriate. Pressley took a personal and participatory role in this lawsuit. She testified she propose drafts for Rogers consideration and at his directions of portions of the Contests, assisted in drafting discovery questions to Travis County for Roger’s



to decide how to use, and was, according to Rogers, the most hands-on client he's ever had. These facts have little if any significance since many clients assist their attorneys for various reasons including their better familiarity with the facts and a hope of saving money. These normal activities by Pressley should not weigh in the Low analysis of sanction imposition and that Pressley would be responsible for 44.44 % of the sanction award."

130. Conclusion of Law number 147 be amended to read as follows:

"147. The eighth *Low* factor, the risk of chilling the specific type of litigation involved, also weighs against awarding sanctions. This factor weighs against awarding sanctions of \$90,000.00 for filing an election contest 44.44% of which are assessed against the Candidate because doing so will obviously have a chilling effect on any decision by another candidate to exercise their statutory right to file an election contest for fear that a court who holds they failed to prove their case by clear and convincing evidence will impose crippling sanctions on them."

131. Conclusion of Law number 148 be amended to read as follows:

"148. The ninth *Low* factor, the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction, also weighs against awarding sanctions. Pressley has very few assets that can be used to pay sanctions. There is no evidence she still has any of the \$40,000 she raised to pay expenses in this case. The undisputed evidence is that her costs have greatly exceeded that amount already. The \$170,000 that belongs to an independent entity is not hers and could not be subject to seizure to pay the sanctions. Here, there is no evidence that she has any of the profit from the sale of her home or how much or the sales price was profit. She is no longer making a salary and if she could in the future it would be needed to live on as is her husband's earning capacity not an asset that can be currently liquidated to pay sanctions and does make her more able to pay monetary sanctions. She has basically has \$1,000 in assets, \$6,000 counting her husband's assets. The \$40,000 award is greatly in excess of the assets she has available to pay the sanctions Rogers presumably earns enough income but there is no evidence he has assets available to pay any monetary sanctions. Contestee did not identify or prove

Pressley's existing liabilities and therefore, a full accounting of her net assets could not be assessed by the Court."

132. Conclusion of Law number 149 be amended to read as follows:

"149. The tenth *Low* factor, the impact of the sanction on the offended party, including the offended person's need for compensation, also weighs against awarding sanctions. There is no evidence of Casar's need for compensation or that the sanction would have a positive impact on Casar. Since it has been made clear that he is not accused of any wrongdoing, he does not to point to an award of sanctions as evidence of vindication."

133. Conclusion of Law number 150 be amended to read as follows:

"150. The eleventh *Low* factor, the relative magnitude of sanction necessary to achieve the goal or goals of the sanction, also weighs against awarding sanctions. The goals in awarding sanctions, according to the Texas Supreme Court in *Remington Arms v. Caldwell* are compensation, punishment, and deterrence. 850 S.W.2d 167 (Tex. 1993). The Texas Civil Practices and Remedies Code Section 10.004 states that the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. There cannot be any more challenges before the court of appeals rules so either there will be more suits because the cast vote record only practice violates the election code or everyone will know this is not a winnable argument and will not go through the unnecessary expense of litigation. Furthermore, an award of sanctions of \$90,000 is manifestly greater than is necessary to deter the conduct in this case while not chilling future election contest proceedings."

134. Conclusion of Law number 151 be amended to read as follows:

"151. The twelfth *Low* factor, burdens on the court system attributable to the misconduct, weighs against awarding sanctions. There is no evidence that this no evidence Summary Judgment burdened the Court system any more than any other election contest. The judge would have to be appointed and hear the case even if allegations of criminal conduct, voter disenfranchisement and failure to print cast vote records on the day of the election were not issues in

this case.”

135. Conclusion of Law number 152 be amended to read as follows:

“152. The thirteenth *Low* factor, the degree to which the offended person’s own behavior caused the expenses for which recovery is sought, weighs in slightly favor of awarding sanctions. Pressley admits that Casar did nothing wrong in the conduct of the election.”

136. Conclusion of Law number 153 be amended by deleting it.

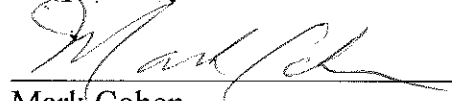
**Additional Findings of Fact and Conclusions of Law**

135. Additional Finding of Fact No. 1. “The Court did not base findings and conclusions on allegations related to whether cast vote record satisfies the statutory requirement to maintain an image of a ballot.”

136. Additional Finding of Fact No. 2. “There was no evidence at the hearing that Pressley knew her evidentiary allegations were without evidentiary support, if they were. She testified that she thought the disenfranchise allegations were properly based on factual statistical analysis and reports from potential voters, that being told no zero tapes were made on the day of the election by Mr. Winn and that the clerk instructed her workers not to print zero tapes was the evidence for that allegation and that the refusal to let poll watchers to see the whole process of printing the CVRs was her evidence for violations of the law requiring poll watchers to view the printing process. There was no evidence Pressley knew that those facts were either false, if they were (they were admitted) or that they did not

constitute evidence of irregularities that a court could use to determine it could not ascertain the true outcome. Although the court in hindsight may have believed they were sufficient to establish the legal causes of action that does not mean she knew they could not have that effect.”

Respectfully Submitted,



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**ATTORNEYS FOR CONTESTANT  
LAURA PRESSLEY**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 30th day of July, 2015.

Kurt Kuhn

KUHN HOBBS PLLC

3307 Northland Drive, # 310

Austin, Texas 78731

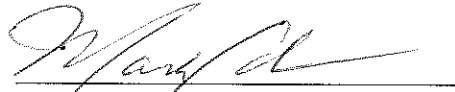
(512) 476-6000 Telephone

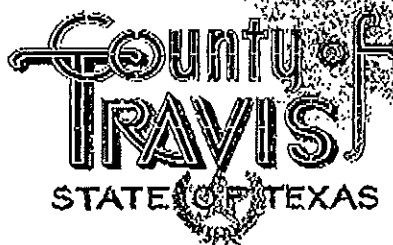
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Mark Cohen

**OFFICE OF THE DISTRICT JUDGES**

Travis County Court House

P.O. Box 1748

Austin, Texas 78767

(512) 854-9300

August 13, 2015

Mr. Mark Cohen  
*Via Facsimile (512) 472-5444*

Mr. David A. Rogers  
*Via Facsimile (512) 201-4082*

Ms. Jessica Palvino  
*Via Facsimile (512) 519-7580*

Mr Kurt Kuhn  
*Via Facsimile (512) 476-6002*

Mr. Charles Herring, Jr.  
*Via Facsimile (512) 519-7580*

Re: **Cause No. D-1-FM-15-000374; Laura Pressley vs. Gregorio  
"Greg" Casar;** in the 200th Judicial District, Travis County, Texas

Dear Counsel:

Please find enclosed copy of **Order On Request For Amended And Additional Findings Of Fact And Conclusions Of Law** in the above matter signed by **Judge Dan Mills**. The original order has been filed with the District Clerk's office. Please provide copies to all parties of record in this case.

Sincerely,

Laura Gomez  
Civil District Courts

Orig: Ms. Velva Price, Travis County District Clerk

Filed in The District Court  
of Travis County, Texas

AUG 13 2015

At 10:48 A.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-15-000374

LAURA PRESSLEY  
Contestant

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

v.

TRAVIS COUNTY, TEXAS

GREGORIO "GREG" CASAR  
Contestee

201ST JUDICIAL DISTRICT

ORDER ON REQUEST FOR AMENDED AND ADDITIONAL FINDINGS  
OF FACT AND CONCLUSIONS OF LAW

On this day came the request of Laura Pressley, Contestant herein to make amended and additional findings of fact and conclusions of law from those made by the court on July 23, 2015 and the court having reviewed the Formal Request For Amended and Additional Findings of Fact and Conclusions of Law, rules as follows:

The following paragraphs of Contestant's Formal Request for Amended and Additional Findings of Fact and Conclusions of Law are granted in part and denied in part and are amended to read as follows:

**#34** On May 26, 2015, after briefing and a hearing, this Court granted Casar's no-evidence summary judgment motion.

**#57** Pressley did not exercise her right to comment on or object to any of the voting location changes at the Austin City Council meeting

**#72** Pressley testified at least three people assisted her in drafting proposed discovery and with various other aspects of this election contest.

**#74** Pressley testified she has assets and income sufficient to be able to pay a monetary sanction. Specifically, Pressley has: (1) approximately \$30,000 to \$40,000 that she has raised for the cost of pursuing this Contest and the appeal; (2) at least \$170,000 in her business account for Pure Rain LLC, which is an Limited Liability Company of which she is the only owner; (3) real estate in Wyoming with a net value of between \$10,000 and \$25,000; (4) profit from a home that she and her husband recently sold for approximately

\$530,000; (5) annual sales of \$50,000 to \$60,000 per year from Pure Rain LLC; (6) annual income of approximately \$130,000 to \$160,000 from her husband's job as an engineer at Applied Materials; (7) a personal checking account valued at approximately \$1,000; (8) her husband's personal account which is valued at approximately \$5,000; and (9) savings of approximately \$51,500 in legal fees which were owed to her attorney David Rogers. Additionally, Pressley has income earning capacity of over \$100,000 per year based on her previous jobs. No evidence was offered to address Pressley's existing liabilities, if any.

**#78** The fees charged by Herring & Irwin LLP and McGinnis Lochridge & Kilgore LLP in defending Casar in this litigation were \$ 150,000.00. Casar has not paid any of the legal fees.

**#135** The allegations that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff has no evidentiary support. There is evidence to suggest some "zero tapes" were printed prior to the run-off election and there is evidence to suggest "zero tapes" were printed on the day of the run-off election.

All other paragraphs of Contestants Formal Request for Amended and Additional Findings of Fact and Conclusions of Law not granted herein are denied.

SIGNED this the \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
JUDGE DAN MILLS



\$530,000; (5) annual sales of \$50,000 to \$60,000 per year from Pure Rain LLC; (6) annual income of approximately \$130,000 to \$160,000 from her husband's job as an engineer at Applied Materials; (7) a personal checking account valued at approximately \$1,000; (8) her husband's personal account which is valued at approximately \$5,000; and (9) savings of approximately \$51,500 in legal fees which were owed to her attorney David Rogers. Additionally, Pressley has income earning capacity of over \$100,000 per year based on her previous jobs. No evidence was offered to address Pressley's existing liabilities, if any.

**#78** The fees charged by Herring & Irwin LLP and McGinnis Lochridge & Kilgore LLP in defending Casar in this litigation were \$ 150,000.00. Casar has not paid any of the legal fees.

**#135** The allegations that discovery documents provided by Travis County showed that no Zero Tapes were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff has no evidentiary support. There is evidence to suggest some "zero tapes" were printed prior to the run-off election and there is evidence to suggest "zero tapes" were printed on the day of the run-off election.

All other paragraphs of Contestants Formal Request for Amended and Additional Findings of Fact and Conclusions of Law not granted herein are denied.

SIGNED this the 12<sup>th</sup> day of August, 2015.

  
JUDGE DAN MILLS

7/30/2015 2:33:28 PM

No. D-1-GN-15-000374

LAURA PRESSLEY, Contestant,	§	IN THE DISTRICT COURT
V.	§	OF TRAVIS COUNTY, TEXAS
GREGORIO "GREG" CASAR, Contestee.	§	201 <sup>st</sup> JUDICIAL DISTRICT

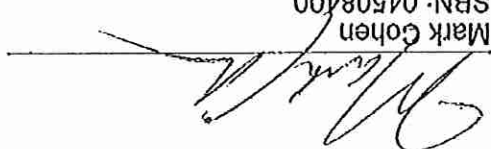
SECOND AMENDED NOTICE OF ACCELERATED APPEAL

TO THE HONORABLE COURT:

NOW COMES, Laura Pressley, Contestant herein and give notice of her intent

to appeal the trial court's judgment rendered on May 26, 2015 the trial court's amended judgment filed on June 24, 2015, the trial court's Amended Judgment filed on July 23, 2015, the trial court's Order on Sanctions with Findings of Fact and Conclusions of Law also filed on July 23, 2015. This is an accelerated appeal. This accelerated appeal is taken to the Third Court of Appeals, in Austin, Texas. This appeal does not pertain to a parental termination or child protection case as defined in Appellate 28.4.

Respectfully Submitted,

  
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ATTORNEY FOR CONTESTANT

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 30th day of July, 2015.

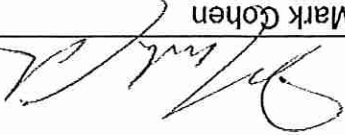
Kurt Kuhn  
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Mark Cohen



[Print this page](#)**Case # D-1-GN-15-000374****Case Information**

Location Travis County - District Clerk  
 Date Filed 07/30/2015 02:33:28 PM  
 Case Number D-1-GN-15-000374  
 Case Description

Assigned to Judge

Attorney

Mark Cohen

Firm Name

Law Office of Mark Cohen

Filed By

Rose Cohen

Filer Type

Not Applicable

**Fees**

Convenience Fee \$0.00

Total Court Case Fees \$0.00

Total Court Filing Fees \$0.00

Total Court Service Fees \$0.00

Total Filing &amp; Service Fees \$0.00

Total Service Tax Fees \$0.00

Total Provider Service Fees \$0.00

Total Provider Tax Fees \$0.00

Grand Total \$0.00

**Payment**

Account Name

American Airlines Credit Card

Transaction Amount

\$0.00

Transaction Response

Transaction ID

10320695

Order #

006294762-0

**No Fee Documents**

Filing Type

EFileAndServe

Filing Code

No Fee Documents

Filing Description

Pressley-Second Amended Notice of Accelerated Appeal

Reference Number

Pressley-Second Amended Notice of Accelerated Appeal

Comments

Courtesy Copies

jan@thorrmannlegal.com

Status

Accepted

07/30/2015 02:55:06 PM

Accepted Date

Fees

Court Fee

Service Fee

Documents

Lead Document

Second Amended Notice of Accelerated  
Appeal.pdf

[Original] [Transmitted]

## eService Details

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Laura Pressley puraainlaura@aol.com		EServe	Sent	Yes	Not Opened
Kurt Kuhn kurt@kuhnhobbs.com	Kuhn Hobbs PLLC	EServe	Sent	Yes	07/30/2015 02:38:13 PM
Linda Trial linda@kuhnhobbs.com	Kuhn Hobbs PLLC	EServe	Sent	Yes	07/30/2015 02:53:08 PM
Jessica Palvino jpalvino@mcginnislaw.com	McGinnis Lochridge	EServe	Sent	Yes	07/30/2015 02:34:39 PM
Chuck Herring cherring@herring-irwin.com		EServe	Sent	Yes	Not Opened
Kurt Kuhn Kurt@kuhnhobbs.com		EServe	Sent	Yes	07/30/2015 02:37:06 PM
Lauren Ross laurenbrross@gmail.com		EServe	Sent	Yes	07/30/2015 02:34:31 PM
Mark Cohen mark@cohenlegalservices.com		EServe	Sent	Yes	07/30/2015 02:38:04 PM
Jess Irwin jess@herring-irwin.com		EServe	Sent	Yes	Not Opened

# **Tex. Const. Art. VI, § 4**

## **Sec. 4. Elections By Ballot; Numbering, Fraud, and Purity of Elections; Registration of Voters.**

- In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 10. SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS

Sec. 10.001. SIGNING OF PLEADINGS AND MOTIONS. The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(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;

(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; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.002. MOTION FOR SANCTIONS. (a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.003. NOTICE AND OPPORTUNITY TO RESPOND. The court shall provide a party who is the subject of a motion for sanctions under Section 10.002 notice of the allegations and a reasonable opportunity to respond to the allegations.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.004. VIOLATION; SANCTION. (a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the following:

- (1) a directive to the violator to perform, or refrain from performing, an act;
- (2) an order to pay a penalty into court; and



(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.005. ORDER. A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.006. CONFLICT. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

ELECTION CODE

TITLE 1. INTRODUCTORY PROVISIONS

CHAPTER 2. VOTE REQUIRED FOR ELECTION TO OFFICE

SUBCHAPTER A. ELECTION BY PLURALITY

Sec. 2.001. PLURALITY VOTE REQUIRED. Except as otherwise provided by law, to be elected to a public office, a candidate must receive more votes than any other candidate for the office.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

## Sec. 33.056. Observing Activity Generally.

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- **(a)** Except as provided by Section 33.057, a watcher is entitled to observe any activity conducted at the location at which the watcher is serving. A watcher is entitled to sit or stand conveniently near the election officers conducting the observed activity.
- **(b)** A watcher is entitled to sit or stand near enough to the member of a counting team who is announcing the votes to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly.
- **(c)** A watcher is entitled to inspect the returns and other records prepared by the election officers at the location at which the watcher is serving.
- **(d)** A watcher may not be prohibited from making written notes while on duty. Before permitting a watcher who made written notes at a precinct polling place to leave while the polls are open, the presiding officer may require the watcher to leave the notes with another person on duty at the polling place, selected by the watcher, for retention until the watcher returns to duty.

## History

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Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986.

Sec. 52.001. OFFICIAL BALLOT. (a) Except as provided by Subsection (b), the vote in an election is by official ballot.

(b) If an official ballot is unavailable at a polling place, the presiding election judge shall provide a ballot designed in accordance with this chapter.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Election Code Sec. 52.003. PLACING CANDIDATE'S NAME ON BALLOT. (a) Except as otherwise provided by law, the authority responsible for having the official ballot prepared shall have placed on the ballot the name of each candidate:

(1) who has filed with the authority an application for a place on the ballot that complies with the requirements as to form, content, and procedure that the application must satisfy for the candidate's name to be placed on the ballot; or

(2) whose entitlement to placement on the ballot has been lawfully certified to the authority.

(b) A candidate's name shall be placed on the ballot in the form indicated on the candidate's application or, if the application was not filed with the authority, in the form certified to the authority.

(c) Except as otherwise provided by law, in a runoff election, the authority shall have placed on the ballot the name of each candidate who is entitled to a place on the runoff ballot as indicated by the canvass for the main election.

Sec. 52.062. NUMBERING OF BALLOTS. The ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number "1."

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Texas Election Code Sec. 52.063. DESIGNATION OF ELECTION  
AND DATE. A designation of the nature of the election and the  
date of the election shall be printed at the top of the ballot.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Texas Election code Sec. 52.031. FORM OF NAME ON BALLOT. (a) A candidate's name shall be printed on the ballot with the given name or initials first, followed by a nickname, if any, followed by the surname, in accordance with this section



Election code sections 66.051 to .054

Sec. 66.051. DISTRIBUTION OF ELECTION RECORDS. (a) The presiding judge shall deliver envelope no. 1 in person to the presiding officer of the local canvassing authority. If the presiding officer of the local canvassing authority is unavailable, the envelope shall be delivered to the general custodian of election records who shall then deliver it to the local canvassing authority before the time set for convening the local canvass.

(b) The presiding judge shall deliver envelope no. 2, ballot box no. 3, and ballot box no. 4 and its key in person to the general custodian of election records.

(c) The presiding judge shall retain envelope no. 3.

(d) The presiding judge shall deliver envelope no. 4 in person to the voter registrar. If the voter registrar is unavailable, the envelope shall be delivered to the general custodian of election records, who shall deliver it to the voter registrar on the next regular business day.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.  
Amended by Acts 1987, 70th Leg., ch. 54, Sec. 12(b), eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 728, Sec. 21, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 1078, Sec. 17, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1315, Sec. 39, eff. Jan. 1, 2004.

Sec. 66.052. DELIVERY BY ELECTION CLERK. A delivery of election records or supplies that is to be performed by the presiding judge may be performed by an election clerk designated by the presiding judge.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 66.053. TIME FOR DELIVERING ELECTION RECORDS. (a) The precinct election records shall be delivered to the

appropriate authorities immediately after the precinct returns are completed.

(b) If the presiding judge determines that the ballots will not be counted in time to allow delivery of the precinct election records by 2 a.m. of the day after election day, the presiding judge, between midnight of election day and 1 a.m. of the following day, shall notify the general custodian of election records by telephone of:

(1) the total number of voters who voted at the polling place as indicated by the poll list;

(2) the vote totals tallied for each candidate and for and against each measure at the time of notification; and

(3) the expected time of finishing the count.

(c) The precinct election records shall be delivered not later than 24 hours after the polls close in each election.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 66.054. FAILURE TO DELIVER ELECTION RETURNS AND VOTED BALLOTS. (a) An election officer responsible for delivering precinct election returns or voted ballots commits an offense if the officer:

(1) fails to make the delivery to the appropriate authority;

(2) fails to make the delivery by the deadline prescribed by Section [66.053\(c\)](#); or

(3) fails to prevent another person from handling in an unauthorized manner the returns or voted ballots that the officer is responsible for delivering while they are in the officer's custody.

(b) If the officer is an election clerk, it is an exception to the application of Subsection (a)(2) that the election clerk did not receive the returns from the presiding judge in time to permit a timely delivery.

(c) An offense under this section is a Class B misdemeanor.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

# Tex. Elec. Code § 128.001

## Sec. 128.001. Computerized Voting System Standards.

- (a) The secretary of state shall prescribe procedures to allow for the use of a computerized voting system. The procedures must provide for the use of a computerized voting system with:
  - (1) multiple voting terminals for the input of vote selections on the ballot presented by a main computer; and
  - (2) a main computer to coordinate ballot presentation, vote selection, ballot image storage, and result tabulation.
- (b) Notwithstanding Chapter 66, a system under this section may allow for the storage of processed ballot materials in an electronic form on the main computer.
- (c) The secretary of state may modify existing procedures as necessary to allow the use of a system authorized by this chapter.

## History

Enacted by [Acts 1997, 75th Leg., ch. 1349 \(H.B. 331\), § 50](#), effective September 1, 1997.

Texas Election Code Sec. 213.016. PRINTING IMAGES OF BALLOTS CAST USING DIRECT RECORDING ELECTRONIC VOTING MACHINES. During any printing of images of ballots cast using direct recording electronic voting machines for the purpose of a recount, the full recount committee is not required to be present. The recount committee chair shall determine how many committee members must be present during the printing of the images. Each candidate is entitled to be present and to have representatives present during the printing of the images in the same number as Section [213.013](#)(b) prescribes for watchers for a recount.

Texas Election Code Sec. 214.049. COUNTING PROCEDURE.

(e) If electronic voting system ballots are to be recounted manually, the original ballot, rather than the duplicate of the original ballot, shall be counted.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Amended by Acts 1987, 70th Leg., 2nd C.S., ch. 59, Sec. 19, eff.

Oct. 20, 1987; Acts 1997, 75th Leg., ch. 864, Sec. 225, eff.

Sept. 1, 1997; Acts 2001, 77th Leg., ch. 851, Sec. 8, eff.

Sept. 1, 2001.

# Tex. Elec. Code § 221.003

## Sec. 221.003. Scope of Inquiry.

- (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 involved 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.
- (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.

## History

Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986.

## Annotations

## Notes

The revised law clarifies the scope of inquiry of a tribunal hearing an election contest, provides a definition of "illegal vote," and provides that the scope of inquiry in an election contest is not limited by this section.

## Case Notes

- ▣ Civil Procedure: Judicial Officers: Judges: Discretion
- ▣ Civil Procedure: Appeals: Standards of Review: Abuse of Discretion
- ▣ Evidence: Procedural Considerations: Burdens of Proof: Clear & Convincing Proof
- ▣ Evidence: Testimony: Experts: Credibility: General Overview
- ▣ Governments: Legislation: Initiative & Referendum
- ▣ Governments: Local Governments: Elections
- ▣ Governments: State & Territorial Governments: Elections

### Case Notes

- ▣ Civil Procedure: Judicial Officers: Judges: Discretion
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- ▣ Governments: State & Territorial Governments: Elections

- ▣ Civil Procedure: Judicial Officers: Judges: Discretion

1. If a sufficient number of voters are rendered potentially ineligible by mistakes made during the recording process to account for the entire margin of victory, a trial court is within its discretion to declare an election void because it is impossible to determine the true outcome of the election. [Gonzalez v. Villarreal, 251 S.W.3d 763, 2008 Tex. App. LEXIS 921 \(Tex. App. Corpus Christi 2008\) pet. dism'd w.o.j. No. 08-0132, 2008 Tex. LEXIS 194 \(Tex. Mar. 4, 2008\), reh'g denied, No. 13-07-704-CV, 2008 Tex. App. LEXIS 4339 \(Tex. App. Corpus Christi Mar. 24, 2008, no pet.\).](#)

- ▣ Civil Procedure: Appeals: Standards of Review: Abuse of Discretion


2. In a case where a contestee won an election by three votes, a trial court did not abuse its discretion by declaring an election void under Tex. [Elec. Code Ann. § 221.012](#) where seven voters testified that they were precluded from voting in a county commissioner's race due to




their being assigned to the incorrect precinct. [McCurry v. Lewis, 259 S.W.3d 369, 2008 Tex. App. LEXIS 5029 \(Tex. App. Amarillo 2008, no pet.\)](#).

 Evidence: Procedural Considerations: Burdens of Proof: Clear & Convincing Proof

3. Where a trial court was presented with clear and convincing evidence that illegal votes were counted in an election for places on the board of trustees for an independent school district, that officials failed to count some legal votes, and that election judges made mistakes that materially affected and obscured the true outcome of the election, the trial court properly declared the election void and ordered a new election; legally sufficient evidence supported the trial court's implied findings that 77 votes were illegally cast and that, with respect to 436 voters, mistakes by election clerks in failing to record information required by the election code made it impossible to determine whether those votes were legally cast and countable because, among the undisputed testimony presented by an election contestant was that: (1) 72 voters listed on the combination forms were registered voters but, according to the online database, did not reside in the school district at issue; (2) five voters voted in the wrong precinct; (3) with respect to 127 voters who cast their votes on election day, the names or registration certificate numbers could not be located on the list of registered voters, either because the name did not appear on the list at all or because there were multiple, identical names on the list that might or might not have been the voter, making it impossible to tell if those votes were legally cast; (4) four voters on election day voted, but provided an incorrect voter registration number, and no address was provided, making it impossible to tell if those voters were qualified and properly accepted for voting, or whether they had been required to cast a provisional ballot; and (5) with respect to voting during early voting, because there was a lack of an address on the combination forms and the inability to match a particular voter with a particular listing on the online database, the contestant could not determine the eligibility of 208 voters from one polling place and 97 voters at another polling place. [Gonzalez v. Villarreal, 251 S.W.3d 763, 2008 Tex. App. LEXIS 921 \(Tex. App. Corpus Christi 2008\)](#)pet. dism'd w.o.j.[No. 08-0132, 2008 Tex. LEXIS 194 \(Tex. Mar. 4, 2008\)](#), reh'g denied, [No. 13-07-704-CV, 2008 Tex. App. LEXIS 4339 \(Tex. App. Corpus Christi Mar. 24, 2008, no pet.\)](#).

 Evidence: Testimony: Experts: Credibility: General Overview

4. In an election contest under Tex. [Elec. Code Ann. § 221.003\(a\)](#), a trial court was not required to accept the opinion of an expert concerning the unreliability of electronic voting devices where he admitted that he had not examined or tested any machines used in the county; his conclusions were unsupported by any analysis or reasoning, and a county elections administrator testified to the contrary by pointing to the fact that signature rosters almost perfectly matched the number of paper votes. The trial court found that the election day count was valid; even if a court-supervised recount was accurate, the benefit to the incumbent was insufficient to affect the outcome of the election. [Flores v. Cuellar, 269 S.W.3d 657, 2008 Tex. App. LEXIS 6610 \(Tex. App. San Antonio 2008, no pet.\)](#)

 Governments: Legislation: Initiative & Referendum

5. Statements by the mayor, cited as newly discovered evidence in a motion for new trial, were immaterial to the scope of inquiry in an election contest because the statements did not address matters discussed in either the measure or the proposition and consequently did not bear on the

question of whether voters were misled by the proposition. [Dacus v. Parker, 383 S.W.3d 557, 2012 Tex. App. LEXIS 5420 \(Tex. App. Houston 14th Dist. 2012, no pet. h.\)](#)

 Governments: Local Governments: Elections

6. Court properly granted summary judgment in favor of appellee, because appellant indicated that he had no evidence that anybody failed to count legal votes and no evidence to prove the election results were wrong or that the voting machines were not working, and testified he had no evidence of any illegal votes. [Vazaldua v. Muoz, — S.W.3d —, 2014 Tex. App. LEXIS 6701 \(June 20, 2014, no pet. h.\)](#)

7. Statements by the mayor, cited as newly discovered evidence in a motion for new trial, were immaterial to the scope of inquiry in an election contest because the statements did not address matters discussed in either the measure or the proposition and consequently did not bear on the question of whether voters were misled by the proposition. [Dacus v. Parker, 383 S.W.3d 557, 2012 Tex. App. LEXIS 5420 \(Tex. App. Houston 14th Dist. 2012, no pet. h.\)](#)

8. Given that the parties utilized the trial court to resolve an issue of disputed fact and appellants had a right to the court's review to determine whether the trial court properly exercised its discretion in resolving the issues in this election contest, the court declined to issue sanctions. [McDuffee v. Miller, 327 S.W.3d 808, 2010 Tex. App. LEXIS 8676 \(Tex. App. Beaumont 2010, no pet.\)](#).

9. Clearly, the Legislature contemplated the use of election contest proceedings to resolve disputes concerning whether votes were countable. [McDuffee v. Miller, 327 S.W.3d 808, 2010 Tex. App. LEXIS 8676 \(Tex. App. Beaumont 2010, no pet.\)](#).

10. Legislature gave district courts a significant role in election contest proceedings, given that in an election contest, the district court determines whether the canvassed result includes illegal votes, under Tex. [Elec. Code Ann. § 221.003](#), and the trial court is expressly authorized to subtract illegal votes from the official total for the candidate, under Tex. [Elec. Code Ann. § 221.011](#); thus, it does not appear that the Legislature intended the registrar's role of hearing complaints about the validity of a voter's registration to be the exclusive method of assuring the accuracy of elections. [McDuffee v. Miller, 327 S.W.3d 808, 2010 Tex. App. LEXIS 8676 \(Tex. App. Beaumont 2010, no pet.\)](#).

11. Because the incumbent directors prevailed in the trial court, on appeal the court reviewed the evidence in the light most favorable to the judgment and determined if the trier-of-fact could have formed a firm belief that the residences of the voters casting the challenged votes were not within the right district on the date they signed a voter's registration application, nor when they voted, nor subsequently. [McDuffee v. Miller, 327 S.W.3d 808, 2010 Tex. App. LEXIS 8676 \(Tex. App. Beaumont 2010, no pet.\)](#).

12. Trial court erred in awarding summary judgment to a mayor in a city resident's action challenging a special election in which three proposed city charter amendments were passed because the expert testimony offered by the resident raised a genuine issue of material fact regarding whether irregularities in the conduct of the election rendered it impossible to determine

the majority of the voters' true will under Tex. [Elec. Code Ann. § 221.003\(a\)](#). [Duncan-Hubert v. Mitchell](#), 310 S.W.3d 92, 2010 Tex. App. LEXIS 1889 (Tex. App. Dallas 2010)pet. deniedNo. 10-0493, 2010 Tex. LEXIS 729 (Tex. Oct. 1, 2010).

13. Challenge that does not concern whether the outcome of the election was incorrect for one of the four reasons listed in the statute is, by definition, not an election contest under Tex. [Elec. Code Ann. § 221.003](#). [City of Granite Shoals v. Winder](#), 280 S.W.3d 550, 2009 Tex. App. LEXIS 1925 (Tex. App. Austin 2009)pet. deniedNo. 09-0368, 2010 Tex. LEXIS 152 (Tex. Feb. 12, 2010).

14. Because property owners' suit for declaratory judgment did not raise any of the issues that had to be resolved in an election contest, they were not required to bring their challenge as an election contest under Tex. [Elec. Code Ann. § 221.003](#). [City of Granite Shoals v. Winder](#), 280 S.W.3d 550, 2009 Tex. App. LEXIS 1925 (Tex. App. Austin 2009)pet. deniedNo. 09-0368, 2010 Tex. LEXIS 152 (Tex. Feb. 12, 2010).

15. In an election contest under Tex. [Elec. Code Ann. § 221.003\(a\)](#), a trial court was not required to accept the opinion of an expert concerning the unreliability of electronic voting devices where he admitted that he had not examined or tested any machines used in the county; his conclusions were unsupported by any analysis or reasoning, and a county elections administrator testified to the contrary by pointing to the fact that signature rosters almost perfectly matched the number of paper votes. The trial court found that the election day count was valid; even if a court-supervised recount was accurate, the benefit to the incumbent was insufficient to affect the outcome of the election. [Flores v. Cuellar](#), 269 S.W.3d 657, 2008 Tex. App. LEXIS 6610 (Tex. App. San Antonio 2008, no pet.)

16. Election was properly declared void where two voters testified that they were prevented from voting in a county commissioner race due to their placement in an improper voting precinct; the voters' testimony did not amount to impeachment, the fact that the voters were able to cast a ballot did not preclude a finding that they were prevented from voting, and they had no correction duty under Tex. [Elec. Code Ann. § 15.021\(a\)](#). The trial court was unable to determine the true outcome of the election under Tex. [Elec. Code Ann. § 221.012](#). [Perez v. Alanis](#), No. 04-08-00276-CV, 2008 Tex. App. LEXIS 6127 (Tex. App. San Antonio Aug. 13, 2008, no pet.).

17. In a case where a contestee won an election by three votes, a trial court did not abuse its discretion by declaring an election void under Tex. [Elec. Code Ann. § 221.012](#) where seven voters testified that they were precluded from voting in a county commissioner's race due to their being assigned to the incorrect precinct. [McCurry v. Lewis](#), 259 S.W.3d 369, 2008 Tex. App. LEXIS 5029 (Tex. App. Amarillo 2008, no pet.).

18. If a sufficient number of voters are rendered potentially ineligible by mistakes made during the recording process to account for the entire margin of victory, a trial court is within its discretion to declare an election void because it is impossible to determine the true outcome of the election. [Gonzalez v. Villarreal](#), 251 S.W.3d 763, 2008 Tex. App. LEXIS 921 (Tex. App. Corpus Christi 2008)pet. dismissed w.o.j.No. 08-0132, 2008 Tex. LEXIS 194 (Tex. Mar. 4, 2008), reh'g denied, No. 13-07-704-CV, 2008 Tex. App. LEXIS 4339 (Tex. App. Corpus Christi Mar.

[24, 2008, no pet.](#)).

19. Where a trial court was presented with clear and convincing evidence that illegal votes were counted in an election for places on the board of trustees for an independent school district, that officials failed to count some legal votes, and that election judges made mistakes that materially affected and obscured the true outcome of the election, the trial court properly declared the election void and ordered a new election; legally sufficient evidence supported the trial court's implied findings that 77 votes were illegally cast and that, with respect to 436 voters, mistakes by election clerks in failing to record information required by the election code made it impossible to determine whether those votes were legally cast and countable because, among the undisputed testimony presented by an election contestant was that: (1) 72 voters listed on the combination forms were registered voters but, according to the online database, did not reside in the school district at issue; (2) five voters voted in the wrong precinct; (3) with respect to 127 voters who cast their votes on election day, the names or registration certificate numbers could not be located on the list of registered voters, either because the name did not appear on the list at all or because there were multiple, identical names on the list that might or might not have been the voter, making it impossible to tell if those votes were legally cast; (4) four voters on election day voted, but provided an incorrect voter registration number, and no address was provided, making it impossible to tell if those voters were qualified and properly accepted for voting, or whether they had been required to cast a provisional ballot; and (5) with respect to voting during early voting, because there was a lack of an address on the combination forms and the inability to match a particular voter with a particular listing on the online database, the contestant could not determine the eligibility of 208 voters from one polling place and 97 voters at another polling place. [Gonzalez v. Villarreal, 251 S.W.3d 763, 2008 Tex. App. LEXIS 921 \(Tex. App. Corpus Christi 2008\)](#)pet. dism'd w.o.j.[No. 08-0132, 2008 Tex. LEXIS 194 \(Tex. Mar. 4, 2008\)](#), reh'g denied, [No. 13-07-704-CV, 2008 Tex. App. LEXIS 4339 \(Tex. App. Corpus Christi Mar. 24, 2008, no pet.\)](#).

20. Origin of the requirement that the plaintiff in an election contest prove the allegations by clear and convincing evidence is not clear to the court, as the court finds no such requirement in the applicable part of the Texas Election Code for purposes of Tex. [Elec. Code Ann. § 221.003](#); the earliest case imposing the burden is Johnston v. Peters and it thus appears to be a judge-made rule, but the court followed the majority of election-contest cases in reviewing this appeal under the higher standard. [Willet v. Cole, 249 S.W.3d 585, 2008 Tex. App. LEXIS 514 \(Tex. App. Waco 2008, no pet.\)](#).

21. Appellee had the burden to prove by clear and convincing evidence that challenged voters did not reside, as defined in Tex. [Elec. Code Ann. § 1.015](#), at a vet clinic, thus making them ineligible to vote under Tex. [Elec. Code Ann. § 11.001\(a\)\(1\)-\(3\)](#); because the evidence was sufficient to produce a belief that the voters did not reside at the clinic, given witness testimony that the voters did not live, reside, sleep, or stay at the clinic and the evidence that their residence was outside the city, the trial court did not err in overturning the election under Tex. [Elec. Code Ann. § 221.003](#). [Willet v. Cole, 249 S.W.3d 585, 2008 Tex. App. LEXIS 514 \(Tex. App. Waco 2008, no pet.\)](#).

22. Appellee's motion to issue a mandate immediately was granted, good cause having been

shown, and the clerk was directed to issue the mandate at the same time as the judgment affirming the trial court's overturning of an election under Tex. [Elec. Code Ann. § 221.003](#), for purposes of [Tex. R. App. P. 18. Willet v. Cole, 249 S.W.3d 585, 2008 Tex. App. LEXIS 514 \(Tex. App. Waco 2008, no pet.\)](#).

23. Because some people who were deeded land by an election contestee did not meet the residency requirements under Tex. [Elec. Code Ann. § 1.015\(a\)](#), a trial court did not err by finding that their votes were illegally counted under Tex. [Elec. Code Ann. § 221.003\(a\)\(1\)](#) and ordering a new county commissioner election; a ranch hand who stayed in different places at night, a student attending school in another town, and a person that merely visited the county in question were not found to be residents, even though two of them owned land there; however, three others who stayed in a mobile home on property in the county were properly found to be residents. [Kiehne v. Jones, 247 S.W.3d 259, 2007 Tex. App. LEXIS 4869 \(Tex. App. El Paso 2007\)](#)pet. denied[No. 07-0607, 2007 Tex. LEXIS 855 \(Tex. Sept. 14, 2007\)](#).

24. Trial court properly refused to include in a final election tally three ballots in appellant's favor that had been excluded based on ballot application and carrier envelope signatures that did not match; the ballot board acted properly in comparing the signatures on the ballot applications and carrier envelopes to determine whether they were signed by the same person. [Harrison v. Stanley, 193 S.W.3d 581, 2006 Tex. App. LEXIS 1906 \(Tex. App. Houston 1st Dist. 2006\)](#), reh'g denied, [193 S.W.3d 581, 2006 Tex. App. LEXIS 4119 \(Tex. App. Houston 1st Dist. 2006, no pet.\)](#)pet. denied[No. 06-0517, 2006 Tex. LEXIS 814 \(Tex. Aug. 31, 2006\)](#).

25. Location of temporary polling places for a school district's special bond election, which included a football stadium during a high school football game, was not improper under Tex. [Elec. Code Ann. § 221.003](#); the school district had authority to establish temporary polling places pursuant to Tex. [Elec. Code Ann. § 85.062\(a\)\(2\)](#). [Bielamowicz v. Cedar Hill Indep. Sch. Dist., 136 S.W.3d 718, 2004 Tex. App. LEXIS 4645 \(Tex. App. Dallas 2004\)](#)pet. denied[No. 04-0768, 2004 Tex. LEXIS 947 \(Tex. Oct. 8, 2004\)](#).

26. Complaints alleging that city officials prevented eligible voters from voting or that city officials, by failing to publish or republish an ordinance, engaged in fraud or illegal conduct were all grounds within the scope of an election contest review as defined by Tex. [Elec. Code § 221.003](#). [Rossano v. Townsend, 9 S.W.3d 357, 1999 Tex. App. LEXIS 8971 \(Tex. App. Houston 14th Dist. 1999, no pet.\)](#).

27. Although election officials combined the locations of certain polling places, leaving some precincts without a polling location in violation of Tex. [Elec. Code Ann. § 43.001](#), the violations were not sufficient to invalidate the results of the election pursuant to Tex. [Elec. Code Ann. § 221.003](#) as there was no testimony offered regarding any eligible voters who were prevented from voting nor were there any allegations that any election official engaged in illegal conduct or of other election irregularities. [Honts v. Shaw, 975 S.W.2d 816, 1998 Tex. App. LEXIS 5666 \(Tex. App. Austin 1998\)](#).

28. Although Tex. [Elec. Code Ann. § 221.003\(a\)\(2\)\(C\)](#) does not define the term "mistake," the nature of the mistake contemplated by the statute must be one of such magnitude as to affect the

true outcome of the election. [Honts v. Shaw, 975 S.W.2d 816, 1998 Tex. App. LEXIS 5666 \(Tex. App. Austin 1998\).](#)

29. Judgment in an election contestant's action was proper where there was no evidence that the contestees committed election fraud or that there were a sufficient number of illegal votes cast that would have changed the election's outcome. [Frias v. Board of Trustees, 584 S.W.2d 944, 1979 Tex. App. LEXIS 3969 \(Tex. Civ. App. El Paso\), cert. denied, 444 U.S. 996, 100 S. Ct. 531, 62 L. Ed. 2d 426, 1979 U.S. LEXIS 4141 \(U.S. 1979\).](#)

30. Write-in candidate's suit contesting a school board trustee election failed where no evidence was introduced that there was any voting irregularity, that any voter was denied the right to vote, nor that any voter would have voted differently had write-in candidate's name appeared on the ballot, so there was no evidence to show that the results of the election would have been materially changed. [Perez v. Alarcon, 491 S.W.2d 688, 1973 Tex. App. LEXIS 2559 \(Tex. Civ. App. El Paso 1973, no writ\).](#)

31. The burden was on the contestant in an election contest to allege and prove either that a different result would have been reached by counting or not counting certain specified votes, or that irregularities in the conduct of an election were such as to render it impossible to determine the will of the majority of the voters participating. [Ware v. Crystal City Independent School Dist., 489 S.W.2d 190, 1972 Tex. App. LEXIS 2379 \(Tex. Civ. App. San Antonio 1972, no writ\).](#)

 Governments: State & Territorial Governments: Elections

32. Court properly granted summary judgment in favor of appellee, because appellant indicated that he had no evidence that anybody failed to count legal votes and no evidence to prove the election results were wrong or that the voting machines were not working, and testified he had no evidence of any illegal votes. [Vazaldua v. Muoz, — S.W.3d —, 2014 Tex. App. LEXIS 6701 \(June 20, 2014, no pet. h.\)](#)

33. Individual did not follow the necessary procedures under Tex. Elec. Code Ann. § /Aa84.032 to cancel her mailed-in ballot, and thus the trial court did not err in finding that the individual was not eligible to vote in a runoff. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

34. Individual was improperly placed in district two and forwarded such a mail-in ballot instead of a district one ballot; the record did not indicate whether the individual was aware of the problem or whether she intended to vote for a certain candidate, and the trial court did not err in finding that the board member did not show that the individual was prevented from voting for the candidate of her choice. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

35. Individual had lived in housing with district one, but he could not return home after a hurricane; at trial, he was living in district two, and the trial court did not err in finding that the individual was not eligible to vote in district one at the time of the runoff election. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet.](#)



[h.\)](#)

36. Tex. [Elec. Code Ann. § 15.021\(a\)](#) requires the voter to ensure that accurate registration information is provided, and the application for registration requires either the applicant's state-issued identification number or the last four digits of her social security number; an individual's application contained neither, and the evidence supported the finding that she was ineligible to vote at the runoff election. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

37. Individual was told she could not vote because she lived in Houston, and the trial court did not err in finding that she was not an eligible voter on the runoff election date. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

38. Evidence did not show whether an individual mailed in her ballot timely, and the individual's mother testified that the individual was not allowed to vote, and the evidence did not support the board member's burden under Tex. [Elec. Code Ann. § 221.003](#). [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

39. Individual was not allowed to vote in a district one runoff election because her new address was in district six; she wanted to remain in her rented house in district one, but she had no definite plans to return to that district, and the trial court did not err in finding that the evidence did not show that she was a qualified registered voter. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

40. Evidence supported the conclusion that individuals were not statutorily eligible to vote in district one at the time of the runoff election, nor did the record show their intent to vote in the election or any denial of the intent to vote. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

41. Evidence supported the finding that a person was not an eligible voter because she was not a resident of a certain district at the time of the runoff election and she did not show a present intent to return to that district, for purposes of Tex. [Elec. Code Ann. § 1.015](#). [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

42. Council member argued that the trial court erred in failing to credit evidence to show that the outcome was not correct because of mistakes in assigning certain voters in one precinct to another precinct, for purposes of Tex. [Elec. Code Ann. § 221.003\(a\)\(2\)\(C\)](#), but the record did not contain testimony from any of these voters, and the trial court did not err in finding that the evidence did not rise to the level of clear proof that any voter was deprived of a vote for the candidate of his choice. [Woods v. Legg, 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 \(Tex. App. Houston 1st Dist. 2011, no pet. h.\)](#)

43. Individual admitted that she decided not to complete the registration card and she had no reason to believe that, had she done so, she would not have been given a provisional ballot; the trial court did not err in finding that a council member failed to present clear evidence that an

election worker wrongfully denied the individual a chance to vote in a runoff. [Woods v. Legg](#), 363 S.W.3d 710, 2011 Tex. App. LEXIS 6281 (Tex. App. Houston 1st Dist. 2011, no pet. h.)

## Research References & Practice Aids

LexisNexis ® Notes  
LAW REVIEWS

1. [28 Tex. Tech L. Rev. 1095](#), ARTICLE: CONSIDERATION OF ILLEGAL VOTES IN LEGISLATIVE ELECTION CONTESTS, 1997.

Hierarchy Notes:

[Tex. Elec. Code Title 14, Subtit. A, Ch. 221](#)

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# **Tex. Elec. Code § 221.012**

## **Sec. 221.012. Tribunal's Action on Contest.**

- (a) If the tribunal hearing an election contest can ascertain the true outcome of the election, the tribunal shall declare the outcome.
- (b) The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.

## **History**

Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986.

Jump To:

## Tex. Elec. Code § 213.013

This document is current through the 2015 regular session, 84th Legislature, S.B. 45, S.B. 293 (ch. 2), S.B. 415(ch. 15), S.B. 459, S.B. 529 (ch. 37), S.B. 835 (ch. 6), S.B. 901 (ch. 54), S.B. 903 (ch. 3), S.B. 1749 (ch. 29), and S.B. 1985 (ch. 4).

### Sec. 213.013. Representation of Parties and Political Parties at Recount.

- **(a)** Each person entitled to notice of the recount under Section 213.009 is entitled to be present at a recount.
- **(b)** In a recount of an election on an office, each candidate for the office is entitled to be present at the recount and have watchers present in the number corresponding to the number of counting teams designated for the recount. If only one counting team is designated or the recount is conducted on automatic tabulating equipment, each candidate is entitled to two watchers.
- **(c)** In a recount of an election on an office for which a political party has a nominee or for which a candidate is aligned with a political party, the party is entitled to have watchers present in the same number prescribed for candidates under Subsection (b).
- **(d)** In a recount of an election on a measure, watchers may be appointed by the campaign treasurer or assistant campaign treasurer of a specific-purpose political committee that supports or opposes the measure in the number corresponding to the number of counting teams designated for the recount. If only one counting team is designated or the recount is conducted on automatic tabulating equipment, each eligible specific-purpose political committee is entitled to two watchers.
- **(e)** A watcher appointed to serve at a recount must deliver a certificate of appointment to the recount committee chair at the time the watcher reports for service. A watcher who presents himself or herself for service at any time immediately before or during the recount and submits a proper certificate of appointment must be accepted for service unless the number of appointees to which the appointing authority is entitled have already been accepted.

- **(f)** The certificate must be in writing and must include:
  - **(1)** the printed name and the signature of the watcher;
  - **(2)** the election subject to the recount;
  - **(3)** the time and place of the recount;
  - **(4)** the measure, candidate, or political party being represented;
  - **(5)** the signature and the printed name of the person making the appointment; and
  - **(6)** an indication of the capacity in which the appointing authority is acting.
  
- **(g)** If the watcher is accepted for service, the recount committee chair shall keep the certificate and deliver it to the recount coordinator after the recount for preservation under Section 211.007. If the watcher is not accepted for service, the recount committee chair shall return the certificate to the watcher with a signed statement of the reason for the rejection.
  
- **(h)** Each person entitled to be present at a recount is entitled to observe any activity conducted in connection with the recount. The person is entitled to sit or stand conveniently near the officers conducting the observed activity and near enough to an officer who is announcing the votes or examining or processing the ballots to verify that the ballots are counted or processed correctly or to an officer who is tallying the votes to verify that they are tallied correctly. Rules concerning a watcher's rights, duties, and privileges are otherwise the same as those prescribed by this code for poll watchers to the extent they can be made applicable.
  
- **(i)** No device capable of recording images or sound is allowed inside the room in which the recount is conducted, or in any hallway or corridor in the building in which the recount is conducted within 30 feet of the entrance to the room, while the recount is in progress unless the person entitled to be present at the recount agrees to disable or deactivate the device. However, on request of a person entitled to appoint watchers to serve at the recount, the recount committee chair shall permit the person to photocopy under the chair's supervision any ballot, including any supporting materials, challenged by the person or person's watcher. The person must pay a reasonable charge for making the copies and, if no photocopying equipment is available, may supply that equipment at the person's expense. The person shall provide a copy on request to another person entitled to appoint watchers to serve at the recount.

## History

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Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986; am. Acts 1987, 70th Leg., 2nd C.S., ch. 59 (H.B. 19), § 13, effective October 20, 1987; am. [Acts 1993, 73rd Leg., ch. 728 \(H.B. 75\), § 75](#), effective September 1, 1993; am. [Acts 1997, 75th Leg., ch. 864 \(H.B. 1603\), § 218](#), effective September 1, 1997; am. [Acts 2009, 81st Leg., ch. 1235 \(S.B. 1970\), § 21](#), effective September 1, 2009; am. [Acts 2011, 82nd Leg., ch. 1164 \(H.B. 2817\), § 37](#), effective September 1, 2011.

## Texas Rule of App. P. Rule 45 Damages for Frivolous Appeals in Civil Cases

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If the court of appeals determines that an appeal is frivolous, it may - on motion of any party or on its own initiative, after notice and a reasonable opportunity for response - award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

## Texas Rule of Civil Procedure

### Rule 11 Agreements to Be in Writing

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Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

- **192.3. Scope of Discovery.**

- **(a) Generally.** --In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
- **(b) Documents and Tangible Things.** --A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.
- **(c) Persons with Knowledge of Relevant Facts.** --A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.
- **(d) Trial Witnesses.** --A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

## Texas Rules of Civil Procedure

- **193.4. *Hearing and Ruling on Objections and Assertions of Privilege.***
  - **(a) *Hearing.*** --Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.
  - **(b) *Ruling.*** --To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.
  - **(c) *Use of Material or Information Withheld Under Claim of Privilege.*** --A party may not use - at any hearing or trial - material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.



**Foust v. Hefner, 2014 Tex. App. LEXIS 8880**[Copy Citation](#)

Court of Appeals of Texas, Seventh District, Amarillo

August 12, 2014, Decided

No. 07-13-00331-CV

**Reporter**

2014 Tex. App. LEXIS 8880 | 2014 WL 3928781

ALICIA FOUST, APPELLANT, v. DON E. HEFNER, CPA, APPELLEE

**Prior History:** [1] On Appeal from the 99th District Court, Lubbock County, Texas. Trial Court No. 2012-502,047, Honorable William C. Sowder, Presiding.**Core Terms**

sanctions, defamation claim, defamation, trial court, existing law, defamatory, levied, vandalism, evidence supports, Improper purpose, pleadings, cause of action, trial counsel, accusation, damages, pet

**Case Summary****Overview**

**HOLDINGS:** [1]-In asserting a defamation per se claim on behalf of an accountant's employee after the accountant told a third party that the employee vandalized the office, counsel was not shown to have acted in bad faith or asserted a claim without legal or factual basis sufficient for the imposition of sanctions under Tex. Civ. Prac. & Rem. Code Ann. § 10.001; [2]-Although the employee had a friend call the employer to see what he was saying about her, the friend did not induce or bait the employer into accusing the employee of vandalism, but merely posed as a potential employer.

**Outcome**

Judgment reversed.

**LexisNexis® Headnotes**Civil Procedure > [Sanctions](#) ▾ > [Baseless Filings](#) ▾ > [Signature Requirements](#) ▾Civil Procedure > [Sanctions](#) ▾ > [Baseless Filings](#) ▾ > [Frivolous Lawsuits](#) ▾

**HNI** Per Tex. Civ. Prac. & Rem. Code Ann. § 10.001 (2002), the signing of a pleading or motion constitutes a certificate by the person that, to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, 1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation; 2) each claim, defense, or other legal contention asserted 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; 3) each allegation or factual assertion has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and 4) each denial is warranted on the evidence or is reasonably based on a lack of information or belief. Furthermore, a court determining that a person signed such pleading or motion in violation of section 10.001 may sanction either or both the signatory and the party represented by the person. Tex. Civ. Prac. & Rem. Code Ann. § 10.004(a). *Shepardize - Narrow by this Headnote*

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Signature Requirements](#)

Evidence > [Inferences & Presumptions](#) > [Presumptions](#) > [Rebuttal of Presumptions](#)

Evidence > [Burdens of Proof](#) > [Allocation](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Certification Requirements](#)

**HN2** Before sanctions may issue under [Tex. Civ. Prac. & Rem. Code Ann. § 10.001](#) (2002), the presumption that the signatory acted in good faith must be rebutted, and the burden to do so lies with the movant. The pertinent window through which the court considers the matter is that existing when the petition or motion is filed. Consequently, a plaintiff's failure to convince the ultimate factfinder to render a favorable verdict does not ipso facto entitle the opposition to sanctions. Nor is it enough that the plaintiff unsuccessfully attempted to pursue an unpopular claim or one which other attorneys would have eschewed. Unless it is shown that the certification created by [section 10.001](#) was false or breached, sanctions cannot issue under [section 10.001 et seq. of the Civil Practice and Remedies Code](#). [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [General Overview](#)

Civil Procedure > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#)

**HN3** Whether a court erred in levying sanctions under [Tex. Civ. Prac. & Rem. Code Ann. § 10.001](#) (2002) depends upon whether it abused its discretion. That occurs when the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Certification Requirements](#)

**HN4** The pertinent window for considering sanctions under [Tex. Civ. Prac. & Rem. Code Ann. § 10.001](#) (2002) is that revealing what counsel thought, knew, or should have known when he signed the pleading or motion. [Shepardize - Narrow by this Headnote](#)

Torts > ... > [Defamation](#) > [Elements](#) > [General Overview](#)

**HN5** The common law recognizes a cause of action for defamation. Recovery under the cause depends upon proving that the defendant 1) published a statement, 2) that defamed the plaintiff, 3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement. [Shepardize - Narrow by this Headnote](#)

Torts > ... > [Defamation](#) > [Defenses](#) > [General Overview](#)

**HN6** Alleged defamatory statements made to someone acting on behalf of the defamed individual does not alone render a defamation suit groundless. Publishing defamatory comments to a person's agent may create a cause of action. Yet, the claim is lost if the defamatory statements are procured to create a lawsuit or invited by the complainant. And, they are so procured or invited if the person induced them or knew in advance that they were likely to be forthcoming. [Shepardize - Narrow by this Headnote](#)

Torts > ... > [Defenses](#) > [Privileges](#) > [Statutory Privileges](#)

Labor & Employment Law > [Employee Privacy](#) > [Disclosure of Employee Information](#) > [General Overview](#)

**HN7** The immunity granted ex-employers who talk about ex-employees in [Tex. Labor Code Ann. § 103.004\(a\)](#) (2006) does not encompass comments known by that employer to be false at the time the disclosure was made or disclosures made with malice or in reckless disregard for the truth or falsity of the information disclosed. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Certification Requirements](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#)

**HN8** Losing at trial does not alone prove that a cause of action lacked present or reasonably potential legal or factual basis (or was offered for an improper purpose) at the time when the pleadings were signed for purposes of sanctions under [Tex. Civ. Prac. & Rem. Code Ann. § 10.001](#) (2002). [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > ... > [Miscellaneous Offenses](#) > [Destruction of Property](#) > [Elements](#)

**HN9** [Tex. Penal Code Ann. § 28.03\(a\)\(1\) & \(2\)](#) (2011) provide that one commits a criminal offense when he, without effective consent, intentionally, or knowingly damages the tangible property of the owner, or intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner. [Shepardize - Narrow by this Headnote](#)

Torts > [Intentional Torts](#) > [Defamation](#) > [Defamation Per Se](#)  
 Evidence > [Inferences & Presumptions](#) > [Presumptions](#) > [Creation](#)

**HN10** Falsehoods accusing one of criminal conduct not only are defamatory per se but also are presumed to cause the defamed nominal damages. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#)  
 Civil Procedure > [Sanctions](#) > [Misconduct & Unethical Behavior](#) > [General Overview](#)

**HN11** The phrase "improper purpose" in [Tex. Civ. Prac. & Rem. Code Ann. § 10.001](#) (2002) has been construed as equivalent to "bad faith" under [Tex. R. Civ. P. 13](#). Moreover, under [Rule 13](#), establishing bad faith requires proof of conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose. [Shepardize - Narrow by this Headnote](#)

Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Frivolous Lawsuits](#)  
 Civil Procedure > [Sanctions](#) > [Baseless Filings](#) > [Bad Faith Motions](#)

**HN12** Litigants must factor caution and thought into their decision whether to pursue relief under [Tex. R. Civ. P. 13](#) and [Tex. Civ. Prac. & Rem. Code Ann. § 10.001 et seq.](#) (2002). Indeed, just as sanctions may be levied, in appropriate cases, for filing a frivolous pleading, so too may they be levied for filing a baseless motion for sanctions. [Shepardize - Narrow by this Headnote](#)

Judges: Before [QUINN](#), C.J., and [CAMPBELL](#) and [PITILE](#), JJ.

Opinion by: [Brian Quinn](#)

## Opinion

### MEMORANDUM OPINION

Alicia Foust (Foust) appeals from a judgment awarding Don E. Hefner (Hefner) sanctions against her. After terminating her employment with Hefner, Foust sued him for defamation, business disparagement, and the recovery of unpaid overtime. Before trial, Hefner moved the trial court to award him sanctions.<sup>[1]</sup> The suit was tried by the court, and by the time of trial, Foust had abandoned her claim for business disparagement. Ultimately, the trial court awarded Foust unpaid overtime due her from Hefner but denied her defamation claim. It also granted Hefner sanctions in the amount of \$5,271.75 against both Foust and her attorney. The sum represented the amount of attorney's fees purportedly incurred by Hefner in defending against the defamation claim. On appeal, we are asked to determine whether the trial court abused its discretion in levying such sanctions. We conclude that it did.

### Authority

Hefner moved for sanctions under [section 10.001 et seq. of the Texas Civil Practice and Remedies Code](#). **HN1** Per that statute, the signing of a pleading or motion constitutes a certificate by the person that, to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, 1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation; 2) each claim, defense, or other legal contention asserted 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; 3) each allegation or factual assertion has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; [3] and 4) each denial is warranted on the evidence or is reasonably based on a lack of information or belief. [TEX. CIV. PRAC. & REM. CODE ANN. § 10.001](#) (West 2002). Furthermore, a court determining that a person signed such pleading or motion in violation of [section 10.001](#) may sanction either or both the signatory and the party represented by the person. *Id.* [§ 10.004\(a\)](#).

Yet, **HN2** before sanctions may issue, the presumption that the signatory acted in good faith must be rebutted, and the burden to do so lies with the movant. [Unifund CCR Partners v. Villa](#), 299 S.W.3d 92, 97 (Tex. 2009). We further note that the pertinent window through which the court considers the matter is that existing when the petition or motion is filed. See [R.M. Dudley Constr. Co., Inc. v. Dawson](#), 258 S.W.3d 694, 711 (Tex. App.—Waco 2008, pet. denied) (stating that sanctions for frivolous or groundless pleadings do not apply to an action later determined to be groundless after the pleading was filed). Consequently, a plaintiff's failure to convince the ultimate factfinder to render a favorable verdict does not *ipso facto* entitle the opposition to sanctions. Nor is it enough that the plaintiff unsuccessfully attempted to pursue an unpopular claim or one which other attorneys would have eschewed. Unless it is shown that the certification created by [section 10.001](#) was false or breached, sanctions cannot issue under [section 10.001 et seq. of the Civil Practice and Remedies Code](#).

Finally, **HN3** whether the court erred in [\[4\]](#) levying sanctions depends upon whether it abused its discretion. [Low v. Henry](#), 221 S.W.3d 609, 614 (Tex. 2007). That occurs when the trial court "acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Id.*

### Discussion

Here, the sanctions levied arose from Foust's effort to pursue her cause of action for defamation. The allegedly defamatory statements were made by Hefner during a phone call. The parties to the call were Hefner and Travis, the latter being a friend of Foust. Travis agreed to place the call while posing as a prospective employer inquiring about Foust. The latter had left her job with Hefner, applied for others, and had encountered little success in finding new employment. Thus, she engaged her friend to help discover what Hefner may have been saying about her to prospective employers.

During the phone conversation, which was recorded, Hefner indicated that he often had to finish Foust's work and described her as jealous and abrasive. He also stated that "[a]nd this last time, she deleted her client e-mails and she or her husband, one, unplugged the file server cables, and I had to have my IT people come over and fix that." When asked by his trial counsel whether these [5] acts of "vandalism really only affected her work area," Hefner replied, "That's right. That and the file server, which was not in her work area." Foust denied having "vandalized" the office or her computer.

As previously mentioned, one of the two claims upon which trial was had met with favor. That is, the trial court awarded Foust past overtime but denied recovery for the purported defamation. It also concluded, in its judgment, that the defamation claim 1) "was presented for an improper purpose," 2) was "not 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) lacked "evidentiary support and . . . [was] not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." So too did it explain, via the judgment, that the claim was improper or unwarranted under the law because Foust "instigated" the purportedly defamatory utterance from Hefner.

Following entry of the judgment, the trial court also executed findings of fact and conclusions of law. Included therein was the following:

A reasonable inquiry by J. Craig Johnston, as required by CPRC Sec. 10.001 would [6] have disclosed to him that the defamation claim pursued by him on Foust's behalf was not warranted by existing law and that such allegations of defamation did not have evidentiary support. There was no evidence presented on causation of any alleged defamatory statement and the damages claimed by Foust.

. . . At trial, J. Craig Johnston made no arguments, nonfrivolous or otherwise, for the extension, modification or reversal of existing law regarding the defamation claim.

\* \* \*

The facts and equities of this case are such that Hefner is entitled to relief, jointly and severally, from Foust and J. Craig Johnston under the Texas Civil Practices and Remedies Code Section 10.001 et seq. And specifically Section 10.001 (1), (2) and (3), due to the filing of an unwarranted defamation claim by Foust and her attorney against Hefner . . . [and]

Foust's defamation claim was filed for an improper purpose.

In addressing the accuracy of the trial court's findings and decision, we initially note that it did not conduct a separate evidentiary hearing on the motion for sanctions before levying them.<sup>[24]</sup> So, we do not have before us sworn testimony from Foust's legal counsel describing the extent of his investigation, if any, into the factual or legal basis underlying the defamation claim or [7] what he believed with regard to the components encompassed within section 10.001 of the Civil Practice and Remedies Code. While we cannot say that the absence of such evidence makes it impossible to find that section 10.001 was breached, it nonetheless inhibits our ability to construct the appropriate window through which the court views the dispute. Again, HNS the pertinent window is that revealing what counsel thought, knew, or should have known when he signed the pleading or motion.

Next, one cannot deny that HNS the common law recognizes a cause of action for defamation. See Neely v. Wilson, 418 S.W.3d 52, 60 (Tex. 2013). Similarly indisputable is that recovery under the cause depends upon proving that the defendant 1) published a statement, 2) that defamed the plaintiff, 3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement. Id. at 61. The record before us contains, at the very least, evidence that Hefner told a third party that Foust vandalized his office and that the accusation was false, assuming, of course, one was to believe Foust's testimony. In comparing the latter evidence with the elements of defamation, it cannot be said that [8] the claim lacked either legal or factual basis.

As suggested above, what troubled the trial court was the evidence that Foust "instigated" the call to Hefner or had her friend place it. In doing so, she invited the falsehood, according to the court. In so inviting the defamation, she purportedly vitiated the cause of action, and, in the trial court's view, that was something her trial counsel should have recognized. Yet, authority illustrates that HNS alleged defamatory statements made to someone acting on behalf of the defamed individual does not alone render the suit groundless. Frank B. Hall v. Buck, 678 S.W.2d 612, 618 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (wherein the defamed hired the investigator to whom the disparaging remarks were said). Publishing defamatory comments to a person's agent may create a cause of action, as it did in Buck. Yet, the claim is lost if the defamatory statements are procured to create a lawsuit or invited by the complainant. Id. And, they are so procured or invited if the person induced them or knew in advance that they were likely to be forthcoming. Id.

According to the record before us, the circumstances precipitating Foust's departure involved her perceived inability to be "consistent" in appearing for work; they had nothing to do [9] with her engaging in criminal conduct such as vandalism. So, we may assume arguendo that Foust could or should have expected Hefner to give her a less than glowing reference when Travis placed the call. Yet, nothing in the recorded conversation indicated that Travis induced or baited Hefner into accusing Foust of vandalism. And in view of the absence of evidence suggesting that vandalism was the cause of or played any role in Foust's decision to end her employment relationship with Hefner, one can reasonably debate about whether she or Travis could or should have expected that Hefner would accuse her of such criminality. We couple the latter observation with the absence of evidence suggesting trial counsel for Foust had reason to doubt the veracity of his client's foreseeable testimony about not having engaged in such illegal activities. And, when so combined, they lead us to conclude that no reasonable basis existed upon which the trial court could have found that the defamation claim lacked arguable basis in law or fact (when the pleading was signed) simply because a friend of Foust placed the call.

Nor can it be said that section 103.004 of the Texas Labor Code vitiated Foust's claim of legal or factual basis. HNS The immunity [10] granted ex-employers who talk about ex-employees in that statute does not encompass comments "known by that employer to be false at the time the disclosure was made or [disclosures] . . . made with malice or in reckless disregard for the truth or falsity of the information disclosed." TEX. LABOR CODE ANN. § 103.004(a) (West 2006). Admittedly, the statute placed upon Foust and her attorney the obligation to clear a higher legal hurdle before recovering. Yet, it did not indicate that they could not recover. Nor did it obligate them to forego pursuing recovery for what was perceived to be a false accusation, especially when Foust would testify, under oath, that the accusation was false.

As for the trial court's statement that "no evidence [was] presented on causation of any alleged defamatory statement and the damages claimed by Foust," we have several concerns. First, the finding suggests that the trial court levied sanctions by focusing upon what Foust may or may not have proved at trial, as opposed to what trial counsel thought, believed, or should have known or discovered when he signed the pleadings. HNS Losing at trial does not alone prove that the cause of action lacked present or reasonably potential legal or factual [11] basis (or was offered for an improper purpose) at the time when the pleadings were signed. Second, the purportedly false

utterance accused Foust of vandalism, that is, a type of criminal conduct. See *HNI* <sup>2</sup> TEX. PENAL CODE ANN. § 28.03(a)(1)&(2) (West 2011) (stating that one commits a criminal offense when he, without effective consent, intentionally or knowingly damages the tangible property of the owner, or intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner). *HNI* <sup>10</sup> Falsehoods of that ilk not only are defamatory per se but also are presumed to cause the defamed nominal damages. See *Medical Gardens, LLC v. Wike*, No. 07-12-00011-CV, 2013 Tex. App. LEXIS 6699, at \*3-4 (Tex. App.—Amarillo May 29, 2013, no pet.) (mem. op.). Thus, it was inappropriate to consider the claim groundless from its inception due to the absence of evidence illustrating a causal link between the utterance and injury since one was to presume the existence of nominal damages as a matter of law (assuming, of course, that Foust proved the other elements of her claim).

As for the finding that the defamation claim was asserted for an "improper purpose," *HNI* <sup>11</sup> the latter phrase has been construed as equivalent to "bad faith" under Texas Rule of Civil Procedure 13. *Dike v. Pelier Chevrolet, Inc.*, 343 S.W.3d 179, 195 (Tex. App.—Texarkana 2011, no pet.); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 321 (Tex. App.—Texarkana 2006, pet. denied). Moreover, under Rule 13, establishing [12] "bad faith" requires proof of "conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose." *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d at 321; *Stites v. Gillum*, 872 S.W.2d 786, 795 (Tex. App.—Fort Worth 1994, writ denied). As previously mentioned, we are not privy to the mental processes in which Foust's attorney engaged when signing the original petition. And, while someone's *mens rea* may be discerned from circumstantial evidence, *Anaya v. State*, 381 S.W.3d 660, 666 (Tex. Crim. App. 2012, pet. ref'd), none appears of record here from which one can reasonably infer that counsel for Foust consciously sought to do wrong for a dishonest, discriminatory, or malicious purpose when including the defamation claim in the lawsuit. Certainly such a *mens rea* or desire cannot be inferred from simply losing at trial.

The tenor of the record leads us to conclude that Hefner failed to rebut the presumption that Foust's legal counsel acted in good faith when he signed the pleading that contained the defamation claim. As discussed above, there existed legal and factual basis to Foust's defamation per se claim given the evidence of record, and there was no evidence indicating that Foust's trial counsel acted in bad faith when he included the claim in the petition. Accordingly, we reverse the judgment insofar as it levied sanctions against Foust and her counsel and affirm [13] the remainder of the judgment. <sup>3A</sup>

Brian Quinn ▾

Chief Justice

#### Footnotes

[1] Hefner asserted in his motion that "[b]oth pleadings have a claim, defense or other legal contention that is not [2] 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 each allegation or other factual contention in the pleadings does not have evidentiary support, even after a reasonable opportunity for further investigation or discovery. Respondent's pleadings were presented for an improper purpose, to harass Movant."

[2] It was carried along with the trial.

[3] Pending before the court is Hefner's motion to further sanction Foust and her attorney for pursuing a "frivolous" appeal. Given our decision on the merits of the appeal, we deny Hefner's motion. We do not know whether the effort to obtain sanctions arose from a desire to be an effective advocate or some animus developed over the course of the dispute. Nonetheless, *HNI* <sup>2</sup> litigants must factor caution and thought into their decision whether to pursue relief under Rule 13 of the Texas Rules of Civil Procedure and section 10.001 et seq. of the Texas Civil Practice and Remedies Code. Indeed, just as sanctions may be levied, in appropriate cases, for filing a frivolous pleading, so too may they be levied for filing a baseless motion for sanctions.

Jump To ▾



Sec. 231.009. PRECEDENCE OF CONTEST ON APPEAL. An election contest has precedence in the appellate courts and shall be disposed of as expeditiously as practicable.

# Tex. Elec. Code § 52.070

## Sec. 52.070. Voting Square and Instruction for Candidates.

- (a) A square for voting shall be printed to the left of each candidate's name on a ballot.
- (b) Immediately below "OFFICIAL BALLOT," the following instruction shall be printed: "Vote for the candidate of your choice in each race by placing an 'X' in the square beside the candidate's name."
- (c) Appropriate changes in the instruction shall be made if only one race appears on the ballot or if more than one candidate is to be elected in a race.
- (d) If more than one candidate is to be elected in any race on the ballot, "Vote for none, one, two, or " (in the numerical sequence appropriate for the number of candidates to be elected) shall be printed immediately below each office title appearing on the ballot.
- (e) A square shall be printed to the left of each line provided for write-in voting under Section 52.066(c), but failure to place a mark in the square does not affect the counting of a write-in vote.

### History

Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986; am. [Acts 1987, 70th Leg., ch. 472 \(H.B. 612\), § 14](#), effective September 1, 1987; am. [Acts 1987, 70th Leg., ch. 497 \(H.B. 2364\), § 2](#), effective September 1, 1987.

Sec. 52.064. DESIGNATION AS OFFICIAL BALLOT. "OFFICIAL BALLOT" shall be printed in large letters on the ballot immediately below the designation and date of the election.



Sec. 213.013. REPRESENTATION OF PARTIES AND POLITICAL PARTIES AT RECOUNT. (a) Each person entitled to notice of the recount under Section 213.009 is entitled to be present at a recount.

(b) In a recount of an election on an office, each candidate for the office is entitled to be present at the recount and have watchers present in the number corresponding to the number of counting teams designated for the recount. If only one counting team is designated or the recount is conducted on automatic tabulating equipment, each candidate is entitled to two watchers.

(c) In a recount of an election on an office for which a political party has a nominee or for which a candidate is aligned with a political party, the party is entitled to have watchers present in the same number prescribed for candidates under Subsection (b).

(d) In a recount of an election on a measure, watchers may be appointed by the campaign treasurer or assistant campaign treasurer of a specific-purpose political committee that supports or opposes the measure in the number corresponding to the number of counting teams designated for the recount. If only one counting team is designated or the recount is conducted on automatic tabulating equipment, each eligible specific-purpose political committee is entitled to two watchers.

(e) A watcher appointed to serve at a recount must deliver a certificate of appointment to the recount committee chair at the time the watcher reports for service. A watcher who presents himself or herself for service at any time immediately before or during the recount and submits a proper certificate of appointment must be accepted for service unless the number of appointees to which the appointing authority is entitled have already been accepted.

(f) The certificate must be in writing and must include:

(1) the printed name and the signature of the watcher;

(2) the election subject to the recount;

- (3) the time and place of the recount;
- (4) the measure, candidate, or political party being represented;
- (5) the signature and the printed name of the person making the appointment; and
- (6) an indication of the capacity in which the appointing authority is acting.

(g) If the watcher is accepted for service, the recount committee chair shall keep the certificate and deliver it to the recount coordinator after the recount for preservation under Section 211.007. If the watcher is not accepted for service, the recount committee chair shall return the certificate to the watcher with a signed statement of the reason for the rejection.

(h) Each person entitled to be present at a recount is entitled to observe any activity conducted in connection with the recount. The person is entitled to sit or stand conveniently near the officers conducting the observed activity and near enough to an officer who is announcing the votes or examining or processing the ballots to verify that the ballots are counted or processed correctly or to an officer who is tallying the votes to verify that they are tallied correctly. Rules concerning a watcher's rights, duties, and privileges are otherwise the same as those prescribed by this code for poll watchers to the extent they can be made applicable.

(i) No device capable of recording images or sound is allowed inside the room in which the recount is conducted, or in any hallway or corridor in the building in which the recount is conducted within 30 feet of the entrance to the room, while the recount is in progress unless the person entitled to be present at the recount agrees to disable or deactivate the device. However, on request of a person entitled to appoint watchers to serve at the recount, the recount committee chair shall permit the person to photocopy under the chair's supervision any ballot, including any supporting materials, challenged by the person or person's watcher. The person must pay a reasonable charge for making the copies and, if no photocopying equipment

is available, may supply that equipment at the person's expense. The person shall provide a copy on request to another person entitled to appoint watchers to serve at the recount.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Amended by Acts 1987, 70th Leg., 2nd C.S., ch. 59, Sec. 13, eff. Oct. 20, 1987; Acts 1993, 73rd Leg., ch. 728, Sec. 75, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 864, Sec. 218, eff. Sept. 1, 1997.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1235 (S.B. [1970](#)), Sec. 21, eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1164 (H.B. [2817](#)), Sec. 37, eff. September 1, 2011.

Sec. 33.061. UNLAWFULLY OBSTRUCTING WATCHER. (a) A person commits an offense if the person serves in an official capacity at a location at which the presence of watchers is authorized and knowingly prevents a watcher from observing an activity the watcher is entitled to observe.

(b) An offense under this section is a Class A misdemeanor.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

## Rule 329b Time for Filing Motions

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- The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:
  - **(a)** A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.
  - **(b)** One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.
  - **(c)** In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.
  - **(d)** The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.
  - **(e)** If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.
  - **(f)** On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.
  - **(g)** A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the

judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

- **(h)** If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

Travis County

December 16, 2014 Joint  
Special Runoff Election

December 16, 2014

50 (38) Memorial United  
Methodist Church

Eco Tape Report

Date: 11-26-2014

Time: 09:11:31

\*\*\*\*\*

Precinct:

101-A

\*\*\*\*\*

PLACE 2, ACC TRUSTEE  
AUSTIN COMMUNITY COLLEGE  
DISTRICT

- Gigi Edwards Bryant 0

- Jade Chang Sheppard 0

Precinct Ballot Summary

Total Ballots voted in  
this Precinct = 0

\*\*\*\*\*

Precinct:

101-B

\*\*\*\*\*

PLACE 2, ACC TRUSTEE  
AUSTIN COMMUNITY COLLEGE  
DISTRICT

- Gigi Edwards Bryant 0

- Jade Chang Sheppard 0

MAYOR, CITY OF AUSTIN

- Mike Martinez 0

- Steve Adler 0

DISTRICT 1, AUSTIN CITY  
COUNCIL, CITY OF AUSTIN

- DeWayne Loflon 0

- Ora Houston 0

Precinct Ballot Summary

Total Ballots voted in  
this Precinct = 0

\*\*\*\*\*

Sec. 52.075.

MODIFICATION OF BALLOT FORM FOR CERTAIN VOTING

The secretary of state may prescribe the form and content of a ballot for an election using a voting system, including an electronic voting system or a voting system that uses direct recording electronic voting machines, to conform to the formatting requirements of the system



NO. 03-15-00368-CV

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IN THE COURT OF APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AT AUSTIN

FILED IN  
3rd COURT OF APPEALS  
AUSTIN, TEXAS  
2/17/2016 2:42:10 PM  
JEFFREY D. KYLE  
Clerk

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**LAURA PRESSLEY,  
APPELLANT  
VS.  
GREGORIO "GREG" CASAR,  
APPELLEE**

---

APPEAL FROM THE 201ST DISTRICT COURT  
TRAVIS COUNTY, TEXAS  
CAUSE NO. D-1-GN-15-000374

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**APPELLANT'S REPLY BRIEF**

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## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....	ii-iv
TABLE OF CONTENTS .....	v-vi
INDEX OF AUTHORITIES.....	vii-ix
STATEMENT OF REPLY POINTS.....	

<b>Reply Point I. Appellant Did Produce More Than a Scintilla of Evidence to Preclude Summary Judgment.....</b>	<b>13</b>
---	-----------

<b>Reply Point I.A. The issue of the Court's abuse of discretion was briefed with citations under Issue 1. . . . .</b>	<b>.20</b>
--	------------

<b>Reply Point I.B. Appellant objected to the Clerk's failure to properly produce documents and manuals it claimed were proprietary. The trial court did not follow the law by requiring the clerk to present the documents it claimed were proprietary for in camera inspection which was an abuse of discretion . . . . .</b>	<b>22</b>
---	-----------

<b>Reply Point I.C.1. The Summary Judgment Evidence establishes that Cast Vote Records are not images of ballots as a Matter of Law or at a minimum constitutes more than a scintilla of evidence as to whether they do or not. . . . .</b>	<b>24</b>
---	-----------

<b>Reply Point I.C.2. The Legislature clearly mandated that the court must declare the outcome cannot be ascertained, declare the election void, and order a new election under the factors of this case and it is not a disenfranchisement of voters to do so. . . . .</b>	<b>.31</b>
---	------------

<b>Reply Point I.D. The summary judgment evidence raised genuine issues of material fact to authorize a court to hold that it cannot determine the true outcome of the election.</b>	
--	--

<b>Appellant’s Brief Points Out More Than a Scintilla of Evidence Precluding the Granting of a No Evidence Summary Judgment. . . . .</b>	<b>34</b>
<b>Reply to Point II. Trial Court Abused its Discretion in Sanctioning Pressley.. . . .</b>	<b>38</b>
<b>Reply to Point II.A. The Court’s finding that all issues had been resolved without preserving the issue of a pending sanctions request and entry of Rule 11 Agreement barred later imposition of sanctions. . . . .</b>	<b>42</b>
STATEMENT REGARDING ORAL ARGUMENT.....	2
RESPONSE TO APPELLEE’S RESTATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	13
CONCLUSION.....	46
CERTIFICATE OF COMPLIANCE.....	47
CERTIFICATE OF SERVICE.....	47-48

## INDEX OF AUTHORITIES

CASES	PAGE(S)
<i>Andrade v. NAACP of Austin</i> , 345 S.W.3d 1 (Tex. 2011) .....	18
<i>Cincinnati Life Ins. V. Cotes</i> , 927 S.W.2d 633 (Tex. 2013) .....	17
<i>Collier v. Walker</i> , 341 S.W.3d 570-574 (Tex. App.—Houston, [14th Dist.] 2011, no pet.) .....	38
<i>Conroe v. Retamco</i> , 138 S.W.3d 1, 7-8 (Tex. App.—San Antonio, 2004, pet. denied) .....	21
<i>Guerra v. Garza</i> , 865 S.W.2d 573, 576 (Tex.App.—Corpus Christi, 1993, writ dismiss'd w.o.j.) .....	16, 37
<i>Johnson v. Fourth Court of Appeals</i> , 700 S.W.2d 916, 917, 29 Tex. Sup. Ct. J. 101 (Tex. 1985) (quoted in <i>In re: Dupont</i> , supra at 223) .....	21
<i>Lowe v. Henry</i> , 221 S.W.3d 609 - 622 (Tex. 2007) .....	12, 38
<i>Merriman v. XTO Energy, Inc.</i> , 2011 Tex. App. Lexis 3601 p..4 (Ct.App.—Waco, 2011 affirmed 407 S.W.3d 244 (Tex. 2013) .....	16, 17
<i>Monsanto, Co. v. May</i> , 889 S.W.2d 274, 276 (Tex. 1994) .....	24
<i>Nootsie, Ltd. V. Williamson County Appraisal Dist.</i> , 925 S.W. 2d 659, 662 (Tex. 1996) .....	29
<i>Prado v. Johnson</i> , 625 S.W.2d 368 (Tex.App.—San Antonio, 1981, writ dismissed) .....	32, 33
<i>Proctor v. Andrews</i> , 972 S.W.2d 729, 735 (Tex. 1998) .....	29
<i>Westgate, Ltd. V. State</i> , 843 SW2d 448, 455 (Tex. 1992) .....	31

**STATUTES****PAGE(S)**

Texas Civil Practice and Remedies Code § 10 .....	38, 44
Texas Constitution, Article VI, Section IV .....	4, 9, 13, 14, 20, 26, 29
Texas Election Code § 2.002 .....	31
Texas Election Code § 2.028 .....	31
Texas Election Code § 33.016 .....	3
Texas Election Code § 33.056(c) .....	8
Texas Election Code § 43.062 .....	8
Texas Election Code § 52 .....	15, 16
Texas Election Code § 52.001 .....	13, 14, 20, 26, 33
Texas Election Code § 52.003 .....	4
Texas Election Code § 52.062 .....	13, 14, 20
Texas Election Code § 52.063 .....	13, 14, 20
Texas Election Code § 52.064 .....	13, 14, 20
Texas Election Code § 52.070 .....	4, 13, 14, 20
Texas Election Code § 65.014 .....	3, 8
Texas Election Code § 66.022 .....	3, 8, 19
Texas Election Code § 66.024 .....	3, 8, 19
Texas Election Code § 52.075 .....	28
Texas Election Code § 128 .....	33
Texas Election Code § 128.001 .....	14, 15, 16, 27, 28
Texas Election Code § 128.001a(2) .....	15
Texas Election Code § 129.002 .....	27, 28
Texas Election Code § 129.002(c) .....	28
Texas Election Code § 213.007 .....	5, 13, 14, 20
Texas Election Code § 213.013 .....	5
Texas Election Code § 213.013(h) .....	3, 8
Texas Election Code § 213.016 .....	3, 5, 13, 14, 15, 16, 20, 26, 28
Texas Election Code § 213.033 .....	13, 14, 15, 20
Texas Election Code § 214.001 .....	5, 13
Texas Election Code § 214.002 .....	5, 13, 14, 15, 16, 20, 26
Texas Election Code § 214.002(a) .....	14
Texas Election Code § 214.003 .....	13, 14, 20
Texas Election Code § 214.042 .....	5, 13, 14, 20
Texas Election Code § 214.048 .....	13, 14, 20
Texas Election Code § 214.049 .....	13, 14, 15, 16, 20



Texas Election Code § 214.049(e).....	5, 14, 15
Texas Election Code § 221.003 .....	9, 10, 13, 16, 19, 31, 32, 33
Texas Election Code § 221.003(1).....	18
Texas Election Code § 221.011 .....	33
Texas Election Code § 221.012 .....	9, 13, 16, 19, 31, 32, 33
Texas Election Code § 221.013 .....	41

## **RULES**

## **PAGE(S)**

Texas Rules of Appellate Procedure, Rule 45.....	45
Texas Rules of Civil Procedure, Rule 11 .....	43
Texas Rules of Civil Procedure, Rule 65.....	42
Texas Rules of Civil Procedure, Rule 166b(c).....	35
Texas Rules of Civil Procedure, Rule 192.3(a) .....	24
Texas Rules of Civil Procedure, Rule 192.3(b) .....	24
Texas Rules of Civil Procedure, Rule 192.7(b) .....	23
Texas Rules of Civil Procedure, Rule 329.....	42
Texas Rules of Evidence, Rule 703 .....	35

NO. 03-15-00368-CV

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IN THE COURT OF APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AT AUSTIN

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**LAURA PRESSLEY,  
APPELLANT  
VS.  
GREGORIO “GREG” CASAR,  
APPELLEE**

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APPEAL FROM THE 201ST DISTRICT COURT  
TRAVIS COUNTY, TEXAS  
CAUSE NO. D-1-GN-15-000374

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**APPELLANT’S REPLY BRIEF**

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## **STATEMENT REGARDING ORAL ARGUMENT**

**Appellant hereby withdraws its request for oral argument.**

## RESPONSE TO APPELLEE’S RESTATEMENT OF FACTS

Appellee claims the election process for the 2014 Austin City Council Runoff “was carried out smoothly.”<sup>1</sup> Nothing could be farther from the truth as evidenced by documents and testimony provided by the Clerk. Appellant’s Brief and summary judgment response show mistakes<sup>2</sup>, illegalities<sup>3</sup>, and security breaches<sup>4</sup> proving the electronic counting process cannot be trusted for this election.

Appellee declares if Pressley’s election claims are “allowed to go unchecked, such claims could be repeated<sup>5</sup>” insinuating she should be reprimanded for bringing illegalities and irregularities to light. Actually, Texans want legal and fair elections<sup>6</sup> and a decision in Appellant’s favor would require all county clerks to be sure they follow the Constitution and

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<sup>1</sup> Casar Br.1 first ¶

<sup>2</sup> Pressley Br.3, 6-10, 12, 20, 31-33, 35, 44, 1CR 2045-2049, 2081-2082, RR(May26,2015)Vol.3 p.15-16, 18, 19, RR(May26,2015)Vol.4 p.23 lines1-10, 43 lines1-6, 1CR 2046-2060

<sup>3</sup> Not printing Tally/Results tapes , obstructing watchers, ballot images missing for recount—TEC 65.014, 66.022, 66.024, 213.013(h), 33.016, 213.016, Pressley Br.3, 7, 10, 12, 20, 34-35, 43, 50, 55-56, 23, 57, 2CR 7620, 7333, 1 CR 2052-2055, 2CR 3198 lines 3–15, 1CR 2167 line 2025 – 2170 line 2103 (recount activities occurred before recount), 1CR 1865, RR(May26,2015)Vol.4 p.35 lines 4, p.64 lines12-25, p.68 lines 6-10

<sup>4</sup> Tally corruption—Pressley Br.6-7, 16, 33, 1CR 2049 ¶15-17, 2057-2059, RR(May26,2015)Vol.4 p.35 lines 4, p.18 lines 6-16, p.45-46, Extended logons—Pressley Br.7, 33, 1CR 2052 ¶23, 2170 lines 2127-2128, 2CR 3189 line 3 - 3191 line 3, Security seals broken—Pressley Br.7, 33, 1CR 2048 ¶13, 1CR 917, 922, 923, 924, 925, 926, 927, 929, 930

<sup>5</sup> Casar Br.1

<sup>6</sup> 1CR 2072 ¶99 – 2073 ¶102

Texas Election Code (“TEC”) in their administration of elections. If violations are pervasive that only argues the importance of a ruling as requested by Appellant.

Appellee claims the Travis County Clerk conducted a manual recount of all ballots cast in the election.<sup>7</sup> That is factually untrue; the Clerk conducted a manual recount of a) 480 Ballots by Mail (BBM) paper ballots,<sup>8</sup> and b) 3,937 printed Cast Vote Records (“CVRs”) <sup>9</sup> which are not legal ballots.<sup>10</sup>

Appellee’s claim, “...when the voter makes his or her choices during an election, the final screen of the electronic ballot the voter sees is a list of each of the races on the ballot with the name of the candidate chosen by the voter”<sup>11</sup>...is false. When the voter *makes* his or her choices, they see an image of the ballot on the eSlate with all candidates’ names, voting squares, date of the election, name of the election and instructions as consistent with the TEC.<sup>12</sup>

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<sup>7</sup> Casar Br.2

<sup>8</sup> Pressley Br.6, 10, 12, 22 26, 1CR 2044-2045 ¶14, 2 CR 3074 column “BBM [Ballot by Mail]”

<sup>9</sup> *Id.*

<sup>10</sup> TEC 52.003 App.14 and Sec. 52.070 App.31., Texas Constitution, Article VI, Section 4 App.9, Pressley Br.26-27, 1CR 2055, 2062-2067, 2CR 613, RR(May26,2015)Vol.4 p.35 lines 4-10

<sup>11</sup> Casar Br.3

<sup>12</sup> Pressley Br.6, 1CR 2053 ¶26, 1CR 2055 ¶33, 2CR 3118 line 21 – 3122 line 18 referring to Exhibit 8 (2CR 688) and Exhibit 10 (2CR 613)

Appellee makes a misleading claim, “for a manual recount, the CVR for each individual voter is printed and counted.”<sup>13</sup> This statement is legally deficient—CVRs are not printed for manual recounts; TEC states ballots are used in a recount and specifically, “images of ballots cast” are printed<sup>14</sup> and counted in a recount.<sup>15</sup> Only ballots are referenced in the TECs; CVRs are not referenced.

Appellee makes a misleading claim, “At the recount, the CVRs for each voter...were printed under the watch of...Pressley and her chosen observers.”<sup>16</sup> This is not true. CVRs are stored electronically as data structures for tabulation<sup>17</sup> and the CVR extraction was done before Pressley and her recount watchers arrived at the official start time.<sup>18</sup> Appellant’s request to view the source and properties of the CVR files and was denied by the Travis County Director of Elections, Michael Winn.<sup>19</sup>

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<sup>13</sup> Casar Br.3

<sup>14</sup> TEC 213.016, Pressley Br.22, 25,

<sup>15</sup> TEC 213.007, 213.013, 213.016, 213.007, 214.001, 214.002, 214.042, 214.049(e), Pressley Br.22, 25-26, 1CR 2066, 1CR 4622 footnote 12, 4647 ¶101, 4655 ¶134, 137

<sup>16</sup> Casar Br.4

<sup>17</sup> Pressley Br.23, 1CR 2054 ¶31 – 2055 ¶34, 1CR 2064 ¶67, 1CR 2068 ¶¶84–85, 1CR 2075 ¶115, 1 CR2087 ¶¶3-4, 1CR 2088 ¶¶1-2, 1CR 2599 second sentence under “Detailed Description,” RR(May26,2015)Vol.4 p.16 line 20 – 17 line8

<sup>18</sup> Pressley Br.43, 1CR 1087, 1CR 1860 line 2025 – 1863 line 2013 (data compiled days before recount), 4644 ¶93

<sup>19</sup> *Id.*

Appellee repeats the misleading claim, that the “manual recount was conducted of all early, election day...and provisional ballots.”<sup>20</sup> Factually, the only legally sufficient ballots that were manually recounted were the 480 Ballot by Mail (BBM) ballots.<sup>21</sup> Actually, 3,937 equally deficient, printed CVRs,<sup>22</sup> from Early Voting and Election Day were erroneously recounted.<sup>23</sup>

Appellee falsely claims Mr. Brim, chair of the Recount committee, “...signed an affidavit...that the number of voters matched to the number of ballots cast...”<sup>24</sup> Mr. Brim’s written statement, “Standard Affidavit,” was not a legal affidavit since it was not notarized.<sup>25</sup> Second, the number of voters was not reconciled with the total number of ballots cast. At the recount, appellant repeatedly requested the Recount Committee verify the number of ballots and voters. She was told, “That is not the scope of a recount” by the Committee<sup>26</sup> and the Secretary of State (SOS).<sup>27</sup>

Appellee claims Dr. Pressley’s election contest is an “attack on electronic voting,”<sup>28</sup> and “Pressley’s stated goal is to use this lawsuit to

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<sup>20</sup> Casar Br.5

<sup>21</sup> Pressley Br.6, 10, 22, 1 CR 2043 ¶1, 1CR 4621 ¶9 – 4622 ¶13, 4645 ¶96, 1CR 916

<sup>22</sup> 1CR 1803, 1CR 916

<sup>23</sup> Pressley Br.26, 1CR 2044-2045, 2CR 3074

<sup>24</sup> Casar Br.5

<sup>25</sup> 2CR 484

<sup>26</sup> 1CR79, 1CR 446 Item 3

<sup>27</sup> 1CR 55 Item 1

<sup>28</sup> Casar Br.6

force Travis County to change its voting system.”<sup>29</sup> Appellee provides no reference to substantiate these false claims. In the summary judgment hearing, Appellant’s lawyer confirmed the eSlate as being a “legitimate system.”<sup>30</sup> Appellee further misrepresents that “Pressley’s preference is to revert to paper ballots.”<sup>31</sup> Pressley was not asked her broad preference for future elections. She was asked specifically what election system she would prefer if a new election was called. Her appropriate response was to use a system that stores a legal ballot—not the same system that precipitated the voided election<sup>32</sup>:

Q. “...If you have a new election, what do you want? Do you want to use the eSlate system? Do you want to use paper ballots as your earlier pleading said...?”

A. “... it's concerning to me that the -- the DRE's slate -- the eSlates can't store a ballot image, according to the county Clerk. So we want something that stores a ballot...legally official ballot. So paper ballot seems to be the logical -- the logical solution.”<sup>33</sup>

Appellee claims, “Pressley claimed that Travis County ‘illegally’ disenfranchised thousands of voters in consolidating voting locations...”<sup>34</sup> are misleading. Appellant received reports from upset voters and phone

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<sup>29</sup> *Id.*

<sup>30</sup> RR(May26,2015)Vol.4 p.33 lines 16-18

<sup>31</sup> Casar Br.6

<sup>32</sup> 1CR 591 lines 13-23

<sup>33</sup> *Id.*

<sup>34</sup> Casar Br.7



bankers stating no signs were posted at closed polling locations, informing voters of alternate voting sites.<sup>35</sup> Appellant claimed the illegality was due to Travis County not installing signs<sup>36</sup> where the locations had moved. At discovery, Travis County produced copies of signs which were claimed to have been posted on consolidated polling locations. Subsequently, Appellant removed disenfranchisement claims from the Sixth Amended Petition.

Appellee claims none of Appellants allegations of election irregularities (e.g. not printing Zero<sup>37</sup> and Results/Tally Tapes<sup>38</sup> on Election Day, obstructing poll watchers<sup>39</sup>, etc.) are true.<sup>40</sup> Yet, all are true as referenced herein.

The most concerning and erroneous claims Appellee makes its “discovery failed to produce any evidence to support Pressley’s [irregularity and illegality] claims.”<sup>41</sup> This is grossly untrue. Appellant produced more than a scintilla of evidence supporting material errors, illegalities, and

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<sup>35</sup> 2CR 344 ¶¶13–14, 345 ¶18

<sup>36</sup> TEC 43.062, 2CR 344 ¶¶13-14, 345 ¶18,

<sup>37</sup> Pressley Br.7, 33, 43, 46-48, 1CR 861 ¶13d-¶14, 863 ¶8, 871-872, RR(June18,2015)Vol.2 p.49 lines 2-9, p.77 line 15 – p.78 line 16, p.139 line 15 – p.140 line 5, p.183 lines 5-11, p.186 lines 8-23, p.213 lines 1-4, 1CR 4629 ¶¶38-39, 2CR 712

<sup>38</sup> TEC 65.014, 66.022, 66.024, Pressley Br.7, 22, 45, 1CR 2052 ¶24 , 1CR 2066 footnote 28, 1CR 2081 ¶132, 2CR 7620, 1CR 1865 line 7

<sup>39</sup> TECs 213.013(h) and 33.056(c), 1CR 4634 ¶55, 2CR 7620, 1CR 2167 line 2025 – 2170 line 2103 (logs show recount activities days before recount), 1CR 885–887

<sup>40</sup> Casar Br.8

<sup>41</sup> *Id.*

security breaches occurred and the electronic vote tabulation cannot be trusted. In addition, the recount was conducted with legally deficient ballots further supporting the outcome cannot be ascertained, the election must be void, a new election must be called, and a reversal of the No Evidence Summary Judgement.<sup>42</sup>

Appellee mischaracterizes, “Pressley’s lawyers agreed that they had not presented evidence to show that she could overcome the 1,291 vote deficit...”<sup>43</sup> Actually, at the summary judgment hearing, Pressley’s lawyers clearly presented evidence the voting results of 3,397 printed CVR’s cannot be ascertained because:

- a) 3,937 CVRs are not legal ballots or images of ballots,<sup>44</sup>
- b) Official precinct returns/Tally/Results tapes were not printed, retained and produced to document results for 3,937 electronically cast votes,<sup>45</sup>
- c) Tally computer showed corruption errors occurred when the 3,937 CVRs votes were tallied,<sup>46</sup> and
- d) 3,937 printed CVR’s were illegally recounted.<sup>47</sup>

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<sup>42</sup> <sup>42</sup> TEC 221.003, 221.012, Pressley Br.30-32

<sup>43</sup> *Id.*

<sup>44</sup> Pressley Br.3, 6, 10, 1CR 916, 2CR 613, 1CR 2081 ¶133, 1CR 2053 ¶¶26 - 2055 ¶34, 2060 ¶54 – 2067 ¶80, RR(May26,2015)Vol.4 p.35 lines 4-10 TEC 221.003, 1CR 2049-2050 ¶17, 1CR 2051-2052 ¶22,1CR 2082 ¶135

<sup>45</sup> Pressley Br.7,22,33-34, 1CR 2054 ¶24 – 2053 ¶25, 1CR 875 ¶¶51-53, 876 ¶55, 2CR 7620, 1CR 1865 line 7

<sup>46</sup> Pressley Br.6,7,33, 1CR 2049 – 2052, 1CR 2082 ¶135, Corrupt errors when votes tallied—1CR 1811 line 185, 1CR 1828 line794, 1CR 1829 lines 853 and 860, 1CR 1832 line 968, 1CR 1833 line 984 and 986, 1CR 1835 line 1058, 1CR 1848 line 1544

<sup>47</sup> TEC 221.003, Pressley Br. 3, 1CR 2049-2050 ¶17, 1CR 2051-2052 ¶22,1CR 2082 ¶135, RR(May26,2015)Vol.4 p.35 lines 4-10

The concise statement Pressley's attorney made to the Court at the summary judgment hearing was consistent with statute, "with all these mistakes, how could anybody know what the true outcome is?"<sup>48</sup>

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<sup>48</sup> RR(May26,2015)Vol.4 p.113 lines 9-11, TEC 221.003

## **SUMMARY OF ARGUMENT**

The former judge trial court abused its discretion in many ways including:

1. Ruling on a No Evidence Summary Judgment without reading the evidence attached to the opposition to the motion
2. Allowing a third party to withhold documents claimed as proprietary without conducting an in camera inspection,
3. Not requiring the third party to produce documents within its constructive possession that would have contained information to defeat the Motion for Summary Judgment,
4. Awarding sanctions because he did not believe the evidence when there was at least some factual and legal basis for alleging them, and
5. Imposing attorney's fees for filing an appeal without there even being offered any evidence as to their necessity and reasonableness or what customary charges would be.

It is undisputed, the clerk did not maintain images of anything meeting the statutory and constitutional requirements of a ballot and did not recount legal ballots (other than BBMs) to report the outcome of the run-off election.<sup>49</sup> Unless this Court is willing to hold that despite their failure to

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<sup>49</sup> RR(May26,2015)Vol.4 p.113 lines 9-11, TEC 221.003

meet statutory and constitutional requirements for a ballot, CVRs may be manually recounted to determine the outcome of an election, the case must be reversed.

There was ample summary judgment evidence of mistakes and irregularities that went to the unreliability of the reported election results to raise fact issues that would sustain an exercise of discretion holding that it was impossible to ascertain the true outcome of the election. Because all the factual allegations of the pleadings were supported by evidence or by a possibility that such evidence could be acquired from further discovery and those facts could void the election, the court was not entitled to legally impose sanctions on Appellant and doing so was an abuse of discretion and was inconsistent with the *Lowe* factors controlling their imposition. Finally the trial court's sanctions of attorney's fees for this appeal without any evidence of reasonable and customary fees was a usurpation of this court's authority and an abuse of discretion.

Actually, this case is not an attack on the Hart Voting System.<sup>50</sup> It is a contest of an election. First, the recount voided the original canvass, and second, the recount required counting actual images of what the law

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<sup>50</sup> RR(5/26/15)Vol.4 p.33 lines 16-18

defines as a ballot.<sup>51</sup> Since there were no such ballots other than the BBMs, which resulted in a tie the election must be declared void.

### **REPLY POINT ONE**

#### **Reply Point I. Appellant Did Produce More Than a Scintilla of Evidence to Preclude Summary Judgment**

In Point One, Appellee ignores the fact that this is not an appeal from a final judgment, but from a no evidence summary judgment by a judge who admitted he did not read Appellant's Summary Judgment Evidence.<sup>52,53</sup>

Appellee erroneously argues, "Pressley does not ever attempt to argue that a different result should have been reached by counting the vote cast in the runoff."<sup>54</sup> This clearly erroneous and misleading statement exposes the weakness of Appellee's argument. It is clear from the record and Appellant's brief<sup>55</sup> that Pressley contends:

1. There was more than a scintilla of evidence that all 3,937 electronically cast votes in the form of printed CVRs were illegally recounted because of violations of TEC laws.<sup>56</sup> None of the 3,937 printed

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<sup>51</sup> TEC 52.001, 52.062-52.064, 52.070, 213.007, 213.016, 213.033, 214.042, 214.002, 214.003, 214.048, 214.049, ; Texas Constitution Article VI Section4

<sup>52</sup> Pressley Br.11, 17-18

<sup>53</sup> RR(MAY26,2015)Vol.3 p.20-21

<sup>54</sup> Casar Br.11-12

<sup>55</sup> Pressley Br.3, 6-8, 10, 12, 20, 22-23, 25, 27, 32, 57

<sup>56</sup> TEC 221.003, 221.012, 213.007, 213.013, 213.016, 213.007, 214.001, 214.002, 214.042,

CVRs counted in the Recount complied with the TEC requirements<sup>57</sup> of what can be legally counted at a recount.<sup>58,59</sup> This left the only ballots that could be legally counted, the BBMs, which resulted in a tied election.<sup>60,61</sup> Regardless of the use of CVRs to determine the original outcome, the TEC requirement that ballot or images of the ballot is essential to maintain evidence of the actual choice made on an official ballot in the event of a recount.<sup>62</sup> The Legislature required maintaining an image of ballot<sup>63</sup> that meets the definitions it used for the term “ballot”<sup>64</sup> so the initial election tabulation results using a data structure file<sup>65</sup> such as a CVR<sup>66</sup> could be verified at a manual recount by of an image file of the actual ballot on which the vote was cast.<sup>67</sup> When a manual recount is requested the result, reached by recounting actual legal ballots determines the outcome of the

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214.049(e ), Pressley Br. 3, 1CR 2049-2050 ¶17, 1CR 2051-2052 ¶22, 1CR 2082 ¶135, RR(May26,2015)Vol.4 p.35 lines 4-10

<sup>57</sup> TEC 52.001, 52.062-52.064, 52.070, 213.007, 213.016, 213.033, 214.042, 214.002, 214.003, 214.048, 214.049, Texas Constitution Article VI Section4

<sup>58</sup> Pressley Br.3, 6, 10, 22, 33, 67

<sup>59</sup> 1CR 2051-2055, 1CR 2063-2064, 1CR 2087, 2088, 1CR 1805, 1CR 1927, lines 14-18 with the CVR 1CR 1803 and Ballot by Mail 2CR 2058, 1CR 2073

<sup>60</sup> Pressley Br.6, 10, 12, 22, 25-26, 1CR 2044, 1CR 2049 ¶14, 2CR 688, 2CR 738

<sup>61</sup> 2CR 3074 column “BBM [Ballot by Mail]”; 1CR 1938, line 23 - 1939, line 4, 1CR 4667, ¶¶186–187, 1CR 2073-2074

<sup>62</sup> TEC 214.002(a)

<sup>63</sup> TEC 128.001, 213.016

<sup>64</sup> TEC 52.001, 52.062-52.064, 52.070, 213.007, 213.016, 213.033, 214.042, 214.002, 214.003, 214.048, 214.049, Texas Constitution Article VI Section4

<sup>65</sup> Pressley Br. 23 ¶3, 1CR 2055 ¶24, 1CR 2068 ¶84, 1CR 2087-2088

<sup>66</sup> Audit logs,

<sup>67</sup> BBM example

election.<sup>68</sup> Appellant was denied her rights to effectively verify the original votes cast by voters on their ballot and therefore the integrity of the vote in this election is lost and the true outcome cannot be determined<sup>69,70</sup> Also, TEC 214.049(e) states: “(e) If electronic voting system ballots are to be recounted manually, the original ballot, rather than the duplicate of the original ballot, shall be counted.”<sup>71,72</sup>

2. The failure to follow the TEC requirement to store ballot images<sup>73</sup> of documents meeting the statutory definition of a ballot<sup>74</sup> is shown to be a critical ingredient in this election because laws were violated and numerous mistakes were made<sup>75</sup>. These laws assure the integrity of the reported results. This case is a perfect example of the Legislature’s wisdom in requiring images of ballots, not CVRs, to be preserved for the manual recount.<sup>76</sup>

As pointed out in Appellant’s brief, there was clearly more than a scintilla of evidence that the 3,937 printed CVRs recounted, without images of ballots to back them up, were illegally counted resulting in a tied

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<sup>68</sup> TEC 213.033, 214.002

<sup>69</sup> Pressley Br.20-22, 25, 27, 67

<sup>70</sup> 1CR 2073-2074, 1CR 4667, ¶¶186–187

<sup>71</sup> Pressley Br.26, 172

<sup>72</sup> 1CR 2066, 1CR 4622, 4647, 4655

<sup>73</sup> TEC 128.001(a)2

<sup>74</sup> TEC 52, *et.seq.*

<sup>75</sup> Pressley Br.21-23, 25-26, 29, 34, 43, 45, 47

<sup>76</sup> TEC 52 *et.seq.*, 128.001, 213.016, 214.002, 214.049



election.<sup>77,78</sup> Appellee fails to understand this case is not about using CVRs for the original canvass with a system certified by the SOS. It is about not counting legal ballots to determine the votes at the manual recount. The Original canvass was void as soon as the recount was completed and the results of recounting, as required by the TEC and Constitution, was the only ballots that remained, the BBMs, were tied,<sup>79</sup> which was different from the original canvass: “Sec. 213.033. Canvass Following Recount. **(a)** ... An original canvass for the office or measure is void, and the new canvass is the official canvass for the election on that office or measure.” Thus once the recount occurred the issue of how a legal vote looks is decided by the requirements of TEC § 52 *et. seq.*, 128.001, 213.016, 214.002, 214.049 and those results resulted in a tie as the final canvass.

In addition, there was more than a scintilla of evidence there were so many irregularities that a court, in the exercise of its discretion, could decide it was impossible to determine the majority of the voter’s true will.

<sup>80,81</sup> See *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex.App.—Corpus Christi, 1993, writ dismissed w.o.j.). Appellee cites *Merriman v. XTO Energy, Inc.*, 407

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<sup>77</sup> Pressley Br.6, 10, 12, 22, 25-26,

<sup>78</sup> 2CR 3074 column “BBM [Ballot by Mail]”; 1CR 1938, line 23 to 1939, line 4, 1CR 4667, ¶¶186–187, 1CR 2073-2074

<sup>79</sup> 1CR 3074 (showing 240 to 240), 1CR 2044, 2CR 3498-3773

<sup>80</sup> TEC 221.003, 221.012, Pressley Br.3, 19, 25, 31-32, 43, 173-174, 176

<sup>81</sup> 1CR 2055-2056, 1CR 2065-2066

S.W.3d 244, 248 (Tex. 2013) for the propositions that in deciding the appeal of the granting of this no evidence summary judgment, the Court should consider the evidence offered in the trial court to support his traditional Motion for Summary Judgment. However, in that case, the appeal was from an order granting both the No Evidence and Traditional Summary Judgment. See *Merriman v. XTO Energy, Inc.*, 2011 Tex. App.Lexis 3601p.3 (Ct. App.—Waco, 2011 affirmed 407 S.W.3d 244 [Tex. 2013]). The same is true of the other case cited by Appellee, *Cincinnati Life Ins. V. Cotes*, 927 S.W.2d 633 (Tex. 2013). On page 626 of that case the Court made clear that consideration of a No Evidence and Traditional Motion for Summary Judgment overruled a prior plurality decision and only applied when both Motions were perfected for appeal.

Even if the Court considered the summary judgment evidence attached to Appellee's Motion for Traditional Summary Judgment which the Court did not rule on, there is ample summary judgment evidence attached to Appellant's Response,<sup>82,83</sup> to preclude a traditional summary judgment.

Appellee did not sustain its burden to show it was entitled to summary judgment as a matter of law. Quite the contrary, the summary judgment

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<sup>82</sup> Pressley Br.33-35

<sup>83</sup> Appellants MSJ Response: 1CR 2043-2940, 3189-3425, 3472-3474, 3475-3641, 2CR 2243-3073, 3262-4690,

evidence shows as a matter of law that printed CVRs are not ballots,<sup>84 85</sup> and therefore, printing and counting them at a recount instead of and without maintaining ballots meeting the statutory and constitutional standards, is tantamount to counting illegal votes.<sup>86</sup>

Indeed, the Clerk confessed that a ballot image and a CVR are not the same thing.<sup>87</sup>

There is no disagreement the SOS has certified the Hart Voting System. Appellee has asserted the issues raised in this case have been decided in *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011). That case has nothing to do with issues raised in this case. Appellant's case is focused on the misuse of the certified Hart Voting System by Travis County's Election Division and as a candidate she has shown injury:

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1. There are more ballots than names,<sup>88</sup>
  2. Ballot images are missing for 3,937 electronically cast ballots,<sup>89</sup>
  3. Election judges were instructed to not print the paper results tapes to document the precinct returns for the 3,937 votes,<sup>90</sup> and
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<sup>84</sup> Pressley Br.22, 27, 41

<sup>85</sup> 1CR 2087-2088, 1CR 1925, line 22 to 1928, line 24; 2CR 2058 exhibits showing appearance of ballot and CVR 1CR 1982, Lines 19-21; 2CR 2058, 1CR 1984, lines 9-11

<sup>86</sup> TEC 221.003(1)

<sup>87</sup> RR(MAY26,2015)Vol.2, p.189 lines 2-9

<sup>88</sup> 1CR 868-870

<sup>89</sup> Pressley Br.22,25,27, 1CR 2049 ¶14, 1CR 2944-2945, 2CR 3074, all early voting CVR's 2CR

4. Main counting computer (Tally Computer) where 3,937 electronic votes are tabulated shows corrupted entries/logs at the central counting station.<sup>91</sup> These numerous mistakes could be relied on by a court to decide that it is impossible to determine the majority of the voters' true will.<sup>92</sup>

Therefore, the summary judgment evidence shows as a matter of law that by recounting printed CVRs, 3,937 illegal votes were recounted for the runoff election. When those votes are discounted, only the BBMs which complied with state law could be legally recounted—resulting in a tie. Since the 3,937 votes were illegally recounted, the election results cannot be ascertained,<sup>93</sup> and the election must be declared void,<sup>94</sup> and because the BBM were tied, a new election must be called.

The evidence offered by Appellee to support the Traditional Motion for Summary Judgment is that non-state agencies and the Texas SOS believes CVRs are the same as a ballot image. These opinions of these advisory committee's and state employees do not trump a statute or the Texas Constitution. They do not make a computer data structure file

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5116-7328

<sup>90</sup> TEC 66.022, 66.024, Pressley Br.7,22, 33-34, 45, 52, 1CR 1865 line 7, 1CR 872 ¶42, 874 ¶48, RR(MAY26,2015)Vol.3 p.222, line 17–223, line2, 1CR 2008, lines 13-15, (1CR 872 ¶42) affidavits for poll watchers that witnessed the same (2CR 7620)

<sup>91</sup> 1CR 4317, 4321, 4338-4339, 4342-4343, 4345, 4358

<sup>92</sup> Pressley Br.3, 22, 31-32, 35, 57, 67, 1CR 2050 ¶17 and footnote 10, 1CR 2052 ¶22, 1CR 2056 footnote 16, 1CR2072 ¶100 and footnote 37

<sup>93</sup> TEC 221.003

<sup>94</sup> TEC 221.012

(CVR)<sup>95</sup> an image file of an Official Ballot which is the only document that can determine the outcome of a recounted election.<sup>96</sup>

**Reply Point I.A. The issue of the Court's abuse of discretion was briefed with citations under Issue 1.**

The fact that the trial court did not review the summary judgment evidence could not have been more clearly stated on the record.<sup>97</sup> This was raised under Issue 1 in Appellant's brief<sup>98</sup> and the law of arbitrary and capricious conduct is clearly cited on Sub Issue 1 of Issue 1 where this was raised and Appellant did not have to repeat it within another subpart of the same Issue. Appellee offered no cases holding to the contrary. The Court clearly stated that although he read the motion and printed out the evidence, he did not read the evidence attached to it.<sup>99</sup>

If the Court had read all the evidence provided in Appellant's summary judgment response, it would have realized Appellant produced a scintilla of evidence to defeat the no evidence summary judgment. Specifically, the Tally Manual states the exact procedures for quarantining corrupt MBBs, "Remove the MBB [Mobile Ballot Box] from the PC Card

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<sup>95</sup> Pressley Br. 23 ¶3, 1CR 2055 ¶24, 1CR 2068 ¶84, 1CR 2087-2088

<sup>96</sup> Texas Constitution Article VI Section 4, 52.001, 52.062-52.064, 52.070, 213.007, 213.016, 213.033, 214.042, 214.002, 214.003, 214.048, 214.049

<sup>97</sup> RR(MAY26,2015)Vol.3 pp.20 line 22 - p.21-line 2

<sup>98</sup> Pressley Br.17

<sup>99</sup> RR(May26,2015)Vol.3 p.20 line 22 - p.21-line 2

device that has the flashing LED and *place it in the stack of invalid MBB's.*"<sup>100</sup> Similarly, the Hart Voting System Support Procedures Training Manual reiterates and defines the procedures to resolve corrupt MBB errors as, "Remove MBB, mark and set aside."<sup>101</sup> These documents were attached to the summary judgement response as noted herein. Travis County's Clerk stated, "...the Tally system could not read the MBB and you should just *re-try inserting the card*" and she claimed, "...but I -- I -- I mean, you put it in once and maybe it you know, *you put it in a second time...*"<sup>102</sup> The Clerk testified her office violated the Hart manuals' operational instructions with regard to vote tabulation procedures. The Court reiterated the errors at the hearing.<sup>103</sup>

The failure to read the evidence is a clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). See also *Conroe v. Retamco*, 138 S.W.3d 1, 7-8 (Tex. App.—San Antonio, 2004, pet. denied).

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<sup>100</sup> 1 CR 2249, Figure 3.0 and instructions 1-3.

<sup>101</sup> 2 CR 4893 states the resolution for Invalid or Corrupt MBB error, "Resolution: Remove MBB, mark and set aside."

<sup>102</sup> 1 CR 2045, 1 CR 4602, lines 21-23, 2 CR 3172 lines 9 – 15

<sup>103</sup> RR(MAY 26,2015) Vol. 4 p.46 lines 19 – p.47 line 9

**Reply Point I.B. Appellant objected to the Clerk’s failure to properly produce documents and manuals it claimed were proprietary.<sup>104,105</sup>**  
**The trial court did not follow the law by requiring the clerk to present the documents it claimed were proprietary for *in camera* inspection which was an abuse of discretion<sup>106</sup>.**

Contrary to Appellee’s contention, Appellant filed a Motion to Compel Production<sup>107</sup> raising objections for the Clerk’s failure to produce documents it claimed were “proprietary” for *in camera* inspection and pointing out the trial court was required to do so before allowing the clerk to withhold the discovery.<sup>108</sup> This Motion was sufficient to bring to the trial court’s attention that the law applicable to discovery had not been complied with.<sup>109</sup> Although, the Clerk did supply some manuals for the system; it is admitted she did not supply the eSlate operations manual which was critical and most relevant to disposition of this case.<sup>110,111,112</sup> The eSlate support documents and manual were expected to document evidence which would have disclosed the ballot image storage details regarding maintaining an image of the actual ballots it displayed to voters when they made their decision on who to vote for. The excuse the clerk offered in an

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<sup>104</sup> Pressley Br.11,14-15

<sup>105</sup> 1CR 333, 475, 4501, 4504 ¶11, 4505 ¶¶14-16, 4507, 4524 ¶3, 4613-4614 ¶19

<sup>106</sup> Pressley Br.15-17

<sup>107</sup> 1CR 4501-4509 (Motion to Compel), 4510-4539 (Exhibits A–F of Motion to Compel)

<sup>108</sup> RR(MAY26,2015)Vol.4 p.87 lines 10-17

<sup>109</sup> 1CR 4501-4539

<sup>110</sup> Pressley Br.24-25

<sup>111</sup> 1CR 2942, 1CR 1927, lines 14-19, 1CR 1925 line 22 - 1828 line 24, 1CR 2656

<sup>112</sup> RR (MAY26, 2015) Vol.4 p.92 line 5 – p.96 line 6.

attempt to rationalize its failure to produce the eSlate manual, was it did not have the eSlate operations manual used to describe how to store ballot images in this election. The excuse came after numerous erroneous assurances to the Court<sup>113</sup> it had delivered the manual. Minutes before the trial court granted Appellee's Motion for No Evidence Summary Judgment, the Clerk's attorney admitted it had not delivered the eSlate operations manual.<sup>114</sup> Of course, the claim that the clerk did not have the eSlate manual and support materials does not prevent and excuse it from producing it since the Clerk, as owner of the system, was clearly entitled to get it from the manufacturer.<sup>115</sup> The manual was within the clerk's constructive possession<sup>116</sup> requiring them to obtain it and produce it (Rule 192.7(b), T.R.C.P.). During the hearing, the court indicated it would permit some further discovery<sup>117</sup> as requested in the Motion to Compel. It cut off the opportunity and obligations on the Clerk and its own obligation, with respect to the Motion to Compel, by abruptly changing course and granting the No Evidence Motion for Summary Judgment in effect denying the

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<sup>113</sup> *Id.*

<sup>114</sup> Pressley Br. 16, 67, RR (MAY26, 2015) Vol.4 p.92 line 5 – p.96 line 6.

<sup>115</sup> Pressley Br. 14-17, 189, 1CR 4506(Motion to Compel), 1CR 525 (Exhibit 6, Travis County/Hart purchase contract, showing Section 11.4 that "support materials" are in Travis County's possession.

<sup>116</sup> *Id.*

<sup>117</sup> RR(MAY26,2015)Vol.4, p.86 line 23 – p.88 line 23, RR(MAY26,2015)Vol.4 p.95 line 8 – p.96 line 7



Motion to Compel. The court abused its discretion, by not requiring the Clerk to get the manual and produce it before ruling on the Motion for Summary Judgment. Incredulously the Court ruled there was no evidence in opposition to the summary judgment motion while depriving Appellant of the very evidence it held did not exist. This was objected to and the error clearly pointed out to the court.<sup>118</sup> The case cited by the Clerk in its Amicus Curie brief demonstrates the court was required to follow in camera inspection protocol and require production of documents that reasonably could lead to the discovery of admissible evidence like the eSlate operations manual. Rule 192.3(a) and (b), T.R.C.P.; *Monsanto, Co. v. May*, 889 S.W.2d 274, 276 (Tex. 1994).

These actions along with the trial court's failure to review the evidence attached to Appellant's Opposition to the Motion for Summary Judgment constitute an egregious abuse of discretion requiring reversal.

**Reply Point I.C.1. The Summary Judgment Evidence establishes that CVRs are not images of ballots as a Matter of Law or at a minimum constitutes more than a scintilla of evidence as to whether they do or not.**

Appellee contends that whether a CVR constitutes an image of a ballot to satisfy statutory and constitutional requirements of a ballot image is purely a matter of law and no fact issues can be created to defeat

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<sup>118</sup> RR(MAY26,2015)Vol.4 p.92 line 5 – 96 line 6 (specifically p.94 line 18 – p.94 line 7)

summary judgment. While Appellant contends this determination is a fact question, the answer to the fact question is established by undisputed evidence which converts the issue into a conclusion that CVRs are not ballots that can be counted to determine the outcome of an election once a manual recount is conducted. The factual dispute is between a) the conclusions, statements, and documentation promulgated<sup>119</sup> by the SOS and federal advisory agencies that parenthetically and inconsistently state a CVR is a ballot image without any justification or reference to statute and Constitution, and b) Appellant's factual evidence<sup>120,121</sup> of what a ballot is and that the eSlate formats it for voters. In addition, Appellant disputed the Appellee's evidence with expert testimony of the fact a CVR is a data structure file<sup>122</sup> and not an image of anything a voter sees let alone a ballot as defined by law and Constitution. Since the evidence of administrative pronouncements do not trump our TEC and Constitution, the factual dispute is settled. When that fact is applied to law, the county clerk had no legal votes to recount other than the 480 BBMs. Appellee makes the convoluted argument since the legislature has not passed a law stating

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<sup>119</sup> Pressley Br.35 ¶c, 38, 41, 1CR 2053-2054, 1CR 2062, 2CR 566 2<sup>nd</sup>¶, see SOS's definition, "Ballot Image: The ballot as it appears on a direct recording electronic (DRE) Voting system."

<sup>120</sup> Pressley Br.6, 12, 29-30—the critical aspects of this description for this appeal are the Supreme Court's acknowledgement that the system used by Travis County "displays the ballot."

<sup>121</sup> Clerk testimony: 2CR 3118 line 21 – 3122 line 18 referring to Exhibit 8 (2CR 688) and Exhibit 10 (2CR 613)

<sup>122</sup> Pressley Br. 23 ¶3, 1CR 2055 ¶24, 1CR 2068 ¶84, 1CR 2087-2088

CVRs are not images of a ballot they have conceded it is true. Yet, the Texas Legislature has never mentioned them in any statute. This is the crux of the issue: Do the CVRs produced by Travis County satisfy the statutory requirements that recounts are decided by counting Official Ballots<sup>123</sup> that must be numbered?<sup>124</sup>

It is undisputed that printed CVRs produced by Travis County and used in the recount have not one single element of a ballot defined by statute and Constitution.<sup>125</sup>

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<sup>123</sup> TEC 52.001, 214.002, 213.016, Pressley Br.25-27

<sup>124</sup> Texas Constitution Article VI, Section4, Pressley Br.6, 23, 25-27

<sup>125</sup> RR(MAY26,2015)Vol.4 p.35 lines 4-10

Exhibit R

Vote Both Sides      Vote en Ambos Lados de la Página

December 16, 2014 Joint Special Runoff Election  
16 de diciembre, 2014 Elecciones Especiales Secundarias Conjuntas  
Travis County  
Condado de Travis  
December 16, 2014 - 16 de diciembre, 2014      Precinct Precinto 156-B

<p>CITY OF AUSTIN RUNOFF ELECTION ELECCIÓN SECUNDARIA CIUDAD DE AUSTIN</p> <p>MAYOR, CITY OF AUSTIN ALCALDE, CIUDAD DE AUSTIN</p> <p><input checked="" type="checkbox"/> Mike Martinez <input type="checkbox"/> Steve Adler</p> <p>DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN DISTRITO 4, CIUDAD DE AUSTIN CONSEJO, CIUDAD DE AUSTIN</p> <p><input checked="" type="checkbox"/> Laura Pressley <input type="checkbox"/> Gregorio "Greg" Casar</p> <p>To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).</p>	<p>AUSTIN INDEPENDENT SCHOOL DISTRICT SCHOOL BOARD TRUSTEE RUNOFF ELECTION ELECCIÓN SECUNDARIA PARA JUNTA DE REGENTES DISTRITO ESCOLAR INDEPENDIENTE DE AUSTIN</p> <p>AT LARGE POSITION 9, AISD PUERTO EN GENERAL 9, AISD</p> <p><input checked="" type="checkbox"/> Kendall Pace <input type="checkbox"/> Hillary Procknow</p> <p>To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).</p>
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Vote Both Sides      Vote en Ambos Lados de la Página

4493031271

Mail In Ballot

Exhibit Q

Votes by Precinct  
JBCs Election Day GR14

Precinct: 133-C      Device: JBC - CD09EB  
Party: NP      Polling Place: ED (38) Memorial United  
Methodist Church - Election Day

Contest Title	Candidate/Option
PLACE 2, ACC TRUSTEE, AUSTIN COMMUNITY COLLEGE	Jade Chang Sheppard
DISTRICT	
MAYOR, CITY OF AUSTIN	Mike Martinez
DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN	Gregorio "Greg" Casar
DISTRICT 1, SINGLE MEMBER TRUSTEE, AISD	David D Thompson
AT LARGE POSITION 9, AISD	Hillary Procknow

1/6/2015 10:00:06AM      Page 52 of 1804

738

Printed Cast Vote Record

Furthermore, if CVRs are to satisfy statutory requirements of maintaining ballot images when they have none of the statutory requirements of a ballot, the Legislature would have provided for such in the TEC. It has not done so. Therefore the CVRs produced by Travis County are not images of any document meeting statutory definitions of a ballot and cannot be used as legal votes to be counted at a recount.<sup>126</sup>

Appellee relies on TEC Sections 128.001 and 129.002 for the proposition that the Legislature gave the SOS authority to declare a printed CVR is a ballot in contravention of all the other TEC provisions and

<sup>126</sup> Pressley Br.22, 25-26

Constitution providing what a ballot must contain cited earlier in this brief. Those provisions do not and could not have that intended effect. Section 128.001 requires the SOS to demand election officials store images of the ballot. TEC 129.002(c) provides the “...secretary of state shall prescribe any procedures...to implement...this chapter.” Chapter 129 relates only to testing and security and procedures, it does not provide authority to cancel statutes and the Constitution to redefine what constitutes a ballot. TEC, Sec. 52.075, provides some limited leeway on the form of the ballot to allow a modification of a ballot but only to the extent required to conform to the formatting requirements of the computer used. Contrary to Appellee’s contention, this statute is a clear indication votes cannot be counted at a recount unless they are on a ballot meeting the requirements of the TEC. If the Legislature intended a printed CVR to be an acceptable form of ballot to determine the outcome of an election, TEC Sections 128.001, 129.002, and 213.016 were the place to do it. Since the Legislature refused to do so, it is clear that information printed on CVRs cannot be counted at a recount and the TEC requires the true outcome of this election cannot legally be determined by counting information contained on printed CVRs.<sup>127</sup>

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<sup>127</sup> Pressley Br. 27, 30,-32

The undisputed facts, presented by Appellant in opposition to the Appellee's Motion for Summary Judgment which shows the eSlate system formats a ballot meeting statutory requirements at the polls for voters to see when they decide who to vote for,<sup>128</sup> also deprives the SOS authority to declare without justification a printed CVR is an image of a ballot. If for no other reason than a printed CVR is not a numbered ticket as required by the Texas Constitution<sup>129</sup> even if the Legislature had given authority to the SOS to so declare that legislation would be unconstitutional. A court should always construe a statute so it can be consistent with the Constitution *Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998); *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996). Therefore, the correct statutory interpretation is, regardless of what the SOS wrote, it was without authority to conclude a printed CVR is an image of a ballot.

In addition, Dr. Jacobson's expert declaration makes clear that a CVR is not a ballot, it is not an image of a ballot, and it is not even an image type file from a computer science or plain language standpoint<sup>130,131,132</sup> He is

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<sup>128</sup> Pressley Br.6, 1CR 2053 ¶26, 1CR 2055 ¶33, 2CR 3118 line 21 – 3122 line 18 referring to Exhibit 8 (2CR 688) and Exhibit 10 (2CR 613)

<sup>129</sup> Texas Constitution Article VI Section4, Pressley Br. 6, 23, 25-28

<sup>130</sup> Pressley Br.21-23

<sup>131</sup> 1CR 2044, 2064-2065

competent to make this determination.<sup>133</sup> The trial court acknowledged this.<sup>134</sup> Since the trial court did not rule on Appellee's Objections to Dr. Jacobson's expert affidavit, but on the contrary acknowledged he was competent to render the opinion,<sup>135</sup> Jacobson's affidavit raised genuine issues of material fact as to whether a CVR was an "image of a ballot" as required by law precluding summary judgment.

All of Appellee's protestations fail to remove the simple undisputed fact that, the clerk did not maintain images of anything meeting the statutory and constitutional requirements of a ballot and did not recount ballots (other than BBMs) to report the outcome of the run-off election recount. Unless this Court is willing to hold that despite their failure to meet statutory and constitutional requirements for a ballot, CVRs may be manually recounted to determine the outcome of an election, the case must be reversed.

Since the trial court clearly stated that if a CVR is not a legal image of a ballot, Appellant would be entitled to a new election.<sup>136</sup> There is nothing a remand would accomplish but to effectively deny Appellant any portion of

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<sup>132</sup> 1CR 2087-2088

<sup>133</sup> 1CR 2092-2113

<sup>134</sup> RR(MAY26,2015)Vol.4 p.42 lines 15–23, RR(MAY26,2015)Vol.4 p.54 lines 18–24, RR(MAY26,2015)Vol.4 p.71 line 14 – p.73 line 5

<sup>135</sup> RR(MAY26,2015)Vol.4 p.71 line 14 – p.73 line 5

<sup>136</sup> RR(MAY26,2015)Vol.4 p.62 lines 7-18

her term which expires on January 1, 2017. This court, in the interest of justice, judicial economy and the need for prompt disposition of an election contest, should rule that a CVR is not an image of a ballot as a matter of law and could not be used to tally votes at the recount and reverse and render judgment ordering the outcome of the runoff election is either a tie or cannot be ascertained<sup>137</sup> and the election is void,<sup>138</sup> requiring a new election to be held. TEC Sections 2.002 and 2.028; *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992). At a minimum, this Court should rule Appellee's Motion for Summary Judgment failed to establish he was entitled to summary judgment because as a matter of law a CVR does not satisfy the requirements of the TEC or the Texas Constitution for a ballot and reverse and remand for action not inconsistent with its decision. The trial court has already indicated it would call a new election if this Court rules the CVR is not a ballot image.<sup>139</sup>

**Reply Point I.C.2. The Legislature clearly mandated that the court must declare the outcome cannot be ascertained, declare the election void, and order a new election under the factors of this case and it is not a disenfranchisement of voters to do so.**

Since there are missing records and illegal votes were used at the recount, without which the election was tied, the TEC requires the Court to

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<sup>137</sup> TEC 221.003

<sup>138</sup> TEC 221.012

<sup>139</sup> *Id.*



declare the outcome cannot be ascertained,<sup>140</sup> declare the election void<sup>141</sup> and order a new election.<sup>142</sup> Following the law of this state cannot be an unlawful disenfranchisement of voters when the action is authorized by law.

Appellee relies on *Prado v. Johnson*, 625 S.W.2d 368 (Tex.App.—San Antonio, 1981, writ dismissed) for the proposition that when mistakes and irregularities are purely technical and is not committed by the voter, it cannot be grounds for reversal. That case is not applicable to issues in this case. First of all, *Prado, supra* dealt with an attack on absentee ballots for minor irregularities that did not involve counting illegal votes nor go to the integrity of the votes counted. Secondly, the Court was affirming a trial court's exercise of discretion after a trial.

Furthermore, the challenge in that case did not go to the absence of legal ballots and the illegality of the items, CVRs, erroneously treated as ballots. Finally, that decision was based on the finding by the Court of Appeals that failures of election officials in that case were violations of directory statutory provisions rather than mandatory provisions of the TEC. *Id. at 369.* In Appellant's case, there were alleged votes counted as a result of violating the mandatory provisions of the Texas Constitution that

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<sup>140</sup> TEC 221.003, Pressley Br. 3,10,12,19,22, 30-32

<sup>141</sup> TEC 221.012, Pressley Br. 13,19,25,30,33,35

<sup>142</sup> TEC 221.003 and 221.012, Pressley Br. 12,13,22,26,30

elections are to be by numbered official ballots as cited herein. Therefore, *Prado v. Johnson, supra* and the other cases cited by Appellee are totally inapplicable to this case. The Legislature has clearly spoken, a recount is determined by counting ballots<sup>143</sup> and if other forms of votes are counted they are illegal votes. The Legislature also has clearly provided that if discounting illegal votes alters the outcome of the election, the courts must declare the outcome cannot be ascertained, the election is void, and order a new election.<sup>144</sup> The Legislature has also provided that if mistakes and irregularities of any kind especially as here when they bring into question the actual vote count to the degree a court believes it cannot ascertain the true outcome of the election, the court must declare the election void, and order a new election.<sup>145</sup>

In addition, contrary to Appellee's assertion, Appellant does not rely solely on the mandatory provisions of TEC Section 128. It is Appellee that must rely on that Section and others to authorize its counting of CVRs instead of ballots.

This is not a "technical violation" referred to in the cases cited by Appellee. Appellant's case presents the situation of the counting of illegal

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<sup>143</sup> TEC 52.001

<sup>144</sup> TEC 52.001, 221.003, 221.011, 221.012, , Pressley Br.31-32, 1CR 2050 paragraph17 and footnote 10

<sup>145</sup> *Id.*

ballots/votes that when discounted changes the outcome of the election. In such circumstances the law requires the court to order a new election and it is not disenfranchisement of voters to follow the Constitutional and statutory laws of Texas.

**Reply Point I.D. The summary judgment evidence raised genuine issues of material fact to authorize a court to hold that it cannot determine the true outcome of the election.**

See discussion *ante* under Reply Point One.

**Appellant's Brief Points Out More Than a Scintilla of Evidence Precluding the Granting of a No Evidence Summary Judgment.**

See discussion *ante* under Reply Point One.

Dr. Jacobson's expert opinion is clearly based on his evaluation of other computer expert reports, operations manuals, entries on the audit log that corrupt memory cards where votes are stored and tabulated, Mobile Ballot Boxes (MBBs), were used.<sup>146</sup> His uncertainty as to how many MBBs were actually corrupt and invalid would have been confirmed if Appellant had access to the MBBs and other evidence noted in the Motion to Compel.<sup>147</sup> The County Clerk's conclusion was there must have been something wrong with the reader downloading votes on the Tally.<sup>148</sup> Appellee erroneously contends Appellant's expert's opinion is not

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<sup>146</sup> Pressley Br. 21-23, 1CR 2044 paragraph4, 2057 footnote 17, 2086-2087

<sup>147</sup> 1CR 4506-4507

<sup>148</sup> Pressley Br.7,33, 1CR 2049-2050 ¶¶15-17, 2CR 3173 line 4-5

competent because it is not based upon personal knowledge. The law is clear an expert opinion need not be based on personal knowledge. Rule 703, T.R.EV. To the extent the Clerk's testimony contradicted Dr. Jacobson his declaration creates a fact issue, is not conclusive and cannot therefore support a traditional summary judgment. Rule 166b(c), T.R.C.P. Indeed, the Clerk's statement that there was something wrong with reader<sup>149</sup> raises fact issues as to whether votes were reliably received/tabulated by the Tally computer – an even more compelling mistake or irregularity<sup>150</sup> making it even more impossible to determine the true outcome of the election.

Appellant's brief has not taken the County Clerk's deposition testimony regarding the reliability of the audit log out of context. She clearly stated if the audit log states the Tally computer was left unattended on several occasions once for as long as seven days, she stated multiple times, in her deposition, that she did not believe the log was accurate.<sup>151</sup> If a court and the Clerk cannot rely on the audit log, it is impossible to determine the integrity of what the true outcome of the vote tallied by the audited computer. Under this point, Appellee relies on the Clerk's testimony to show there is another explanation for the evidence Appellant

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Pressley Br.7, 33, 1CR 2052 ¶23, 2170 lines 2127-2128, 2CR 3189 line 3 - 3191 line 3

submitted in opposition to the No Evidence Summary Judgment. Appellee's argument validates Appellant's position that the existence of more than scintilla evidence and/ or a genuine issue of material fact was presented to the trial court precluding summary judgment.

In addition, since nothing attached to Appellee's Traditional Summary Judgment has been perfected for review in this Appeal the clerk's efforts to avoid the effects of her original deposition testimony cannot be considered in deciding whether the court properly granted a no evidence summary judgment. Even if it had been, the Clerk's testimony creates a fact issue precluding summary judgment.

Appellee The Clerk's testimony about zero tapes and security measures is likewise not relevant to resolution of an appeal of a No Evidence Summary Judgment and even if they were her testimony would create a fact issue. The clerk testified zero tapes were not made when the polls opened as required<sup>152, 153, 154</sup> and concedes that result tapes were not made at the time the polls closed as required<sup>155</sup> or that security was

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<sup>152</sup> Pressley Br.7, 33, 46, 1CR 4611, 1CR 4619 ¶3d, 1CR 4629 ¶38 – 4631 ¶44, 1CR 871-872

<sup>153</sup> 1CR 1865 – 1880 (page 1875 shows a Tape falsely labeled a "Zero Tape" printed on 11/26 (nearly 3 weeks prior to the runoff election) and lacks the components of a true Tape. It is missing Appellant's district, her name, zero votes for Appellant and opponent, and is not authenticated with judges' signatures. It does not meet the state's criteria for a true Zero Tape as documented on 2CR 508 of the SOS's Electronic Voting Procedures memo)

<sup>154</sup> RR(MAY26,2015)Vol.3 p.222 line 17 – p.223 line 2

<sup>155</sup> 2CR 3200 Lines 17-18

questionable with regard to the tally computer and prevention of manipulation of the MBBs, what they contained, or from tampering with the computer left open and unattended.<sup>156</sup>

Contrary to Appellee's contention<sup>157</sup>, Appellant did point to the affidavits attached to the Opposition to Summary Judgment delineating instances of interference with the legal functioning of official poll watchers. These instances had the effect of preventing the poll watchers from and consequently 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.

Therefore, it is more than a scintilla of evidence, especially in conjunction with all the other irregularities and mistakes, and failure to maintain ballot images to allow a Court in the exercise of discretion to determine it is impossible to ascertain the true outcome of the election. *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex.App.—Corpus Christi, 1993, writ diss'd w.o.j.)

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<sup>156</sup> 2CR 3189 lines 7 –11, 2CR 3190 lines 22-24 , 2CR 3190 lines 25 – 3191 line 3

<sup>157</sup> Casar Br.39

## **REPLY POINT TWO**

### **Reply to Point II. Trial Court Abused its Discretion in Sanctioning Pressley**

Appellee does not attempt to justify the sanctions imposed by the trial court by any reference to the *Lowe* factors. *Lowe v. Henry*, 221 S.W.3d 609, 622 f/n 5 (Tex. 2007)(hereinafter “*Lowe*”). By failing to contend that Appellant’s treatment of *Lowe* factors showing that the sanctions are not justified by the factors required by the Supreme Court to consider before permitting sanctions to stand, Appellee has waived any argument that Appellant’s analysis of the *Lowe* factors are incorrect. *Collier v. Walker*, 341 S.W.3d 570-574 (Tex.App.—Houston [14th Dist.] 2011, no pet.)

Therefore, this Court should reverse and render the sanctions, imposed by the trial court, unwarranted for misapplying the *Lowe* factors.

The lack of evidence of any violation of Chapter 10, Texas Civil Practices and Remedies Code, for which Pressley could be sanctioned, is well described in Appellant’s Brief<sup>158</sup> with detailed references below. It is clear from the court’s conclusions of law<sup>159</sup> it imposed sanctions for assertion of facts that had evidentiary support:

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<sup>158</sup> Pressley Br.41–43

<sup>159</sup> Pressley Br.89 – 121, 149-151

1. Election Day Zero tapes were not produced that were printed on the day of the runoff election, 12/16/14. Evidence/references that counter the Sanctions<sup>160</sup> are as follows:

a) Clerk repeatedly testified no Zero Tapes were printed,<sup>161,162</sup> and the SOS can instruct Travis County to not follow state law with regard to tapes<sup>163</sup> and the SOS verbally instructed the Clerk to not print the Zero Tapes<sup>164</sup>.

b) discovery documents Appellant received from Travis County and as referenced in Sixth Amended Pleadings,<sup>165</sup> (contained in all seven contest pleadings);

c) Appellant in responses to the Sanctions motion;<sup>166</sup>

d) Appellant's brief.<sup>167</sup>

The Court abused its discretion in awarding sanctions and denying Appellant's Request to remove sanctions relating to Zero Tapes.<sup>168</sup>

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<sup>160</sup> RR(June24,2015)Vol.3 p.222 line 17 – p.223 line 2

<sup>161</sup> RR (June18, 2015) Vol.2 p.220 line 7 – p.226 line 6.

<sup>162</sup> RR (June18, 2015) Vol.2 p.213 lines 1-4.

<sup>163</sup> RR(June18,2015)Vol.2 p.186 lines 8-23

<sup>164</sup> RR(June18,2015)Vol.3 p.225 line 16 – p.226 line 6

<sup>165</sup> 1CR 1875 shows an Tape produced by County printed 11/26 (nearly 3 weeks prior to the runoff election) and lacks components of a true Zero Tape

<sup>166</sup> 2CR 2051 ¶10 – 2053 ¶13

<sup>167</sup> Pressley Br.7, 33, 43, 46-48, 52, 205(Tape produced by Travis County lacking components, printed on 11/26/14 and runoff election was 12/16/14).

<sup>168</sup> Pressley Br.151, item #135.



2. Some voter's did not vote because the largest voting locations in the general election were closed and consolidated elsewhere for the runoff election. (not in the 6th amended final pleading). Evidence/ references to counter the Sanctions are as follows:

a) Testimony of Appellant regarding complaints from voters and those doing phone banking for the runoff;<sup>169</sup>

b) Statistical analyses showed "die hard" voters, that consistently vote in primaries and runoffs, did not vote when the County closed and consolidated the precinct polling locations most supporting Appellant;<sup>170</sup>

c) Removal of claim in 6<sup>th</sup> Amended final pleading once discovery documents revealed inconsistencies;<sup>171</sup>

d) Appellant's brief. <sup>172</sup>

The Court abused its discretion in denying<sup>173</sup> Appellant's Request<sup>174</sup> to remove sanctions for disenfranchised voters resulting from closing the largest and strongest Pressley voting boxes in her District for the runoff.

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<sup>169</sup> RR(June18,2015)Vol.2 p.88 lines 6–20, p.99 line 10 - 100 line 22, p.91 line 15 – 94 line 1

<sup>170</sup> 2CR 1543 ¶14, 1544 ¶18, 1545 ¶22, 2CR 1547 ¶28

<sup>171</sup> 1CR 860-915, RR(June18,2015)Vol.1 p.99 line 10 –p.100 line 22

<sup>172</sup> Pressley Br.8–9, 48-50

<sup>173</sup> Pressley Br.150

<sup>174</sup> Pressley Br.131 ¶¶52-54, 132 ¶55, 137 ¶¶98-99

3. Michael Winn and Dana DeBeauvoir violated the criminal statute prohibiting interference with poll watchers. Evidence/references to counter the Sanctions<sup>175</sup> are as follows:

a) Court admitted, “Although I’m not sure that’s what the statute<sup>176</sup> says when it says to witness the printing [the ballot images].”<sup>177</sup>

b) Pleadings do not directly accuse Michael Winn and Clerk of criminal conduct,<sup>178,179</sup>

c) trial court and the Appellee never pointed out any cases holding Rogers’ application of the factual affidavits to the criminal code was erroneous.<sup>180</sup>

The Court abused its discretion in denying<sup>181</sup> Appellant’s Request<sup>182</sup> to remove sanctions for accusations related to criminal violations.

The mere fact Appellant is sanctioned for presenting facts which were sufficient to defeat the No Evidence Summary Judgment actually prevented the trial court from having authority under Chapter 10 of the Civil Practices and Remedies Code to impose sanctions.

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<sup>175</sup> RR(June24,2015)Vol.3 p.221 lines 2-10.

<sup>176</sup> TEC 221.013, App.24

<sup>177</sup> RR(June24,2015)Vol.3 p.217 lines 21-23.

<sup>178</sup> Pressley Br.50-51

<sup>179</sup> 1CR 877, ¶¶60-62 and 886, ¶93 to 887, ¶96

<sup>180</sup> Pressley Br.51

<sup>181</sup> Pressley Br.150

<sup>182</sup> Pressley Br.136 ¶¶92-96

**Reply Point II.A. The court's finding that all issues had been resolved without preserving the issue of a pending sanctions request and the Rule 11 Agreement barred later imposition of sanctions.**<sup>183,184</sup>

The filing of an amended motion for sanctions<sup>185</sup> by rule relates back to the one on file (Rule 65, T.R.C.P.)<sup>186</sup> When the Court held it had been disposed of as one of the issues between the parties,<sup>187</sup> it is not the same as a sanction motion filed for the first time after a final judgement and could not extend the trial court's plenary power to consider an issue pending at the time. This is a totally different situation to the cases Appellee cites where a motion for sanctions was not pending prior to the court's judgment. A prejudgment motion for sanctions is not one of those listed in Rule 329, T.R.C.P. capable of extending the Court's plenary power when the court enters judgment resolving a motion for sanctions at the time of such disposition.<sup>188</sup> Rule 329, T.R.C.P.

In addition, Appellee was bound by his attorneys Rule 11 agreement that all issues had been resolved.<sup>189</sup> When attorneys agree in open court that all issues between them have been resolved and the Court approves it

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<sup>183</sup> Pressley Br.21-22, 47, 49, 84, 188, 2CR 2055 ¶122, 1CR 4605

<sup>184</sup> RR(May26,2015)Vol.4 p.120 line 18 – p.121 line 9

<sup>185</sup> 2CR 1934

<sup>186</sup> RR(May26,2015)Vol.3 p.1

<sup>187</sup> 2CR 2060, 1CR 4605, (May26,2015)Vol.4 p.120 lines 18 – 121 line 9, Pressley Br.84, 1CR 4605

<sup>188</sup> *Id.*

<sup>189</sup> Pressley Br.10-11, 84, 2CR 2060, RR(May26,2015)Vol.4 p.120 lines 18 – 121 line 9, Pressley Br.84, 1CR 4605

on the record,<sup>190</sup> all of the requirements of Rule 11, T.R.C.P. are satisfied and the parties are bound by that agreement. Appellee's attempt to distinguish an agreement in open court from a statement<sup>191</sup> that the party does not object to the Court entering an order based on the proposition that all issues have been resolved is a distinction without substance. Casar was precluded from seeking sanctions after the original judgment with agreed language that the motion for sanction had been resolved.<sup>192</sup> The authority Appellee wishes to ignore is the language of Rule 11, T.R.C.P. itself. However, Appellant was entitled to enforcement by the courts of the agreement of the parties that all issues had been resolved between the parties by conclusion of the hearing on the motion for summary judgment.<sup>193</sup> Appellee clearly relied on same because she noticed appeal<sup>194</sup> from the judgment containing the Rule 11 agreement.<sup>195</sup>

Pressley's allegations are not sanctionable also because Pressley had an evidentiary basis for making them or because an evidentiary basis could have been developed through discovery.

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<sup>190</sup> *Id.*

<sup>191</sup> Pressley Br.10-11, RR(May26,2015)Vol.4 p.121 lines 1-5

<sup>192</sup> Pressley Br.10-11,84, RR(May26,2015)Vol.4 p.120 lines 18 – 121 line 9, 1CR 4605

<sup>193</sup> *Id.*

<sup>194</sup> 2CR 5224-5226

<sup>195</sup> Pressley Br.84, 1CR 4605

Pressley had adequate information from her inquiries or that was likely to be received after a reasonable opportunity for discovery to insulate her allegations from Chapter 10 of the T.C.P.R.C. coverage. Pressley cannot be sanctioned for her lawyer's legal proposition that the combination of mistakes and irregularities whose occurrence was supported by evidence were adequate for a court to exercise its discretion and find it is unable to ascertain the true outcome of the election. Even if she were responsible, such a legal proposition was clearly warranted by existing law and a non-frivolous argument to change existing law. The election contest statutory provisions and case law are clear a court may void election if because of mistakes and irregularities, it is impossible to ascertain the true outcome of the election.

Finally, the Court awarded attorney's fees as sanctions for filing the appeal without a motion and without evidence of what an expert opined how many hours this appeal would take and what would be a customary, reasonable and necessary hourly rate.<sup>196</sup> The trial court had absolutely no evidence that appealing its order would violate Chapter 10 of the Civil Practices and Remedies Code. Whether a party can be sanctioned for filing an appeal is exclusive within the jurisdiction of this Court and requires a

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<sup>196</sup> Supp.Clerk's Record, vol. IV, page 20.

finding the appeal itself is frivolous by this Court. Rule 45, T.R.A.P. Appellee has made no such assertion. The action is clearly arbitrary and capricious and an abuse of discretion and beyond the trial court's power. This Court should reverse and render judgment that in addition to there being no sanctions for filing Pressley's petition and amended petitions that there be no sanctions based on attorney's fees for this appeal.

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## **CONCLUSION**

Since Appellant produced more than a scintilla of evidence that the election was not determined by Ballot and no ballot images meeting Constitutional and statutory requirements were maintained for the purpose of use at a manual recount other than BBMs, Appellant prays this Court to reverse and render in the interest of justice and the statutory requirement of expedited resolution. In the alternative, Appellant prays the Court to reverse and remand holding CVRs are not ballot images and therefore all votes other than mail – in votes were illegal votes and the trial court erred in holding Appellant did not provide more than a scintilla of evidence to defeat Appellee’s Motion for Summary Judgment. Finally, Appellant prays this Court to reverse and render the sanctions imposed by the trial court upon Appellant or at a minimum those calculated sanctions in the event of this appeal.

Respectfully Submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief does not comply with the requirements of Texas Rules of Appellate Procedure 9.4(i)2 for type-volume limitation because this brief contains 9423 words, excluding the parts of the brief exempted by Texas Rules of Appellate Procedure 9.4(i)1 according to the word count application in Microsoft Word. Appellant has on file a Motion to Extend the word Limitation that has not yet been ruled on and a Motion to Extend the Time to file this brief until it is ruled on that has not been ruled on either. This brief is being filed so that it is timely and in anticipation of the Word limit extension request being granted. This brief complies with the typeface requirements of Texas Rules of Appellate Procedure 9.4(i)3 because this brief has been prepared in a proportionally spaced sans serif typeface using Microsoft Word 2010 in 14 pt. Arial.

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/s/ Mark A. Cohen

Mark A. Cohen

Attorney for Laura Pressley, Appellant

Dated: February 16, 2016

## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served by efile and/or facsimile to the following persons on this 16th day of February, 2016.

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No. 03-15-00368-CV

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IN THE COURT OF APPEALS  
FOR THE THIRD DISTRICT OF TEXAS  
AUSTIN, TEXAS

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**LAURA PRESSLEY**

Appellant,

v.

**GREGORIO “GREG” CASAR**

Appellee.

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On Appeal from the 201<sup>st</sup> District Court  
of Travis County, Texas

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
INDEX OF AUTHORITIES .....	iii
BRIEF OF THE ARGUMENT .....	1
I. Whether the number of ballots matches the number of CVRs is a disputed question of fact. ....	1
II. Appellant’s interpretation of the unambiguous term “ballot image” is supported by the Election Code and the summary judgment evidence. ....	4
III. The Secretary of State does not have authority to define “ballot image” in a manner that violates the Election Code. ....	5
IV. The requirement that ballots be counted in a recount is mandatory, not directory. ....	7
V. The Election Code authorizes, and the trial court should have granted, additional discovery. ....	9
VI. The trial court erred in granting Appellee’s no-evidence motion for summary judgment because of the existence of summary judgment evidence in the record. ....	10
VII. To preserve the integrity of elections in Travis County, the Court should enforce the Election Code. ....	12
CONCLUSION AND PRAYER .....	12
CERTIFICATE OF COMPLIANCE .....	13
CERTIFICATE OF SERVICE .....	14

## INDEX OF AUTHORITIES

### CASES

<i>Christy v. Oliphint</i> 291 S.W.2d 406 (Tex.Civ.App.—Galveston 1956) <i>aff'd</i> 299 S.W.2d 933 (Tex. 1957) .....	7, 12
<i>Cotham v. Garza</i> , 905 F. Supp. 389 (S.D. Tex. 1995) .....	6
<i>Duncan-Hubert v. Mitchell</i> 310 S.W.3d 92 (Tex.App.—Dallas 2010, pet. denied) .....	11
<i>Gonzalez v. Villareal</i> 251 S.W.3d 763 (Tex.App.—Corpus Christi 2008, pet. dism'd) .....	8, 12
<i>Honts v. Shaw</i> , 975 S.W.2d 816 (Tex.App.—Austin 1998, no pet.) .....	9
<i>Merriman v. XTO Energy, Inc.</i> , 407 S.W.3d 244 (Tex. 2013) .....	11
<i>Prado v. Johnson</i> 625 S.W.2d 368 (Tex.Civ.App.—San Antonio 1981, writ dism'd) .....	9, 12
<i>Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water</i> 336 S.W.3d 619 (Tex. 2011) .....	5
<i>Reynolds v. Dallas County</i> , 203 S.W.2d 320 (Tex.Civ.App.—Amarillo 1947). 8, 11	
<i>Terrazas v. Slagle</i> , 821 F. Supp. 1154 (W.D. Tex. 1992) .....	6

### TEXAS CONSTITUTION

ART. 6, § 4 .....	5, 8
-------------------	------

### TEXAS ADMINISTRATIVE CODE

1 TEX. ADMIN. CODE 81.60 .....	9
--------------------------------	---

## TEXAS ELECTION CODE

TEX. ELEC. CODE § 31.004 .....	5
TEX. ELEC. CODE CHAPTER 52 .....	5
TEX. ELEC. CODE § 52.001 .....	4
TEX. ELEC. CODE § 52.031 .....	4, 6
TEX. ELEC. CODE § 52.062 .....	6
TEX. ELEC. CODE § 52.063 .....	4, 6
TEX. ELEC. CODE § 52.064 .....	4, 6
TEX. ELEC. CODE § 52.070 .....	4, 6
TEX. ELEC. CODE § 52.075 .....	6
TEX. ELEC. CODE CHAPTER 65 .....	5, 12
TEX. ELEC. CODE § 122.0331(a).....	9
TEX. ELEC. CODE § 122.0331(d) .....	10
TEX. ELEC. CODE § 127.130 .....	5
TEX. ELEC. CODE § 128.001(a)(2) .....	12
TEX. ELEC. CODE § 211.002(1) .....	2, 7, 12
TEX. ELEC. CODE § 213.016 .....	5
TEX. ELEC. CODE CHAPTER 214 .....	5
TEX. ELEC. CODE § 214.049(a).....	7
TEX. ELEC. CODE § 214.049(e).....	7, 12

TEX. ELEC. CODE § 221.008 .....	9
---------------------------------	---

TEX. ELEC. CODE § 231.006 .....	10
---------------------------------	----

## **TEXAS GOVERNMENT CODE**

TEX. GOV'T CODE CHAPTER 311 .....	5
-----------------------------------	---

## BRIEF OF THE ARGUMENT

### I. Whether the number of ballots matches the number of CVRs is a disputed question of fact.

At oral argument, Justice Field asked a question of the parties that merits clarification: does Appellant Laura Pressley (“Pressley”) dispute that the number of cast vote records (“CVRs”) matches the number of ballots cast? While Pressley’s counsel responded at oral argument that Pressley does dispute the accuracy of those numbers, it is helpful to point out the main evidence in the record underlying the dispute – *the invalid/corrupt Mobile Ballot Boxes*, as shown by the Tally Audit Log prepared and produced by the Travis County Clerk.<sup>1</sup>

Audit Log ó Official

Travis County ó December 16, 2014 Joint Special Runoff Election ó December 16, 2014

Page 5 of 58

02/05/2015 11:17 AM

Total Number of Voters : 80,511 of 574,094 = 14.02%

Precincts Reporting 428 of 453 = 94.48%

Entry	User	Code	Date	Time	Description	Data
793	tallyadmi	400	12/16/2014	8:32:29 pm	Viewed/Printed Report	Cumulative Report (Report Time 00:00:00)
794	tallyadmi	602	12/16/2014	8:34:45 pm	Invalid/Corrupt MBB	
795	tallyadmi	1,002	12/16/2014	8:35:10 pm	Valid eOM PIN	
796	tallyadmi	601	12/16/2014	8:35:10 pm	MBB Inserted	Id:699 CVRs: 153 Poll:ED (149) Cantu/Pan Am Recreation Center, Device:\PhysicalDrive5 (1CR 2135)
852	tallyadmi	56	12/16/2014	8:41:46 pm	DB Path	Path: C:\Program Files\Hart InterCivic\Tally\DataBase\141205-100309\TallyData.db
853	tallyadmi	602	12/16/2014	8:42:16 pm	Invalid/Corrupt MBB	
854	tallyadmi	1,002	12/16/2014	8:42:43 pm	Valid eOM PIN	
855	tallyadmi	601	12/16/2014	8:42:43 pm	MBB Inserted	Id:524 CVRs: 279 Poll:ED (83) Grant AME Worship Center, Device:\PhysicalDrive6 (1CR 2136)
859	tallyadmi	601	12/16/2014	8:42:43 pm	MBB Inserted	Id:484 CVRs: 4 Poll:ED (27) Elgin High School, Device:\PhysicalDrive2
860	tallyadmi	602	12/16/2014	8:42:43 pm	Invalid/Corrupt MBB	
861	tallyadmi	601	12/16/2014	8:42:50 pm	MBB Inserted	Id:476 CVRs: 164 Poll:ED (37) Sims Elementary School, Device:\PhysicalDrive5 (1CR 2136)
967	tallyadmi	601	12/16/2014	8:53:36 pm	MBB Inserted	Id:559 CVRs: 386 Poll:ED (118) Rancalls Flagship West Lake Hills, Device:\PhysicalDrive4
968	tallyadmi	602	12/16/2014	8:53:36 pm	Invalid/Corrupt MBB	
969	tallyadmi	601	12/16/2014	8:53:42 pm	MBB Inserted	Id:695 CVRs: 70 Poll:ED (154) Houston Elementary School, Device:\PhysicalDrive3 (1CR 2139)
985	tallyadmi	601	12/16/2014	8:57:11 pm	MBB Inserted	Id:484 CVRs: 82 Poll:ED (47) Pioneer Crossing Elementary School, Device:\PhysicalDrive7
986	tallyadmi	602	12/16/2014	8:57:11 pm	Invalid/Corrupt MBB	
987	tallyadmi	601	12/16/2014	8:57:12 pm	MBB Inserted	Id:497 CVRs: 285 Poll:ED (59) Lanier High School, Device:\PhysicalDrive2 (1CR 2140)

<sup>1</sup> 1 CR 2118, 2135-36, 2139-40, 2142, 2155.

A Mobile Ballot Box (“MBB”) is a flash card that stores ballot information.<sup>2</sup> To use counsel’s example from oral argument of electronic voting being a multi-step process, at step one the voter views the ballot and fills it out on the Hart InterCivic Voting System’s eSlate. Converting the image of the ballot the voter sees to a data structure, which is subsequently tabulated as a CVR at the Tally Computer at Travis County Central Counting, occurs later, in multiple steps.<sup>3</sup> Because of the evidence of corruption errors, which occurred well after voters cast their ballots and after the polls closed on election night when the votes are electronically converted to a data structure and counted as CVRs, there is certainly a dispute regarding the accuracy of the election results/numbers generated by the tabulation of the CVRs.

The important question is whether the *percentage* of ballots reflecting Pressley as the voter’s selected candidate matches the *percentage* of CVRs tabulated by the computer at Central Count containing Pressley’s name. The CVR results cannot be verified (as required in a recount, Tex. Elec. Code § 211.002(1)) absent the legally sufficient ballot images and absent a Zero Tape containing the components required by the Secretary of State.<sup>4</sup> Without a Zero Tape containing Pressley’s name and a beginning number of zero votes for both her and Appellee,

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<sup>2</sup> 1 CR 2203.

<sup>3</sup> *Id.*

<sup>4</sup> 2 CR 508.



there is no way to confirm that the percentage of CVRs indicating Pressley as the voter's choice equals the percentage of ballots cast for Pressley. Additionally, as stated at oral argument, the trial court erred in preventing further discovery on this issue.

Furthermore, the CVR results cannot be verified absent the precinct returns/Tally/Results. Election judges did not print the tapes as evidenced by the affidavit of Paul Williams, an official poll watcher for Pressley.<sup>5</sup> The instruction to election judges to not print the Tally/Results Tapes is reflected on the JBC Envelope from Pressley's voting precinct, 133, produced by the Travis County Clerk in discovery in this case.<sup>6</sup>

**JBC REPORT ENVELOPE**

Precinct: 130-133-118 Date: 12-16-2014

Beginning Public Count: 2

To be completed after the last voter in line at 7:00 pm has voted

- After the last voter has voted, print an Access Code Report. (Leave it attached to the JBC.)
  - Press "OTHER"
  - Press "Access Code Report"
  - Press "Polls Open Menu"
- Using the Access Code Report, fill out the "Access Code Report" section on the right.
- Press "Close Polls" on the JBC.
- Press "CONTINUE" to confirm that you want to close the polls.
- Enter the Close Polls Password and press ACCEPT.
- The Close Polls Report Prints. Tear off the whole tape and place it inside Envelope #1.
- DO NOT PRINT THE TALLY.**
- Record the Public Count in the section on the right. The Public Count is found on the JBC screen in the lower right hand corner.
- Count the number of signatures on the Combo Forms and enter the number in the section on the right. Place the Combo Forms in this envelope.
- Place the EDay Poll List tape (printed from the laptop) in Pink Envelope #3.
- Count the number of Provisional Voters listed on the "Lists of Provisional Voters" and enter the number in the section on the right.
- Count the number of paper ballots logged on the

ACCESS CODE REPORT	
NUMBER OF ACCESS CODES:	
ISSUED:	<u>354</u>
VOTED:	<u>353</u>
EXPIRED:	<u>      </u>
CANCELED:	<u>1</u>
ACTIVE:	<u>      </u>
PUBLIC COUNT:	<u>353</u>
# OF SIGNATURES ON COMBO FORMS:	<u>353</u>
# OF PROVISIONALS:	<u>0</u>

1865

EXHIBIT C

<sup>5</sup> 2 CR 7620.

<sup>6</sup> 1 CR 1865 (Image of JBC [Judge's Booth Controller] Report Envelope instructing election judges: "7. DO NOT PRINT THE TALLY.").

Because of the evidence of corruption errors, missing Zero Tapes, and other irregularities, whether or not the CVRs accurately reflect the number of ballots cast cannot be known.

## **II. Appellant’s interpretation of the unambiguous term “ballot image” is supported by the Election Code and the summary judgment evidence.**

Justice Field asked Mr. Kuhn if the term “ballot image” is ambiguous. We agree with Mr. Kuhn that the term is not ambiguous. We disagree with Appellee’s position that the unambiguous term “ballot image” is synonymous with “cast vote record.” Chapter 52 of the Election Code specifically states the required elements of a ballot (Tex. Elec. Code §§ 52.001, 52.031, 52.063, 52.064, 52.070), none of which appear on a CVR.<sup>7</sup> The Texas Secretary of State clearly defines “ballot image” as “the ballot as it appears on a direct recording electronic (DRE) voting system.”<sup>8</sup>

Glossary of Elections Terminology	<a href="http://www.sos.state.tx.us/elections/laws/glossary.shtml">http://www.sos.state.tx.us/elections/laws/glossary.shtml</a>
<b>Ballot Envelope:</b> The envelope, usually white, in which a voter places his marked ballot when voting by mail; also called a ballot secrecy envelope. This envelope is in turn placed in the Carrier Envelope.	
<b>Ballot Image:</b> The ballot as it appears on a direct recording electronic (DRE) voting system.	

Voters view the ballot on the Hart InterCivic Voting System’s eSlate when they decide which candidate to choose.

The term “cast vote record” appears nowhere in the Texas Constitution or the Election Code, although the Legislature has updated the Code as recently as

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<sup>7</sup> 2 CR 688, 738.

<sup>8</sup> 2 CR 566.

2013, nor does it appear in the Secretary of State's Glossary of Elections Terminology. *Id.*

**III. The Secretary of State does not have authority to define “ballot image” in a manner that violates the Election Code.**

The only Texas authority to which Appellee can cite in support of its interpretation of “ballot image” is an election advisory from the Texas Secretary of State to election administrators, where the Secretary equates a ballot image with a CVR. Yet this contradicts the Secretary of State's official definition of “ballot image,” 2 CR 566, and cannot be reconciled with the Election Code.

The Secretary of State's interpretation must be reasonable and not in conflict with the language of the statute it is interpreting. *See, e.g., Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). The Legislature has charged the Secretary of State with assisting and advising in regard to the application, operation, and interpretation of the Election Code. Tex. Elec. Code § 31.004. It plainly has not given the Secretary authority to exercise that function in a manner that would render sections of the Election Code meaningless. To equate “ballot image” with the statutorily undefined “cast vote record” would conflict with, among other Election Code provisions, parts of Chapter 52, Chapter 65, § 127.130, § 213.016, Chapter 214, Chapter 311 of the Government Code, and Article 6, § 4 of the Texas Constitution.

Section 52.075 of the Election Code does not affect this analysis. While the Legislature has granted the Secretary of State some manner of discretion in working with different voting systems that may have different formatting capabilities, nothing in the plain language of the Election Code indicates that the Legislature intended to give the Secretary of State the authority to fundamentally alter the recount process or substitute cast vote records for ballots. To the contrary, Appellee’s argument that § 52.075 allows just that would be correct only if § 52.075 contained the language “Notwithstanding §§ 52.031, 52.062, 52.063, 52.064, and 52.070...” Section 52.075 does not contain that language.

Courts have enjoined the Secretary of State from exceeding its authority in interpreting the Election Code. *See, e.g., Cotham v. Garza*, 905 F. Supp. 389 (S.D. Tex. 1995); *Terrazas v. Slagle*, 821 F. Supp. 1154 (W.D. Tex. 1992). While the Secretary of State is not a party to this appeal, these cases illustrate that Appellee’s unquestioning reliance on the Secretary of State’s interpretation of the Election Code is unavailing and should not control this Court’s analysis of the issue that is central to this appeal, an issue that the trial court and all counsel have agreed on the record needs to be resolved by the Court.<sup>9</sup>

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<sup>9</sup> 4 RR 62.

**IV. The requirement that ballots be counted in a recount is mandatory, not directory.**

At oral argument, Appellee's counsel incorrectly asserted that the statutorily required actions in a recount are directory and, as such, violations of the Election Code should not result in a new election. The purpose of mandatory provisions is to aid in detecting fraud, irregularity, or illegality. *Christy v. Oliphint*, 291 S.W.2d 406, 408 (Tex.Civ.App.—Galveston 1956), *aff'd* 299 S.W.2d 933 (Tex. 1957). Detecting fraud, irregularity, and illegality is exactly why a recount (the purpose of which is to verify the election result, Tex. Elec. Code § 211.002(1)) requires the counting of *ballots*, not simply a recalculation of the vote tally. Tex. Elec. Code § 214.049(a). Furthermore, when an electronic voting system is used and the recount is to be done manually, as occurred in this case, *the original ballot shall be counted*. Tex. Elec. Code § 214.049(e) (emphasis added).

Justice Goodwin correctly pointed out at oral argument that relying solely on CVRs provides no confirmation that Pressley's name even appeared on the ballot presented to the voter. Similarly, a Zero Tape not printed on Election Day prior to the opening of the polls provides no confirmation that Pressley and Appellee both began the election with zero votes). Moreover, an examination of the format of a CVR (2 CR 613, 738) shows that, unlike a ballot (2 CR 688), there is no distinguishing feature, such as a number or bar code, to separate one CVR from another. This makes CVRs susceptible to manipulation and duplication,

precisely what the Election Code and Art. 6, § 4 of the Texas Constitution were designed to prevent through the counting of ballots. *See, e.g., Reynolds v. Dallas County*, 203 S.W.2d 320, 323 (Tex.Civ.App.—Amarillo 1947) (“...the voting should be conducted under such conditions, as to make it possible to detect and punish fraud and preserve the purity of the ballot box.”); *Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex.App.—Corpus Christi 2008, pet. dismissed) (“The purpose of the election code is to ensure that the true will of the voters is ‘fairly expressed’ and that the evidence of that expression ‘is properly preserved.’”).

### Hart Voting System Ballot (2CR 688)

Exhibit R

Vote Both Sides      Vote en Ambos Lados de la Página

December 16, 2014 Joint Special Runoff Election  
16 de diciembre, 2014 Elecciones Especiales Secundarias Conjuntas  
Travis County  
Condado de Travis  
December 16, 2014 - 16 de diciembre, 2014      Precinct Precinto 156-B

<p>CITY OF AUSTIN RUNOFF ELECTION ELECCIÓN SECUNDARIA CIUDAD DE AUSTIN</p> <p>MAYOR, CITY OF AUSTIN ALCALDE, CIUDAD DE AUSTIN</p> <p><input checked="" type="checkbox"/> Mike Martinez <input type="checkbox"/> Steve Adler</p> <p>DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN DISTRITO 4, CIUDAD DE AUSTIN CONSEJO, CIUDAD DE AUSTIN</p> <p><input checked="" type="checkbox"/> Laura Pressley <input type="checkbox"/> Gregorio "Greg" Casar</p> <p>To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).</p>	<p>AUSTIN INDEPENDENT SCHOOL DISTRICT SCHOOL BOARD TRUSTEE RUNOFF ELECTION ELECCIÓN SECUNDARIA PARA JUNTA DE REGENTES DISTRITO ESCOLAR INDEPENDIENTE DE AUSTIN</p> <p>AT LARGE POSITION 9, AISD PUERTO EN GENERAL 9, AISD</p> <p><input checked="" type="checkbox"/> Kendall Pace <input type="checkbox"/> Hillary Procknow</p> <p>To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).</p>
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10000820210064      100017732275      4493031271

Vote Both Sides      Vote en Ambos Lados de la Página

DD EXHIBIT 8 5/11/2015 KB

### Printed Cast Vote Record (2CR 613,738)

Exhibit Q

Votes by Precinct  
JBCs Election Day GR14

Precinct: 133-C      Device: JBC - C009EB  
Party: NP      Polling Place: ED (38) Memorial United Methodist Church - Election Day

Contest Title	Candidate/Option
PLACE 2, ACC TRUSTEE, AUSTIN COMMUNITY COLLEGE DISTRICT	Jade Chang Sheppard
MAYOR, CITY OF AUSTIN	Mike Martinez
DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN	Gregorio "Greg" Casar
DISTRICT 1, SINGLE MEMBER TRUSTEE, AISD	David "D" Thompson
AT LARGE POSITION 9, AISD	Hillary Procknow

1/6/2015 10:00:08AM      Page 52 of 1804

DD EXHIBIT 10 5/11/2015 KB

In the cases cited in Appellee's brief, there was nothing in the record raising a question of illegality or mistake. *See Prado v. Johnson*, 625 S.W.2d 368, 370 (Tex.Civ.App.—San Antonio 1981, writ diss'd) (no question that all votes were legally cast); *Honts v. Shaw*, 975 S.W.2d 816, 823 (Tex.App.—Austin 1998, no pet.). This is a key distinction between this case and the “directory” cases cited by Appellee.

**V. The Election Code authorizes, and the trial court should have granted, additional discovery.**

The trial court erred in denying Pressley the opportunity to obtain key evidence and then rendering a no-evidence summary judgment. Appellee took the position in the trial court that the electronic voting system used by Travis County does not retain ballot images (despite the fact that the Secretary of State certified the use of the system as requiring ballot image systems for recounts (1 Tex. Admin. Code § 81.60, Graphic 3)), and thus complying with the Election Code would upend the administration of elections in Travis County, causing the need for a new voting system at huge cost to taxpayers. Pressley was denied the opportunity to obtain evidence, in particular the voting system manuals, that would contradict this argument and further support the reasonableness of Pressley's interpretation of the plain language of the Election Code.

Section 221.008 of the Election Code allows for the examination by the court of ballots, voting machines, and other equipment. Section 122.0331(a)

requires that copies of program codes and user manuals relating to electronic voting systems be filed with the Secretary of State. Pursuant to § 122.0331(d), such materials may be made available for in camera inspection in a judicial proceeding. Section 231.006 allows the trial court to compel the production of election records, ballot boxes, and other tangible items, highlighting the importance of this evidence to an election contest.

The trial court unquestionably had the authority and, based on these provisions of the Election Code, should have compelled the production of the voting system user manuals. It was reversible error for the trial court to prevent Pressley from obtaining key evidence.

Finally, Pressley has not waived her objection on this point. The trial court clearly denied her motion to compel at the summary judgment hearing.<sup>10</sup>

**VI. The trial court erred in granting Appellee's no-evidence motion for summary judgment because of the existence of summary judgment evidence in the record.**

In response to the Court's request at oral argument that the parties provide specific citations to the record, Pressley offers the following record cites, which demonstrate that there was competent summary judgment evidence in the record to defeat Appellee's no-evidence and traditional motions for summary judgment:

- Expert report – 1 CR 2086
- Poll watcher affidavits – 2 CR 690, 2 CR 7620

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<sup>10</sup> 4 RR 94-95.



- Travis County Clerk deposition – 1 CR 4543
- Invalid Zero tape – 1 CR 1867
- Comparison of Hart InterCivic formatted ballot to CVR – 2 CR 736-38
- Tally audit logs showing corrupt MBBs – 1 CR 2114
- Judge Booth Controller envelope with instruction to not print tally/results tape – 1 CR 1865
- Secretary of State Glossary of Elections Terminology – 2 CR 566

The record clearly contains more than a scintilla of evidence and, considered in the light most favorable to Pressley, *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013), evidence sufficient to raise a fact question.

Additionally, Appellee has not preserved his objections to Pressley's summary judgment evidence. The trial court did not rule on Appellee's objections, and it cannot be inferred that the objections were sustained based on the granting of the no-evidence summary judgment. *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 100-01 (Tex.App.—Dallas 2010, pet. denied).

**VII. To preserve the integrity of elections in Travis County, the Court should enforce the Election Code.**

Election integrity underlies not only the specific requirements of the Texas Constitution and Election Code but also the history of election jurisprudence. As technology has evolved over the last one hundred years, Texas courts have consistently examined the constitutionality of voting systems and procedures in the context of what will “preserve the purity of the ballot box” and “[detect] any fraud, irregularity or illegality in the election.” *Reynolds v. Dallas County*, 203 S.W.2d at

323; *Christy v. Oliphint*, 291 S.W.2d at 408. *See also Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex.App.—Corpus Christi 2008, pet. dismiss’d) (“The purpose of the election code is to ensure that the true will of the voters is ‘fairly expressed’ and that the evidence of that expression ‘is properly preserved.’”); *Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex.Civ.App.—San Antonio 1981, writ dismiss’d) (“The purpose of the [Election] Code is to prohibit error, fraud, mistake and corruption...”). Consistent with this history and the constitutional requirement that the vote in Texas be by ballot, the Legislature mandates that *ballots* be counted (Tex. Elec. Code Ch. 65), that computerized voting systems store ballot images (Tex. Elec. Code § 128.001(a)(2)), and that the *original ballot* be counted in a manual recount of an electronic voting system ballot (Tex. Elec. Code § 214.049(e)). These requirements are also consistent with the purpose of a recount: to *verify* the vote count in an election (Tex. Elec. Code. § 211.002(1)).

Pressley respectfully requests that the Court enforce the plain language of the Election Code.

### **CONCLUSION AND PRAYER**

WHEREFORE, PREMISES CONSIDERED, Pressley prays that this Court reverse the trial court’s no-evidence summary judgment and remand this case for further proceedings consistent with the Court’s action. Pressley also requests such other and further relief to which she may be entitled.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document complies with Tex. R. App. P. 9.4(i)(2)(B), in that this brief contains 2,403 words and the aggregate of all briefs filed by Appellant Laura Pressley does not exceed 27,000 words.

/s/ Anna Eby\_\_\_\_\_

Anna Eby

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document was served via electronic service on this the 9<sup>th</sup> day of May, 2016 on the following:

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