# Misrepresentations of law, fact and appellants arguments – Ad hominem

Appellees’ response begins with an Ad hominem attack and follows with a rant that is replete with misrepresentations of the law and distortion of appellants arguments, embellished with disingenuous statements of purported fact in the place of substantive legal arguments.

Appellees argue contrary facts to those established by Appellant but fail to provide exhibits or citations to the record when it is their burden to support their contrary claims with relevant exhibits and citations to the record. Appellees cannot prevent the court of appeals from relying on an appellant's statement of facts without offering any contrary factual assertions or citations to the record. See Fredonia St. Bank v. General American Life Ins. Co., 881 S.W.2d 279, 283-84 (Tex. 1994)

(“If under Rule 74(f) an appellee can prevent the court of appeals from relying on an appellant's statement of facts without offering any contrary factual assertions or citations to the record, the court would be forced to either search the record for evidence itself or order rebriefing under Rule 74(p). TEX.R.APP.P. 74(p). The first option has never been considered part of an appellate court's duties in conducting judicial review. See Saldana v. Garcia, [285 S.W.2d 197, 201](https://casetext.com/case/saldana-v-garcia#p201) (Tex. 1955) (holding that it is "not the duty of the Court of Civil Appeals to make an independent search of the statement of facts"); Most Worshipful Prince Hall v. Jackson, [732 S.W.2d 407, 412](https://casetext.com/case/worshipful-prince-hall-ldg-v-jackson#p412) (Tex.App. — Dallas 1987, writ ref'd n.r.e.) (same); Hercules, [458 S.W.2d at 228](https://casetext.com/case/hercules-inc-v-eilers#p228) n. 8 (holding that construing the appellees' broad statement as a challenge "would render meaningless Rule 419 and thrust a burden upon the court which properly should be assumed by the appellees"); Rubenstein Son Produce, Inc. v. State, [272 S.W.2d 613, 621](https://casetext.com/case/rubensteinssson-produce-v-state#p621) (Tex.Civ.App. — Dallas 1954, writ ref'd n.r.e.) (holding that "it is not ordinarily our duty to search the record for supporting evidence")”)

# Appeal is timely -

A void judgment is a 'nullity' that can be attacked at any time." see Masa Custom Homes, LLC v. Shahin, 547 S.W.3d 332, 338 (Tex. App.-Dallas 2018, no pet.) citing Nix v. State, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001) A void judgment may be attacked either directly or collaterally. PNS Stores, 379 S.W.3d at 271.

A void judgment is an absolute nullity and has no legal force or effect, while a voidable judgment is capable of being voided or confirmed. See In re Sensitive Care, Inc., 28 S.W.3d 35, 39 (Tex.App.-Ft. Worth 2000, no pet.); Easterline v. Bean, 49 S.W.2d 427, 429 (Tex. 1932). A judgment is void when the court had no jurisdiction to issue it. Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Other defects merely render the judgment voidable. Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631, 636 (Tex. App. 2003)

# Jurisdiction

“It is well established law that jurisdiction cannot be created by waiver or by agreement. Puente v. State, 71 S.W.3d 340, 343 (Tex.Crim.App.2002); Garcia v. Dial, 596 S.W.2d 524, 527 (Tex.Crim.App.1980) (orig. proceeding). Gaddy v. State, 433 S.W.3d 128, 142 (Tex. App. 2014)

Moreover, a trial court's subject matter jurisdiction is never presumed and cannot be waived. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993). Our jurisdiction over the merits of an appeal extends no further than that of the court from which the appeal is taken. Ward v. Malone,115 S.W.3d 267, 268 (Tex.App.-Corpus Christi 2003, pet. denied); Dallas County Appraisal Dist. v. Funds Recovery, Inc.,887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). Shell Cortez Pipeline v. Shores, 127 S.W.3d 286, 291-92 (Tex. App. 2004)

# MSJ void for failing to render

The rules of civil procedure do not authorize a judge to render a decision following a hearing unless she personally heard the evidence on which the order or judgment is based. See Masa Custom Homes, [547 S.W.3d at 335](https://casetext.com/case/masa-custom-homes-llc-v-shahin-2#p335); W.C. Bank, Inc. v. Team, Inc., [783 S.W.2d 783, 785](https://casetext.com/case/wc-banks-inc-v-team-inc#p785) (Tex. App.—Houston [1st Dist.] 1990, no writ).When a judge has no authority to render an order or judgment, that order or judgment is void. See Masa Custom Homes, [547 S.W.3d at 338](https://casetext.com/case/masa-custom-homes-llc-v-shahin-2#p338). An appellate court has no jurisdiction to consider the merits of an appeal of a void order or judgment. See id. Catapult Realty Capital, L.L.C. v. Johnson (In re Catapult Realty Capital, L.L.C.), No. 05-19-01056-CV, at \*9 (Tex. App. Feb. 20, 2020) and authorities cited therein.”

Of course, the counter claims the challenged summary judgment was dependent upon, have their own procedural and substantive defects. Co-Trustee Defendant/Appellees Original Counterclaims filed November 4, 2019 [ROA 304-311], were untimely, vague, overbroad, disloyal[[1]](#footnote-1) and compulsory counter claims waived under Tex. R. Civ. P. Rule 97(a) that fails to contain any jurisdictional statements affirmatively declaring that the probate court, in which the action was brought, had the jurisdiction to hear and decide the claims and, impliedly relies upon Plaintiff Carl Brunsting’s jurisdictional statements, which appellant covered in her opening brief beginning on page 27.

“The general rule is that the allegations of the plaintiff's petition must state facts which affirmatively show the jurisdiction of the court in which the action is brought. Brown v. Peters, [127 Tex. 300](https://casetext.com/case/brown-v-peters), [94 S.W.2d 129](https://casetext.com/case/brown-v-peters) (1936); Smith v. Horton, [92 Tex. 21](https://casetext.com/case/smith-v-horton), [46 S.W. 627](https://casetext.com/case/smith-v-horton) (1898); Texas N.O.R.R. Co. v. Farrington (Tex.Com.App., 1905), [40 Tex. Civ. App. 205](https://casetext.com/case/t-n-o-ry-co-v-farrington), [88 S.W. 889](https://casetext.com/case/t-n-o-ry-co-v-farrington). Richardson v. First Nat. Life Ins. Co., 419 S.W.2d 836, 839 (Tex. 1967)”

“(“The pleader is required to allege facts that affirmatively demonstrate the court's jurisdiction to hear a case. See Tex. Ass'n of Bus., [852 S.W.2d at 446](https://casetext.com/case/texas-assn-of-business-v-texas-air-control-bd#p446).” It was not Fidelity's burden to plead specific facts that would disprove subject matter jurisdiction. James, as the plaintiff, had the initial burden of alleging facts and framing legal arguments that would affirmatively demonstrate the trial court's jurisdiction to hear her claims. Miranda, [133 S.W.3d at 225–26](https://casetext.com/case/texas-dept-parks-wildlife-v-miranda#p225) (citing Texas Ass'n of Bus., [852 S.W.2d at 446](https://casetext.com/case/texas-assn-of-business-v-texas-air-control-bd#p446)). Unsupported legal conclusions do not suffice. See Creedmoor–Maha Water Supply Corp. v. Tex. Comm'n on Envt'l Quality, [307 S.W.3d 505, 515–16](https://casetext.com/case/creedmoor-maha-water-supply-v-tceq#p515) & nn. 7 & 8 (Tex.App.-Austin 2010, no pet.). James v. Underwood, 438 S.W.3d 704, 716 (Tex. App. 2014))”

# CURTIS’ claims were not filed in, transferred to or remanded to Harris county probate court.

Federal district courts lack the power to remand a case to a court from which it had not been removed.

“A case may be remanded only to the court from which it was removed and the federal district court does not have the authority to remand a case originally brought in federal court.” See First National Bank of Pulaski v. Curry, 301 F.3d 456, 467 (6th Cir. 2002).

Federal district courts lack the power to transfer an action originally filed in federal court to state court.

In the present case, the United States District Court never had jurisdiction of the action, and even if that court had jurisdiction, it did not have the power to transfer the action to the state courts. No statute authorizes a federal court to transfer such an action to state courts. See White v. CommercialStd. Fire Marine Co., [450 F.2d 785, 786](https://casetext.com/case/white-v-commercial-standard-fire-marine-co#p786) (5th Cir. 1971). A federal court may not transfer an action commenced in that court to a state court. A federal court may remand an action to a state court only if the action was commenced in the state court and then removed to a federal court. See [28 U.S.C. §§ 1447](https://casetext.com/statute/united-states-code/title-28-judiciary-and-judicial-procedure/part-iv-jurisdiction-and-venue/chapter-89-district-courts-removal-of-cases-from-state-courts/section-1447-procedure-after-removal-generally) etseq. See, e.g., Edward Hansen, Inc. v. Kearny Post OfficeAssocs., [166 N.J. Super. 161](https://casetext.com/case/edward-hansen-v-kearny-post-office-assocs) (Ch.Div. 1979). Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 198 (N.J. 1980)

There is no authority that holds a Texas state court has the power to transfer a case pending in federal court to a state court and Appellant cannot be placed in the impossible position of having to prove the non-existence of a statute authorizing such a transfer. No such authority exists.

# Subject matter jurisdiction is a question of law subject to de novo review.

Parties cannot create Subject matter jurisdiction by waiver, agreement, consent, participation, or otherwise create subject matter jurisdiction where it is not strictly authorized by operation of of law.

# Not probate and NO PENDING PROBATE when “transferred”

The word "pending" does not describe a closed estate.

## In re John G. Kenedy Memorial Found, 159 S.W.3d 133, 144 (Tex. App. 2004)

Tex. Prob. Code Ann. § 5B (emphasis added). The word "pending" is not defined in the probate code. See Tex. Prob. Code Ann. § 3 (Vernon 2003). Black's Law Dictionary defines "pending" as:

 Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is 'pending' from its inception until the rendition of a final judgment.

BLACK'S LAW DICTIONARY 1134 (6th ed. 1990); see Alba, 89 S.W.3d at 134 (utilizing Black's Law Dictionary's definition of "suspension" in construing statute).

In re John G. Kenedy Memorial Found, 159 S.W.3d 133, 143-44 (Tex. App. 2004)

# REPEALED CODE SECTION Gov’t Code §25.1034(a)

Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

 “Our review of the legislative framework for a statutory probate court's jurisdiction shows that the court's trust jurisdiction is independent of its probate jurisdiction.” Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

A case on point with Lee, In re J7S Inc., 979 S.W.2d 374, 377 n.2 (Tex. App. 1998), provides the following analysis under the former probate court:

We note that section 607 of the Probate Code also provides that a statutory probate court has concurrent jurisdiction with a district court in all actions by or against a person in the person's capacity as a guardian, "whether or not the matter is appertaining to or incident to a guardianship estate. TEX.PROB. CODE ANN § 607 (c), (e) (Vernon Supp. 1998). Likewise, section 25.1034 (a) of the Government Code provides that the statutory probate courts of Harris County have concurrent jurisdiction with the district courts in all actions by or against a personal representative, whether or not the matter is appertaining to or incident to an estate. See TEX. GOV'T CODE ANN. § 25.1034 (a) (Vernon Supp. 1998).

The Lee court holding is in direct conflict with the controlling jurisdictional statute which is Tex. Gov’t Code § 25.0021 as cited in Mortensen v. Villegas 630 S.W.3d 355, 361 (Tex. App. 2021). In re J7S Inc., cites to Tex. Gov’t Code § 25.1034(a) as providing “*that the statutory probate courts of Harris County have concurrent jurisdiction with the district courts in all actions by or against a personal representative, whether or not the matter is appertaining to or incident to an estate*”. However, a plain reading of Tex. Gov’t Code § 25.0021 clearly shows that section 25.0021 prevails over any specific provisions for a particular statutory probate court or county that attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

Tex. Gov’t Code § 25.1034(a) was a provision applicable to a particular statutory probate court or county that sought to extend the jurisdiction of the statutory probate courts of Harris County beyond those boundaries set by the controlling statute, Tex. Gov’t Code § 25.0021, which would explain why section (a) of Tex. Gov’t Code § 25.1034(a)-(m) were repealed leaving only sub-sections (b), (g) and (i) intact.

1. Such conduct by trustees is prohibited by Article XII B of the restatement. [ROA 86-173] and constitutes a challenge to the settlors intentions. [↑](#footnote-ref-1)