

CAUSE NO. 412249-401

CANDICE CURTIS, Plaintiff	§	IN THE STATUTORY PROBATE COURT
VS	§	
AMY BRUNSTING AND ANITA	§	OF HARRIS COUNTY, TEXAS
BRUNSTING, Individually and as	§	
Trustee of the Nelva and Elmer	§	
Decedent's and Survivor's Trust,	§	PROBATE COURT NO.4
Defendants		

RESPONSE TO MOTION TO EXCLUDE EVIDENCE, SANCTIONS AND/OR CONTEMPT WITH MOTION TO SET ASIDE ORDERS FOR WANT OF JURISDICTION AND FAILURE TO RESOLVE BILL OF REVIEW FIRST

TO THIS HONORABLE COURT:

Comes now PLAINTIFF BENEFICIARY CANDACE CURTIS and files this Response to Motion to Exclude Evidence, Sanctions and/or Contempt and Motion to set aside Orders for want of jurisdiction and failure to resolve Bill of Review First. CURTIS moves the court to set aside two separate judgments for constructive contempt entered against Petitioner in want or excess of jurisdiction and for failure to resolve PLAINTIFF'S BILL OF REVIEW first. DEFENDANT'S MOTION reveals the true vexatious litigant in this case, as well as their desperation to avoid trial, knowing they will lose as the federal court ruled was likely in its 2013 Order granting PLAINTIFF'S Motion for Preliminary Injunction.

STATEMENT OF THE FACTS

FIRST MOTION FOR SANCTIONS / CONTEMPT

1. On May 5, 2019, Defendant Co-Trustee (co-beneficiary) Amy Brunsting filed a motion for sanctions asking the court to hold Petitioner in contempt of the Court's February 14, 2019 order to transfer, not specifically directed at Candace Curtis.

2. The Hearing on the first motion for sanctions and/or contempt was held June 28, 2019 (2019-06-28 Hearing Transcript). The Defendant was without counsel and without the ability to retain counsel.
3. The first Order for sanctions was issued July 23, 2019 and Petitioner herein asks the Court to take judicial notice of the docket, the May 5, 2019 motion for sanctions and the affidavit of attorney Neal Spielman attached thereto, the June 28, 2019 hearing records and the July 23, 2019 Order for Sanctions.

SECOND MOTION FOR SANCTIONS

4. On November 4, 2019 Defendant Co-Trustee (co-beneficiary) Amy Brunsting filed a second motion for contempt asking for additional sanctions and complaining that the beneficiary failed to comply with the July 23, 2019 order for sanctions and a January 24, 2019 order for deposition.
5. On November 11, 2019 Petitioner filed a statutory bill of review challenging the February 14, 2019 order. That bill remains pending (see cause No. 412,249-404). Petitioner herein asks the Court to take judicial notice of the November 11, 2019 Bill of Review, the docket, the records and the pleadings in Cause No. 412,249-404 (the -404).
6. A second order for contempt and for sanctions was entered against the pro se on December 12, 2019 for failure to comply with the first Order for sanctions. Petitioner herein asks the Court to take judicial notice of the November 4, 2019 “2nd motion for sanctions”, the record of hearing if any, and the order for sanctions entered against the “pro se” trust beneficiary on December 12, 2019.
7. This Order was entered in error as PLAINTIFF’S challenge to the jurisdiction of this court via Bill of Review had not been adjudicated. Notably, the 5th Circuit Court of

Appeals ruled that the probate exception did not apply and that jurisdiction was proper in the Southern District of Texas before the malpractice (-403) and probate actions (-401) were even filed. CURTIS justifiably relies upon this ruling of the federal appeals court as res judicata and has properly challenged the jurisdiction of this Court.

8. Candace Curtis' lawsuit was filed before the probate matter, malpractice cases (with Carl Brunsting filing two halves of the same lawsuit in two different courts). Based upon the principle of dominant jurisdiction, this Court should not have sanctioned CURTIS while jurisdiction was being challenged, as the bill of review by necessary implication, is also a collateral attack on the order to transfer and the order for contempt of that order.
9. Moreover, CURTIS did not purposely violate the Court's order. Rather, CURTIS' inability to pay the sanctions was the main reason the fees were not paid. See Sworn Declaration of Candace Curtis, attached hereto and incorporated by reference. See also Candice Schwager's Unsworn Declaration attached hereto and incorporated by reference. CURTIS should not be held in contempt for failing to abide by the sanctions / contempt order when it was impossible for her to comply without financial relief from her trust share and while her proper challenge to the first contempt order via statutory bill of review remained pending.

THIRD MOTION FOR SANCTIONS / CONTEMPT,

REQUESTING DEATH PENALTY SANCTIONS

10. On February 21, 2022 both Defendant Co-Trustees filed yet another motion for sanctions (3rd motion for sanctions) ground upon Petitioners failure to comply with the December 12, 2019 order for sanctions (2nd order), which in turn is ground upon failure to comply with the July 23, 2019 order for sanctions (1st order), which in turn is ground upon failure

to comply with the February 14, 2019 Order. Further, Curtis has certified that her inability to pay the sanctions and fees has resulted from the war of attrition being waged against her by the fiduciary Defendants. *See Affidavit of Candace Curtis.*

11. For the reasons stated in response to Defendant's First Motion for Sanctions and/or Contempt, PLAINTIFF requests that this Court deny the relief requested by DEFENDANTS. Clearly, Defendants filed this Motion maliciously in effort to further malign and intimidate the beneficiary PLAINTIFF to whom they owe the fiduciary duty of undivided loyalty. It is not CURTIS who is the vexatious litigant but DEFENDANTS. DEFENDANTS are retaliating against PLAINTIFF for failing to submit to their ransom demand for over ½ million dollars in attorney's fees for which the Defendant Co-Trustee beneficiary's refuse to account.

12. PLAINTIFF further directs the court to Candice Schwager's affidavit, stating that her late filed witness and exhibit list and the joint pretrial order was not intentional, but the result of illness due to a long standing disability for which Schwager is entitled to reasonable accommodation under the Americans with Disabilities Act of 1990 (ADA and ADAAMA of 2008). Moreover, Schwager sent the foregoing documents to all counsel of record at 2:46 p.m., less than three hours past noon. Notably, Ms. Bayless sent her revisions to the parties and court at 4:23 p.m., yet DEFENDANTS do not seek to Sanction Bayless or hold her in contempt.

RULE 10, 13, AND 215 SANCTIONS

13. Notably, Defendants fail to cite which rules of civil procedure they rely upon to request this Court grant their motion to exclude evidence, for sanctions and/or contempt. Therefore, PLAINTIFF is left to guess which rules they rely upon and is not provided with fair notice of the law they rely upon in asking for this extraordinary relief.

14. Furthermore, DEFENDANTS have failed to provide the beneficiary plaintiff with their attorney client contract to show their claim that they represented DEFENDANTS in their official capacities, rather than their individual capacities for which they are not entitled to fees. Similarly, DEFENDANTS refuse to provide their attorney fee bills, delineating the time spent administering the trusts versus defending AMY AND ANITA BRUNSTING, the malfeasant trustees.

15. Based upon DEFENDANT'S reasoning, evidence of attorneys' fees of the DEFENDANTS should be excluded as well. Exhibit lists were due February 21, 2022 and DEFENDANTS continue to refuse to provide this evidence to PLAINTIFF. Due to DEFENDANTS' failure to cite the rules and/or statutes upon which they rely, PLAINTIFF'S continued challenge to the jurisdiction of the court via Bill of Review (which has yet to be ruled upon) and PLAINTIFF'S counsel's disability, causing her to send counsel her portion of the joint PTO, exhibit and witness list a mere 2 hours and 45 minutes late, PLAINTIFF requests the Court deny DEFENDANTS' motion to exclude evidence, for sanctions and/or contempt.

RULE 13 STANDARD

16. To impose sanctions under Rule 13, the proponent must establish that the SUIT

WAS GROUNDLESS and brought (1) in bad faith or (2) for the purposes of harassment.

Tex. R. Civ. P. A pleading is groundless when it has no basis in fact or law.

17. Defendant Co-Trustees are in violation of Rule 13.

The burden is on the party moving for sanctions to overcome the presumption that the pleading was filed in good faith. GTE Comm'ny Sys. Corp v. Tanner, 856 S.W.2d 725, 731 (Tex. 1993). A groundless pleading is not sanctionable unless it is also brought in bad faith or for purposes of harassment. Id. Bad faith does not exist when a party exercises bad judgment or negligence. Instead, bad faith means the "conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." Campos, 879 S.W.2d at 71; Mattly v. Spiegel, Inc.; 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist] 2000, no pet).

18. DEFENDANTS' Motion to Exclude and Third Motion for Sanctions / contempt violates

Rule 13 and 10 of the Texas Rules of Civil Procedure because it was brought in bad faith for the purpose of harassment. Tex. R. Civ. Pro. 10, 13. Clearly, filing three motions for sanctions and contempt and requesting death penalty sanctions—is malicious and filed in bad faith to avoid a trial DEFENDANTS know they cannot win. Indeed Judge Hoyt of the U.S. District Court for the Southern District of Texas found that PLAINTIFF was likely to win based upon irregularities in DEFENDANTS' purported trust instruments and inability to account. Defendants attempt to use one of the myriad of questionable "change instruments" to disinherit Candace Curtis for doing nothing more than seeking an accounting and injunction in federal court and for efforts to compel the Defendant Co-Trustees to perform their fiduciary duties. Moreover, Curtis reasonably believed that the case in federal court would be reopened for Defendants' misconduct. The Court considered PLAINTIFFS' filing and issued an Order. Clearly, PLAINTIFF reasonably believed jurisdiction was in the federal court based upon the 5th Circuit's ruling. Instead of PLAINTIFF, it is DEFENDANTS who violated Rules 10 and 13.

19. In deciding whether a pleading was filed in bad faith or for purposes of harassment, the

trial court must measure a litigant's conduct at the time the relevant pleading was filed. *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 139 (Tex. App.—Texarkana 2000, no pet). Texas law requires the Court examine not just objectively, but examine subjectively the motives and credibility of the attorney who signed the petition. Candace Curtis did nothing in bad faith or for purpose of harassment but merely to prosecute her claims in the federal district court and now, this court. Rule 13 requires that the Judge look beyond the merits of the pleading to the intent (as best as they can discern). Improper motive is an ESSENTIAL ELEMENT of BAD FAITH. *Parker vs Walton*, 233 S.W. 3d 535, 539 (Tex. App.—Houston {14th Dist} 2007, no writ).

RULE 215 STANDARD

20. DEFENDANTS seek sanctions based upon PLAINTIFF'S failure to attend a deposition unilaterally noticed for CURTIS, a California resident, to personally appear during the middle of a worldwide pandemic. DEFENDANTS seek to depose CANDACE CURTIS in bad faith and for purposes of harassment, as they have no valid defense to Plaintiff Curtis claim they breached their fiduciary duties and admit they have no claims against her as a nominal defendant in this Court. Furthermore, CURTIS was unable to attend the deposition remotely because she has a full time job and risks losing it if she fails to appear for work. DEFENDANTS offered no compensation to her for missing work and PLAINTIFF did not have access to a camera on her computer from which she could do the deposition remotely, at that time. DEFENDANTS' offer to come to California was similarly rejected because she feared leaving her house during the middle of the pandemic, given her risk of serious illness or death if she contracted covid-19. She wrote to Defendant Co-Trustees counsel and fully informed them of her reasons.

21. Based upon the following, PLAINTIFF'S failure to attend a deposition scheduled by DEFENDANTS solely for the purpose of harassment during the middle of a worldwide pandemic—was not intentional or the result of conscious indifference or disrespect to the court, but due to the reasons stated herein.
22. Furthermore, DEFENDANTS seek to exclude PLAINTIFF'S evidence for failing to attend a deposition during the middle of a pandemic while they fail to produce the attorney client contract and attorney fee bills to justify their demands. Based upon the foregoing, DEFENDANTS' evidence of attorneys' fees should be excluded.
23. DEFENDANTS have violated Rules 10, 13 and 215 by filing their motion to exclude, for sanctions and/or contempt, seeking death penalty sanctions for PLAINTIFF'S failure to comply with an order which was impossible for her to satisfy. See Affidavit of Candace Curtis and Unsworn Declaration of Candice Schwager. They have violated these rules by acting in bad faith for the purpose of harassment, seeking discovery via deposition that they know is frivolous, yet demanded simply to harass the PLAINTIFF. The section violated below is 215.3.
24. Rule 215 provides as follows:

215.1 Motion for Sanctions or Order Compelling Discovery.

A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an **order compelling discovery** as follows:

(a)Appropriate court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. ...As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

(b)Motion... (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails: **(A)** to appear before the officer who is to take his

deposition, after being served with a proper notice; ..the discovering party may move for an order compelling a designation, an appearance, ..or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.

...

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

215.2 Failure to Comply with Order or with Discovery Request.(a)Sanctions by court in district where deposition is taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.**(b)Sanctions by court in which action is pending.** If a party ..fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:**(1)** an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;**(2)** an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;**(3)** an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;**(4)** an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;**(5)** an order striking out pleadings or parts thereof, or staying further proceedings **until the order is obeyed**, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party

215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

25. For the foregoing reasons, PLAINTIFF requests that the Court deny DEFENDANT'S motion to exclude evidence, for sanctions and/or contempt.

DEATH PENALTY SANCTIONS UNDER RULE 215

26. The malice, bad faith and harassment inherent in DEFENDANT'S Third motion for sanctions and/or contempt and death penalty sanctions is without merit for the reasons stated herein. PLAINTIFF'S failure to attend a deposition during the middle of a worldwide pandemic under the circumstances described herein is not so egregious as to merit striking her pleadings or disallowing evidence to support her claims.

27. These are instances when a party's claims or actions are so egregious, and so without merit, that judges must impose sanctions in order to stop the case from proceeding because it would be unjust to allow the dispute to continue. For example, a trial court in Texas imposed death penalty sanctions in 2014 after a party involved with a contract dispute falsified contracts and introduced them during discovery while ushering in corporate representatives to provide false testimony in depositions.⁴ In another instance, the Texas Supreme Court found that no lesser sanction would be appropriate when a party deliberately destroyed 70 to 100 audiotapes in a legal malpractice case.⁵ The use of death penalty sanctions is incredibly rare, as they should be, only arising in the most egregious of circumstances.

28. Sanctions can include "dismissal, default judgment, exclusion of evidence and jury instructions resolving fact issues in favor of one party."⁶ Monetary awards – to cover attorneys' fees - are also common in egregious circumstances. They vary dramatically by jurisdiction and rely prominently on judicial discretion. In addition, death penalty

sanctions are incredibly powerful and have been likened to a court dismissing a case with prejudice.

29. Courts typically follow a four-part test for determining whether death penalty sanctions are appropriate:

30. There must be a direct relationship between the conduct and the sanction;

31. The sanction may only be as severe as necessary to promote compliance;

32. To uphold death penalty sanctions, there must be a showing that a lesser sanction was previously imposed and did not resolve the issue; and

33. In egregious cases of misconduct, a court is not required to attempt lesser sanctions before imposing death penalty sanctions "as long as the record reflects that the court considered lesser sanctions and found the party's conduct would not be deterred by lesser sanctions."⁹

34. In Texas, courts must actually both consider *and test* the effectiveness of less severe sanctions before levying death penalty sanctions (unless, however, there are exceptional circumstances). According to relevant case law, the sanctions are only appropriate when a "party's conduct justifies a presumption that its claims or defenses lack merit," and trial courts actually have an obligation "to consider the availability of lesser sanctions before imposing death penalty sanctions."

35. This drastic sanction should be used only in the most rare situations. It is critical to establish for the court that your party cannot successfully move forward with its case, or that evidence has been spoiled to such a degree that there would be no way to either recreate the destroyed evidence or repair the tarnished lens that the evidentiary misconduct has created. Counsel should then be able to establish that a default judgment

in the form of sanctions is the only reasonable remedy.

36. Clearly, DEFENDANTS have not met the standard for death penalty sanctions, so their motion to exclude evidence must be denied.

CONTEMPT OF COURT

1. DEFENDANTS' third Motion for contempt of Court should be denied for the reasons stated herein. Indeed, her bill of review continues to challenge the jurisdiction of this court and has not been ruled upon. One accused of an indirect civil contempt is constitutionally entitled to the assistance of counsel, the same as in a criminal action. Thus, whether the bill of review is sustained or not, the first order for sanctions is void, the second order based upon failure to comply with the first falls as a matter of right and there is no basis in law or fact for a third or for defendants malicious pleadings.
2. PLAINTIFF relied upon her reasonable belief that this court lacked jurisdiction, based upon the 5th Circuit ruling and the authorities cited in the -404.
3. Furthermore, PLAINTIFF should not be held in contempt for failing to comply with an order which is impossible for her to satisfy due to lack of funds. Had the DEFENDANTS distributed the trust as they were required to do in 2011, and as compelled by the preliminary federal injunction, PLAINTIFF would be able to pay this sanction — if in fact one has ever been entered.

DIRECT VERSUS CONSTRUCTIVE CONTEMPT

4. The due process considerations for direct and constructive contempt are very different. In a direct contempt proceeding, the trial court may conduct a summary proceeding in which the alleged contemnor is not entitled to notice or a hearing. A contemnor who commits a

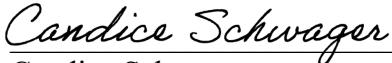
direct contempt in the presence of the court is generally found to be in contempt of court immediately after committing the offending conduct and accordingly punished.

5. However, this stands in stark contrast to the due process requirements for indirect civil (constructive) contempt proceedings. For those, the Court of Criminal Appeals has said that due process is satisfied when the contemnor is given notice, a hearing, and the opportunity to obtain an attorney. A brief review of the judgment roll shows the alleged contemnor did not enjoy the assistance of counsel and that no rights were waived. The judgments of contempt are void on due process ground alone.
6. Due process requires “full and complete notification” of the charges alleged with a reasonable opportunity to meet the charges by way of defense or explanation.” A contempt order rendered without such adequate notification is void. A void judgment is a nullity that can simply be ignored. A void judgment can be challenged either directly or collaterally any time a right is claimed under it. It may be more prudent to comply with the order while seeking judicial review but if the rights at issue are substantial and the defendant has gauged his legal position correctly, disregard for a void order constitutes no punishable wrong. Based on this authority, PLAINTIFF should not have been held in contempt for violating the initial order that DEFENDANTS have filed three harassing bad faith motions for contempt.
7. A constructive contemnors’ right to due process extends through the contempt hearing itself. Contempt proceedings in Texas are quasi-criminal, so they should conform as nearly as practicable to those in criminal cases. Because contempt proceedings are triggered by actions that defy the State’s authority and entail possible penal sanctions, Texas courts have consistently held that alleged constructive contemnors are entitled to

procedural due process protections before they may be held in contempt. This means that contemnors have the right to be represented by an attorney and have the privilege against self-incrimination. These protections were not afforded CURTIS during any of the foregoing contempt hearings as far as counsel has been able to determine.

8. Be that as it may, the contemnor must either meet or agree to meet the conditions of the order; after that, he or she is no longer held in contempt. In this sense, the person can bring an end to the contempt of court consequences at any time he or she chooses. The person just needs to follow the orders of the court (purge) or at least offer to purge (like make monthly payments in effort to do so).
9. Suppression of evidence on the other hand, is unheard of except under the exclusionary rule and in limited cases of “discovery abuse”, such as the Co-Trustee Defendants continued attorney fee invoice and retainer agreement disclosure refusals. The Defendants refuse to disclose their retainer agreements with their attorneys, refuse to provide invoices for services claimed rendered to the trust that would account for the more than 1/2 million dollars in attorney fees the Co-Trustee defendants have demanded the other three beneficiary's share, coupled with threats that the fees will continue to rise until the beneficiaries all agree.
10. For the foregoing reasons, DEFENDANTS’ Motion to Exclude Evidence, for Sanctions and/or Contempt should be denied and attorneys’ fees granted to PLAINTIFF for having to respond to DEFENDANTS’ bad faith driven harassment motion.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Candice Schwager, certify that this response and motion was served on all counsel of record
this 23rd day of February 2022.

Candice Schwager

Candice Schwager