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IN THE NINTH COURT OF APPEALS
BEAUMONT, TEXAS

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9th COURT OF APPEALS
BEAUMONT, TEXAS
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L&S PRO-LINE, LLC AND LEE BURKETT,
Appellants

V.

GARRETT GAGLIANO, SNOOK HOLDINGS, LLC, AND TACTICAL AUTOMATION, INC.
Appellees

FILED IN
9th COURT OF APPEALS
BEAUMONT, TEXAS
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On Appeal from the 457th District Court of Montgomery County, Texas
Trial Court Cause Number 18-06-07704
Judge Vincenzo J. Santini, Presiding

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ARGUMENT AND AUTHORITY

ISSUE 1: The trial court erred in denying Burkett's Rule 166(g) motion and holding that Burkett did not successfully purchase Gagliano's membership interest.

Contrary to Appellees' assertion otherwise, the question of whether Burkett successfully purchased Gagliano's interest in L&S is before this Court as a result of the trial court's denial of Burkett's Rule 166(g) motion to have the trial court determine, as a matter of law, whether Burkett's buy-out was effective. (9 CR 8526). The trial court was not granting Gagliano's motion for summary judgment on the issue, but, in connection with denying Burkett's Rule 166(g) motion, ruled:

> As argued by Gagliano in his Motion for Partial Summary Judgment on file since August 21, 2020, Burkett's purported exercise of Section 12.7(b) of the L&E Pro-Line Company Agreement was ineffective.

Id. Nothing about this statement is a ruling granting Gagliano's summary judgment motion, nor is there any order in the record granting his motion on this issue.

Gagliano's response brief ignores that the Company Agreement does not define an "Unresolved Dispute" as one in which a mediator makes a good faith finding that there is no possibility of settlement. Instead, Section 12.7(a) defines an "Unresolved Dispute" as "any Dispute being unresolved after mediation."

While Section 12.7 does state that the mediation process "shall continue until the controversy is resolved or the mediator makes a good faith finding that there is no possibility of settlement," that does not mean that that a Dispute is unresolved

only when the "mediator makes a good faith finding that there is no possibility of settlement." Instead, the Court should assign the plain meaning of "unresolved," which is "not resolved." https://www.merriam-webster.com/dictionary/unresolved.

It would further make no sense to, as Gagliano suggests, place compliance with the Company Agreement in the hands of a non-party mediator. If the parties are unable to resolve their dispute at mediation – which the parties tried twice to do and failed both times in this case – the ability of one party to buy out the other should not rest on whether a mediator has decided that there is no possibility of settlement. The parties could not have anticipated a situation where a mediator refuses to make a good faith finding that there is no possibility of settlement when it is clear that the parties cannot resolve their dispute.

ISSUE 2: The trial court erred in denying Burkett's Plea to the Jurisdiction and holding that Tactical Automation, Inc. was a third-party beneficiary of the Company Agreement.

Appellees fail to meet their burden to overcome "the presumption against conferring third-party beneficiary status on noncontracting parties." *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007). "An express disclaimer is not necessary to deny third-party rights; instead, an express obligation is necessary to confer them." *EPGT Tex. Pipeline, L.P. v. Harris Cty. Flood Control Dist.*, 176 S.W.3d 330, 341 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd). "Only a clear expression of the intent to create a third-party beneficiary can overcome that

presumption." *First Bank v. Brumitt*, 519 S.W.3d 95, 103 (Tex. 2017). "Consequently, a presumption exists that parties contracted for themselves unless it 'clearly appears' that they intended a third party to benefit from the contract." *MCI Telecomms. v. Tex. Util. Elect. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). "All doubts must be resolved against conferring third-party beneficiary status." *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011).

Appellees' contention that Tactical is a donee beneficiary completely glosses over the fact that Tactical had to exchange something of value (*i.e.,* the finished control panels) in order to receive a benefit (*i.e.,* the control panel work). Where the third-party has to provide some consideration or exchange to receive the benefit of the contract, they are not a donee beneficiary. *See, e.g. Maddox v. Vantage Energy, LLC*, 361 S.W.3d 752, 759 (Tex. App.—Fort Worth 2012, pet. denied). A person is a donee beneficiary only if a donative intent expressly or impliedly appears in the contract. *Esquivel v. Murray Guard, Inc.*, 992 S.W.2d 536, 543 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). That intent is absent here.

Tactical admitted in its response to Burkett's and L&S Proline's amended pleas to the jurisdiction that it is not a creditor beneficiary. This, alone, should preclude a finding that Tactical is a third-party beneficiary, but Appellees ignore their prior pleadings in a blatant misrepresentation of their situation.

In making both arguments, Appellees rely heavily on the *Dynex* case, which is inapposite. There, Basic Capital Management sued its lender for failing to provide financing that Basic needed to fund third parties, ART and TCI, which held property through "single-asset, bankruptcy-remote entities"—SABREs, for short. *Basic Capital Management, Inc. v. Dynex Comm., Inc.*, 348 S.W.3d 894, 897 (Tex. 2011). The terms of that agreement identified the "borrower" as "[t]hree (3) single asset, bankruptcy remote borrowing entities, acceptable to Lender." *Id.* As such, the *Dynex* agreement expressly anticipated that the funds at issue would flow through third parties. This is nothing like the L&S Pro-Line Company Agreement. There is nothing in the L&S Agreement or the record to show that Burkett agreed to or intended to form a business with Gagliano to benefit Gagliano's other businesses. Unlike the loan agreement in *Dynex*, which the parties entered for the express purpose to loan money to third parties, the parties here entered into the L&S Company Agreement to form a business.

ISSUE 3: There is insufficient evidence to support the jury's conclusion that Appellants breached the Company Agreement.

Both Appellants and Appellees agree that the evidence presented to the jury was heavily impacted by the trial court's decision to find that Burkett's buy-out of Gagliano's interest in L&S was ineffective. If the Court had properly found that Burkett bought out Gagliano's interest in L&S Pro-line, Burkett could not have breached the Company Agreement post buy-out. The trial court did not segregate

damages or liability into pre- and post- attempted buy-out, so there is no way to know the effect of the trial court's erroneous decision on the evidence the jury considered and what evidence the jury heard that it should not have as a result of the trial court's finding. The jury should have the opportunity to decide this question with the explicit instruction that Burkett properly purchased Gagliano's interest in L&S.

Appellees also ignore that Appellants also argue that Burkett could not breach any duty he may have owed to Tactical, because Tactical was not a third-party beneficiary, whether before or after the buy-out. This clearly impacted the evidence the jury heard as well. Because the pre-trial rulings were wrong, the evidence presented on the claims at trial was legally and factually insufficient as well.

ISSUE 4: The jury's award of punitive damages was excessive, and it is not supported by legally or factually sufficient evidence.

The final judgment awarded Gagliano, individually, $5,276,202.10 in punitive damages for Burkett's alleged breach of fiduciary duty. The final judgment awarded Gagliano, standing in the shoes of L&S, $11,106,329.70 in punitive damages for Burkett's alleged breach of fiduciary duty. While this is less than the $25.1 million the jury awarded, more than $16 million in punitive damages, especially to the extent that the punitive damages are a multiple of Gagliano's impermissible double recovery, is clearly excessive.

Appellees rely on two cases,[1] neither of which is binding on this Court, for the contention that if punitive damages comply with the statutory cap in Texas Civil Practice & Remedies Code § 41.008, the damages are presumptively reasonable. In both of the cases to which Appellees cite, the Court held "by statute the amount is presumptively reasonable" if the exemplary damages are less than two times actual damages. *Foley*, 68 S.W.3d at 882; *Guajardo*, 919 S.W.2d at 742. But nothing about Section 41.008 creates this presumption. The statute simply states that "exemplary damages awarded against a defendant may not exceed an amount equal to two times the amount of economic damages." Tex. Civ. Prac. & Rem. Code § 41.008(b)(1) (cleaned up). The Court should not follow the flawed reasoning of its sister courts in these decisions, but should instead follow the United States Supreme Court's requirement to review *de novo* three factors in reviewing exemplary damages:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Bunton v. Bentley, 153 S.W.3d 50, 53 (Tex. 2004)(quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003)). In reviewing these factors, *de novo*, as the Court must, it is clear the damages are excessive.

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[1] *Peco Const. Co. v. Guajardo*, 919 S.W.2d 736, 742 (Tex. App.—San Antonio 1996, writ denied); *Foley v. Parlier*, 68 S.W.3d 870, 882 (Tex. App.—Fort Worth 2002, no pet.).

Just because the damage ratio is within the limits of the statute does not prove that it is reasonable, there are other factors which Appellees have neglected. *See generally State Farm Mut. Auto. Ins. Co.v. Campbell*, 538 U.S. 408, 425-26 (2003).

A. Alleged Reprehensible Conduct

To support the jury's award of punitive damages, Appellees recite a laundry list of Burkett's supposedly reprehensible acts, but Appellees conveniently ignore the fact that Gagliano approved of and/or participated in many of the actions of which Appellees complain, or that such actions occurred after Burkett reasonably believed Gagliano was no longer a member of L&S.

Regarding actions approved of or participated in by Gagliano, Appellees cite Burkett's practice of expending L&S funds on hunting trips and gifts for L&S customers as part of Burkett's sales efforts on behalf of L&S, but conveniently ignore the fact that Gagliano not only approved these actions but engaged in similar practices himself (6 RR 109:2-112:16). Additionally, Appellees note that Burkett would, on occasion, use L&S funds to pay personal expenses, which were later deducted from Burkett's distributions, but they fail to mention that Gagliano engaged in the same practice prior the at attempted buy-out. (6 RR 100:11-101:5). Finally, Appellees point to the decision to hire Kyle Smith as perhaps Burkett's "worst" act of all, but neglect to acknowledge that Gagliano discussed Smith's legal troubles with Burkett before Smith was hired, Gagliano did not object to hiring

Smith at the time, and Gagliano even assisted in the hiring process (5 RR 141:25-142:19). Given that Gagliano approved of and/or engaged in each of the actions described above, it was flatly contradictory for Appellees to argue the same actions were reprehensible when engaged in by Burkett.

Regarding actions taken by Burkett following his attempted buy-out of Gagliano, and most specifically the supposed wrongful withholding of distributions and unilateral changes to the company agreement, these actions would not be wrongful if, as Appellants allege, Burkett had successfully bought-out Gagliano, and Gagliano was no longer a member of L&S. Appellees contend that Burkett cannot have reasonably believed that his buy-out was effective, however there is ample evidence to the contrary. Following attempted mediation of their dispute, Burkett sent Gagliano a $1.3 million cashier's check, which Gagliano never returned, and operated L&S from that point forward independent of Gagliano. (6 RR 44:19-47:24). These facts alone are enough to create a reasonable belief that Burkett's buy-out was successful, and, if not, certainly created enough doubt and confusion regarding the matter to negate the existence of the malice or gross negligence necessary to support an award of punitive damages.

B. Harm/Award Consistency and Double Recovery

Appellees attempt to paper-over the disparity between the actual damages awarded in this matter and the double recovery by Gagliano in his personal capacity

and standing in for L&S regarding the same alleged harm by pointing out that Gagliano agreed to reduce the amount of damages to stay below the statutory cap. This argument places an improper emphasis on the amount of damages rather than their source.

Appellees' further arguments that there was no double recovery make no sense. Appellees admit that Gagliano, as Tactical's 100% owner, suffered $2.4 million in lost-profit damages, but the final judgment awarded Tactical double that amount: $2.4 million from Burkett individually and $2.4 million from L&S Pro-Line. Appellees have no explanation for how that is not a double recovery.

Appellants do not use the word "derivative" in their opening brief, so Appellants did not focus on any purported "derivative claim." Appellees contend that Gagliano asserted a derivative claim on behalf of L&S Pro-Line, but that is completely absent from any of Gagliano's pleadings. By awarding Gagliano, individually, $5,553,163.45 from Burkett for breach of fiduciary duty and awarding Gagliano, standing in the shoes of L&S Pro-Line even though he did not assert a derivative action, $5,553,163.45 from Burkett for breach of fiduciary duty is a clear double recovery. Gagliano essentially admits as such in response to Issue 5 in which he calculates his damages if he is forced to elect a remedy, which he is required to do.

ISSUE 5: The jury's award of actual damages is not supported by legally or factually sufficient evidence.

Appellee argues that his election of remedy cures any error. However, the damages awarded him under any tort are barred as they arise from and are wholly based on the Company Agreement contract. When, as is the case here, the injury is only the economic loss to the subject of the contract, the action sounds in contract alone. *Mid-Continent Aircraft Corp. v. Curry County Spraying Sercie,* 572 S.W.2d 308, 312 (Tex. 1978). Gagliano's injury was that he was owed distributions of money from L&S Pro-Line, LLC by virtue of his ownership interest and those distributions were set forth in the Company Agreement. Therefore, his claim sounds only in contract.

Appellee's attempt to elect the remedy under his breach of fiduciary duty cause of action violates the well-settled principal in Texas prohibiting "Con-Torts." His claim is based on and damages were incurred as measured by the contract between L&S Pro-Line and Gagliano as a Member. His attempt to impose damages against Burkett for breach of fiduciary duty using the exact same measure and category of damages is an attempt to shift his breach of contract claim into the tort of breach of fiduciary duty. The Texas Supreme Court has ruled against this strategy.

The jury awarded damages for unpaid distributions, which are wholly based on Gagliano's rights under the Company Agreement. His attempt to shift these

damages to Burkett under the guise of a breach of fiduciary duty cause of action does not change the nature of the injury to a tort as required by *Mid-Continent*.

His claim for lost profits is based on the breach of the contract between Tactical Automation, LLC and L&S Pro-Line, LLC and Gagliano, individually, has no rights that were breached nor has he suffered any harm. The personal expenses category of damages seeks recovery of the money L&S Pro-Line spent to benefit Burkett. None of which was paid by Gagliano. These damages are not his to claim as his own; they belong to L&S Pro-Line and Gagliano, contrary to his assertions otherwise, did not assert a derivative action on behalf of L&S Pro-Line. TEX. BUS. ORG. CODE §101.106(b). Moreover, as stated above, exemplary damages are not recoverable for a breach of contract. As such, any calculation of exemplary damages must exclude unpaid distributions and lost profits since both are based solely on contract rights.

The trial court's judgment violates the one-satisfaction rule that a party who prevails on more than one theory of liability for a single injury is limited to recover damages on only on of the theories. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303-04 (Tex. 2006). Appellee is entitled to elect to recover on whichever claim will provide the greatest recovery, but he is limited to that recovery. *Id; see also W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 377–78 (Tex. App.–Fort Worth 2007, no pet.) (holding that as between clients' negligence and breach of

fiduciary duty claims against brokerage firm and broker who sold them variable annuities, the latter afforded the greatest possible recovery and, further, holding that trial court erred by awarding attorney's fees because attorney's fees "are not available for a breach of fiduciary duty claim"). Having elected to recover under a tort cause of action, Appellee cannot mix and match claims, and also recover attorneys' fees allowed under breach of contract, declaratory judgment, theft liability causes of action or indemnity. *See Bruce v. Cauthen*, 515 S.W.3d 495, 515-16 (Tex. App – Houston [14th Dist.] 2017, pet. denied) (plaintiff's election to recover for tort claim of breach of fiduciary duty barred recovery for attorney's fees under breach of contract claim.). In other words, Appellee cannot recover for damages his tort causes of action, including exemplary damages, and also recover his attorneys' fees for his breach of contract, as well.

ISSUE 6: The jury's award of Appellees' attorneys' fees is not supported by legally or factually sufficient evidence.

Appellee misstates the standard for the requirements to segregate attorneys' fees. Because attorneys' fees are recoverable only when provided for by statute or the parties' contract, a fee claimant must segregate attorney's fees that are recoverable from those that are not. *Tony Gullo Motors,* 212 S.W.3d at 310, 314. When "discrete legal services" that advance both a recoverable and unrecoverable claim are intertwined, they need not be segregated. *Id.* at 313-314. The Appellee

bears the burden of proving segregation Is not required. *CA Partners v. Spears,* 274 S.W. 3d 51, 82 (Tex. App. – Houston [14th Dist.] 2008, pet denied).

Appellee argues that he did not have to segregate his attorneys' fees between work on claims for which fees are recoverable from those for which they are not. He bases this conclusion on an outdated explanation of the "inextricably intertwined" exception. The standard is not, as Appellee asserts, when the claims are so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts. (Appellee's Brief p. 62). "Intertwined facts do not make [unrecoverable] fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Tony Gullo Motors,* 212 S.W.3d at 313-314; *see also Hillegeist Family Enters., LLC v. Hillegeist,* No. 01-21-00121-CV, 2022 Tex. App. LEXIS 5651, at *6 (Tex. App.—Houston [1st Dist.] Aug. 9, 2022). Appellee did not carry his burden and prove that his fees were properly segregated between the various causes of action. His causes of action are varied and required discrete legal services. Very little could be ascribed as advancing recoverable and nonrecoverable causes of action. Regardless, as stated above, if Appellee is permitted to recover under his breach of fiduciary duty claim, then his claim for attorneys' fees is barred.

ISSUE 7: The trial court abused its discretion in striking Douglas Moll as an expert prior to trial.

There was no waiver of complaint regarding the exclusion of Douglas Moll. Appellees contend that he was not timely designated and that the correct evidence at the Robinson hearing was not presented. Both arguments are flawed. First, Dr. Moll was timely designated – in July of 2020 (in advance of the August 2020 deadline). Next, at the hearing on the Motion to Strike Dr. Moll, the issues presented to the Court regarding Dr. Moll's testimony focused on whether or not his designation was timely and proper and whether his testimony about the scope of his testimony was proper. The Court did not conduct a *Robinson* hearing to determine Dr. Moll's qualifications or reliability, nor were Appellants required to put on evidence or testimony about Dr. Moll's qualifications and reliability at the pretrial hearing.

In his Motion to Strike, Gagliano complained that Moll was not timely designated, his testimony was irrelevant, he was testifying as to the law, he was testifying as to mixed questions or law and fact, and his testimony contradicted the Company Agreement, among other reasons. To meet this burden, Burkett filed his Response to the Motion to Strike and Exclude the Testimony of Douglas Moll. (C.R. 8014-8027) This response addressed the issues presented in the Motion and those same arguments were made at the hearing. There was no waiver.

ISSUE 8: The trial court abused its discretion in allowing Gagliano to testify as an expert on lost profits and in allowing the testimony of lost revenue rather than lost profits.

A. No disclosure

Despite Gagliano's protestations to the contrary, he was not properly designated as an expert. Within the disclosure (8CR 6327-296), Gagliano is identified as a non-retained expert. And he provided one page that included a list of what he characterized as improper expenditures by Burkett. (8CR 6333) If that was the limit of testimony, perhaps the disclosure was proper. But Gagliano testified to far more than the disputed transactions. Instead, he testified to lost profits, despite having no relevant training. The disclosures do not even identify the documents that Gagliano expert reviewed to develop his opinions. Accordingly, Gagliano's testimony violates Rule 193.7 and Gagliano should not have been permitted to testify to anything beyond the disclosures.

B. Gagliano is Not Qualified

1. No Waiver

Gagliano suggests that because the property owner's rule was not addressed, any questions about his qualifications are waived. Not so, because the property owner's rule does not apply to allow Gagliano to testify about his company's lost profits. Instead, the property owner rule allows an otherwise unqualified witness to express an opinion on the value of real or personal property. *Natural Gas Pipeline*

Co. of Am. V. Justiss, 397 S.W.2d 150, 155 (Tex. 2012). Gagliano has pointed to this court to no case, and Appellants have found no case, that applies the property owner rule to testify regarding lost profits. Instead courts have refused to permit property owners to testify about alleged lost profits. *Accurate Precision Plating, LLC v. Guerrero*, No. 01-14-00706-CV, 2015 WL 7455826, at *3 (Tex. App.—Houston [1st Dist.] Nov. 24, 2015, pet. denied) (finding that the property owner rule did not apply to permit the plaintiff's owner to testify about alleged lost profits).

2. Lack of Qualifications

Gagliano argues that he was not testifying as to lost profits, but was instead testifying as to damages. And yet, he asserts that he opined about "the profits Tactical lost, including costs deducted from revenue – basic, non-CPA arithmetic (12RR.64:10-22) – using data inputs only he and a few others know. He likened his testimony to a car mechanic's diagnosis of a car's performance being sufficient without being an engineer. But this is not the same. Certainly, a car mechanic can diagnosis problems with a car's performance. But that does not mean that this same car mechanic can testify as to the shop's lost profits.

C. Methodology

Similarly, while Gagliano may have specific knowledge of the "niche midstream energy sector," lost profits is more than just math. It requires an analysis of "what remains in the conduct of the business after deducting from its total receipts

all of the expenses incurred in carrying on the business." *Turner v. PV Int'l*, 765 S.W.2d 455, 465 (Tex. App.—Dallas 1988, pet denied). This Gagliano did not do. Instead the net outcome of his "methodology" was hardly the type of lost profits analysis one would expect to see from an actual expert. Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity. *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002).

D. Remedy

Gagliano suggests that a remittur is the appropriate appellate remedy. It is not. Remittitur is appropriate where there was some evidence of damages but not enough to support the full amount awarded by the trial court. That is not this case. Instead, Gagliano's testimony was unreliable and his testimony as to lost profits was improperly admitted. Gagliano's qualifications and methodology were unmoored from the requirements of admissible testimony regarding lost profits, and the trial court erred in admitting his testimony.

ISSUE 9: The trial court erred in denying Appellants' Motion for Mistrial after the trial court admonished and threatened to arrest Burkett in front of the jury and in sanctioning Mr. Touchstone.

The trial court erred in denying the Motion for Mistrial and in sanctioning Burkett's attorney.

A. Motion for Mistrial

While Burkett's attorney was on the stand testifying as to attorney fees, the trial court demanded the lawyers approach the bench. (R.R. Vol 10 at p. 84) Then Burkett was called to the bench as well. (R.R. Vol. 10 at p. 84) No other parties were summoned. There Burkett was accused of staring at the judge. The court indicated that he would kick Mr. Burkett out of the courtroom if he stared down the court. He would be arrested if the court caught him staring him down one more time. He was instructed to sit down and not look up at the bench again. (R.R. Vol. 10 at p. 84)

A jury trial is hard for all the participants, but especially for litigants, who may never have been in a courthouse before the trial. While no one should ever stare down anyone, Mr. Burkett was not allowed to explain himself. He was the only party at the bench and obviously the subject of the court's ire. The trial court erred by singling out Burkett and visibly yelling at him from the bench. This emotional display resulted in unfair prejudice against Burkett as reflected by the jury's excessive verdict. It was error for the Court not to grant a mistrial on this basis, alone.

B. Sanctions

The trial court abused its discretion in sanctioning Mr. Touchstone. Importantly, the basis underlying the trial court's sanction—Mr. Touchstone's alleged violation of a motion in limine prohibiting in the presence of the jury or jury panel "[a]ny reference to Garrett Gagliano attending a strip club or strip clubs, as such would be irrelevant and would be unfairly prejudicial"—is belied by the very document Mr. Touchstone displayed and witness testimony immediately following the trial court's decision to sanction Mr. Touchstone. Page 8 of *Defendants*' Exhibit No. 13 neither facially nor factually refers to any strip club at all, let alone demonstrates that Gagliano had attended a strip club. (9 CR 218). Rather, the specific charge to which Appellee's counsel objected, an $888.38 charge on February 9, 2017, contains the following information:

> PAYPAL *TTWORD
> 402-935-77233
> Description
> PROFESSIONAL SERVIC

Notably, Tim Word, the witness testifying at the time the Court sanctioned Mr. Touchstone, stated under oath that the $888.38 charge on February 9, 2017 is related to Word's wife's bed and breakfast. (9 RR 278:19-278:23).

Further, Appellees suffered no harm as result of Mr. Touchstone's inadvertent display of an exhibit that was not *yet* in evidence. To be sure, later that same day—outside the presence of the jury—Appellees' counsel moved to admit and the trial

court admitted into evidence "unredacted Defense Exhibit 13." (9 RR 330:4-331:4). Thus, even if Mr. Touchstone violated a motion in limine—he clearly did not—Appellees' counsel's decision to admit an unredacted copy of Exhibit No. 13 eliminated any prejudice or harm that Mr. Touchstone could have caused.

Moreover, four days earlier, on April 15, 2021, the jury heard testimony pertaining to the same credit card statement as Defendants' soon-to-be admitted Exhibit No. 13, including the $888.38 charge on February 9, 2017, when the parties played portions of the video deposition of Zachary Prentiss. (10 RR 30:14-30:23; 10 RR 318-19 (deposition excerpt Nos. 193-201); *see also* 9 CR 8735-46). Notably, Appellees had previously discussed information from Exhibit No. 13 during Prentiss's deposition and Appellees agreed to show to the jury those same portions of Prentiss's deposition, including Appellees' counsel's examination of Prentiss, during trial. (10 RR 24:24-28:19; *see also* 9 CR 8735-46).

Accordingly, the trial court's decision to sanction Mr. Touchstone for any amount, let alone $5,000 is an unsupported and insupportable abuse of discretion and the trial court's inherent power to discipline an attorney's behavior.

PRAYER

For these reasons, Appellants request that the Court reverse the Judgment of the trial court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, I certify that the Appellants' Reply Brief has been electronically filed with the Clerk of the Ninth Court of Appeals, and true and correct copies of same have been electronically served, on this 1st day of November, 2022, correctly addressed as follows:

/s/Kenna M. Seiler
Kenna M. Seiler

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 9.4(i)(1), 9.4(i)(2)(B), and 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this Appellants' Reply Brief contains 4,717 words (excluding the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes, which are in 12-point typeface. In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document.

/s/Kenna M. Seiler
Kenna M. Seiler

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