NO. 2012-502,692

MALLORY J. BRODRICK	§	IN THE COUNTY COURT AT LAW #3
	§	
VS.	§	OF
	§	
WILLIAM B. JONES	§	LUBBOCK COUNTY, TEXAS

APPLICANT'S RESPONSE AND BRIEF OPPOSING RESPONDENT'S BRIEF AND MOTION FOR ATTORNEY'S FEES, MOTION TO DISMISS AS A MATTER OF LAW, AND, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Lubbock County Criminal District Attorney's Office, on behalf of Applicant, files this Applicant's Response And Brief Opposing Respondent's Motion For Attorney's Fees And His Brief, Motion to Dismiss as a Matter of Law, and Motion For Summary Judgment, and shows:

I.
Introduction and Summary

Applicant would respectfully show this Court that the Respondent's Motion for Attorney's Fees must be denied as a matter law and that such an order may be immediately entered to finally conclude this matter without need for further waste of the Court's time. In Sections II-IX below, Applicant will show the Court that there are no legal or even equitable grounds for a claim for attorney's fees against an applicant within an action brought under Chapter 7A of the Code of Criminal Procedure and pursuant to Title 4 of the Family Code. For this reason, in Section X ("Motion to Dismiss as a Matter of Law"), Applicant moves for the Court to deny the Respondent's motion for sanctions as a matter of law and to thereby effectuate the nonsuit.

While sanctions in this case are legally unavailable against the Applicant as a matter of law, if the Court could hypothetically consider sanctioning the Applicant for attorneys' fees and

other costs as requested, Section XI ("Motion for Summary Judgment") shows that there is substantial evidence raising factual issues supporting the Application's grounds; therefore, even if sanctions against the Applicant were available, summary judgment in favor of the Applicant must be entered because there is evidence supporting the Application (a basis in law and fact). The relevant evidence, discussed fully in Section XI, negates the "no basis in fact" requirement which is an essential element of the sanctions claims. In short, since there is *some* factual basis for an application for a protective order, summary judgment must be granted in favor of Applicant. There cannot be sanctions where the claims are not really frivolous.[1]

In summary, Applicant would show that this Court should enter an order granting Applicant's nonsuit and denying Respondent's Motion for Attorney's Fees (and deny relief requested in Respondent's brief) based on the law and, in the strict alternative, grant summary judgment in favor of Applicant because there is some evidence supporting the Application which negates essential elements of the sanctions claims.[2]

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[1] This is not a situation where a soon-to-be divorced wife is trying to make her husband look bad for legal advantage. This is a situation where the Respondent has already attempted to kill himself with a gun after a break up with the Applicant and after losing his job over the affair with her. This is a Respondent that persists to attempt to continue a relationship despite being instructed multiple times by her and by even his former employer to leave Applicant alone. *See Exhibit A at page 1ff.* This is a Respondent that, even in this legal proceeding, will not give up the relationship, asking irrelevant intimate questions in discovery regarding her sex life and regarding other potentially hurtful topics. Applicant hereby requests that, if the Court does not dismiss the respondent's claims as a matter of law, that this Court protect Applicant from answering the abusive portions of the discovery which appears to be intended not only to intimidate Applicant but also as a means of a fishing expedition meant to jeopardize her job or otherwise harass her.

[2] Applicant's counsel provided Respondent's counsel with all evidence then possessed by the State on August 1, 2012, and copies of illustrative case law regarding the "no basis in fact" requirements of the sanctions provisions. These were produced without request by hand delivery of counsel to Respondent's counsel on August 1, 2012, including sticky notes indicating supportive evidence. *See Exhibit A at pages 41, 42, and 43.* Applicant's counsel also sent multiple requests asking Respondent's counsel to review such information and evidence and to let Applicant's counsel know if further work could be avoided. *Id.* No response was given necessitating Applicant's counsel (on Applicant's behalf) and in the interest of the State to commit and expend many hours of the undersigned lawyers to appropriately respond to this matter. Applicant expects that the Motion for Attorney's Fees, or at least its continued pursuit, would meet the standards of frivolousness required for the kinds of sanctions envisioned in the Family Code *for* applicants. Nevertheless, in keeping with the tradition in Lubbock County's professionalism, and to consciously avoid the overuse of seeking sanctions, all that is sought in this pleading is that this matter be concluded by an order granting the nonsuit and denying the requested sanctions as a matter of law or, alternatively, granting summary judgment on the evidence—unless, of course, the Court should find *sua sponte* that such sanctions should issue or a that any protective order should be entered against Respondent.

II.
Procedural History

Applicant filed an *Application for a Family Protective Order* on June 25, 2012. The Court signed a *Temporary Ex Parte Protective Order and Order to Show Cause* on June 26, 2012. Applicant filed a *Motion for Extension of Temporary Ex Parte Protective Order* on July 9, 2012, upon agreement of opposing counsel—following Respondent's filing of a *Motion for Continuance*. The Court signed the *Order Extending Temporary Ex Parte Protective Order and Order Resetting Hearing* on July 9, 2012, resetting the hearing for July 23, 2012.

Respondent filed his *Respondent's Original Answer* on July 12, 2012. Respondent then filed several subpoena requests for various witnesses. Following verbal notice from the State's counsel that Applicant would nonsuit the case, Respondent filed a *Motion for Attorney's Fees* on July 18, 2012, alleging that attorney's fees should be awarded to him because the application and attached affidavit were frivolous and/or groundless and brought in bad faith and for the purpose of harassment. Applicant responded with a *Notice of Nonsuit and, If Necessary, Motion for Continuance on Respondent's Motion for Attorney's Fees* on July 20, 2012.

A hearing was held on Respondent's *Motion for Attorney's Fees* on July 23, 2012. At the hearing, the parties discussed whether attorney's fees could be ordered; briefs were requested by the Court. Respondent filed his *Brief in Support of Respondent Obtaining a Hearing on his Motion for Attorney's Fees* on August 3, 2012. Applicant, by and through the Lubbock County Criminal District Attorney's Office, hereby files her response to Respondent's *Motion for*

Attorney's Fees and accompanying *Brief in Support of Respondent Obtaining a Hearing on his Motion for Attorney's Fees*. Applicant produced all evidence in the State's possession to Respondent's counsel without request on August 1, 2012, in compliance with the Court's general instructions. Discovery between the parties is almost complete.

III.
Application, Affidavit, & Temporary *Ex Parte* Protective Order

Applicant, by and through the Lubbock County Criminal District Attorney's Office, filed an Application for a Family Protective Order on July 25, 2012. The application, brought under Chapter 7A of the Code of Criminal Procedure and Title 4 of the Texas Family Code, sought a protective order against Respondent, alleging that Respondent had engaged in stalking (under Section 42.072 of the Texas Penal Code) and/or dating violence. Chapter 7A of the Code of Criminal Procedure allows a victim of stalking (as well as victims of other offenses) or a prosecuting attorney acting on behalf of the stalking victim to file an application for a protective order "without regard to the relationship between the applicant and the alleged offender." TEX. CODE CRIM. PROC. ANN. art. 7A.01(a) (West 2011). Title 4 of the Family Code allows an adult member of the dating relationship or a prosecuting attorney to apply for a family violence protective order. TEX. FAM. CODE ANN. § 82.002(a), (d)(1).

The application was sought "for the protection of Applicant and all members of Applicant's family or household located in Lubbock County, Texas" due to Respondent's actions, which "indicate a continuing threat of stalking and/or violence." Applicant requested that after notice and a hearing, the Court issue a protective order prohibiting Respondent from committing family violence against Applicant or any member of her family or household; from directly or indirectly communicating with Applicant or any member of her family or household in any manner; from going within 200 yards of Applicant (or any member of her family or

household), her residence, her place of employment, or any school or child-care facility where her children (if any) may attend; and from communicating with Applicant in any form or manner, except through her attorney. Further, Applicant requested an immediate Temporary *Ex Parte* Protective Order prohibiting Respondent from engaging in the conduct above until a hearing could be held on the application.

An affidavit was attached to the application in support of Applicant's request for a protective order. In the affidavit, Applicant discussed the facts showing how she has been the victim of family violence and/or stalking. She stated that she and Respondent were in a dating relationship for about five months. Respondent was her immediate supervisor (a Captain) at the Texas Parks and Wildlife Department. She told Respondent on at least three occasions that she wanted to end their personal relationship, and finally ended their relationship the third time and told Respondent to leave her alone.

After the relationship ended, Applicant began recording hers and Respondent's conversations due to Respondent's actions towards her—both inside and outside the workplace. In addition to the conduct detailed below, Respondent would call and text message her several times a day to her personal phone, both during the relationship and after she ended it.

Following the breakup of their relationship, Respondent engaged in several actions that caused Applicant to fear for her safety. On April 25, 2012, Respondent sent her a text message that stated he was not feeling well, so she volunteered to take him to the hospital. When she got there, he got into her truck and asked if anybody knew she was there. When she said yes, he got mad, got out of the truck, and went back inside. She parked the truck and went inside to get him to go to the hospital, but he refused to go and wanted to sit there and talk. She tried to leave, but

Respondent used his body to block her from leaving. When she tried to leave again, Respondent grabbed her shirt, stretching it out. He kept her there for over an hour.

A few days later, Applicant and Respondent went to Palo Duro Canyon State Park and back (on April 28, 2012) for work. On the way back, Respondent was argumentative and kept criticizing Applicant. It escalated to the point that Applicant felt like a five-year child being beat down. When they arrived back at her apartment (where Respondent had picked her up that morning), Applicant just wanted to get away from Respondent, so she went inside her apartment, but he followed her inside her own apartment and continued berating her for between one and two hours. She could see the rage and fury on his face. She felt so emotionally beat down as this was going on that she went down to her knees on the floor and tucked her head between her legs. He tried to get her to kiss him "one last time," saying that "he needs it . . . closure"; he also asked if they could have one last sexual encounter, but she refused. The next morning (April 29, 2012), Respondent showed up uninvited at her apartment around 7:00 a.m. with doughnuts, attempting to apologize for his behavior. Applicant was shaking uncontrollably the entire time he was there because she was afraid of them. He left, but called her later that day; she asked him to just leave her alone.

Respondent later tried to take his own life. He called Applicant into his office on May 11, 2012. She went into his office for a few minutes, then walked out to leave and went to her vehicle. Respondent then said (as a question) that they were never going to hang out again; she told him not right now. She received a text message from Respondent that evening asking if they could talk, saying that he was sorry, that he had fucked everything up, and goodbye. The next day (May 12, 2012), she learned from Greg Parrott that Respondent had tried to take his own life, so she visited him at the hospital to make sure that he was alright.

After an internal affairs investigation began the week of May 12th, Applicant began to tell the Texas Parks and Wildlife Department investigator about what had happened between herself and Respondent. An internal memo was sent by Lieutenant Colonel Craig Hunter to Respondent on May 17, 2012, directing him as follows: "You are ordered to have no further written, verbal, or electronic contact with Mallory Brodrick. Please call me with questions." The memo had no expiration date. Rather than wait for the internal investigation to be completed, however, Respondent decided to retire/resign from the Texas Parks and Wildlife Department. His employment with the Department ended on May 31, 2012. On June 1, 2012, at exactly midnight, Applicant received a group text message from Respondent. He also called and left her a message on June 13, 2012, telling her he wanted her to contact him. Further, he also sent her personal text messages and an e-mail (following his retirement) begging her to contact him and telling her that he was seeing a psychiatrist and still thinks about killing himself.

Applicant has not made any type of contact or communication with Respondent since visiting him at the hospital on May 12, 2012—and has never rescinded her previous directive of April 29, 2012, for Applicant to leave her alone, though he frequently violated or ignored that directive for him to leave her alone. Based on all of the above conduct directed at her, Applicant stated in her affidavit that she fears for her safety and has every reason to expect the stalking and/or violence to continue—unless a protective order is entered.

The Court, after examining the *Application for a Family Protective Order* and the *Affidavit in Support of Application for a Protective Order*, determined that a *Temporary Ex Parte Protective Order and Order to Show Cause* should be granted (on June 26, 2012). Specifically, the order states as follows:

> The Court finds that the Applicant's sworn affidavit shows that Applicant and Respondent have a dating relationship.

> The Court, having examined the application and sworn affidavit, finds that there is clear and present danger of stalking and/or violence, or other harm to the applicant, and that a Temporary Ex Parte Protective Order for the protection of Applicant and all members of Applicant's family or household should be entered.

The Temporary *Ex Parte* Protective Order was ordered effective immediately and binding on Respondent, and would continue "in full force and effect until the hearing set herein or until further order of this Court or until it expires by operation of law not more than twenty (20) days from this date." A hearing was ordered to be held on the application on July 9, 2012 (which was later extended to July 23, 2012).

IV.
Respondent's Pleadings

Respondent filed his *Respondent's Original Answer* on July 12, 2012, entering a general denial and demanding strict proof of each and every allegation made by Applicant. Respondent prayed that "Petitioner take nothing and that Respondent be granted all relief requested in this Original Answer."

Following Applicant's oral notice of her intent to nonsuit the case, Respondent filed his *Motion for Attorney's Fees* (on July 18, 2012) requesting that sanctions—in the form of attorney's fees, expenses, and costs—be ordered against Applicant under Rule 13 of the Texas Rules of Civil Procedure and under Chapter 10 of the Texas Civil Practice and Remedies Code. In support thereof, he alleged that the *Application for a Family Protective Order* and the *Affidavit in Support of Application for a Protective Order* were both "frivolous and/or groundless pleadings and brought in bad faith and for the purpose of harassment."

In Respondent's *Brief in Support of Respondent Obtaining a Hearing on his Motion for Attorney's Fees*, Respondent discusses whether he is entitled to "attorney's fees, costs, and expenses, and or sanctions related to his defense" of Applicant's application for a protective

order. He argues that he is entitled to sanctions "pursuant to Civil Practice and Remedies Code Chapter 10, Texas Rules of Civil Procedure Rule 13, the Court's inherent power, and under equity." (Brief at *3). In support of his request for sanctions, he alleges that Applicant's "allegation of stalking and/or violence is not based on the evidence." (Brief at *4). He also alleges that "[t]here is insufficient evidence to support a final protective order pursuant to either the Code of Criminal Procedure for stalking or the Family Code for family violence." (Brief at *5).

As noted above, Respondent argues that he is entitled to attorney's fees, costs, and expenses under the following bases: (1) Chapter 10 of the Texas Civil Practice and Remedies Code; (2) Rule 13 of the Texas Rules of Civil Procedure; (3) the Court's inherent power, and (4) under equity. Applicant will respond to each of those four separate claims for relief, by first discussing whether relief is even potentially *available* to Respondent, and then by discussing the different claims under which Respondent believes himself entitled to attorney's fees, costs, and expenses.

V.
Availability of Sanctions

Respondent argues that he is entitled to sanctions based on Chapter 10 of the Texas Civil Practice and Remedies Code, Rule 13 of the Texas Rules of Civil Procedure, the Court's inherent power, and based on equity. But, because this is a protective order proceeding, the availability of sanctions against Applicant is limited by the provisions of Title 4 of the Texas Family Code.[3] When various provisions of Subtitle B of Title 4 of the Family Code are considered, the law

[3] The application here sought a protective order either under Chapter 7A of the Code of Criminal Procedure or under Title 4 of the Family Code. Though Chapter 7A is in the Code of Criminal Procedure rather than in the Family Code, the provisions of Title 4 of the Texas Family Code are applicable to a Chapter 7A protective order "except as otherwise provided by" that chapter. TEX. CODE CRIM. PROC. ANN. art.7A.04.

limits the award of attorney's fees (and other costs) to *petitioners* in protective order cases, *not* to the *respondent* against whom a protective order is sought.

Section 81.005 of the Texas Family Code says that "[t]he court may assess reasonable attorney's fees *against the party* found to have committed family violence or a party against whom an agreed protective order is rendered under Section 85.005 as compensation for the services of a private or prosecuting attorney . . ." TEX. FAM. CODE ANN. § 81.005(a) (emphasis added). The attorney's fees assessed against the respondent (pursuant to Section 81.005) are to be paid to the private attorney (if there is one), a county fund if a prosecuting attorney represented the victim, or the general revenue fund if the Department of Family and Protective Services represented the victim. TEX. FAM. CODE ANN. § 81.006. Similarly, Section 81.003(a) of the Texas Family Code says that "the court shall require in a protective order that *the party against whom the order is rendered* pay the $16 protective order fee, the standard fees charged by the clerk of the court in a general civil proceeding for the cost of serving the order, the costs of court, and all other fees, charges, or expenses incurred in connection with the protective order." TEX. FAM. CODE ANN. § 81.003(a) (emphasis added). And, Section 81.003(b) of the Texas Family Code says that "[t]he court may order a party *against whom an agreed protective order is rendered* under Section 85.005 to pay the fees required in Subsection (a)." TEX. FAM. CODE ANN. § 81.003(b) (emphasis added).

The common denominator in all of the provisions listed above is that they all say that fees, costs, and/or attorney's fees may be awarded *against* the person found to have committed family violence (or stalking); there is no similar provision regarding the assessment of fees, costs, and/or attorney's fees *for* the person against whom a family violence (or stalking) protective order is sought. That shows a legislative determination that a victim should not have

to pay anything to have a protective order sought or entered on his or her behalf. This legislative determination is made abundantly clear by Section 81.002, which states that "[a]n applicant for a protective order or an attorney representing an applicant *may not be assessed a fee, cost, charge, or expense* by a district or county clerk of the court or a sheriff, constable, or other public official or employee in connection with the filing, serving, or entering of a protective order or for any other service described by this subsection . . ." TEX. FAM. CODE ANN. § 81.002 (emphasis added).

Respondent argues that Sections 81.002, 81.003, and 81.005 do not exclude the possibility of attorney's fees being assessed against the victim because (1) 81.002 applies to fees, costs, charges, or expenses by a clerk, sheriff, constable, or public official (none of which opposing counsel is); and (2) 81.003 and 81.005 are applicable only when a respondent is found to have committed family violence. (Brief at *5). That is an unreasonably narrow reading of Sections 81.002, 81.003, and 81.005. All of those, when read and considered together, express a legislative determination that a victim of alleged stalking or family violence should not bear any of the costs of seeking a protective order—even if the application is subsequently withdrawn or if a binding protective order is not otherwise entered. If there is no protective order entered into (whether under Chapter 7A or under Title 4), then there simply are no fees or costs entered against either party.

In addition to protection afforded by the Family Code to the *victim*, the Family Code also protects a person who *reports* family violence or provides information regarding family violence (unless the person is reporting the person's own conduct or otherwise reports family violence in bad faith) from civil liability. TEX. FAM. CODE ANN. § 92.001(a)-(b). The reason for providing immunity from civil liability for a person who reports family violence is because the Legislature

wants to ensure family violence victims are entitled to the "maximum protection" from abuse or other harm provided by law. See TEX. CODE CRIM. PROC. ANN. art. 5.01(a). Reporting family violence in the first place is the first step towards ensuring that family violence stops; another important step is to seek a protective order (in an appropriate case) preventing the attacker/abuser from being around the victim. Financially punishing a victim for trying to seek a protective order—by trying to get thousands of dollars in attorney's fees from them—goes directly against the Legislature's goal of protecting the victim and encouraging the victim to come forward and seek help and protection from further harm and abuse.

Respondent also argues that he is entitled to seek attorney's fees—notwithstanding the above-listed Family Code provisions—because of Section 81.008 of the Family Code. He argues that Section 81.008 "specifically authorizes relief and remedies that are cumulative to those authorized in Subtitle B of the Texas Family Code" and "permits the court to look outside of this specific subtitle for remedies and relief in this case." (Brief at *5, 6). Section 81.008 states: "Except as provided by this subtitle, the relief and remedies provided by this subtitle are cumulative of other relief and remedies provided by law." TEX. FAM. CODE ANN. § 81.008. But, Section 81.008 must be looked at in the context of where it is placed in the Family Code (since § 81.008 specifically references "this subtitle") in order to"determine and give effect to the Legislature's intent." See *National Liability & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). Section 81.008 is placed in Subtitle B of Title 4 of the Family Code, which regards remedies available to the victim of family violence, not to the person accused of committing family violence. In other words, nothing in the language of 81.008 regarding "cumulative remedies" is intended to apply to a respondent in a protective order case, only to the applicant.

Thus, any attempt to argue that Section 81.008 allows for the respondent in a protective order case to obtain attorney's fees—notwithstanding Section 81.005—is lacking in merit.

The provisions of the Texas Family Code cited above merit denial of relief for Respondent. The Family Code protects a family violence and/or stalking victim from having to pay any fees, costs, or attorney's fees related to filing, seeking, or obtaining a protective order.[4] Thus, notwithstanding Rule 13 of the Rules of Civil Procedure and Chapter 10 of the Civil Practice and Remedies Code, Respondent cannot obtain sanctions (in the form of attorney's fees or other fees or costs) arising out of this proceeding from Applicant.

VI.
Rule 13, Texas Rules of Civil Procedure

Under TEX. R. CIV. P. 13, a signature on a document by an attorney or party constitutes a certificate that they have read the pleading, motion, or other paper, and that to the best of their "knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." "Groundless" means "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." *Id.* An "appropriate sanction" may be ordered against the person who signed the pleading, a represented party, or both when attorneys or parties bring "a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause." *Id.*

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[4] To the extent that Section 81.002, 81.003, and 81.005 of the Texas Family Code conflict with Rule 13 of the Texas Rules of Civil Procedure and/or Chapter 10 of the Texas Civil Practice and Remedies Code, the provisions of the Family Code are more specific—in dealing specifically with protective order cases—while Rule 13 and Chapter 10 deal more generally with civil cases. As such, the special provision, i.e., the provisions of the Family Code dealing with no assessment of attorney's fees or other costs against the applicant, "prevails as an exception to the general provision." See TEX. GOV'T CODE ANN. § 311.026(b).

Rule 13 prohibits the filing of a pleading, motion, or other paper that is either (1) groundless and brought in bad faith; or (2) groundless and brought for the purpose of harassment. *See GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993); *City of Houston v. Chambers*, 899 S.W.2d 306, 309 (Tex. App.—Houston [14th Dist.] 1995, no pet.). "Bad faith does not simply mean bad judgment or negligence, but rather means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose." *Olibas v. Gomez*, 242 S.W.3d 527, 534 (Tex. App.—El Paso 2007, pet. denied). Improper motive is an essential element of "bad faith." *Elkins v. Stotts-Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.). "Harassment" means that the pleading was "intended to annoy, alarm, and abuse another person." *Parker v. Walton*, 233 S.W.3d 535, 540 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Courts are required to presume that pleadings, motions, and other papers are filed in good faith, and no Rule 13 sanctions may issue except for good cause, the particulars of which must be stated in the sanction order. Therefore, the party moving for sanctions has the burden of overcoming that presumption. *Tanner*, 856 S.W.2d at 731. If a court finds a pleading or motion was signed in violation of Rule 13, the court shall impose an appropriate sanction upon the person who signed the document, a represented party, or both. In making the determination, the trial court must examine the credibility of the party or attorney against whom sanctions are requested, taking into consideration all facts and circumstances available at the time of the filing. *See Olibas*, 242 S.W.3d at 534.

Respondent has not shown either that the *Application for a Family Protective Order* was groundless and brought in bad faith or groundless and brought for the purpose of harassment. Respondent's contact with Applicant in the months following their breakup constitute the offense

of stalking.[5] Respondent sent *numerous* unwelcome text messages to Applicant following the break-up of their relationship, mostly of a personal nature unrelated to Applicant's work-related actions. And, his interactions with Applicant on-the-job (prior to Respondent's retirement) also had an unwelcome aspect to it, in that Respondent involved himself in Applicant's personal life in the guise of acting as her supervisor. He even went to (and into) Applicant's house without permission, and berated her to the point that she felt like a young child being verbally beat down. When she tried to help him once, when she believed he needed to go to the hospital, he prevented her from leaving his apartment by blocking the door with his body; he also grabbed and stretched out her shirt to prevent her from leaving. When Respondent was told to stop having contact with Applicant when the Texas Parks and Wildlife internal investigation began, he chose to retire instead. Once his retirement began at midnight on June 1, 2012, he immediately thereafter contacted Applicant—*via* a group text message—and thereafter continued communicating with Applicant repeatedly, even though Applicant had told Respondent on April 29, 2012 that she wanted Respondent to leave her alone and to stop communicating with her.[6]

Respondent seems to be confused about what constitutes the offense of stalking. He seems to believe that the "traditional" form of stalking, i.e., following somebody in the shadows without the other person's consent, is the only way to commit the offense of stalking. Contrary to his implicit belief, Texas Penal Code Section 42.072 is actually much broader than simply following or "creeping" behind someone. In fact, neither "following" nor "physical presence" are elements of the offense of stalking. See *Manuel v. State*, 357 S.W.3d 66, 83 (Tex. App.—

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[5] The Texas stalking statute prohibits a person from doing the following: on more than one occasion and pursuant to the same scheme or course of conduct—even if there are different types of conduct done pursuant to the same scheme or course of conduct—that is directed specifically at another person, knowingly engaging in conduct that: (1) the actor knows or reasonably believes the other person will regard as threatening bodily injury or death for the other person; (2) causes the other person to be placed in fear of bodily injury or death; and (3) would cause a reasonable person to fear bodily injury or death for himself or herself. TEX. PEN.CODE ANN. § 42.072(a).

[6] One of the text messages (on June 13, 2012) from Respondent to Applicant begged her to contact him and told her he was thinking about killing himself.

Tyler 2011, pet. ref'd). What is an element of the offense is that the actor's conduct is reasonably interpreted as threatening bodily injury or death—which can be done by phone messages and electronic communications since the conduct element includes speech. See *Manuel*, 357 S.W.3d at 83-84.

Based on the allegations in the affidavit, there was sufficient evidence for the Court to find "reasonable grounds" to believe that Applicant is the victim of stalking, and therefore to issue a protective order.[7] TEX. CODE CRIM. PROC. ANN. art.7A.03(a)-(b). The continuous text messaging and phone calls, coming to—and into—Applicant's apartment uninvited, constantly verbally berating Applicant in a volatile manner, and communicating his desire for her and his thoughts of suicide constitute stalking—in that the above-mentioned conduct was done on more than one occasion and pursuant to the same scheme or course of conduct, Respondent knew or reasonably believed Applicant would regard his conduct as threatening bodily injury or death for herself, he caused her to be placed in fear of bodily injury or death, and his actions would cause a reasonable person to fear bodily injury or death to himself or herself. Respondent, however, argues that Applicant did not use words such as death, hurting, threaten, bodily, injury, or assault in her affidavit. (Brief at *2). While those specific words were not used, that does not render the application and affidavit groundless. There is nothing in either Chapter 7A or in Title 4 that states that a protective order application is void if not in a specific form.[8] And, Respondent

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[7]It should be noted that "reasonable grounds" does not mean "beyond a reasonable doubt." To the extent Respondent argues there has to be a stalking conviction or sufficient evidence to support a stalking conviction for there to be a Chapter 7A protective order based on stalking, that argument lacks merit. There does not have to be a stalking conviction for there to be a protective order based on a stalking offense. In fact, it would have been impermissible for the State's counsel to wait until a criminal complaint had been made before proceeding tofile an application for a protective order. A prosecuting attorney's decision to file an application for a protective order (whether under Chapter 7A or under Title 4) is required to be made "without regard to whether a criminal complaint has been filed by the applicant." TEX. CODE CRIM. PROC. ANN. art. 5.06(b).

[8] In fact, an application for a protective order is only required to state four things: (1) the name and county of residence of each applicant; (2) the name and county of residence of each individual alleged to have committed family violence; (3) the relationship between the applicant and the individual alleged to have committed family

seems to have overlooked the portion of the affidavit that states: "Therefore, I fear for my safety and have every reason to expect the stalking and/or violence to continue." Based on the numerous references in the affidavit to multiple, unwanted communications from Respondent, his entering her apartment uninvited, his verbally berating her for hours (both on and off the job), and his preventing her from leaving his apartment by using his body to block her from leaving, a reasonable person would certainly fear bodily injury or death for himself or herself and would necessarily fear for their own safety.

Even if (for some reason) the allegations in the Application were insufficient to support a Chapter 7A protective order based on stalking, the allegations in the Application (and accompanying affidavit) were sufficient to support a family violence protective order.[9] A family violence protective order shall be issued if the court finds that "family violence has occurred and is likely to occur in the future." TEX. FAM. CODE ANN. § 81.001. Respondent's actions in coming over to Applicant's apartment uninvited and unwelcome, barricading Applicant inside his apartment and preventing her from leaving (to the point of stretching out her shirt to prevent her from leaving), and communicating with her in an obsessive manner—several times a day even though she did not communicate back and after she told him not to contact her anymore—is indicative of a threat that would reasonably place her in fear of imminent physical harm, bodily injury, or assault. The prior conduct constitutes family violence that has already occurred; Respondent's continuous communication with Applicant constitutes a likelihood that dating

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violence; and (4) a request for one or more protective orders. TEX. FAM. CODE ANN. § 82.004. Thus, even if no specific facts had been alleged, that still would not have rendered the application "groundless."

[9] "Family violence" includes dating violence. TEX. FAM. CODE ANN. § 71.004(3). "Dating violence" means an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim with whom the actor has or has had a dating relationship, and "is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault." TEX. FAM. CODE ANN. § 71.0021(a). A "dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. TEX. FAM. CODE ANN. § 71.0021(b).

violence will occur in the future. Thus, even if a protective order could not have been issued under Chapter 7A, a dating violence protective order could still have been issued.

In addition, Respondent's argument for sanctions under Rule 13 lacks merit because the Court previously determined that the allegations in the application and affidavit warranted the granting of an *ex parte* protective order. A court may grant a temporary *ex parte* protective order under Chapter 7A without further notice to the alleged offender and without a hearing "[i]f the court finds from the information contained in an application for a protective order that there is a clear and present danger of sexual assault, stalking, or other harm to the applicant[.]" TEX. CODE CRIM. PROC. ANN. art. 7A.02 (West 2011). Similarly, a court may grant a temporary *ex parte* order under Title 4 without further notice to the individual alleged to have committed family violence and without a hearing "[i]f the court finds from the information contained in an application for a protective order that there is a clear and present danger of family violence." TEX. FAM. CODE ANN. § 83.001. If the Court has already once before determined that the application and affidavit established "a clear and present danger of stalking and/or violence, or other harm" to Applicant, then how could the application and affidavit have no basis in law or fact?[10] The allegations in the affidavit were sufficient to show a "clear and present danger" of stalking, family violence or other harm—as shown from Respondent's actions in continuously texting (and otherwise communicating with) Applicant, coming into her apartment uninvited, making unwelcome advances towards her following the breakup of their relationship, and attempting suicide following his unsuccessful attempt to "win her back." The Court properly determined that the allegations in the affidavit supported the issuance of a temporary *ex parte*

[10]And, if the temporary *ex parte* protective order was so "groundless," then why did Respondent voluntary enter into an agreement to extend the *ex parte* order? *See Exhibit A at page 47.*

protective order, and would have had a sufficient basis on which to issue a protective order had Applicant not filed a Notice of Nonsuit.

Respondent cannot meet either standard under Rule 13, i.e., cannot show either that the application and affidavit were groundless and brought in bad faith, or were groundless and brought for the purpose of harassment. The application was not filed either for "dishonest, discriminatory, or malicious purpose[s]," nor was it filed to "annoy, alarm, and abuse" Respondent. None of the actions taken either by Applicant or on Applicant's behalf constitute bad faith, i.e., the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. The application was filed in good faith belief on Applicant's behalf based on the instances of stalking and family violence that Respondent engaged in against her. Those actions engaged in by Applicant constitute stalking since Respondent, on more than one occasion and pursuant to the same scheme or course of conduct, contacted Applicant in a manner that he knew or should have known that Applicant would reasonably regard as threatening bodily injury or death towards herself. Those actions also constitute family violence since Respondent reasonably placed Applicant in fear of imminent physical harm, bodily injury, or assault on prior occasions and would likely continue to do so in the future.

Regardless of whether the State could prove that Applicant had committed a stalking offense beyond a reasonable doubt, there was sufficient evidence upon which to seek a protective order prohibiting Applicant from engaging in stalking (or alternatively one based on family violence). Respondent cannot show that there was "no basis in law or fact" in which to file the application for a protective order, i.e., cannot show that the filing of the Application was groundless and brought either in bad faith or for purposes of harassment.

Respondent's Rule 13 request for sanctions should be denied, since Respondent cannot show either that the application (and attached affidavit) was groundless and brought in bad faith or groundless and brought for the purpose of harassment.

VII.
Chapter 10, Civil Practice and Remedies Code

Under Section 10.002 of the Texas Civil Practice and Remedies Code, a party may make a motion for sanctions describing the specific conduct violating Section 10.001, i.e., when a person has signed a pleading or motion for purposes of harassment, unnecessary delay or needless increase in the cost of litigation, or makes a frivolous argument or an allegation that does not have any evidentiary support. TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001, 10.002(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. TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(a). Under Chapter 10, the person seeking sanctions need not specifically show bad faith or malicious intent, just that some of the allegations in the petition or application did not have evidentiary support or that a reasonable inquiry was not made into all of the allegations in the petition or application. *Low v. Henry*, 221 S.W.3d 609, 617 (Tex. 2007).

The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(b). A sanction may include (among other things) 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. TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(c)(3).

Respondent cannot obtain relief under Chapter 10 of the Texas Civil Practice and Remedies Code. Respondent did not specify in his *Motion for Attorney's Fees* the "specific conduct" alleged to have violated Section 10.001. See TEX. CIV. PRAC. & REM. CODE ANN. 10.002(a). Due to Respondent's failure to specify the conduct alleged to have violated Section 10.001—either in the Motion or in his Brief—his claim for relief under Chapter 10 should be denied.

Even if the Chapter 10 claim should be considered on the merits, his Chapter 10 claim for relief lacks merit. While Respondent does not have to show bad faith or malicious intent, he still has to show that the application was filed for an improper purpose (such as harassment), that the claims in the application are not warranted by existing law, or that the claims have no evidentiary support. Respondent has not shown any of the above. The application was not filed for an improper purpose, but rather to seek a protective order due to Respondent's acts of stalking and family violence against Applicant. And, the claims in the application, i.e., that Applicant is entitled to a family violence and/or stalking protective order, are warranted by existing law and have evidentiary support. The claims have evidentiary support in the text messages and verbal recordings she recorded of hers and Respondent's conversations (and in her testimony, had there been a protective order hearing). Respondent cannot meet the standard required to obtain relief under Section 10.004.

Respondent's Chapter 10 claims should be denied, since Respondent has not shown that the application or any other document in the case was signed in violation of Section 10.001 of the Texas Civil Practice and Remedies Code.

VIII.
Court's Inherent Power & Equity

Respondent argues in his Brief that he is entitled to fees, costs, expenses, and attorney's fees based on "the Court's inherent power, and under equity." Specifically, Respondent argues that the Court may order attorney's fees (and other costs) under the court's inherent power, i.e., the Court's inherent power to "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." ((Brief at *3) (citing *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979)).

While courts do have inherent powers and equity authority, that does not mean that Respondent is entitled to attorney's fees or other costs from Applicant. Texas courts have "no 'inherent powers' that permit them to ignore an express statutory or constitutional mandate." See *Queen v. State*, 842 S.W.2d 708, 711 (Tex. App.—Houston [1st Dist.] 1992, no pet.). As discussed in the "Availability of Sanctions" portion of this Response and Brief, courts cannot charge applicants for seeking a family violence protective order or a protective order based on stalking. The inherent power of the Court does not override the statutory mandate (and legislative intent) that family violence/stalking protective order applicants not be charged a fee for filing or seeking a protective order. And, Respondent has not shown or argued anything—separate and apart from Rule 13 and Chapter 10—showing entitlement to attorney's fees and other costs based either on the Court's inherent power or on equitable principles.

To the extent that the concept of equitable relief applies in this case, it should be *against* Respondent rather than for him. He filed his *Motion for Attorney's Fees* barely *three hours* after undersigned counsel notified him—by and through his counsel—that Applicant would be nonsuiting the case. That conduct indicates a certain level of gamesmanship in these proceedings on Respondent's part that is worthy of denial of relief for Respondent on equitable

grounds. The timing of the filing of the Motion for Attorney's Fees shows that Respondent is simply being vindictive and seeking to punish Applicant for: (a) filing a protective order (one supported under Chapter 7A and under Title 4, both legally and factually); and (b) filing a nonsuit of the case (even though Applicant has the absolute, unqualified right to take a nonsuit at any time before he has rested his case[11]). Respondent should not be allowed to attempt to punish Applicant for doing something that she is entitled to do by law, i.e., to nonsuit a case.

Respondent's "inherent power" and equitable relief claims should be denied.

IX.
Public Policy Considerations

Public policy reasons also dictate that attorney's fees not be assessed against a person seeking a protective order on the basis of family violence, stalking, sexual assault, etc. If a victim of stalking or family violence can be "on the hook" for her attacker's attorney's fees, then why would any victim ever seek a protective order? No victim would ever seek a protective order if they can be liable for thousands of dollars of their attackers/abusers attorney's fees. Such is not good public policy, to punish a victim for seeking a protective order.

As *most* practitioners know, a nonsuit can be sought for reasons wholly unrelated to the merits of the case—as here.[12] But, Respondent now seeks to financially punish Applicant for seeking a protective order—one based both in law and fact—simply on the basis that a nonsuit was filed (as shown from the "eleventh hour" filing of the *Motion for Attorney's Fees*). He says this case "is a prime example of what not to do in an application for protective order." (Brief at *6). How is seeking a protective order based on stalking and/or family violence in a case where the law and facts support the issuance of a protective order a "prime example" of what not to do?

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[11] See TEX. R. CIV. P. 162; *BHP Petroleum Co. Inc. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990).

[12] Respondent even notes the reason why the case was nonsuited in his brief, when he says that "once [Applicant] learned of the extent of [Applicant's] intent to defend himself, she decided to nonsuit." (Brief at *6). That reason to nonsuit has nothing to do with the merits of the case.

This case involves far more than "permit[ting], condon[ing], or encourag[ing] individuals who are upset with the outcome of an intimate relationship to use the State's prosecuting attorney's to file groundless applications for protection when no protection is needed"[13] (as discussed throughout this Response and Brief).

If there is not a protective order entered, then does that automatically mean that the seeking of the protective order was frivolous or lacking in merit? Of course not. But, if Respondent has his way, no victim of stalking, sexual assault, family violence, etc., would ever seek a protective order for fear of being assessed court costs and attorney's fees if a final protective order is not reached. That goes against legislative intent, which is to make sure that victims of family violence are "entitled to the maximum protection from harm or abuse or the threat of harm or abuse as is permitted by law." TEX. CODE CRIM. PROC. ANN. art. 5.01(a). That is why the Legislature enacted such specific statutes making abundantly clear that a person seeking a protective order should not be assessed *any* fees, costs, or attorney's fees related to the filing, seeking, or entering of a protective order.

Respondent asks in his Brief (in responding to the Notice of Nonsuit) whether Texas wants to encourage false allegations so that Respondent is punished. (Brief at *6). Applicant has neither said nor implied any such thing. Society is not benefitted by false allegations of stalking or family violence. But, neither is society benefitted by seeking to financially punish a victim of stalking or family violence for seeking a protective order. If the Court allows Respondent to obtain attorney's fees here, there is nothing preventing respondents in *every case in Lubbock County* from filing a motion for attorney's fees whenever the case (for whatever reason) does not result in a final protective order. Rather than creating a system—in the form of financial punishment, i.e., the award of attorney's fees—that will deter family violence/stalking

[13] (Brief at *6-7).

victims from seeking protection from their abusers/attackers, the appropriate remedy is *via* the State's filing of perjury or aggravated perjury charges (under TEX. PEN. CODE ANN. §§ 37.02-37.03) against an applicant who falsely swears to the truth of the allegations in an application for a protective order or in an accompanying affidavit.[14] Seeking thousands of dollars in attorney's fees from a victim of stalking and/or family violence, on the other hand, is *not* the appropriate way to address the potential for abuse of the protective order process, due to the potential of discouraging victims from seeking protective orders.

X.
MOTION TO DISMISS AS A MATTER OF LAW

For all of these reasons, Respondent has not shown himself entitled to attorney's fees or other costs from Applicant. The provisions of the Texas Family Code prevent Respondent from obtaining fees, costs, or attorney's fees due to its provisions only allowing costs, fees, and attorney's fees to be assessed against the respondent, not against the applicant. And, even if Respondent were allowed to obtain fees, costs, and attorney's fees under the broad powers of the discretion of the Court in an appropriate case, this is not that case. Respondent cannot obtain relief under Rule 13 of the Rules of Civil Procedure, Chapter 10 of the Civil Practice and Remedies Code, the Court's inherent power, or under equitable relief.

Wherefore, for the above legal reasons, the State respectfully requests that the Court grant the pending motion for nonsuit and deny as a matter of law Respondent's *Motion for Attorney's Fees* and *Brief in Support of Respondent Obtaining a Hearing on his Motion for Attorney's Fees*.

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[14]Indeed, applicants are informed by the Lubbock County Criminal District Attorney's Office prior to filling out an affidavit that they can be prosecuted for aggravated perjury for falsely swearing to anything in the protective order proceeding.

XI.
MOTION FOR SUMMARY JUDGMENT

A movant is entitled to summary judgment if the movant shows competent summary judgment evidence demonstrating that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Property Mgmt. Co.*, 609 S.W.2d 546, 548-49 (Tex. 1985). While the Court should take evidence favorable to the non-movant as true and indulge every reasonable inference and resolve every reasonable doubt in favor of the non-movant, *id.*, a defendant who conclusively negates or disproves at least one of the essential elements of each of the plaintiff's causes of action is entitled to summary judgment. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Lear-Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

In this case, as discussed above, Respondent is claiming entitlement to attorney's fees on the basis of multiple theories of sanctions based on Chapter 10 of the Texas Civil Practice and Remedies Code, Rule 13 of the Texas Rules of Civil Procedure, the Court's inherent power, and based on equity. As stated before, because this is a protective order proceeding, the availability of sanctions against Applicant is limited by the provisions of Title 4 of the Texas Family Code which does not allow for sanctions against the Applicant. *See Section V, supra.*

Nevertheless, as detailed above in Section VI, TEX. R. CIV. P. 13 requires that a sanction arise from a pleading which is "groundless and brought for the purpose of harassment." "Groundless" means "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." *Id.* The Court may take judicial notice that an Application for a Protective Order has a basis in law as it has entertained many such applications. Whether there is any basis in fact is the issue of this element.

Similarly, if not identically, under Section 10.002 of the Texas Civil Practice and Remedies Code, a party may make a motion for sanctions describing the specific conduct violating Section 10.001, i.e., when a person has signed a pleading or motion for purposes of harassment, unnecessary delay or needless increase in the cost of litigation, or makes a frivolous argument or an allegation that does not have any evidentiary support. TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001, 10.002(a). The only portion of this sanction provision which could imaginably be applied to the Applicant (the Applicant's attorney (not the Applicant) signed the pleading) is the underlined portion requiring no evidentiary support. If there is evidentiary support, the "alleger" cannot be sanctioned.

Thus, evidence supporting an Application for a Protective Order negates the elements of both of these sanctions provisions. Because there is some evidence supporting the Application, summary judgment must be granted in favor of Applicant because there is some basis in fact and law for the Application.

Because Applicant is only required to negate one element of the sanction provisions in order to avoid them, Applicant need only show evidence supporting a single ground in law for a protective order. Here, Applicant will show substantial specific evidentiary support for a protective order based on stalking:

A. Stalking PC 42.072

Texas Penal Code Section 42.072 defines stalking as follows:

(a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:

(1) the actor knows or reasonably believes the other person will regard as threatening:

(A) bodily injury or death for the other person

(B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or

(C) that an offense will be committed against the other person's property;

(2) cause the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property; and

(3) would cause a reasonable person to fear:

(A) bodily injury or death for himself or herself;

(B) bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship; or

(C) that an offense will be committed against the person's property.

B. Evidence to support Penal Code Stalking 42.072(a)(1)

There is significant evidence supporting an application for a protective order under this provision of the Penal Code. On more than one occasion and pursuant to the same scheme or course of conduct, Bill Jones knowingly engaged in conduct directed at Mallory Brodrick. *See generally Exhibit A: Evidence Regarding Application Produced to Respondent August 1, 2012.*

Penal Code Section 42.072(a)(1) states that the actor knows or reasonably believes the other person will regard the actor's conduct as threatening bodily injury or death for the other person. The evidence supporting this element of stalking includes but is not limited to the following:

1. On or about April 28, 2012, Mallory was alone with Jones driving on a work related event. As Jones dropped Mallory off at her home, he proceeded into her residence,

uninvited. *See Exhibit A* at 44. He yelled at Mallory; eventually she tried to go to her restroom. He followed Mallory and he continued to yell at her. At one point, Mallory was on the floor, curled up with her head between her knees, crying. This encounter lasted almost two hours. Due to her physical placement on the floor and her demeanor, Jones knew or reasonably believed that his actions threatened Mallory. *See Exhibit A at page 44 and also Exhibit B at April 29, 2012 Recording entitled "April Apology After Wounded Warrior. A").*

2. On or about April 29, 2012, after the previous night's encounter, Jones showed up at 7:00 a.m. at Mallory's home bringing doughnuts, uninvited and unexpected. Mallory, fearing her supervisor's conduct, recorded this conversation. *See Exhibit B at April 29, 2012 Recording entitled "April Apology After Wounded Warrior").* Jones realizes that he has showed up at an unreasonably odd hour by stating, "Sorry for waking you up this morning." Jones notices her demeanor and asks her why she is shaking. Mallory asks Jones to leave her alone. Jones asks Mallory if she worried about last night, to which she replies "very much." Yet, Jones requests a hug. Mallory refused. Jones stated, "Are you that afraid of me?" Mallory replies, "I'm uncomfortable." Jones tells her to "at least answer my call and my text." Jones goes on to further state that he will protect her, but can't protect her from everything. Mallory asks if this is a threat. Jones states that he did not mean it as a threat. Again, Jones makes Mallory feel guilty by not giving him a hug. Mallory tells him to not ask for a hug. Jones admits that he was in an anger stage, stating "it comes and goes. I can't control it." Mallory asks if she should anticipate another flare up by him similar to the night before. Mallory says to Jones, "when I'm nice to you, you take it the wrong way." By this very conversation, Jones knew or reasonably believed that Mallory viewed his actions as threatening. *Id.*

3. On or about April 30, 2012, Mallory recorded a conversation between Jones and herself wherein she absolutely tells him to stay away from her. *See Exhibit B Recording entitled "Stay Away From My House").* The contact occurred at the Texas Parks and Wildlife offices in Lubbock, Texas. Mallory began the conversation by stating to Jones, "Stay away from my house. I don't want you around my house. Don't come in my house. Do not drive by my house." This conversation put Jones on notice that he was no longer allowed to come near her home. These statements should put a reasonable person on notice that their behavior would be regarded as threatening bodily injury or death to another. Furthermore, Jones's own statement "I'm not stalking you," shows that he is aware that the behavior Mallory is referring to does in fact constitute stalking behavior. *Id.* Since Jones is her supervisor, she tells him to not contact her unless it is work related. By this conversation alone, Jones indicates that he knew or reasonably believed Mallory regarded his conduct as threatening. *Id.*

4. On April 29, 2012 Jones calls Mallory and she records the conversation. Jones wanted to apologize for his actions the night before. Mallory tells Jones that it would be best for him to leave her alone. Jones agrees he will leave her alone. Jones states something to the effect of "I want you to care about whether I live or die." Jones acknowledges, "Sorry, I didn't handle yesterday any better." Jones then asks if he can "make a move" on her mother. Mallory did not find this amusing. Jones knew or reasonably believed Mallory regarded his actions as threatening. *See Exhibit B at April 29, 2012 Recording entitled "April Call After the Apology").*

5. On May 4, 2012, during a work trip, Mallory recorded a conversation. Jones asks Mallory how paranoid is she and asks if she is recording the conversation. *See Exhibit B at Recording entitled "Crosby Recording Turned Off").* When Mallory replies that she is recording the conversation, he tells her to turn off the recording device. As ordered by her supervisor,

Mallory does turn off the device. Due to her recording conversations, Jones knew or reasonably believed Mallory regarded his actions as threatening.

6. On May 11, 2012, Jones contacted Mallory by phone to talk about the past relationship. This call was not work related. Mallory was brief and ended the conversation. Shortly after that call, Jones attempted suicide with a firearm, which led to his hospital stay, psychiatric appointments, and medication for depression. By his own attempted suicide, Jones knew or reasonably believed his conduct would make Mallory regard his conduct as threatening bodily injury or death. *See Exhibit A at 44-45.* The Lubbock Police Department did an emergency detention due to the suicide attempt. Jones was injured and placed into a secure environment. Even though Mallory went to the hospital, this does not negate the fact that Jones's conduct placed Mallory in fear of bodily injury or death. *Id. at* page 12-24. From an earlier incident on April 25, 2012 when Jones wanted to go to the hospital, Mallory indicated he did not look well. All of these encounters made Mallory question Jones's unstable state of mind and his risk to himself and others. *See Exhibit A at 44-45.*

7. On May 15, 2012, an office memorandum from Texas Parks and Wildlife Lt. Craig Hunter ordered Jones to have "no further written, verbal, or electronic contact with Mallory." *See Exhibit A at Page 1.* When other individuals, namely law enforcement and/or employers, interceded and issued an order for no contact with Mallory, Jones knew or reasonably believed his conduct threatened Mallory.

8. To circumvent the "no contact" order, Jones resigned on May 31, 2012. On June 1, 2012 at exactly midnight, Jones texted Mallory as part of a group text that he had retired. This was the first of many texts that Jones would begin to send. *See Exhibit A at Page 2 ff.* There was no indication from Mallory that any contact was desired. One of the texts, sent on June 10,

2012, was a picture message Jones sent of the bullet that the medical staff removed from his body after his attempted suicide. *See Exhibit A at Page 5.* On June 13, 2012, Jones texted Mallory stating:

> Mallory please call me I am not mad at you I pray you don't hate me. I have to get past where I am it is a very dark place that makes me not want to live. The medication is starting to make me feel better. Anxiety is what accelerates the depression and makes me want to end it. I do not wish to see any harm come to and would never do anything that would endanger you. I need your help please talk with me. Today has been a good day tomorrow may not be. I saw psychiatrist today and answered there questions honestly and they wanted to but me back in the hospital and I didn't have anyone to take care of the boys. I told them I could not do that again. I know I hurt you when I tried to end my life I didn't do it to hurt you it was me trying to escape my pain. Please call me.

See Exhibit A at Page 5.

Within two hours of this text, Jones sent another text to Mallory asking her to take care of his dogs. *Id.* Mallory did not respond to these texts. By circumventing the "no contact" order from work, Jones resigned and waited until exactly midnight to begin contacting Mallory. By expressing that he never would harm her, his desire to still end his life, his taking of medication and current mental state, Jones knew or reasonably believed his conduct caused Mallory to be placed in fear of bodily injury or death. *Id.*

9. On June 14, 2012, Jones emailed Mallory. Again, this is after the "no contact" memo and Jones' resignation. Certain portions of the e-mail state:

> I am doing ok today. It isn't like that every day. I talked my psychologist Tuesday evening and will speak with him again this Friday. He went on to recommend me staying away from Susan due to something she did on Saturday that sent me over the edge.
>
> I met with my psychiatrist today. She has put me on anti-depressants and anti-anxiety medications. I was truthful with them today and they talked about putting me back into hospital. I did not want that. I told them that I would not voluntarily go. Most of that stemmed from last Saturday. Some days I wish Greg had not gotten the gun off my heart and I wouldn't be living this. Except for last week, that is how I felt. I think about killing myself every day. Some days are worse than others. Other than Saturday I have not taken any steps to complete it I just think about it.
>
> I pray every day for you. I hope and pray you do not hate me. I am very sorry for hurting you. I hope you get this and read it. It would help me greatly if you would

> respond to me. I know I don't deserve it but I miss your friendship. You were the corner stone that kept me together. Please read about depression and anxiety and the effects it has on people.

See Exhibit A at Page 46. By Jones's email, he knew or reasonable believed that his conduct threatened Mallory.

10. On June 13, 2012 Jones left a voice message indicating that he hoped "she didn't hate his guts," indicating his conduct was threatening and unwelcome. *See Exhibit B at Recording entitled "6-13-12 Bill Jones Voice Message ").*

11. On June 27, 2012 Jones was served with an *ex parte* temporary protective order, which stated that Jones is prohibited from directly or indirectly communicating with Mallory in any form or manner, including a threatening or harassing manner. Also, another provision states that Jones is prohibited in any form or manner from communicating with Mallory except through her attorney. Despite these provisions and knowing that Mallory wanted no further contact, Jones contacted a third party to convey a message to Mallory. By being served with the order, Jones knew or reasonably believed his conduct threatened Mallory.

C. Evidence to support Stalking 42.072(a)(2)

Penal Code Section 42.072(a)(2) states that "because of the actor's conduct, it causes the other person... to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property." The evidence supporting this element is as follows:

1. On April 25, 2012, Jones contacted Mallory while she was on duty to state he was not feeling well and needed to go to the hospital. Mallory drove her state truck to pick him up. He wanted to know if she told anyone that she was there. When he realized that she had told people, he became mad and went inside his home. Mallory tried to get him to go to the hospital

and he refused. He wanted to talk about their relationship instead. When she tried to leave, he used his body to block her from leaving. *See Exhibit A at page 32 and pages 44-45.* When she tried to leave again, he grabbed her shirt. She continued to walk, but he still had a grip on her shirt and she could not pull away. He kept her there for about an hour. This caused Mallory to be in fear of bodily injury or death. *Id.*

2. On April 28, 2012, Jones yelled and screamed at Mallory in her home for two hours. At one point, Mallory was on the floor, curled up with her head between her legs, crying. By her body position and demeanor, Jones caused Mallory to be placed in fear of bodily injury or death. *Id.*

3. On April 29, 2012, Jones unexpectedly showed up at her home at 7:00 a.m. During this time, Mallory was terrified and shaking. Mallory refused to give Jones a hug. Jones acknowledged that Mallory is afraid of him. This unexpected appearance caused Mallory to be placed in fear of bodily injury or death. *Id. and see Exhibit B at Recording entitled "Apology After the Wounded Warrior").*

4. After Jones's release from the hospital, Mallory learned that Greg Parrot and Jones visited Tim Williams to gain information regarding Mallory and her new relationship.

5. On May 17, Greg Parrot, Jones's best friend, began texting Mallory. *See Exhibit A at pages 10-11.* This was after Captain Joe Carter with the Internal Affairs Division interviewed Greg regarding his knowledge and involvement on the May 11, 2012 suicide attempt. Greg began "sympathizing" with Mallory about how she must have been feeling over the last few months. He goes on to acknowledge that Jones put her through mental abuse, threats, and the unwarranted "supervision." Mallory, in a previous recorded conversation, told Jones that she did not trust Greg. Due to Greg and Jones jointly going to Tim Williams and

trying to pry into Mallory's personal life, Mallory believed that Jones is using Greg Parrott as a way to gain information and maintain contact with Mallory. *Id.*

6. Mallory wrote a statement for Cpt. Joe Carter in regards to an internal investigation on Jones. *Id at page 32-33.* This letter states Jones "has a very bad and sometimes volatile temper. I am fearful for my safety whenever I am around him." This is clear evidence that Mallory feared Jones, even though he was her supervisor and she was previously in a relationship with him. Because this statement was made shortly after Jones attempted suicide on May 11, 2012, and before her application for her protective order, it shows that her fear, as stated in her affidavit for the *ex parte* protective order, was genuine, and not frivolous. *Id.*

7. Mallory received information that Jones tried to contact other individuals to corner Mallory at a speaking event for the Lions Club. Jones knew Mallory was a guest speaker and would not be able to leave. Jones wanted the individual to get Mallory alone so that he could get access to her. After this information came out, others told Jones that it would not be wise for him to attend the meeting. Having knowledge of Jones's plans placed Mallory in fear of bodily injury or death.

8. After receiving the June 13, 2012, text (*see Exhibit A at pages 5 and 27*), Mallory contacted the Lubbock Police Department and made a report for a subject threatening suicide. *See also Police Report at pages 12-24 and 911 Calls at pages 29-31.* This text referred to Jones's present mental state and his wanting to end his life again. Also, it refers to him taking medication and his psychiatrist and psychologist wanting him to go back into the hospital. Based on this response by Mallory, it is evidence that she was placed in fear of bodily injury or death. *See Exhibit A at page 5.*

9. After the e-mail sent from Jones on June 14, 2012 (*See Exhibit A at page 46*), Mallory again contacted the Lubbock Police Department. *Id. at page 28.* This time she indicates that Jones is stalking her. *Id.* This response by Mallory is some evidence that she was placed in fear of bodily injury or death.

10. Jones continued to text Mallory group messages and pictures of him drinking alcohol (while he is supposedly on anti-depressant and anti-anxiety medications), with a young woman sitting on his lap, on vacation, as an attempt to make her jealous. Mallory did not reply to any of these messages. These texts continued through the end of June 2012. *Id. at pages 2-9.*

11. On June 27, Mallory received a package in the mail that contained soap. There was no note. Mallory turned over the package to law enforcement for further investigation. This is some evidence that Mallory was placed in fear of bodily injury or death.

D. Evidence to support Stalking 42.072(a)(3)

Penal Code Section 42.072(a)(3) requires that "the actor's conduct would cause a reasonable person to fear (A) bodily injury or death for himself or herself; (B) bodily injury or death for a member of the person's family…or for an individual with whom the person has a dating relationship; or (C) that an offense will be committed against the person's property." The following evidence supports this element:

1. By all of the above listed conduct, a reasonable person would fear bodily injury or death.

2. Once Mallory ended the relationship, Jones used "work" situations to discipline Mallory and to set up times when he will be alone with Mallory. He has also set up off-duty work assignments so that other individuals, specifically Greg Parrot can report to Jones on

Mallory's activity. All of this led to Mallory recording conversations that involve Jones. *See Exhibit A at page 40 and Exhibit B at "Brodrick Jones Meeting."*

3. Jones' conduct on April 28th and 29th would have led a reasonable person to fear for their personal safety. *See Exhibit A at page 44 and at 12-24.* Knowing that the relationship is over, Jones proceeded to yell at Mallory while she was on the floor crying. *Id.* This would cause a reasonable person to fear the actor. Also, when Jones showed up at her home at 7:00 a.m. after a night of constant berating, this would also cause a reasonable person to fear bodily injury or death. *Id.*

4. Once Mallory heard of Jones's attempted suicide, and that he in fact was at a hospital for his wound, it caused her fear. It would cause a reasonable person to fear bodily injury or death. *Id.*

5. Upon learning Jones was seeing psychiatrists and psychologists for his mental issues, this would cause a reasonable person to fear bodily injury or death. *See Exhibit A at pages 5 and page 46.*

6. A reasonable person would be placed in fear upon receiving unwanted texts and emails after Jones was ordered to have no contact, after his attempted suicide, and after knowledge of his mental state and thoughts of suicide. *Id. at page 1, 5, 12-24, and 46.*

7. A reasonable person knowing that Jones, no longer employed, going through a divorce, dealing with jealousy, depression and suicidal thoughts would be afraid of bodily injury or death. *Id.*

8. A reasonable person would fear bodily injury or death when someone in an unstable mental state continually asks them for a response, a visit, or some type of attention. *Id.*

9. A reasonable person would fear bodily injury or death when hearing that not only did the actor threaten suicide, but went to such lengths as to actually discharge a firearm which caused bodily injury to the actor. *Id.*

10. When a lack of response from the victim causes the actor to continue making attempts to contact the victim through other individuals, calls, texts, emails, and a package of soap delivered in the mail, this would cause a reasonable person fear bodily injury or death. *Id.*

11. Knowing that an individual does own firearms and has recently used a firearm to attempt suicide, this would make a reasonable person to fear bodily injury or death. *Id.*

12. On multiple dates, including May 11, June 13, and July 3, other individuals called 911 because Jones was threatening suicide. *Id. at 27-31.* Knowing that someone is threatening suicide on multiple occasions would cause a reasonable person to fear bodily injury or death.

Applicant has shown an inordinate amount of evidence making a basis in law and fact for the Application. Therefore, no sanctions are warranted or legally available as a matter of law.

E. Family Violence and "Other Harm" and Supporting Evidence

In addition to the stalking grounds discussed above, the allegations in the Application (and accompanying affidavit) support a family violence protective order and there is at least some evidence supporting the additional legal ground.

As mentioned above, "Family violence" includes dating violence. TEX. FAM. CODE ANN. § 71.004(3). "Dating violence" means an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim with whom the actor has or has had a dating relationship, and "is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm,

bodily injury, assault, or sexual assault." TEX. FAM. CODE ANN. § 71.0021(a). A "dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. TEX. FAM. CODE ANN. § 71.0021(b).

Furthermore, an *ex parte* temporary protective order may be entered to broadly protect against "other harm" for which there is—as here—some supporting evidence. See TEX. CODE CRIM. PROC. ANN. art. 7A.02. An order may be granted "[i]f the court finds from the information contained in an application for a protective order that there is a clear and present danger of sexual assault, stalking, or other harm to the applicant[.]" *Id.*

The following evidence (also discussed above) establishes sufficient evidence of both family violence and "other harm" making sanctions further unavailable as a matter of law:

1. On April 25, 2012, Jones contacted Mallory while she was on duty to state he was not feeling well and needed to go to the hospital. Mallory drove her state truck to pick him up. He wanted to know if she told anyone that she was there. When he realized that she had told people, he became mad and went inside his home. Mallory tried to get him to go to the hospital and he refused. He wanted to talk about their relationship instead. When she tried to leave, he used his body to block her from leaving. *See Exhibit A at page 32 and page 44-45.* When she tried to leave again, he grabbed her shirt. She continued to walk, but he still had a grip on her shirt and she could not pull away. He kept her there for about an hour. This caused Mallory to be in fear of imminent physical harm, bodily injury, assault, or sexual assault and generally fear of "other harm." *Id.*

2. On April 28, 2012, Jones yelled and screamed at Mallory in her home for two hours. At one point, Mallory was on the floor, curled up with her head between her legs, crying.

By her body position and demeanor, Jones caused Mallory to be placed in fear of imminent physical harm, bodily injury, assault, or sexual assault and generally fear of "other harm." *Id.*

3. On April 29, 2012, Jones unexpectedly showed up at her home at 7:00 a.m. During this time, Mallory was terrified and shaking. Mallory refused to give Jones a hug. Jones acknowledged that Mallory is afraid of him. This unexpected appearance caused Mallory to be placed in fear of imminent physical harm, bodily injury, assault, or sexual assault and generally fear of "other harm" and constitutes evidence that violence is likely to occur in the future. *Id. and see Exhibit B at Recording entitled "Apology After the Wounded Warrior").*

4. Mallory wrote a statement for Cpt. Joe Carter in regards to an internal investigation on Jones. *Id at page 32-33.* This letter states "has a very bad and sometimes volatile temper. I am fearful for my safety whenever she is around him." This is clear evidence that Mallory feared Jones, even though he was her supervisor and she was previously in a relationship with him. Because this statement was made shortly after Jones attempted suicide on May 11, 2012, and before her application for her protective order, it shows that her fear, as stated in her affidavit for the *ex parte* protective order, was genuine, and not frivolous. *Id.* It is also some evidence of fear of imminent physical harm, bodily injury, assault, or sexual assault and generally fear of "other harm" and constitutes evidence that violence is likely to occur in the future.

5. After receiving the June 13, 2012, text (*see Exhibit A at pages 5 and 27*), Mallory contacted the Lubbock Police Department and made a report for a subject threatening suicide. *See also Police Report at pages 12-24 and 911 Calls at pages 29-31.* This text referred to Jones's present mental state and wanting to end his life *again*. Also, it refers to him taking medication and his psychiatrist and psychologist wanting him to go back into hospital. Based on

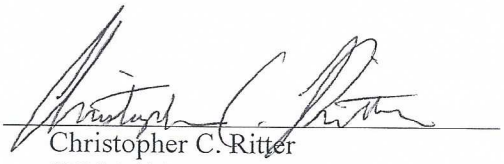
this response by Mallory, it is evidence that she was placed in fear of imminent physical harm, bodily injury, assault, or sexual assault and generally fear of "other harm" and constitutes evidence that violence is likely to occur in the future. *See Exhibit A at page 5.*

Pursuant to Texas Rule of Civil Procedure 166a(d), notice is hereby given of Applicant's intent to utilize all of the documents and recordings of the parties attached hereto as summary judgment evidence. Applicant requests that the Court take judicial notice of the admissible evidence in the form of government records, affidavit testimony, and the written and recorded admissions of parties as summary judgment evidence.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that the Court grant the pending motion for nonsuit and deny as a matter of law Respondent's *Motion for Attorney's Fees* and *Brief in Support of Respondent Obtaining a Hearing on his Motion for Attorney's Fees,* and in the strict alternative, if the Court finds there may be sanctions under these circumstances, that the Court render summary judgment in favor of this Applicant on all claims by Respondent because there is evidence negating essential elements of the sanctions provisions and for such other and further relief to which she may justly be entitled.

Respectfully submitted,

MATTHEW D. POWELL
Lubbock County Criminal District Attorney

By: 
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above document via certified mail, facsimile, e-mail, or by hand-delivery, pursuant to the Texas Rules of Civil Procedure, on this the 15th day of August, 2012, upon the following counsel of record:

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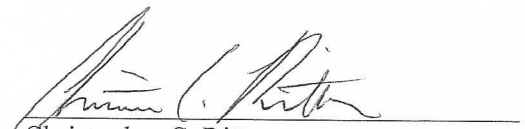
Christopher C. Ritter