No. 12-23-00282-CV

§

In the Court of Appeals
Twelfth Court of Appeals at Tyler

UDO BIRNBAUM
Defendant, Counter-claimant - Appellant

v.

CSD VAN ZANDT LLC
Plaintiff, Counter Defendant - Appellee

Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Chris Martin
Trial cause no. 22-00105

BRIEF FOR APPELLANT

(Clerk's Record separately)

UDO BIRNBAUM
119 An County Road 2501
Tennessee Colony, TX 75861
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(903) 922-5996

APPENDIX – attached hereto at end

A. The summary judgment used to dispossess Defendant of his homestead
B. The proposal of a writ of possession on the summary judgment
C. The writ of possession taking Defendant's 150 acre homestead
D. Posted on front door – ejectment as a supposed "tenant" in a "unit"
E. Defendant's Posting on front door – that the writ was clearly unlawful
F. Final Judgment solely upon the summary judgment, with never a trial
G. The seven (7) page docket sheet, jury fee paid, but never a trial
H. Defendant's Response to Plaintiff's Motion for Summary Judgment
J. Defendant's RCP 166a(i) No Evidence MSJ

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Hon. Chris Martin
294th Trial Court Judge – but never a trial

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STATEMENT OF THE CASE

The nature of the case

PLAINTIFF, Dallas land developer ROBERT O. DOW ("Dow"), via his CSD Van Zandt LLC ("CSD"), borrows $850,000 from Sanger Bank ("Sanger") via a Deed of Trust to pay a LISA L. GIROT ("Girot"), despite being made aware that Defendant UDO BIRNBAUM ("Birnbaum") was living on such 150 acres, and perhaps not then aware that Girot was lying to him about her having inherited any such property, but in any case Dow failing to make a reasonable inquiry, whether there even existed a chain of deeds toward and unto such LISA L. GIROT.

> *("Before purchasing the Property, I was aware that Udo Birnbaum was living on a portion of the Property at 540 Van Zandt County Road 2916, Eustace, Texas 75124".* Affidavit of Robert Dow, owner manager of Plaintiff CSD Van Zandt LLC. First Amended (active) Petition, Exhibit xxx

And PLAINTIFF sues Defendant BIRNBAUM for damages, declaratory judgment, and trespass to try title. Trespass to try title is of course for someone complaining of being dispossessed by someone entering upon to dispossess them **after them having had possession**: (Defendant never "entered upon" Plaintiff)

> RCP 782(d) - That the plaintiff **was in possession** of the premises or entitled to such possession. (emphasis added)
> RCP 782(e) - That the defendant **afterward** unlawfully **entered upon** and dispossessed him of such premises, **stating the date**, and withholds from him the possession thereof. (emphasis added)

Such ROBERT O. DOW, however, even if GIROT would have had title to convey, would have held only equitable title, by reason of the deed of trust, legal title lying with Sanger Bank. ROBERT O. DOW, nor his CSD Van Zandt LLC, had standing to bring this trespass-to-try-title suit.

As for the merit of the deed onto CSD by GIROT, she of course had nothing to convey. A deed can only convey what the grantor owns and no more. Property Code Sec. 5.003.

<u>Course of proceedings</u>

Upon a 7 page docket sheet but never even a hearing, the Court on 8-17-2023 issued <u>summary judgment</u> of *"all relief requested"* to Plaintiff, despite summary judgment being a purely dispositive motion, i.e. to abort further process on the other side's claims, not to grant upon a side's own pleadings.

And upon such <u>summary judgment</u> alone, on 8-30-23 issued <u>writ of possession</u> to ejectment Defendant out of his 42 year homestead via 8 armed officers, and all onto the county road.

And then on 9-20-2023 <u>final judgment</u>, stating that the court had already given everything to Plaintiff, by the aforementioned <u>summary judgment</u> of 8-17-2023.

All without ever a trial. All inconsistent with due process.

DEFENDANT, 86 years old, disabled, had of course been living on his 150 acre homestead uninterruptedly for the last 42 years in "visible, open, exclusive, and unequivocal possession". *Madison*, 39 S.W.3d 604

DEFENDANT, claiming real estate deed fraud upon the elderly, counters with damages, damages by theft, declaratory judgment, and trespass to try title.

CENTRAL to this appeal is that there never was a trial, nor a hearing, and the court by summary judgment issuing writ of possession and taking his 150 acre homestead, and his possessions to the county dump. Such is inconsistent with due process and void.

Here are the key events as to the no jury trial and dispossession by the 8-17-2023 summary judgment at issue. Details as in the seven (7) page docket sheet.

8-24-2022 Plaintiff Original Petition

10-20-2022 Plaintiff First Amended

10-20-2022 Plaintiff Motion for Summary Judgment

10-20-2022 Plaintiff proposed Order, that the judge *"is of the opinion that Plaintiff is entitled to judgment ... ... in all things"*

8-17-2023 Judge's Order of 10-20-2022 – granting that the judge *"is of the opinion that Plaintiff is entitled to judgment ... ... in all things"*

8-28-2023 Proposed Writ of Possession - despite there existing no judgment of possession, never a trial, never a hearing

8-30-2023 Writ of Possession – judge issues such stating that this writ was by authority of him on 8-17-2023 having granted summary judgment

8-30-2023 Final Judgment – judge dispossesses Defendant of his 150 acre homestead - despite there never a trial, never a hearing - the judge stating that this Final Judgment was by reason that he already on 8-17-2023 already granted Plaintiff *"all relief requested"*, which 8-17-2023 document was of course **not a judgment at all**, but a mere **order on a motion for summary judgment**:

> "FINAL JUDGMENT
>
> "1. On August 17, 2023 the Court Granted all relief requested in *Plaintiff's Traditional Motion for Summary Judgment.*
>
> "2. Specifically, the Court grants judgment as a matter of law on Plaintiffs declaratory judgment and suit to quiet title claims.
>
> "3. Accordingly, the Court ORDERS, ADJUDGES AND DECREES that Plaintiff was a bona-fide purchaser of the Property and the Warranty Deed with Vendor's Lien, recorded on June 24, 2022 as document number 2022-007473 in the Official Public Records of Van Zandt County, Texas, conveying the subject Property from Lisa Leger Girot, Patricia Moore Barclay and James T. Moore, III to CSD Van Zandt LLC (Plaintiff) is valid and conveys full and complete legal title to Plaintiff, unencumbered by any interests asserted by Defendant."

NEVER CONSIDERED by the Court was the evidence in Defendant's RCP 166a(i) No Evidence Motion for Summary Judgment of 12-5-2022, regarding Plaintiff having no evidence whatsoever of a chain of land deeds supposedly in or coming out of their supposedly inherited estate.

IN SUMMARY: Without ever right to be heard by trial, without Plaintiff ever having to prove his claim, without ever a hearing, with the judge dispossessing 86 year old handicapped Defendant of his 42 year 150 acre homestead – upon an itself unlawful summary judgment, upon an itself inherently fraudulent trespass to try title – all without ever a trial – this is inconsistent with due process, and void:

> **Black's Law Dictionary, Sixth Edition, p. 1574:**
> **Void judgment**. One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Reynolds v. Volunteer State Life Ins. Co., Tex.Civ.App., 80 S.W.2d 1087, 1092. One which **from its inception is and forever continues to be absolutely null**, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. Judgment is a "void judgment" if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or **acted in a manner inconsistent with due process**. Klugh v. U.S., D.C.S.C., 610 F.Supp. 892, 901. See also Voidable judgment.
> [Black's Law Dictionary, Sixth Edition, p. 1574]

The trial court's disposition of the Case

By Writ of Possession, without ever a trial, the 86 year old handicapped Defendant UDO BIRNBAUM was swindled out of his 150 acre 42 year homestead, and all of his possessions.

By Final Judgment, still without ever a trial, the trial court made such a fait accompli, forcing BIRNBAUM into this Appeal.

ISSUES PRESENTED

1. WHETHER a defendant in a trespass to try title suit, whether the defendant is entitled to a jury trial

2. WHETHER in a trespass to try title suit, whether a summary judgment may substitute for a real judgment

3. WHETHER in a trespass to try title suit, whether a summary judgment may even substitute for a judgment of possession, to issue a writ of possession

4. WHETHER in a trespass to try title suit, the jury fee paid, a plaintiff can satisfy his burden of proof by any other than a proving to a jury

5. WHETHER Plaintiff's whole cause is anything but a sales pitch fabrication, recorded by Plaintiff, spun into pleadings, motions, affidavits, co-mingling, etc

6. WHETHER a plaintiff holding only equitable title, by reason of a deed of trust, whether such only equitable title, can support a trespass to try title suit

7. WHETHER limitations precluded trespass to try title on Defendant's 42 year "visible, open, exclusive, and unequivocal possession". *Madison*, 39 S.W.3d 604

8. WHETHER Defendant/Counterclaimant had a right to show his claim to a jury, and whether he still has that right

Statement of the Facts

One cannot convey more than one has

A someone from Louisiana, a LISA L. GIROT, among others, on or about June 2022, sell a 150 acres which they do not own and have no title to, such property in Van Zandt County, Texas, such property being the 42 year homestead of UDO BIRNBAUM, such GIROT sells such for $850,000 to a CSD VAN ZANDT LLC, to manager thereof ROBERT O. DOW.

Plaintiff had actual knowledge of Defendant living there

Such DOW, despite before paying such $850,000 to GIROT, such CSD / DOW having actual knowledge of BIRNBAUM living on the property, files Trespass to Try Title against BIRNBAUM.

One living there cannot "come upon" to dispossess

Trespass to Try Title is of course upon someone supposedly as a squatter trespassing upon a Plaintiff, instead of the Plaintiff coming upon the Defendant:

> RCP 782(d) - That the plaintiff **was in possession** of the premises or entitled to such possession. (emphasis added)
>
> RCP 782(e) - That the defendant **afterward** unlawfully **entered upon** and dispossessed him of such premises, **stating the date**, and withholds from him the possession thereof. (emphasis added)

The lawsuit itself was the fraud

Plaintiff's lawsuit itself was the real estate deed fraud from the start.

Summary of the Argument

The Judgment does not mention **there not having been a trial**, and there never was a trial, as indicated by the Docket Sheet, despite the jury fee having been paid.

The Writ of Possession states that such was upon judgment of possession, but there never was such judgment of possession, as indicated by the Docket Sheet, also by the writ itself, i.e. upon the 8-17-20223 summary judgment, which is not a judgment.

The dispossession of one's 42 year 150 acre homestead, and destruction of one's entire life, under such process, is inconsistent with due process, and void. The Right to trial is sacred. This is America.

ARGUMENT

1.
Defendant was entitled to a trial but was denied such

The docket sheet makes it clear that this was 1) a trespass to try title case, 2) that the jury fee was paid, and 3), yet there was never a trial.

And the trial is where a plaintiff, in a trespass to try title, has to prove his claim of a valid chain of deeds, upon cross examination by the defendant.

As for the right to trial by jury, such is of course sacred. Art. 1, § 15 of the Texas Constitution guarantees that "The right of trial by jury shall remain inviolate." Even further, Art. V, § 10 of the Texas Constitution clarifies that jury trials are available, specifically in civil cases, if one party demands it and pays for it. What this means is that any party taking a case to trial is allowed to demand a jury trial.

Specifically, a document titled Final Judgment was entered on **9-20-2023**. Such judgment is, however, inconsistent with due process in general, to wit RCP 301, as there never was a trial:

> **RULE 301. JUDGMENTS** – The judgment of the court **shall conform to** the pleadings, the nature of the case proved **and the verdict**, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. (emphasis added)

And such judgment is specifically inconsistent with Trespass to Try Title, RCP 804, Section 8, Trespass to try Title, as there never was a trial:

RULE 804. THE JUDGMENT. Upon the finding **of the jury**, or **of the court** where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession. (emphasis added)

And again, as indicated by the docket sheet, ever since CSD Van Zandt LLC bringing suit on **8-24-2022**, there was abundant filings, but NEVER A TRIAL, NEVER A HEARING, the right to trial by jury being sacred.

Such is inconsistent with due process, and Defendant so indicated such to the Court by the following deadline-extending motions on **10-3-2023**:

- *Request for Findings of Fact and Conclusions of Law*
- *Motion for New Trial because there never was a first*
- *Motion to Modify Correct and Reform the Judgment*

And never a response, neither by the Plaintiff, nor the Court.

2.
A summary judgment cannot substitute for a real judgment

As detailed below, the issuance of a writ of possession by this district court, as under the specifics of this case, de facto constituted the by statute specifically proscribed cause of action of ejectment:

PROPERTY CODE, TITLE 4. ACTIONS AND REMEDIES, CHAPTER 22. TRESPASS TO TRY TITLE, SUBCHAPTER A. GENERAL PROVISIONS:

Sec. 22.001. TRESPASS TO TRY TITLE. (a) A trespass to try title action is the method of determining title to lands, tenements, or other real property.

(b) The action of ejectment is not available in this state.

In Texas, eviction must be filed in the Justice Court in the Justice of the Peace Precinct in the county in which the real property is located. See Section 24.004, Texas Property Code.

In fact the district court has no jurisdiction whatsoever over possession, such even having to be made painfully clear to this court before, to this very 294th district court in 2008, then under Hon. Teresa Drum, in Edom Corner vs. It's the Berrys, LLC, 271 S.W.3d 765 (Tex. App. 2008), where a landlord tenant matter somewhat accidentally slid into district court without having been brought into JP court:

> OPINION
>
> Appellant It's the Berry's, LLC d/b/a Mary Ellen's (Berry's) complains of a **district court judgment granting possession of its leasehold to its landlord**, appellee Edom Corner, LLC. Brought as an action for forcible detainer in justice court, **the case was transferred to district court and there tried as though that court possessed original subject matter jurisdiction**. Finding **the district court lacked original subject matter jurisdiction** to try an eviction suit, we will sever, vacate and dismiss the forcible detainer suit and affirm the remainder of the judgment. (emphasis added, also, incidentally, such judgment now having nothing left in it)

The action of ejectment is however, in fact practiced in other states, where a district or circuit court in a trespass to try title type case, is authorized, upon a finding as to superior title, **to itself proceed to "ejectment"** by writ of possession, **but not so in Texas**.

In Texas writ of possession is **only by the JP court**, and only upon judgment of possession, and such only after right to a trial, and such only upon right to such by jury.

3.
A summary judgment cannot substitute for a judgment of possession and issue a writ of possession

RCP 166a(c) Summary Judgment, states:

> The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the no genuine time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

As for the (i) first part, i.e. the *"discovery responses referenced or set forth in the motion or response"*, - there existed no discovery **responses** set forth – discovery had not even started, both sides still awaiting a discovery control plan.

And as to the (ii) second part of *"no genuine issue as to any material fact"* – there were lots of disputed issues of fact, to wit:

- Did the grantors indeed have title to convey?
- Was the property even in the estate the Plaintiff claims it came out of?
- Whether the supposed bona fide purchaser had constructive even actual knowledge of Defendant's interest in the property?
- Whether the statute of limitations precluded bringing lawsuit?
- Just who was the trespasser, was it the Defendant, or the Plaintiff?
- Exactly who came upon and damaged whom?

As for further details, see Defendant's Response to Plaintiff's Motion for Summary Judgment (Appendix) at issue, not even considering Defendant's RCP

166a(i) No Evidence Motion for Summary Judgment (Appendix xx), such never addressed by the Court.

4.

In a trespass to try title suit, the jury fee paid, a plaintiff cannot satisfy his burden of proof by any other than a proving to a jury

The Law is clear. For there to be a JUDGMENT, there has to be a trial, certainly with the jury fee paid:

> **RULE 301. JUDGMENTS** – The judgment of the court **shall conform to** the pleadings, the nature of the case proved **and the verdict**, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. (emphasis added)

And such judgment is specifically inconsistent with Trespass to Try Title, RCP 804, Section 8, Trespass to try Title, as there never was a trial:

> **RULE 804. THE JUDGMENT.** Upon the finding **of the jury**, or **of the court** where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession. (emphasis added)

Expressio unius est exclusio alterius: a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded.

The right to a trial is sacred, the Right to confront one's accuser, in front of one's peers. ANYTHING else is inconsistent with due process.

5.

Plaintiff's whole cause is nothing but a sales pitch fabrication, recorded by Plaintiff, then spun into pleadings, motions, affidavits, co-mingling, etc

The smoking gun in this whole matter only came to light in the much belated and suddenly hurried deposition on 5-9-2023 of the initial perpetrator, LISA L. GIROT, deposition by Katryna Watkins, then attorney for Robert O. Dow / CSD Van Zandt. Such almost exclusively upon the evidence provided by Defendant BIRNBAUM in his Response to CSD's motion for summary judgment.

Wherein in that long deposition GIROT also was examined about a telephone recording Robert O. Dow made, before purchase, such conversation quickly devolving into how Ms. Girot and Mr. Dow would protect each other to handle any potential claim of adverse possession by Mr. Birnbaum.

Upon this 18 minute recording, and the Zoom deposition in its entirety, it becomes clear that **all** of CSD filings, motions, claims, affidavit of Girot and of Dow himself, are **nothing more** and **nothing less** than further hearsay upon hearsay upon the original fabrication by Girot, as recorded by CSD,s Robert Dow, and as further perpetrated.

With never the appearance of a claimed chain of regular chain of deeds. Any trial would have brought out the fraud.

Be it noted that the above is not essential as to whether there was due process. There was not. The above included, however, as an insight into details of "the big picture", as it should have played out in the trial court.

In any cased, a **deed can only convey what the grantor owns and no more**. This is true even if the deed "purports to transfer a greater right or estate in the property." Prop. Code Sec. 5.003

6.
A plaintiff holding only equitable title, not legal title, by reason of a deed of trust, such only equitable title cannot support a trespass to try title suit

Plaintiff, by reason of a deed of trust, conveyed legal title, and retained and retains only equitable title, or as it is sometimes called, equitable estate.

At its core, legal title represents the formal ownership and the right to transfer or sell property. On the other hand, equitable title speaks to the right to use, benefit from, or eventually obtain full ownership of the property.

Equitable title, often referred to as equitable estate, represents an equitable interest in property or right in a property, which is distinct from legal title. While legal title signifies actual ownership and the right to sell or transfer the property, equitable title implies a right to obtain full ownership in the future or to benefit from the property.

It embodies the idea that while someone else might have legal rights (like the name on a deed), the person with equitable title has the right to use, possess, or benefit from the property in some meaningful way.

PLAINTIFF CSD Van Zandt had no standing, certainly not regarding Defendant coming upon it, after having possession.

Same for Sanger Bank, Defendant certainly did not come upon it, to dispossess it.

So WHO, if anyone, should have come, or could have come, and WHEN, to figure out what was going on?

The simple answer is NO ONE should have "bought", caveat emptor, buyer beware. Reasonable diligence by ANYONE, the title company, the lawyers, anyone, as there clearly existed no chain of actual land title DEEDS.

"**A purchaser takes title to real property solely through a deed**. An instrument **that does not operate as a present conveyance** of title to real property **is a contract to convey rather than a deed**." *Smith v. Davis*, No. 12-12-00169-CV, 2013 WL 2424266 (Tex.App.—Tyler 2013, no pet.).

What Plaintiff CSD Van Zandt LLC filed with the Van Zandt County Clerk is NOT a DEED at all, but a CONTRACT to obtain, in the future, a deed from the current holder of legal title, which is SANGER BANK.

7.
Limitations precluded trespass to try title on Defendant's 42 year "visible, open, exclusive, and unequivocal possession". *Madison*, 39 S.W.3d 604

Here exactly as pleaded, including format, as in Defendant's Second Amended etc, Defendant's active pleading:

* * * * START OF DIRECT QUOTE * * * *

"I.
BIRNBAUM ANSWER RE CSD VAN ZANDT

"1. Defendant UDO BIRNBAUM pleads statute of limitation claim preclusion against any and all claims by reason of 41 years peaceable possession of cultivating, using, and enjoying the 150 acre premises at issue. And specifically peaceable and adverse possession against CSD Van Zandt LLC claim of title based on a Gwendolyn Wright Thibodeaux title of April 12, 2002, that 10 year clock started then:

"Sec. 16.030. TITLE THROUGH ADVERSE POSSESSION. (a) If an action for the recovery of real property is barred under this chapter, the person who holds the property in peaceable and adverse possession **<u>has full title, precluding all claims</u>**.
Sec. 16.026. ADVERSE POSSESSION: 10-YEAR LIMITATIONS PERIOD. (a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

<u>Besides, CSD title thru Gwen Thibodeaux estate, such 150 acres never in that estate!</u>"

* * * * END OF DIRECT QUOTE * * * *

IN SHORT, statute of limitations long ago precluded CSD Van Zandt LLC, Robert O. Dow, Sanger Bank, Lenders, Insurers, Lisa Girot, or ANYONE ELSE from attacking Defendant's possession.

8.
<u>Defendant / Counterclaimant had a right to show his claim to a jury, and still has that right</u>

The docket sheet makes it clear that this was 1) a <u>trespass to try title</u> case, 2) that the jury fee was paid, and 3), yet there was never a trial.

And the trial is where a plaintiff, in a <u>trespass to try title</u>, has to prove his claim of a valid chain of deeds, upon cross examination by the defendant.

Also, where a Defendant / Counterclaimant, gets to show his side if them story.

As for the right to trial by jury, such is of course sacred. Art. 1, § 15 of the Texas Constitution guarantees that "The right of trial by jury shall remain inviolate." Even further, Art. V, § 10 of the Texas Constitution clarifies that jury trials are available, specifically in civil cases, if one party demands it and pays for

it. What this means is that any party taking a case to trial is allowed to demand a jury trial.

Defendant was denied a trial, but was entitled to such, and still is.

PRAYER

DEFENDANT PRAYS that this honorable Appeals Court hear him and remand this cause back to the 294th District Court of Van Zandt County for trial and due process:

1. Defendant was entitled to a trial but was denied such

2. A summary judgment cannot substitute for a real judgment

3. A summary judgment cannot substitute for a judgment of possession and issue a writ of possession

4. In a trespass to try title suit, the jury fee paid, a plaintiff cannot satisfy his burden of proof by any other than a proving to a jury

5. Plaintiff's whole cause is nothing but a sales pitch fabrication, recorded by Plaintiff, then spun into pleadings, motions, affidavits, co-mingling, etc

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8. Defendant / Counterclaimant had a right to show his claim to a jury, and still has that right

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G. The seven (7) page docket sheet, jury fee paid, but never a trial
H. Defendant's Response to Plaintiff's Motion for Summary Judgment
J. Defendant's RCP 166a(i) No Evidence MSJ

Certificate of Service

Today February 15, 2024, CMRR 7020 1290 0000 2939 4754, to Twelfth Court of Appeals, 1517 West Front Street Suite 354, Tyler, Texas 75702

Today February 15, 2024, CMRR 7020 1290 0000 2939 4761, to Gregory Smith, Smith Legal PLLC, 110 N. College Ave., Suite 1120, Tyler, TX 75702

Today February 15, 2024, CMRR 7020 1290 0000 2939 7540, to District Clerk, Karen L. Wilson, Courthouse, 121 E. Dallas St., Suite 302, Canton TX, 75103