No. 05-23-00497-CV

In the Court of Appeals
Fifth District of Texas
Dallas, Texas

COMMISSION FOR LAWYER DISCIPLINE,

APPELLANT,

v.

SIDNEY POWELL,

APPELLEE.

Appealed from the 116th Judicial District Court
of Dallas County, Texas
Honorable Andrea K. Bouressa, Sitting by Assignment

APPELLEE'S BRIEF

NO ORAL ARGUMENT REQUESTED

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TERMS AND PARTY REFERENCES

Bar	Commission for Lawyer Discipline ["Bar"]
Powell	Sidney Powell
Omnibus Response	Petitioner's Second Amended Response to Respondent's Hybrid Motion for Summary Judgment and Respondent's No Evidence Motion for Summary judgment. CR Vol. 1 at 1221-1231.
TDRPC	Texas Disciplinary Rules of Professional Conduct
Brief	Appellant's Brief

STATEMENT REGARDING RECORD REFERENCES

References to the Clerk's Record shall be designated as ("CR [#] at [page]") and references to the Clerk's Supplemental Record shall be designated as ("SCR [#] at [page]"). Reference to the Reporter's Record shall be designated as ("RR [page], [line]").

References to Appellant's Brief filed by the Bar are ("Brief at [page]").

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is requested by Powell or by the Commission.

ISSUES PRESENTED

1. Whether Trial Court's Grant of the Summary Judgment to Powell Should be Affirmed.

   A. Whether the Trial Court's Summary Judgment on the No-Evidence Motion in favor of Powell should be affirmed because the Commission had no evidence to prove Powell knew or intended to make any misstatement as required by the three ethical rules alleged?

   B. Whether the Trial Court's traditional summary judgment should be affirmed because the Commission did not rebut Powell's evidence that she neither had knowledge of the erroneous exhibits when they were attached nor intent to misrepresent anything to the court, and they were not material.

2. Whether the Trial Court abused its discretion in the evidentiary rulings?

INDEX OF AUTHORITIES

Rules

Statement of Relevant Facts[1]

This is an appeal by the Bar from the Trial Court's grant of both a "no evidence" summary judgment and a traditional summary judgment on its allegations that Powell violated Texas ethical rules. App. 1; CR Vol. 2 at 3905-3908. The Bar spent a year "investigating" multiple grievances filed against Powell—all by strangers who were offended by media they saw about Powell's cases but who had no personal knowledge of any infraction by Powell. CR Vol. 1 at 1488. The Bar's live Petition alleged violations of six ethical rules, including that Powell's four Federal lawsuits challenging the 2020 election had no reasonable basis and were frivolous. CR Vol. 1 at 480-488.

The Bar filed suit on March 1, 2022. CR Vol. 1 at 17. A year of full-blown litigation ensued that included Powell's production of more than 55,000 pages of documents, a six-hundred-page privilege log, and seven depositions—including the Bar's deposition of Powell. CR Vol. 1 at 2161. Powell assisted the Bar in obtaining depositions of any witness it wanted; the Bar refused to assist Powell in obtaining depositions of its witnesses.

[1] The Commission's statement of facts is a largely irrelevant recitation of the filings it made in the case. It includes no facts that would constitute evidence that Powell violated any rule.

The depositions included the Bar's paid expert. CR Vol. 1 at 13, 15; Vol. 2 at 2852. Each deposition resulted in evidence so damning to the Bar's allegations that it found nothing to cite in any of them to support its case. Ultimately, the Bar had no witness.

The live pleadings for the Bar were its Third Amended Petition and its Omnibus Response. CR Vol. 1 at 480-488. The trial court ruled on objections and issued its summary judgment decision in open court. CR Supp. Vol. 1 at 1-10. The Bar sought reconsideration and a new trial. The Court set that for a hearing, which the Bar had not requested. CR Vol. 2 at 3928. Regardless the trial court scheduled the hearing—at a later date for the Bar's convenience—and gave it every opportunity to point it to any evidence it might have to support its case. CR Vol. 2 at 5284; RR at 6-8. The Bar presented none. CR Vol. 2 at 5285; RR at 10-11.

The court issued an order denying reconsideration. CR Vol. 2 at 5284-5285.

On appeal, the Bar has abandoned three of the original six disciplinary rules under which it alleged violations. The remaining three are based on a simple mistake of someone other than Powell downloading

and attaching two pages of superfluous exhibits in a landscape format as opposed to a portrait format, thereby making them appear "undated"—about an undisputable *immaterial* fact. Prior to filing the pleading to which the exhibits were attached, Georgia media was flooded with accusations that Georgia officials had rushed the purchase of the Dominion voting machines. CR Vol. 1 at 93; App. 7. The date the machines were purchased was not disputed in the federal court. CR Vol. 1 at 93-94.

Despite its prolix briefing, the Bar still cannot point to a single piece of actual evidence that Powell knowingly violated any of the three disciplinary rules to which it has now reduced its claim. There is no evidence that Powell knew of the error in the two pages or intended to misrepresent anything to the Court. Moreover, there was evidence presented by Powell in the Traditional Motion that Powell neither downloaded nor attached those two pages to the pleading. CR Vol. 1 at 1206. Indeed, the suggestion that she would misrepresent anything to a court is contrary to her entire, stellar 45-year career.

What the Bar does not say is very important. By failing to brief issues in this appeal, the Bar has dropped its claims that Powell:

- "had no reasonable basis to believe the lawsuits she filed were not frivolous." CR Vol. 1 at 482;

- intentionally misrepresented the qualifications of the affiant Spyder, CR Vol. 1 at 483; and,

- "took positions that unreasonably increased the costs" and engaged in repeated violations of Rule 11. CR Vol. 1 at 483.

Accordingly, the Bar also dropped corresponding allegations that Powell violated Rules §§ 3.01, 3.02, and 3.04(c)(1). *Brief* at p. 22, 29-30.

Its entire case now rests on whether two of 570 pages in the complaint filed in Georgia were accidentally or intentionally "mis-oriented" in the downloading or copying process, making them appear undated; whether Ms. Powell had knowledge of those mistakes; and whether she intentionally misrepresented them as "undated" to the court. This case is specious.

SUMMARY OF THE ARGUMENTS

De novo review of the district court's decision to grant both the No-Evidence Motion for Summary Judgment and the Traditional Motion for Summary Judgment reveals that the Bar has no evidence that Powell knowingly or intentionally violated any ethical rule. The Bar's complaint has devolved to the one allegation that Powell knowingly and

intentionally attached two pages as exhibits to a 570-page federal filing for the purpose of misrepresenting to the Georgia federal court that those pages of certificates readily available on the Secretary of State's website were "undated." However, the Bar has no evidence that Powell knew of the error or knew they should be dated—much less that she intentionally misrepresented anything. To the contrary Powell presented evidence that she did not know of the error or that those particular exhibits had been attached to the Georgia complaint. CR Vol. 1 at page 86-91; 92-98.

The Bar's attempt to punish Powell under Rule 8.04 also fails, because one cannot *accidentally* be "dishonest, fraudulent, deceitful, or make a misrepresentation." The only evidence in the record is that Powell did not herself attach or provide those two pages, and the pages were accidentally misoriented in landscape rather than portrait, thereby unintentionally cutting off the date. CR Vol. 1 at page 86-91; 92-98.

There is also no evidence that the error was material. It was undisputed that Georgia's purchase of the Dominion machines was rushed. It was front page news throughout the State and subject to much

criticism.[2] The actual date was undisputed and irrelevant. The federal judge who held several hearings did not mention it.

Furthermore, the district court did not abuse its discretion in its evidentiary rulings. Even if the court considered every document in the papers of the case, the Bar has no evidence that Powell knowingly or intentionally attached cut-off documents or made a misrepresentation to a court. RR at 10. The Trial Court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment *de novo*. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When an appellate court reviews both no-evidence and traditional summary-judgment motions, the court first reviews the trial court's summary judgment under the standard of review for no-evidence summary judgments, potentially pretermitting the need for further analysis. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). No-evidence summary judgments are reviewed under the same legal-sufficiency standard as directed verdicts. *Id.*

[2] https://www.ajc.com/news/state--regional-govt--politics/georgia-bets-new-voting-system-amid-high-stakes-election/XVR7Jw5i1J7MiZ11O8xUZK/.

This Court reviews "the trial court's admission or exclusion of summary judgment evidence under an abuse of discretion standard." *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex. App.–Dallas 2007).

ARGUMENTS AND AUTHORITIES

I. The Trial Court's Grant of the Summary Judgment to Powell Should be Affirmed.

The Bar maintains that Powell violated TDRPCs 3.03(a)(1) and (a)(5) and/or 8.04(a)(3) because two misoriented pages of Georgia Secretary of State online documents were attached to the Georgia Complaint filed in federal court, and the Complaint said they were "undated." Indeed, looking at the two pages, they are undated. This was nothing more than a downloading or copying accident, and the Bar presented no evidence otherwise.

It is obvious from looking at them that the page of the certification and the page of the test report were cut off as if downloaded and printed in a landscape instead of portrait, thereby cutting off the date. CR Vol. 2 at 1770. It was a simple mistake, not intentional.

A. The Trial Court's No-Evidence Judgment Must Be Affirmed.

"After adequate time for discovery, a party . . . may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim . . . on which an adverse party would have the burden of proof at trial." Tex. R. Civ. P. 166a(i). "The trial court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). Powell filed a "no-evidence" motion for summary judgment on all six violations the Bar alleged. The Bar appeals only the dismissal of its allegations of Rules 3.01(a)(1), 3.03(a)(5), and 8.04(a)(3). CR Vol. 1 at 978-996.

1. The Elements the Bar Was Required to Prove.

The elements of each Rule at issue in Powell's no-evidence motion for summary judgment are straightforward:

- Rule 3.01 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." TDRPC 3.01. [The Bar abandoned this claim.]
- Rule 3.02 states: "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." TDRPC 3.02. [The Bar abandoned this claim.]

- Rule 3.03(a)(1) states: "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." TDRPC 3.03(a)(1).
- Rule 3.03(a)(5) states: "A lawyer shall not [i] knowingly offer or use evidence that the lawyer [ii] knows to be [iii] false." TDRPC 3.03(a)(5).
- Rule 3.04(c)(1) states: "A lawyer shall not habitually violate an established rule of procedure or evidence." TDRPC 3.04(c)(1) [The Bar abandoned this claim.]
- Rule 8.04(a)(3) states: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." TDRPC 8.04(a)(3).

2. The Law is Clear: The Bar Was Required to Identify Specific Evidence to Prove its Case.

The Bar claims it attached plenty of evidence to its filings, yet it cannot quote any. Cases are legion that a party opposing a no-evidence motion for summary judgment must do more "than refer to whatever may have been 'on file.'" *Rogers v. Ricane Enterprises, Inc.*, 772 S.W.2d 76, 81 (Tex. 1989). "When presenting summary judgment proof in response to a no evidence motion, a party must specifically identify the supporting proof on file that it seeks to have considered by the trial court." *Rollins v. Texas Coll.*, 515 S.W.3d 364, 369 (Tex.App. – Tyler [12th Dist.] 2016, pet. denied).

The burden was on the Bar –not the trial court. "[A]bsent a summary-judgment response identifying evidence raising a fact issue,

the trial court was not required to review [the nonmovant's] other filings to find any such evidence." *Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at *2 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.). Moreover, a nonmovant does not meet his burden to respond to a no-evidence motion for summary judgment by the mere existence in the court's file of a response to an earlier motion for summary judgment. *Saenz v. S. Union Gas Co.*, 999 S.W.2d 490, 494 (Tex.App.-El Paso 1999, pet. denied).

In *Burns v. Canales*, No. 14-04-00786-CV, 2006 WL 461518, at *4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (mem. op.) the court stated: "the trial court is not required, *sua sponte*, to assume the role of [non-movant's] advocate and supply his arguments for him." "Attaching entire documents to a motion for summary judgment or to a response and referencing them only generally does not relieve the party of pointing out to the trial court where in the documents the issues set forth in the motion or response are raised." *Gonzales v. Shing Wai Brass & Metal Wares Factory, Ltd.*, 190 S.W.3d 742, 746 (Tex.App. – San Antonio [4th Dist.] 2005); *see also Bich Ngoc Nguyen v. Allstate Ins. Co.*, 404 S.W.3d 770, 776 (Tex.App. – Dallas [5th Dist.] 2013, pet. denied)

("Merely citing generally to voluminous summary judgment evidence in response to either a no-evidence or traditional motion for summary judgment is not sufficient to raise an issue of fact to defeat summary judgment.").

Specifically, a trial court is not "required to wade through a voluminous record to marshal a respondent's proof." *Rollins*, 515 S.W.3d at 369. Neither is a trial court "required to search the record for evidence raising a material fact." *Blake v. Intco Invs. of Texas, Inc.*, 123 S.W.3d 521, 525 (Tex.App. – San Antonio [4th Dist.] 2003). A party's failure to "direct the trial court to any specific portion of their summary judgment evidence" is insufficient to "raise a fact issue sufficient to defeat" a party's "no-evidence motion for summary judgment." *Arredondo v. Rodriguez*, 198 S.W.3d 236, 239 (Tex.App. – San Antonio [4th Dist.] 2006). Ordinarily, a mere reference to attached evidence is insufficient to avoid summary judgment. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) ("[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary

judgment evidence."). The Bar could only point to large documents—not specific evidence—because it has no specific evidence to defeat either summary judgment motion.

3. The Bar Simply Has No Evidence

In filing its Second Amended Response, CR Vol. 1 at 1221-1231, and its Omnibus Opposition, CR Vol. 1 at 1000-1010, the Bar had the duty "to ensure that the evidence is properly before the trial court for its consideration in ruling on the motion for summary judgment" and to show that the record supported its contentions. *Blake*, 123 S.W.3d at 521; *Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex.App. – Houston [1st Dist.] 1996). The Bar had the "burden of pointing out to the trial court where in the evidence the issues set forth in the motion or response are raised." *Guthrie*, 934 S.W.2d at 826.

The Bar failed to meet its burden. Despite multiple depositions, the Bar "did not request that the trial court take judicial notice of any deposition testimony." *Blake*, 123 S.W.3d at 521. It did not "cite, quote, or otherwise point out to the trial court testimony [it] relied on to create a fact issue." *Id.* The Bar did not even cite its own paid expert or Powell's

testimony. It did not provide the trial court with any of the over 60,000 pages produced to the Bar by Powell. It did not even provide one affidavit.

Instead, the Bar, by its own admission, neglected to include or "mis-identified" multiple exhibits it claims it relied upon in its second amended response. *See Brief* at p. 24. Exhibit A "was identified in, but not actually attached to the 2nd Amended MSJ Response"; Exhibit B "was *actually attached and marked* as Exhibit D"; Exhibit C "was *actually attached and marked* as Exhibit E"; Exhibit D "was *actually attached and marked* as Exhibit F"; and Exhibit E "was *actually attached and marked*" as Exhibit G. *Brief* at p. 24 (emphasis in original). Remarkably, these errors are worse than those for which it seeks to discipline Ms. Powell. Each error the Bar made could be called a false statement to the Court were it to be held to the same standard it seeks to hold Ms. Powell.

Moreover, the Bar purports to have "generally referenced" those "*additional* exhibits" it "*actually* attached" to its second amended response. *Brief* at p. 24 (emphasis in original) – meaning Exhibit A, a "copy of Powell's Response to First Requests for Production of Documents and Rule 196.4 First Request of Production of Electronic Documents"; Exhibit B, a "copy of Powell's Response to Interrogatories"; Exhibit C,

identified as the "trial court's letter ruling dated October 12, 2022"; and Exhibit H, identified as an "[e]-mail from Powell's counsel with Powell's Categorization of Documents Responsive to Requests." *Brief* at p. 24-25 (emphasis in original). The Bar, however, fails to identify the specific sections of the second amended response – such as paragraphs or lines or quotations – where these exhibits were referenced—let alone the specific page number or verbiage it relied on.

There is a reason for that failure. Indeed, it appears to be a false statement to the court. A review of the Second Amended Response, CR Vol. 1 at 1221-1231, confirms that the Bar did not cite any of these exhibits – Exhibit A, Exhibit B, Exhibit C, and Exhibit H – with particularity. None of these exhibits are referenced, summarized, alluded to, or even discussed in the Second Amended Response. CR Vol. 1 at 1221-1231. Even if the exhibits had been properly cited and used by the Bar, they provide no evidence of Powell's knowledge or intent. They are of no evidence of her knowledge that there was an error with the two pages. CR Vol. 1 at 1221-1231. There is no evidence of any kind of dishonesty, falsehood, or intentional misrepresentation. CR Vol. 1 at 1221-1231.

The Bar is not being honest with this Court. *How* the Bar "generally referenced" these exhibits in its Second Amended Response—as it now claims in this appeal—is a mystery. For example, the Bar maintains it "generally referenced" Exhibit A (Powell's Responses to Requests for Production) on pages 8 and 9 of the second amended response. *Brief* at p. 24-25, referencing CR. Vol. 1 at 1228-1229. Upon scrutiny, those pages in the Second Amended Response make no mention of discovery responses, and they certainly do not refer to any particular response to a request for production or any document produced in written discovery. CR. Vol. 1 at 1228-1229. It thus appears the Bar is making a *post hoc* misrepresentation about the evidence it cited in its second amended response in its desperate attempt to protract this spurious litigation even further.

Regardless, the Bar maintains that its "documentary evidence qualified as proper summary judgment evidence, as all such evidence was on file with the court, and the trial court should have considered all such evidence." *Brief* at p. 26-27. The Bar elides well-settled case law: "A party must expressly and specifically identify the supporting evidence on file that it seeks the trial court to consider in a summary judgment motion or

a response to a summary judgment motion." *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 816 (Tex.App.–Houston [1st Dist.] 2007). Yet the Bar did no such thing.

This Court recently reiterated this important rule. The trial court was not required to find and search through the Bar's exhibits, including those it mis-labeled and failed to attach and forgot to cite, to "determine what evidence supported which challenged element." *Landero v. Future Healthcare Sys., Inc.*, No. 05-21-00881-CV, 2023 WL 4571925 at *3 (Tex. App. – Dallas, July 18, 2023); *see also Blake*, 123 S.W.3d at 525 ("The trial court was not required to search the record for evidence raising a material fact issue without more specific guidance."); *Lee*, No. 14-06-00428-CV, 2007 WL 2990277, at *2 ("[A]bsent a summary-judgment response identifying evidence raising a fact issue, the trial court was not required to review [the nonmovant's] other filings to find any such evidence."); and *Burns*, No. 14-04-00786-CV, 2006 WL 461518, at *4 ("the trial court is not required, *sua sponte*, to assume the role of [non-movant's] advocate and supply his arguments for him.").

Even if this Court were to accept as true the Bar's claimed "general references" to the summary judgment evidence – a point Powell does not

concede – the Bar still does not meet its burden to defeat Powell's no-evidence motion for summary judgment. "[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). There is nothing in those documents that speaks to Powell's knowledge and intent regarding the two pages. CR. Vol. 1 at 1221-1231.

As this Court of Appeals has held, a party is "obligated to point out with specificity where in his filings there was evidence on each of the challenged elements of his claims." *De La Cruz v. Kailer*, 526 S.W.3d 588, 595 (Tex.App. – Dallas [5th Dist.] 2017); *see also Gonzales*, 190 S.W.3d at 746 ("Attaching entire documents to a motion for summary judgment or to a response and referencing them only generally does not relieve the party of pointing out to the trial court where in the documents the issues set forth in the motion or response are raised."); *DeGrate v. Exec. Imprints, Inc.*, 261 S.W.3d 402, 408 (Tex.App.—Tyler 2008, no pet.).

4. The Trial Court Properly Considered the Evidence and Found None to Support the Bar's Claims.

For the reasons stated above, the trial court was correct and well-within its discretionary powers to not consider "any document identified by the Bar that the Bar failed to cite or attach", or any document which it "failed to cite or identify." App. 1 at page 2. The only evidence considered by the Court was Exhibit F – the Georgia pleading was found insufficient to overcome Powell's no-evidence motion for summary judgment. App. 1 page 2; CSR at 7.

The Bar did nothing to meet its burden of proof under the elements of each Rule the Bar alleges Powell violated. It presented no evidence that Powell (i) knew the two misoriented pages were attached to the complaint at the time; (ii) knew they were supposed to be dated; (iii) they were material to the case; or, much less, (iv) that she intended any misrepresentation.

Moreover, the Bar's claim that Powell's complaint condemns her is misleading itself. The federal court knew the federal complaint stated the two pages were "undated." The trial court knew those pages were "mis-oriented." Anyone could see that. This is not a case, however, where a lawyer misrepresented his own status –as in a case the Bar relies on:

McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 811-14 (Tex.App. – Dallas 2005, pet. denied); or where a lawyer submitted a will he knew to be fraudulent, *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 882-83 (Tex.App. – Dallas 2011, pet. denied). To the contrary, this prosecution by the Bar is simply unprecedented and has been a colossal waste of time and resources for everyone.

5. Looking at the Entire Record, Summary Judgment Should Be Affirmed.[3]

Given that the Bar's exhibits were properly not considered by the trial court, this Court is "not free to search the entire record, including materials not cited to or relied on by the trial court." *Rollins*, 515 S.W.3d

[3] The Bar claims this Court must review the entire record and that it is entitled to rely on it. The cases it cites for this proposition, however, are inapposite. *See*, e.g., *Lance v. Robinson*, 543 S.W.3d 723 (Tex. 2018). They do not address whether a trial court must marshal a party's evidence or search for evidence not cited by a party. Furthermore, the case that involved an *amended* pleading specifically referenced and incorporated the prior filing, rather than completely supplanting it as an amended filing does by law. *See Mensa-Wilmot v. Smith Int'l, Inc.*, 312 S.W.3d 771, 779 (Tex. App.–Houston [1st Dist.] 2009, no pet.); *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Hous. Sys.*, 255 S.W.3d 619, 633 (Tex. 2008); *State v. Seventeen Thousand & No/100 Dollars U.S. Currency*, 809 S.W.2d 637, 639 (Tex.App.–Corpus Christi 1991, no writ); *Harlan v. Howe State Bank*, No. 05-96-01583-CV, 1999 WL 72619, at *6 (Tex. App.–Dallas Feb. 17, 1999, no pet.); *Radelow–Gittens Real Property Management v. Pamex Foods*, 735 S.W.2d 558, 559 (Tex.App.–Dallas 1987, writ ref'd n.r.e.).

at 369. However, even assuming *arguendo* that the entire record should be considered, the Bar has yet to identify any evidence that proves Powell's knowledge or intent as required by the ethical rules.

The Bar's attempt to use Rule 8.04(a)(3) as a catchall violation fails also. One cannot accidentally engage in "dishonesty, fraud, deceit, or misrepresentation." "Violation of Rule 8.04(a)(3) requires proof of fraudulent intent or an intent to deceive." *In re Berleth*, No. MC H-19-2011, 2020 WL 522710, at *24 (S.D. Tex. Jan. 31, 2020) (finding "insufficient evidence of dishonesty, fraud, deceit, or misrepresentation" under Rule 8.04(a)(3) where there was "no direct evidence" of intent "to deceive the bankruptcy court"); *see also Curtis v. Comm'n for Law. Discipline*, 20 S.W.3d 227, 234 (Tex. App.—Houston [14th Dist.] 2000) (finding violation of Rule 8.04(a) where evidence showed attorney deliberately lied about another attorney's health to obtain a client). "[A]ctual fraud therefore involves dishonesty of purpose or intent to deceive." *Houle v. Casillas*, 594 S.W.3d 524, 564 (Tex. App.—El Paso [8th Dist.] 2019, no pet.); *see also Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986).

B. The Trial Court Properly Granted Powell's Traditional Motion for Summary Judgment.

Powell moved for, and the trial court granted her traditional motion for summary judgment on the same three alleged rules violations the Bar appeals here. Powell included and specifically referenced her own affidavit and that of local counsel in Georgia, Harry MacDougald, who swore that he received the two pages from other lawyers, attached them himself as exhibits, and that Powell was not involved in that process. Powell's own statements are unrefuted—despite the Bar having deposed her on every subject it wanted.

The Bar failed to raise an issue of material fact in its response to Powell's traditional motion for summary judgment. It first argues that "neither Declaration on which Powell relied passes muster." *Brief* at p. 37. It then argues, inexplicably, that the MacDougald and Powell declarations "actually *support* each element of the Bar's claims." *Brief* at p. 38 (emphasis in original).

The Bar's contradictory claims are best answered by the declarations themselves. MacDougald stated he worked with two other attorneys in determining which exhibits to attach to the Georgia

complaint. CR Vol. 1 at 87. The Bar fails to rebut, let alone address, MacDougald's statements that exclude Powell's role in providing or attaching any exhibits.

In addition, Powell's declaration refutes the Bar's contentions that she knowingly made any type of false claim or knowingly offered false evidence. Consistent with her prior statements, and consistent with MacDougald's representations, Powell states she "relied on other counsel to download the challenged exhibits before they were filed." CR Vol. 1 at 93. She further states that she "did not compile the challenged exhibits to the complaints filed in the three other cases." CR Vol. 1 at 94.

Instead of presenting evidence to support any element of the supposed violations of the Rules, the Bar instead alleges Powell's declaration was not "free from contradictions and inconsistencies." *Brief* at p. 38. Upon closer examination, the Bar fails to provide a single example of a contradiction or inconsistency. The Bar further argues that even if Powell's traditional motion for summary judgment carried its burden, "the summary judgment evidence in the record demonstrates a genuine issue of material fact as to each element of the Bar's claims against Powell." *Brief* at p. 40. It reaches this erroneous conclusion

based, in large part, on Powell's generalized response to the Bar's interrogatories. These interrogatory responses, however, were not part of the summary judgment evidence presented by the Bar, and they were general responses—not specific. As explained in the previous section, the trial court did not consider them in granting summary judgment and this Court cannot consider them at this juncture. *See Landero*, No. 05-21-00881-CV, 2023 WL 4571925, at *3; *DeGrate v. Exec. Imprints, Inc.*, 261 S.W.3d 402, 408 (Tex. App. 2008) (observing "we are not free to search the entire record, including materials not cited to or relied on by the trial court").

The Bar deposed Powell at length, yet it found not a single line to use from her deposition in its opposition to either summary judgment motion. The Bar could have deposed any of the other lawyers on the team, including Mr. MacDougald, but it chose not to do that either. The Bar's own "witnesses" had no personal knowledge of any aspect of the case but relied solely on hearsay from the media to file their grievances. *See* CR Vol. 1 at 1488 (discussing the Bar's lack of witnesses and reliance on hearsay).

II. The District Court Properly Exercised its Discretion in its Rulings on Objections.

This Court reviews "the trial court's admission or exclusion of summary judgment evidence under an abuse of discretion standard." *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex. App. 2007). "A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002) (quotation omitted). "When reviewing matters committed to the trial court's discretion, a court of appeals may not substitute its own judgment for the trial court's judgment." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

Due to "the numerous defects in the Commission's exhibits," the trial court "did not consider any document identified by the Commission that the Commission failed to cite or attach." CR Vol. 2 at 3916. The trial court also "did not consider any document attached by the Commission that the Commission failed to cite or identify." *Id.* The only two exhibits considered by the trial court were "the documents marked Exhibits F and G" – the Georgia pleading and Defendants' Consolidated Brief in Support

of their Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Injunctive Relief filed in the Georgia case. *Id*.

Even with that evidence excluded for being defective—being mismatched and not cited, much less not specifically discussed—the trial court also considered evidentiary objections. It sustained, in part, Powell's objection "that the Bar's Exhibit D—the document marked and attached as Exhibit F—is not competent summary judgment evidence." CR Vol. 2 at 3907. Exhibit F, which was the Georgia complaint, was considered for the "limited purpose" that "such pleading was filed by Powell and others." CR Vol. 2 at 3907. The trial court also sustained "Powell's objection that the Bar's Exhibit E—the document marked and attached as Exhibit G—is not competent summary judgment evidence." CR Vol. 2 at 3907. Exhibit G was Defendants' Consolidated Brief in Support of their Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Injunctive Relief (without exhibits) filed in the Georgia Case. CR Vol. 1 at 1221-31 & 1300-1456.

The Bar's arguments that the trial court should have considered evidence it failed to properly attach or failed to cite are without merit.

Equally meritless are the Bar's arguments regarding the trial court's discretion to sustain Powell's objections.

A. Appellant has the Burden of Identifying Evidence.

As previously explained, the Bar's failed its obligations in presenting its summary judgment evidence. Texas law is clear that the nonmovant has the burden of proof once the movant files a no-evidence motion. *See* Tex. R. Civ. P. 166a(i); *JLB Builders, L.L. C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021). "An appellant has a duty to show that the record supports her contentions." *Blake v. Intco Invs. of Texas, Inc.*, 123 S.W.3d 521, 525 (Tex.App. – San Antonio [4th Dist.] 2003).

The burden of presenting evidence properly to the tribunal in this matter fell on the Bar, not the court. *Scudday v. King*, No. 04-20-00562-CV, 2022 WL 2230730, at *6 (Tex.App. – San Antonio June 22, 2022), review denied (Dec. 30, 2022) ("the trial court was not required to search the thirty-two attachments and exhibits Scudday included in his response for evidence raising more than a scintilla of evidence on that element, and this court is not free to do so."). The court is not "required to wade through a voluminous record to marshal a respondent's proof… [nor is it required] to search the entire record, including materials not

cited to or relied on by the trial court." *Rollins*, 515 S.W.3d at 369; *see Landero*, No. 2023 WL 4571925, at *3 (Upholding summary judgment, reasoning: "The trial court was not required to sift through Dr. Landero's exhibits to determine what evidence supported which challenged element.").

The Bar had the burden of providing to the court its evidence in support of its claims—not the Appellee, not the Court. It failed.

B. Powell's Objections were Properly Sustained.

Moreover, the trial court properly sustained Powell's objections to the Bar's summary judgment evidence. A party cannot rely on other pleadings attached as exhibits to its own motion or response as summary-judgment evidence, even if the pleadings are verified. *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660-61 (Tex.1995). "[P]leadings generally do not qualify as summary-judgment 'evidence,' even when they are sworn or verified." *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818 (Tex. 2021).

This is clear cut law in Texas, and the Bar's argument that the facts in *Laidlaw* are different than those in the present case is immaterial. The Bar had the burden of presenting its evidence, and the pleadings

referenced in Exhibits B and C themselves are insufficient to meet this standard. Moreover, the court took them at face value for what they were, but it could do nothing more. The Bar had no evidence to show that Powell knew there was any error in them, that Powell herself attached them, that Powell intended to misrepresent anything, or that Powell knew that anything had been misrepresented. It was a simple, immaterial error made by others on a team of lawyers working around the clock to complete a massive filing. Furthermore, even if the pleadings were sufficient, they show no evidence of Powell's knowledge, no evidence of an ethical violation under any rule—indeed, nothing more than the equivalent of a typographical error.

Finally, even if this Court considers the cut-off pages as substantive evidence, there is no evidence that Powell attached them, knew they were cut off, intended them to misrepresent anything, or that they were material to the federal court at all. More importantly, the Bar has not pointed to any evidence in the record. Indeed, the only evidence is to the contrary –as contained in the Powell and MacDougald affidavits. CR Vol. 1 at 86-91; 92-98. It would have been easy enough for the Bar to depose MacDougald, or any other lawyer on the team, but the Bar chose not to

do so. Remarkably, although the Bar deposed Powell and questioned her about the two pages, the Bar had nothing from that deposition—or any other deposition for that matter—to cite to the court in support of its claims. In fact, it dropped most of its factual allegations and its purported rules violations after depositions proved them utterly baseless. The Bar simply did not meet its burden of proof by any measure—with or without the evidence the trial court properly excluded.

C. Sauce for the Goose is Sauce for the Gander.

Reason, common sense, and all rational policy considerations dictate against finding an ethical violation for what is obviously a mistake by good lawyers working on a massive filing under extreme time pressures. No lawyer could practice under the "errorless" standard the Bar seeks to impose on Powell—including the lawyers for the Bar themselves. That standard is rejected by the very Rules the Bar alleges Ms. Powell violated. *See* TDRPC 3.03(a)(1) ("A lawyer shall not *knowingly* make a false statement of *material* fact or law to a tribunal."). *See also Joyner v. Comm'n for Law. Discipline*, 102 S.W.3d 344, 347 (Tex. App. 2003) (Discussing comment 7 to Rule 1.01, which states a lawyer acting in good faith is not subject to discipline for neglect "for an isolated

inadvertent or unskilled act of omission, tactical error, or error of judgment.").[4] In the height of irony, the Bar "admittedly mislabeled and mis-referenced the exhibits attached to its Second Amended MSJ Response." *Brief* at p. 26. The Bar made far more errors in its summary judgment filings—similar misrepresentations to the court about its exhibits—than others on Powell's team made in attaching two misoriented pages to the Georgia compliant. The Bar lawyers cannot themselves practice under the standard to which they want to hold Powell and to sanction her, yet it pursues this appeal.

Moreover, this Court should be advised that not only were no sanctions sought in the Georgia case, but Judge Batton granted a temporary restraining order to secure the voting machines. CR Vol. 1 at 48. The federal court had no problem with the two misoriented pages, which counsel would have corrected had the case proceeded further in the district court. Accordingly, these proceedings should never have been

[4] Federal circuit courts also reject the Bar's proposed perfection standard. *Quality Molding Co. v. Am. Nat. Fire Ins. Co.*, 287 F.2d 313, 316 (7th Cir. 1961) ("However, we do not initiate disciplinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.").

initiated, and the Bar should not have appealed this matter. Two accidentally misoriented pages of immaterial and superfluous exhibits are not grist for ethical penalties.

CONCLUSION

For these reasons, the judgment of the district court granting summary judgment against the Bar should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Texas Rules of Appellate Procedure, the foregoing brief on the merits contains approximately 5,991words (total for all sections of brief that are required to be counted), which is less than the total words permitted by the TRAP. Counsel relies on the word count of the computer program used to prepare this petition.

/s/ Robert H. Holmes
Robert H. Holmes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been delivered to the attorneys of record for Appellants on September 19, 2023, by efileTexas.gov.

/s/ Robert H. Holmes
Robert H. Holmes

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