# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-15-00406-CV

FRED WIEGAND A/K/A F. WIEGAND JR. A/K/A F.W.WIEGAND JR. A/K/A F.W.WIEGAND A/K/A FRED WIEGAND II A/K/A FRED W. WIEGAND JR. A/K/A FRED WIEGAND, JR. A/K/A FREDERICK WIEGAND JR. A/K/A/ FREDERICK W. WIEGAND, JR. A/K/A FREDERICK WILLIAM WIEGAND, JR. A/K/A FEDERICO WIEGAND LEE, INDIVIDUALLY AND AS PRESIDENT OF WIEGAND HERMANOS PERFORADORES S.A., A MEXICAN CORPORATION, APPELLANT

V.

FREDRICA KINNARD, STEVE KINNARD, AND CASSANDRA SNIDER-DILLAVOUX, APPELLEES

On Appeal from the 421st District Court
Caldwell County, Texas
Trial Court No. 09-0-369, Honorable Todd A. Blomerth, Presiding

March 29, 2016

## MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Frederick Wiegand, Jr. (Wiegand), acting *pro se*, appealed from a final judgment. In that judgment, Fredrica Kinnard, Steve Kinnard and Cassandra Snider-Dillavoux (collectively referred to as Kinnard) were awarded declaratory, monetary, and injunctive relief against Wiegand. According to both the docket sheet appearing in the clerk's

record and recitals contained in the judgment, Wiegand did not appear at the trial despite having filed an answer to Kinnard's pleadings.

With due respect to Wiegand, his brief is rather confusing. Nonetheless, we interpret his complaints as pertaining to notice of the trial date, the standing of one plaintiff to sue, the boundaries of real property set by the trial court, and the failure of the trial judge to recuse himself. Each has been considered in turn, and, for the reasons stated below, each is overruled.

*Preliminary Matter*

Though an appellate record generally consists of both the clerk's and reporter's record, TEX. R. APP. P. 34.1 (stating that the appellate record consists of the clerk's record and the reporter's record if the latter is necessary to the appeal), only the former was filed here. As he explained in a letter to this court, Wiegand did "NOT request[] from the trial.court [sic] court reporter, nor the trial.court [sic] Clerk . . . and does NOT request, and does NOT want, and will NOT request, the 421st Trial Court's Reporter's Record of the non-jury surprise trial dated 8 September 2015, and will NOT pay for it (unless ORDERED to do so by the 7th COAppeals) [sic]."[1] (Emphasis in original). Similarly absent is any evidence that he requested the trial court to enter findings of fact or conclusions of law. "When there is no reporter's record and findings of fact and conclusions of law are neither properly requested nor filed, the judgment of the trial court implies all necessary findings of fact to sustain its judgment." *Sharp v. Woodridge*

[1] The burden to bring forward a record establishing the error about which he complains lies with the appellant. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990); *Moore v. Hurtado*, No. 07-14-00268-CV, 2015 Tex. App. LEXIS 6073, at *6 (Tex. App.—Amarillo June 16, 2015, no pet.) (mem. op.). Should appellant want the record, he must request it in accordance with the rules of appellate procedure. Should he not want it, then he need not request it but must suffer the legal consequences arising from that choice.

*Props. Co.*, No. 05-13-00869-CV, 2015 Tex. App. LEXIS 862, at *4-5 (Tex. App.—Dallas January 29, 2015, no pet.) (mem. op.); *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.) In other words, we must presume that the missing reporter's record supports the decisions of the trial court. *See Bennett v. Cochran*, 96 S.W.3d 227, 230 (Tex. 2002) (stating that the "court of appeals was correct in holding that, absent a complete record on appeal, it must presume the omitted items supported the trial court's judgment.")

Furthermore, we cannot accept attachments to an appellant's brief as a substitute for a reporter's record. This is so because appellate courts cannot consider documents attached to an appellate brief that do not appear in the record. *Capps v. Foster*, No. 10-14-00061-CV, 2016 Tex. App. LEXIS 626, at *15 n.7 (Tex. App.—Waco January 21, 2016, no pet.) (mem. op.). Similarly, statements in a brief that are unsupported by the record cannot be accepted as facts by an appellate court. *Bard v. Frank B. Hall & Co.*, 767 S.W.2d 839, 845 (Tex. App.—San Antonio 1989, writ denied). With that said, we turn to the issues at hand.

*Notice of Trial*

We address Wiegand's second issue first. It pertains to prior notice of the trial date. He posits in passing that the "defendants" cannot prove he received notice of that date. We say "in passing" because he supported the contentions with neither argument nor citation to the record and legal authorities. We overrule the issue.

Given the absence of supporting argument and citation to the record and legal authority, the issue was not properly briefed. Being improperly briefed, it presents nothing for review. TEX. R. APP. P. 38.1(i); *Roper v. CitiMortgage, Inc.*, No. 03-11-

00887-CV, 2013 Tex. App. LEXIS 14518, at *62-63 (Tex. App.—Austin November 27, 2013, pet. denied) (mem. op.)

We further note that the judgment entered by the trial court recites that Wiegand "although duly noticed, did not appear. . . ." Wiegand did not attempt to contradict this recital via a motion for new trial accompanied by affidavit or other competent evidence. Nor does anything of record contradict the recital. This circumstance, therefore, obligates us to accept the recital as true. *Bard v. Frank B. Hall & Co.*, 767 S.W.2d at 845 (stating that recitals in a judgment are the highest evidence of verity and taken as true when there is nothing of record to contradict them); *accord, GE Capital Assur. Co. v. Jackson*, 135 S.W.3d 849, 853 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding that "where the court order stated that all persons who were entitled to citation were cited, and where there is no evidence to the contrary, we will presume that citation was given to all persons who were so entitled.")

*Standing*

Next, Wiegand asserts that one of the appellees, Cassandra Snider-Dillavoux, lacked the competence to prosecute the claims at trial. We overrule the issue.

As previously mentioned, the absence of a reporter's record obligates us to deem the judgment as implying all necessary findings of fact to sustain it and to presume that the evidence presented at trial supports the judgment. Furthermore, this presumption applies to matters of standing. *Sharp v. Woodridge Prop. Co. L.P. supra* (concluding that because there was no court reporter's record or findings of fact and conclusions of law properly requested or filed, the court presumes sufficient facts support the judgment and Woodridge's standing to prosecute his claim). Given Wiegand's refusal to secure

the reporter's record and the absence of pertinent findings, we presume that there was sufficient evidence to support the implicit finding that Cassandra had standing and was otherwise competent to prosecute her claims.

*Boundary Line*

Next, Wiegand appears to question the accuracy of the boundary lines to real property declared by the trial court in its judgment. In support thereof, he urges such things as abandonment, the improper building of fences on public property, reliance, trespass, theft, the existence of "senior surveyors," and the like. So too does he support his argument by citing to a "power point" and other items attached to his appellate brief. However, nothing suggests that the information attached to his brief were part of the record developed at trial; thus, those things are beyond our consideration. *Capps v. Foster, supra*. And, because Wiegand opted not to request a reporter's record, we must presume that sufficient evidence supports the trial court's designation of the boundaries in question. *Bard v. Frank B. Hall & Co.*, *supra*; *GE Capital Assur. Co. v. Jackson, supra*. So, we overrule the issue.

*Recusal*

Finally, Wiegand intimates that the trial judge was not impartial. The clerk's record contains an unverified "Motion to Recuse" the trial judge. That same record does not indicate whether anyone acted upon the motion. Yet, the judge in question presided over the eventual trial and rendered the judgment under attack.

Per Texas Rules of Civil Procedure 18a, a motion to recuse must be verified. TEX. R. CIV. P. 18a(a)(1). Being unverified, the motion at bar failed to trigger the trial judge's obligation to either 1) recuse or 2) refer the motion to the presiding judge of the

administrative judicial district for determination. *See Barron v. State Atty. Gen.*, 108 S.W.3d 379, 383 (Tex. App.—Waco 2003, no pet.) (stating that such an obligation does not "come into play unless and until a formal timely, written and verified motion to recuse is filed."); *accord*, *Lara v. State*, No. 07-13-00240-CR, 2014 Tex. App. LEXIS 5875, at *3 (Tex. App.—Amarillo May 30, 2014, no pet.) (involving an unverified, oral motion to recuse and stating that the "procedural requisites for recusal are mandatory, so that a party who fails to comply waives his right to complain of a judge's failure to either recuse himself or refer the motion to the presiding judge.") Thus, the record before us fails to illustrate that the trial judge somehow erred in presiding over the litigation, and we overrule the issue.

Having overruled Wiegand's issues, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice