

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

DAVID McINTYRE,	§	
and	§	
MADELEINE CONNOR	§	
Plaintiffs,	§	
vs.	§	
 	§	
ERIC CASTRO,	§	NO. 1:15-CV-001100-RP
NANCY NAEVE	§	
GARY SERTICH,	§	
LEAH STEWART	§	
and	§	
CHUCK McCORMICK,	§	
Defendants.	§	
 	§	

**SIXTH AMENDED ORIGINAL COMPLAINT FOR DECLARATORY JUDGMENT,
DAMAGES UNDER 42 U.S.C. § 1983 FOR THE DEPRIVATION OF
CONSTITUTIONAL RIGHTS, AND APPLICATION FOR TEMPORARY AND
PERMANENT INJUNCTIONS**

TO THE HONORABLE U.S. DISTRICT JUDGE ROBERT PITMAN:

David McIntyre and Madeleine Connor, Plaintiffs, file this Sixth Amended Original Complaint for Declaratory Judgment, Damages under 42 U.S.C. § 1983 for Deprivation of Constitutional Rights, and Application for Temporary and Permanent Injunctions.

PARTIES

1. Plaintiff David McIntyre is an individual who resides and owns real property in Travis County, within the boundaries of the Lost Creek Municipal Utility District/Lost Creek Limited District. Plaintiff pays ad valorem taxes and utility fees to the District.
2. Plaintiff Madeleine Connor is an individual who resides and owns real property in Travis County, within the boundaries of the Lost Creek Municipal Utility District/Lost Creek Limited District. Plaintiff pays ad valorem taxes and utility fees to the District.
3. Eric Castro was a Director and President of the Lost Creek Municipal Utility District. This suit seeks injunctive relief and declaratory judgment against Mr. Castro in his official capacity as a MUD Director. Plaintiff Connor also sues for compensatory and punitive damages under 42 U.S.C. § 1983 against Mr. Castro in his individual capacity for the deprivation of First and Fourteenth Amendment rights and for retaliation for engaging in the same.

4. Nancy Naeve was a Director of the Lost Creek Municipal Utility District. This suit seeks injunctive relief and declaratory judgment against Ms. Naeve in her official capacity as a MUD Director. Plaintiff Connor also sues for compensatory and punitive damages under 42 U.S.C. § 1983 against Ms. Naeve in her individual capacity for the deprivation of First and Fourteenth Amendment rights and for retaliation for engaging in the same.

5. Gary Sertich was a Director of the Lost Creek Municipal Utility District. Plaintiffs bring this suit seeking injunctive relief and declaratory judgment against Mr. Sertich in his official capacity as a MUD Director. Plaintiff Connor also sues for compensatory and punitive damages under 42 U.S.C. § 1983 against Mr. Sertich in his individual capacity for the deprivation of First and Fourteenth Amendment rights and for retaliation for engaging in the same.

6. Leah Stewart was a Director of the Lost Creek Municipal Utility District. This suit seeks injunctive relief and declaratory judgment against Ms. Stewart in her official capacity as a MUD Director. Plaintiff Connor also sues for compensatory and punitive damages under 42 U.S.C. § 1983 against Ms. Stewart in her individual capacity for the deprivation of First and Fourteenth Amendment rights and for retaliation for engaging in the same.

7. Chuck McCormick was a Director of the Lost Creek Municipal Utility District. This suit seeks injunctive relief and declaratory judgment against Mr. McCormick in his official capacity as a MUD Director. Plaintiff Connor also sues for compensatory and punitive damages under 42 U.S.C. § 1983 against Mr. McCormick in his individual capacity for the deprivation of First and Fourteenth Amendment rights and for retaliation for engaging in the same.

JURISDICTION AND VENUE

8. The Court has subject-matter and supplemental jurisdiction of Plaintiffs' state-law claims under the Texas Uniform Declaratory Judgment Act. *See* 28 U.S.C. § 1367; Tex. Civ. Prac. & Rem. Code § 37.003-.004; Tex. Const. Art. 5, § 8; and Tex. Gov't Code §§ 24.007 & 24.008. Under its supplemental jurisdiction, the Court may decide Plaintiffs' state-law claims of first impression in accordance with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The Court has federal-question jurisdiction of Plaintiffs' First Amendment retaliation claims under 28 U.S.C. § 1331.

9. Venue is proper in the Western District of Texas, Austin Division, pursuant to Tex. Civ. Prac. & Rem. Code §§ 15.002(a)(1) and 42 U.S.C. § 1983, as all of the events alleged took place in Travis County, Texas.

10. Governmental immunity does not protect government officials sued in their official capacity for illegal acts performed outside the scope of their government employment. *See Hawkins, et. al. v. El Paso First Health Plan, Inc.*, 214 SW3d 709 (Tex. App.—Austin 2007, pet. denied) (trial court correctly denied the Commission's plea to the jurisdiction because sovereign immunity does not protect a state agency from a suit brought by a party claiming that the state agency has acted outside of its authority and seeking to determine the proper construction of the applicable statutes and to obtain a declaration of the party's rights under the statutes).

11. Taxpayer standing is an exception to the general rule that the plaintiff must show a particularized injury distinct from that suffered by the public. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 555-56; *Hendee v. Dewhurst*, 228 S.W.3d 354, 373-74 (Tex. App.—Austin 2007, pet. denied). A plaintiff relying on taxpayer standing can seek to enjoin prospective expenditures of public funds, but cannot recover funds already expended. *Williams v. Huff*, 52 S.W.3d 171, 180 (Tex. 2001). To establish taxpayer standing, a plaintiff must show that (1) he is a taxpayer, and (2) public funds are to be expended on the allegedly illegal activity. *Id.* at 179.

12. Qualified immunity is an affirmative defense which shields government officials from personal liability for civil damages under § 1983 “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity does not protect the “plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). When qualified immunity is asserted, a court must determine: (1) whether the allegations or facts, viewed in the light most favorable to the plaintiff, show that the defendant-officer violated a constitutional right and (2) if so, whether the constitutional right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). The evidence will show that Defendants are not entitled to a qualified immunity defense, as the rights asserted are clearly established; and Defendants’ conduct was motivated by evil motive and intent, or that it involved reckless or callous indifference to the federally protected rights of Plaintiffs. *See Smith v. Wade*, 461 U.S. 30, 55 (1983) (a plaintiff may recover punitive damages from an officer sued in his individual capacity). *See also, Ex parte Young*, 209 U.S. 123 (1908) (holding that suits in federal courts against state officials in their individual capacity may proceed when the official has acted unconstitutionally).

FACTS

13. The Lost Creek Municipal Utility District was created under and was subject to the authority of Article XVI, Section 59, of the Texas Constitution. *See Tex. Const. Art. 16, § 59; Tex. Water Code §§ 49, et seq.; 54.011, 54.201*. A MUD is a political subdivision of the State and is one of several types of special districts that function as independent, limited governments. MUDs are authorized by the Texas Commission of Environmental Quality to provide water, sewage, drainage, fire prevention, and other services within the MUD boundaries. A MUD is managed by a Board of Directors elected by property owners within the District. Directors serve four-year terms.

14. The Lost Creek Municipal Utility District was converted to a Limited District upon full-purpose annexation by the City of Austin on December 15, 2015. At the time of annexation, all MUD Directors became Limited District Directors. The tax funds and utility surpluses then existing with the MUD were transferred to the Limited District upon annexation.

15. During the early development of the Lost Creek neighborhood, the homeowners were initially required to fund and build sidewalks in front of their homes. For a variety of reasons, two likely being practicality and unsightliness, many homeowners never built their sidewalks. For example, some homeowners could not build a sidewalk without incurring huge expenses because retaining walls and major excavation would be necessary. More specifically, some homes are

situated on hills or steep grades that slope directly down to the street curb, which would make the construction of a sidewalk senseless and prohibitively expensive. And, in some areas, streets narrowed considerably, due to the street's passage through canyons and cliff-sides, making the construction of a sidewalk virtually impossible. Inarguably, sidewalk construction in some parts of the neighborhood was simply not practical or possible, and the MUD Directors who served for nearly forty years, did not demand that homeowners build out their sidewalks.

16. In 2012, a group of homeowners discovered that Director Naeve was to propose a massive project to install new sidewalks throughout the District, using surpluses from its utility functions and ad valorem taxes. Specifically, there was a movement initiated by the MUD to build all of the sidewalks that had never been installed by each original homeowner. In response to the expensive, unsightly, and impractical plan, a group of homeowners, including Plaintiffs, actively opposed the plan, and ultimately proposed that the massive sidewalk installation plan be voted on by the neighborhood. Accordingly, in September 2013, with 50% of the 1,200 homes participating, a referendum on the sidewalk proposal was held. A super-majority of the voters rejected the plan (as well as a smaller-scaled plan along Lost Creek Blvd). Plaintiffs and their fellow sidewalk opponents rejoiced, but the fruit of their political efforts were short-lived.

17. By mid-2015, not only had the MUD secretly installed several stretches of sidewalks throughout the District in opposition to its constituents' vote, it began a campaign to install a four-block length of sidewalks along Lost Creek Blvd.

18. When Plaintiffs and other taxpayers learned in mid-2015 that the MUD had been installing sidewalks and were proposing more, in direct contravention of their vote, they sprang into action. As a result of several open-records requests to Travis County, Plaintiffs discovered that the MUD and Directors named individually herein were improperly lobbying the County for matching bond moneys in order to install the sidewalks. It is believed that Director Naeve and Director Stewart met with County officials and indicated that the neighborhood had changed its position on the sidewalks (due to an April 1, 2015, cyclist's fatality on Lost Creek Blvd.) and that the neighborhood was fully behind the plan to install sidewalks along Lost Creek Blvd. Furthermore, communications between Director Naeve, Director Stewart, Tom Clark (the former general manager), and others, revealed that one or more of the Directors improperly influenced a county engineer (Joe Hall) to issue a report concluding that a sidewalk along Lost Creek Blvd. would enhance safety.¹

19. At a regularly-called MUD meeting in August, the Directors issued false data, purporting to show that all of the homeowners directly affected by the project (with homes bordering Lost Creek Blvd.) were in favor of the project, except for Plaintiff McIntyre (and one not responding). Their data, reflected in a map with the homes responding "yes" shaded in blue, indicated that 9 out of the 11 homes had approved the project. However, one homeowner who was in the audience respectfully raised his hand and tried to object to the data as incorrect (at least with respect to his "yes" vote), but he was gaveled down by Director Castro and not allowed to speak. Other homeowners in the audience tried to speak, apparently to contest the data, and they were gaveled down by Director Castro as well.

¹ <http://www.statesman.com/news/news/local/lost-creek-board-pursues-sidewalk-plans/nnT6L/>

20. On October 26, 2015, Plaintiff McIntyre presented an application for a temporary restraining order to the duty judge that week, the Honorable Karin Crump. McIntyre was prepared to argue that the Directors were poised to vote on the 4-block sidewalk project along Lost Creek Blvd., at the next regularly-called MUD meeting on October 27, 2015, and that such an action ripened the controversy. Judge Crump refused the application and noted the refusal on the Court's docket sheet. Judge Crump further indicated that McIntyre could return to present his TRO for hearing after the circumstances presented an emergency.

21. The next day, at the regularly-called meeting on October 27, 2015, the Directors voted not to go forward with half of the project; specifically, the part of the project that would have directly abutted Plaintiff McIntyre's real property was not approved. However, without any enforceable agreement to the contrary, the MUD/LD Directors could change course and vote to approve the project. More importantly, Plaintiffs have alleged throughout this lawsuit that the MUD Directors lack the authority to spend the funds on the project, and as a result, they enjoy taxpayer standing to oppose the sidewalk project and future sidewalk projects. *See Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001); *cf. Wilson v. Whitmire*, NO. 01-03-01059-CV (Tex. App.—Houston [1st Dist.] 2004) (plaintiff lacked standing because he did not seek to enjoin future, allegedly illegal expenditure of public funds).

22. After his initial application for a temporary restraining order was refused, Plaintiff McIntyre presented two subsequent applications to the Court for temporary injunctive relief, because the sidewalk project complained of had commenced and was ongoing. However, McIntyre's requests to temporarily stop the project and maintain the status quo were denied. The improper denial of the TROs, which would have preserved the status quo until a temporary injunction could be heard, did not eliminate a justiciable controversy. *See id.; Pinnacle Gas Treating, Inc. v. Read*, 104 S.W.3d 544, 545 (Tex. 2003); *see Tex. Civ. Pract. & Rem. Code § 51.014(a)(4)* (interlocutory appeal for denial of a temporary injunction).

23. In an effort to remedy the clear error where Plaintiff McIntyre's three TROs were denied, he filed an application for mandamus relief, but it was also denied. *See In re David McIntyre*, No. 03-15-00707-CV (Tex. App.—Austin 2015) (orig. proceeding). Since McIntyre's three TROs were denied, one purportedly for lack of ripeness, and two subsequent denials wherein once the duty judge stated his reasoning was that "the MUD can do whatever it wants," Defendants have argued mootness. See Doc. 3 at ¶¶ 18-19.

24. During the pendency of this suit and prior to this suit, Plaintiffs have publically criticized the MUD Directors for the use of tax and utility surplus funds to build sidewalks throughout the District. Both Plaintiffs have spoken out during citizen comment at MUD meetings and, additionally, Connor posted complaints of the MUD Directors' actions on a neighborhood message board, NextDoor.² The Statesman also published an article, wherein Connor was quoted about the grounds of the lawsuit. <http://www.statesman.com/news/news/local/lawsuit-sidewalk-unwanted/npfJQ/>

² Defendants have transcribed and kept a log of Connor's statements at citizen comment. No other citizen subject to the MUD/LD's taxing authority has had their public comments transcribed and preserved.

25. Shortly after removing this case to federal court, the MUD Directors issued an electronic communication to the District residents, commenting in a pejorative way about both Plaintiffs and the instant suit. See December 9, 2015, Lost Creek Municipal Utility District's e-UPDATE, reproduced at <http://lostcreekmud.org/default.aspx?section=news&id=490>

26. Since filing the instant suit and complaining about the MUD Directors' actions, the MUD Directors have orchestrated a campaign of personal destruction against Plaintiffs. The Directors and their agents and assigns have lied about Connor and defamed her, and caused her to be ridiculed in the District for the express reason of filing the lawsuit on behalf of Plaintiff McIntyre. Further, all of the Defendants participated in an action to recall Plaintiff Connor from her position as Lost Creek Neighborhood Association president, for the express reason of filing the instant suit on behalf of Plaintiff McIntyre.³ All of the Defendants were present and facilitated an aggressive mob on December 13, 2015, wherein approximately 125 residents jeered, shouted down, booed, cat called, and laughed at Plaintiff Connor for more than two hours during a neighborhood association meeting, causing Connor severe emotional distress. When residents complained on NextDoor of Connor's treatment by the mob, their postings were removed by the NextDoor neighborhood "leads," who are friends and/or supporters of the Directors and have stated that they were angry about the suit brought by Connor. Connor's access to the website was removed to completely silence her dissent concerning the deprivation of her first-amendment rights and retaliation for engaging in the same.

REQUESTS FOR DECLARATORY RELIEF

COUNT ONE

27. Plaintiffs seek a judicial determination under Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ch. 37, that the expenditures of taxpayer and utility-surplus funds on the construction of sidewalks within the District exceeds the Directors' authority under the Texas Constitution and the Texas Water Code, chapters 13, 49 and 54. Specifically, the Directors have allocated tax funds and utility surpluses to construct sidewalks, and attempt to justify the tax and utility surplus expenditures by labeling such projects as "recreational facilities" under the Water Code or for the general "safety" of pedestrians.

28. Plaintiffs seek a construction of the statute under the Code Construction Act, to determine whether a "sidewalk" can be construed as a "recreational facility." See Tex. Civ. Prac. & Rem. Code § 37.004 (a person whose rights, status, or other legal relations are affected by a statute may have determined any question of construction or validity arising under the statute and obtain a declaration of rights, status, or other legal relations thereunder); Tex. Gov't Code § 311.011(a) (words shall be read in context with other provisions and construed according to the rules of grammar and common usage), § 311.021(3) (a just and reasonable result is intended).

29. The powers and duties of a MUD are limited to the following: the supply of water, conservation, irrigation, drainage, firefighting, solid waste collection and disposal (including

³ All of the Directors signed an undated Petition to recall Connor except for Director Sertich. All of the Directors' spouses signed the petition. Again, the primary reason for the petition recites that Connor, President of the Lost Creek Neighborhood Association had a "conflict of interest" in filing the instant lawsuit against the Directors.

recycling activities), wastewater treatment, deed restriction enforcement, and recreational facilities. While a MUD can develop, maintain, or acquire parks or “recreational facilities,” MUDs are prohibited from issuing bonds to pay for these facilities. They can, however, set and charge user fees. See Tex. Water Code § Sec. 54.201 (“a district shall have the functions, powers, authority, rights, and duties which will permit accomplishment of the purposes for which it was created”); see also, Texas Commission on Environmental Quality website, <https://www.tceq.texas.gov/publications/gi/gi-043.html> (guide on water districts’ powers).

30. The construction of sidewalks is not an enumerated power of a MUD, unless a “sidewalk” is construed to be a “recreational facility,” in and of itself, pursuant to Tex. Water Code §§ 49.461-464. That is, even though the Water Code appears to include “sidewalk” in the definition of a “recreational facility,” the definition is not reasonable or related to the purpose of a MUD, and must be construed along with other provisions of the Water Code. Tex. Gov’t Code §§ 311.011(a), .021(3).

31. The Texas Legislature could not have intended that a “sidewalk,” or a “landscaping,” or a “greenbelt” standing alone, to be a “recreational facility,” because when construed with other relevant provisions, such a construction would not make sense. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (the cardinal rule of statutory construction is that the judiciary is to give effect to the intent of the legislature). A sidewalk that follows only one city block, and does not connect to any other walkway, sidewalk or trail, cannot be simply labeled a “recreational facility” in an attempt to justify the expenditure of nearly \$100,000 of utility surplus and tax revenue on the project.

32. Furthermore, a sidewalk that goes nowhere and serves no one cannot be construed as a “recreational facility” because a MUD would never be able to “charge fees directly to the users of the [sidewalk]” or “to water and wastewater customers of the district to pay for all or part of the cost of their development and maintenance,” or enforce the payment of unpaid fees to use a sidewalk through legal restitution, etc. See Tex. Water Code § 49.464. Therefore, Plaintiffs seek a construction of the Water Code to hold that the Legislature did not intend to provide for the construction of sidewalks as self-contained “recreational facilities,” such as a park, pool, or athletic facility. Rather, the Legislature clearly intended that the word “sidewalk” meant a walkway within or servicing a true recreational facility, and that such a walkway could be properly constructed with taxpayer funds. Accordingly, Plaintiffs seek a declaration that the use of taxpayer funds on sidewalks, as self-contained “recreational facilities” within the District is not authorized by the Water Code, and are thus, are non-discretionary, ultra-vires acts under Texas law.

COUNT TWO

33. Plaintiffs seek a declaration that sidewalks may not be built within the District with bond funds supported by ad valorem taxes. See Tex. Water Code § 49.464 (a district may not issue bonds supported by ad valorem taxes to pay for the development and maintenance of recreational facilities). Defendants argue that § 49.464 is inapplicable because the MUD did not issue the bonds. However, the bonds were purportedly issued by Travis County, which were arguably supported by ad valorem taxes, at least paid in part by taxpayers within the District. As such, Plaintiffs seek a declaration that the sidewalk project at issue in this suit violates the funding

provisions of the Texas Water Code, specifically section 49.464. In any event, Plaintiffs have been informed that the funds at issue had been “reassigned” by Travis County after the 2013 referendum, and at the very least, Plaintiffs should be entitled to discovery on the source of the funds supporting the project and the measures taken by the Directors to obtain the funds.

COUNT THREE

34. Plaintiffs seek a declaration that certain Directors attempted to improperly influence a county engineer and a county commissioner, in order to falsely provide legitimacy to the sidewalk project, and that such actions were not discretionary but ultra vires under Texas law. The powers and duties of a MUD director are specifically enumerated under the constitution and the water code. There is nothing in either authority to suggest that MUD directors have the discretion to manipulate the findings of an independent investigation to influence support for an unauthorized project. Similarly, there is no authority which authorizes the use of tax and utility surplus funds for construction projects for general “safety.” The Directors actions were thus ultra vires acts, for which the law provides a remedy. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

COUNT FOUR

35. Plaintiffs further seek a judicial determination that the sidewalk project approved is contrary to the will of the Directors’ constituents, and thus should be restrained through the Court’s equitable powers. Specifically, the Court should decree that Plaintiffs are entitled to equitable relief because the 2013 ballot initiative constitutes a super-majority vote that demonstrates equities in Plaintiffs’ favor; i.e., that the Court should exercise its equitable powers and prevent the construction of the sidewalks on equitable grounds.

36. Plaintiffs will show imminent harm in that the Directors have constructed a portion of the plan, which will bring irreparable injury to Plaintiff and the taxpayers of the District. *See Texas Civil Practices and Remedies Code § 65.011 (2/5)* (a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual; irreparable injury to real or personal property is threatened, irrespective of any remedy at law).

COUNT FIVE

37. Plaintiffs seek a declaration that the Directors failed to comply with Tex. Water Code § 54.602(b) in establishing its 2015 MUD tax rate, and such a failure renders the action void or voidable by the Court. Specifically, the water code provides that “in determining the actual rate to be levied in each year, the board shall consider among other things: (1) the amount which should be levied for maintenance and operation purposes, if a maintenance tax has been authorized; (2) the amount which should be levied for the payment of principal, interest, and redemption price of each series of bonds or notes payable in whole or in part from taxes; (3) the amount which should be levied for the purpose of paying all other contractual obligations of the district payable in whole or in part from taxes; and (4) the percentage of anticipated tax collections and the cost of collecting the taxes.”

38. The Directors considered exactly *none* of the foregoing factors in setting the 2015 MUD tax rate; rather, the Directors looked to other functioning MUDs that are were then providing utility services to their residents (Tanglewood, Anderson Mill, etc.) as the sole source of reference for the imposition of the highest tax rate possible. The evidence will show that the Lost Creek MUD, then in effect, was providing virtually no authorized services, yet, without considering any of the factors listed in Tex. Water Code § 54.602(b), the Directors voted to levy a tax on the District's taxpayers, including Plaintiffs, at the highest tax rate possible within half a cent. The authorization of such a tax was not discretionary, but rather, ultra vires, as the MUD was not providing any of the services authorized under Tex. Water Code § Sec. 54.201. Thus, Plaintiffs seek a declaration that the Directors failed to comply with the Water Code in setting its tax rate. *See id.*; Tex. Water Code § 13.001 (chapter 13 is intended to assure that rates, operations, and services "are just and reasonable to the consumers and to the retail public utilities").

COUNT SIX

39. Plaintiffs seek a declaration that the Defendants' expenditure of tax funds on sidewalks violates Article III, § 52 of the Texas Constitution, which prohibits the use of tax funds to enrich individuals. More precisely, since the creation of the District, individual property owners were required to pay for the construction of sidewalks from their own personal funds. However, the current MUD Directors have paid for the construction of sidewalks from ad valorem taxes and utility surplus funds, causing the unjust enrichment of some residents at the expense of others.

Article III, § 52 of the Texas Constitution provides that "the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever...." Thus, to the extent that sidewalks are held to be a benefit to individual property values, Plaintiffs seek a declaration that the Directors' expenditure of tax funds have benefitted some residents at the expense of others.

REQUEST FOR DAMAGES UNDER 42 U.S.C. § 1983 FOR FIRST AMENDMENT RETALIATION

COUNT SEVEN

40. Plaintiffs sue the Directors in their individual capacities for compensatory and punitive damages under 42 U.S.C. § 1983 for the deprivation of their clearly established first and fourteenth amendment rights to free speech, assembly, and the right to petition the government for redress of grievances. U.S. Const. amends. I, XIV, §§ 1,5; 42 U.S.C. § 1983; *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

41. The evidence will show that Plaintiff Connor:

- i. Engaged in speech and assembly when she criticized the Directors’ actions during citizen comment at the Board of Directors’ meetings;
- ii. Engaged in speech and assembly when she criticized the Directors’ actions on the neighborhood message board, NextDoor;
- iii. Was retaliated against for speaking out about the Directors’ misuse of tax funds, among other non-discretionary acts;
- iv. Was retaliated against and punished for appearing as counsel of record for Plaintiff McIntyre in the instant suit;
- v. Was retaliated against and punished by a broadly devised campaign of personal destruction, defamation, and intimidation, at the direction and behest of Defendants, for engaging in her First Amendment rights.

42. Defendants, under color of law, took retaliatory action against Plaintiff Connor, either individually or through agents and assigns, in the following ways:

- (a) Connor was slandered and her speech was misquoted in several posts in a neighborhood message board, in a manner to bring harm, embarrassment, shame, and severe emotional distress to Plaintiff and her family, and to chill her (and other residents’) federally protected rights to speak out against government officials. Defendants’ retaliatory actions were motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of Connor.
- (b) Connor was publically criticized and ridiculed for representing McIntyre in the instant lawsuit, in a manner to bring harm, embarrassment, shame, and severe emotional distress to Plaintiff and her family. Defendants’ retaliatory actions, including, *inter alia*, threats of professional misconduct for speaking out as a citizen, and organizing a defamatory campaign to publically punish Connor by misrepresenting Connor’s actions to her neighbors, with the intent to chill Connor’s speech. Defendants were motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of Connor.
- (c) Connor was informed on December 2, 2015, that the Lost Creek Neighborhood Association Board had obtained enough petitions for Connor’s recall as President of that organization because of the fact that Connor represented McIntyre in the instant lawsuit. All of the Directors (except one) and their spouses signed the recall petition. Based on the order and grouping of the signatures, it is evident that the Directors organized and facilitated the recall effort. As such, Connor has been retaliated against for exercising her right to free speech

and for representing McIntyre in the instant lawsuit, in a manner to bring harm, embarrassment, shame, and severe emotional distress to Plaintiff and her family. Defendants' retaliatory actions, made through various agents and assigns of the Lost Creek Neighborhood Association, complain of Connor's clearly-established protected speech and repeatedly mention the instant lawsuit and the MUD Directors, which are meant to further chill Connor's speech and McIntyre's right to redress the government of his grievances, and was motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of Connor.

- (d) Defendants organized and directed a mob of residents and supporters to appear at a Lost Creek Neighborhood Association meeting on December 13, 2015, in order to punish Connor for engaging in her First Amendment rights. All of the Directors appeared at the December 13, 2015, meeting and demonstrated agreement and facilitation of the verbally assaultive mob, in an obvious effort to subject Connor to public scorn, hatred, and ridicule, and cause her emotional distress, merely for engaging in her First Amendment rights and for representing McIntyre in the instant suit. In this regard, Defendants' retaliatory actions were motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of Connor.
- (e) To further abridge and retaliate against Connor for her speech, Defendants directed the NextDoor neighborhood "leads" to remove Connor and her supporters' postings criticizing the Directors and the Neighborhood Association Board for their retaliatory actions against Connor. Defendants were also subsequently successful in entirely eliminating any discourse on the subject by blocking Connor's access, and at least one other resident's access, to the web forum, for speaking out against the Defendants. In this regard, the Directors were motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of Connor.

43. The evidence will show that Plaintiff McIntyre:

- i. Engaged in protected first-amendment activity by publically complaining about the MUD Directors' plans and decisions to build sidewalks and for bringing this lawsuit against the MUD for improper use of his tax funds, and for doing so, he was retaliated against.

44. Defendants, under color of law, took retaliatory action against Plaintiff McIntyre in the following way:

- (a) Defendants published and disseminated an "e-UPDATE" newsletter to all residents of Lost Creek, which ridiculed and sought to embarrass Plaintiff McIntyre for bringing the instant suit. More precisely, on December 9, 2015, the Directors sent an email communication to all Lost Creek residents purporting to be an "update" about the lawsuit. However, the "update" was clearly pejorative and complains of McIntyre's clearly-established right to redress the government of his grievances. The "update" was motivated by evil intent, and involved reckless and callous indifference to the federally protected rights of McIntyre.

45. The Directors are not entitled to Qualified/Official Immunity because Plaintiffs' first-amendment rights were clearly established, and no reasonable official would have conducted themselves as alleged. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity shields government officials from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Under the First Amendment, it is clearly established that Plaintiffs had the right to free expression, to peaceably assemble, and to petition the government for access to the courts; and that Defendants should have known that it was permissible for Plaintiffs to engage in these rights without punishment, retaliation, or reprisal.

PRAYER

46. WHEREFORE, PREMSIES CONSDIERED, Plaintiffs McIntyre and Connor respectfully request recovery of the following relief against Defendants:

- a. That the Court render a declaration under the UDJA that the use of ad valorem taxes and utility surpluses are not authorized for the construction of sidewalks under the Texas Constitution or the Texas Water Code;
- b. That the individual Lost Creek MUD Directors, their agents and assigns, are enjoined from constructing or preparing to construct sidewalks within the District; or otherwise expending ad valorem taxes or utility surpluses on the construction of sidewalks within the District, and that the Court void any contract to build sidewalks within the District;
- c. That Plaintiff and similarly-situated taxpayers within the District receive a full refund of the tax and utility expenditures made in violation of the declaration that the MUD Directors' ultra vires actions, as complained of herein, violates the Texas Constitution and the Texas Water Code;
- d. That Plaintiffs be awarded a declaration that the Lost Creek MUD Directors' levying of taxes, while providing virtually no authorized services to its taxpayers, violates Texas Water Code §§ 13.01(c), 54.602(b);
- e. That Plaintiffs be awarded a declaration that expenditure of public funds on sidewalks violates the Texas Constitution, Art. III, § 52;
- f. That Plaintiffs be awarded a Temporary and a Permanent Injunction, prohibiting that acts as set forth in paragraphs a & b;
- g. That the Directors are not entitled to qualified/governmental immunity for the violation of Plaintiffs' constitutional rights to free speech, assembly, and to petition for redress of grievances;
- h. That the Directors are liable for compensatory and punitive damages under 42 U.S.C. § 1983 for the deprivation of Plaintiffs' first and fourteenth amendment rights and for retaliation against them for engaging in the same;
- i. That Plaintiffs be awarded costs of court and attorneys' fees, and

j. Award all other and further relief to which Plaintiffs are justly entitled.

Respectfully submitted,

/s/ Madeleine Connor

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*Attorney pro bono for David McIntyre
Attorney pro se for Madeleine Connor*

CERTIFICATE OF SERVICE

I certify that I served notice of the foregoing instrument as indicated on the following persons on the 27th day of December, 2015:

Lowell Denton and Scott M. Tschirhart, 2500 W. William Cannon Drive, Suite 609, Austin, Texas, by email at lowell.denton@rampage-sa.com and Scott.Tschirhart@rampage-aus.com; and Natalie Scott, Coats Rose, 901 S. Mopac Expressway, Bldg. 1, Suite 400, Austin, Texas 78746, by email at NScott@coatsrose.com.

/s/ Madeleine Connor

Madeleine Connor
*Attorney pro bono for David McIntyre
Attorney pro se for Madeleine Connor*