

Motion Granted; Order and Dissenting Opinion on Order filed December 22, 2022.



In The

Fourteenth Court of Appeals

NO. 14-22-00397-CV

IN RE RAYMOND CHOATE AND KELLY MALLADY, Relators

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1180192**

DISSENTING OPINION ON ORDER

Relators filed a motion for rehearing with what purports to be a November 11, 2022 order signed by the multidistrict litigation court. Part of the order is handwritten and illegible: “the Court finds that [?].” *See* Tex. R. Jud. Admin. 13.6 (proceedings in pretrial multidistrict litigation court). The order does legibly state, “This case is remanded to the Harris County Civil Court at Law [No.] 1, Harris County, Texas.” *See* Tex. R. Jud. Admin. 13.7 (remand to trial court).

Texas Rule of Appellate Procedure 10.2 governs evidence on motions:

A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

- (a) not in the record;
- (b) not within the court's knowledge in its official capacity; and
- (c) not within the personal knowledge of the attorney signing the motion.

Neither the relators, real party in interest, or this court claim the motion does not need to be verified. Clearly, the rule requires the motion to be verified. It is not. And every lawyer knows—or should know—that documents attached to pleadings aren't evidence absent a rule to the contrary.¹ That's what's happening with this motion.

The court could notify the relators and provide an opportunity to cure. I assume that verification would have been swiftly provided. The court could also have inquired about the illegible portion of the order, perhaps leading to both relators and the real party in interest agreeing that language is irrelevant. Instead, the court appears to be in a move-the-merchandise mood and suspends Rule 10.2 without explanation. *See* Tex. R. App. P. 2 (allowing suspension of rules).

This court reaches the merits of the motion without necessary evidence properly before the court. Were I a betting man, I would bet the order is what it purports to be. But this is a court, not a casino. Our job is to follow the law, not “fix” things. This court errs in not following the law.

¹ *See, e.g.*, Tex. R. Civ. P. 166a; Tex. R. App. P. 10.2.

I dissent to the court's failure to give notice and allow an opportunity to cure.² I also dissent to the court reaching the merits when there is no evidentiary basis to support that ruling.

/s/ Charles A. Spain
Justice

Panel consists of Justices Zimmerer, Spain, and Poissant (Spain, J., dissenting).

² The court's failure does not preclude filing a verified motion for reconsideration, which is the proper way to fix the problem. An explanation of the illegible portion of the order would also be helpful.