



**Fourth Court of Appeals**  
**San Antonio, Texas**

**OPINION**

Nos. 04-19-00714-CV, 04-19-00715-CV, 04-19-00716-CV

The **STATE** of Texas ex rel. Todd A. Durden, In His Official Capacity as County Attorney,  
Appellant

v.

James T. "Tully" **SHAHAN**, In His Official Capacity as County Judge; Mark Frerich, In His  
Official Capacity as County Commissioner; Joe Montalvo, In His Official Capacity as County  
Commissioner; Dennis Dodson, In His Official Capacity as County Commissioner; Tim Ward,  
In His Official Capacity as County Commissioner; Kinney County Commissioners Court;  
Kinney County; and Rick Alvarado, In His Official Capacity as District and County Clerk of  
Kinney County, Texas  
Appellees

From the 63rd Judicial District Court, Kinney County, Texas  
Trial Court Nos. 4845, 4863, 4866  
Honorable Sid L. Harle, Judge Presiding<sup>1</sup>

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

Delivered and Filed: May 12, 2021

**DISMISSED**

Todd Durden, acting in his official capacity as Kinney County Attorney, filed three civil suits against Kinney County officials on behalf of the State of Texas. The suits claimed, inter alia, that when Kinney County officials reduced his salary, they violated provisions of the Open

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<sup>1</sup> The Honorable Sid L. Harle, sitting by assignment, signed the final judgment. The Honorable Roland C. Andrade is the presiding judge of the 63rd District Court.

Meetings Act, the Local Government Code, and Durden’s due process rights. The trial court concluded Durden had no legal authority to bring the civil suits on behalf of the State of Texas, dismissed the claims, and assessed sanctions and costs against Durden individually. Durden filed notices of appeal for the State but none in his individual capacity. Because Durden failed to perfect his appeals in his individual capacity and he had no capacity to initiate or maintain the suits on behalf of the State, we affirm the trial court’s judgments.

### **BACKGROUND**

Before we present the applicable law and analysis, we briefly recite the history of the underlying causes that is relevant to the disposition of these appeals.

#### **A. Consolidated Trial Court Causes**

These appeals involve three causes that were heard together by the trial court, but separate notices of appeal were filed for each cause. The trial court causes and appeals align as follows:

Trial Court Cause	Appeal Number
4845	04-19-00714-CV
4863	04-19-00715-CV
4866	04-19-00716-CV

#### **B. Parties**

In each cause, the notice of appeal was filed by Todd Durden, in his official capacity as (then) Kinney County Attorney, asserting that he was acting on behalf of the State of Texas. Appellees are the Kinney County Judge, the Kinney County Commissioners, the Kinney County Commissioners Court, Kinney County, and the District and County Clerk of Kinney County, Texas.

**C. Cause 4845 (Appeal 714)**

In cause number 4845, Durden’s third Amended Petition stated he was acting as Kinney County Attorney on behalf of the State of Texas and “seeking civil remedies available for the enforcement of the laws of the State of Texas.” He sought an injunction “to stop, prevent, or reverse a violation or threatened violation of the Open Meetings Act” by the Kinney County Commissioners Court. He asked the trial court to declare void “the resolutions, orders and other actions taken by the Kinney County Commissioners Court in violation of [section 551.141 of] the Open Meetings Act.” He also sought an award of court costs and attorney’s fees.

The appellees moved to dismiss the suit and moved for summary judgment. They also argued that Durden had no standing or authority in the suit to act on behalf of Kinney County or to represent the State of Texas. The trial court granted both motions and assessed court costs and attorney’s fees against Durden individually.

**D. Cause 4863 (Appeal 715)**

In cause number 4863, Durden’s first amended petition for writ of mandamus identifies the relator as “The State of Texas ex rel. Todd A. Durden, in his official capacity as County Attorney of Kinney County, Texas.” The petition asks for a writ to order the Kinney County District Clerk or the Kinney County Treasurer to refund the \$1,041.71 Durden deposited with the Kinney County District Clerk as security for trial costs.

The respondents moved to dismiss under Rule 91a and moved for final summary judgment. The trial court granted both motions, dismissed the petition, and assessed court costs and attorney’s fees against Durden individually.

**E. Cause 4866 (Appeal 716)**

In cause number 4866, Durden’s petition for writ of mandamus identifies the relator as “The State of Texas ex rel. Todd A. Durden, in his official capacity as County Attorney of Kinney

County, Texas.” The petition alleges Durden’s salary was reduced in violation of the Open Meetings Act, the Local Government Code, Durden’s due process rights, and the due course of law. The respondents argued Durden had no authority to bring the suit on behalf of the State or in his capacity as Kinney County Attorney, lacked standing to sue under the Open Meetings Act or the Local Government Code, and otherwise failed to prove the essential elements of his claims.

The respondents moved to dismiss and moved for summary judgment.

The trial court granted both motions, dismissed the petition, and assessed court costs and attorney’s fees against Durden individually.

## **F. Appeals**

In each cause, Durden filed notices of appeal on behalf of the State of Texas. In his consolidated brief, Durden presents three issues. First, the trial court erred by granting Appellees’ motion for summary judgment because he has standing and authority to sue on behalf of the State of Texas. Second, the trial court erred by assessing sanctions, costs, and attorney’s fees against him personally. Third, the trial court erred by denying his motions for summary judgment.

### **STANDARD OF REVIEW**

A trial court may render summary judgment when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues [presented].” TEX. R. CIV. P. 166a(c); *accord Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). We review a trial court’s summary judgment de novo. *Lightning Oil*, 520 S.W.3d at 45; *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). “[W]e take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.” *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 865 (Tex. 2018); *accord Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

“When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all issues presented, and render the judgment the trial court should have.” *Merriman*, 407 S.W.3d at 248; *accord Valence Operating*, 164 S.W.3d at 661.

**DURDEN AS APPELLANT, INDIVIDUALLY**

In his consolidated brief, Durden argues the trial court improperly assessed sanctions, costs, and attorney’s fees against him personally, but we must first determine whether we may reach Durden’s complaints.

**A. Additional Background**

*1. Trial Arguments, Judgments*

In the underlying suits, Appellees repeatedly challenged Durden’s standing to bring suits on behalf of the State of Texas or Kinney County.

The trial court agreed with Appellees, and it determined Durden lacked the authority to initiate the underlying suits on behalf of the State or Kinney County.<sup>2</sup> In causes 4845 and 4866, the trial court assessed sanctions under Rule 13; in cause 4863, the trial court assessed costs and attorney’s fees under Rule 91a.7. In each judgment, the trial court noted that “an attorney with the experience of Mr. Durden would have known, after reasonable inquiry of the facts and law, that the pleadings he signed and filed of record in this proceeding were legally groundless,” and in causes 4845 and 4866, the trial court added “and were brought in bad faith, or were brought for purposes of harassment.”

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<sup>2</sup> On appeal, Durden does not argue that he was authorized to initiate the suits on behalf of Kinney County. Thus, that question is not before us.

## 2. *Notices of Appeal*

Nevertheless, each notice of appeal begins with “The State of Texas appeals the [respective challenged order].” Each notice of appeal is signed “Todd A. Durden, County Attorney, Kinney County, Texas, *Attorney for the State [o]f Texas.*” None of the notices states it is a joint notice for the State and Durden as an appellant in his individual capacity, and Durden did not file separate notices of appeal in his individual capacity.

## 3. *Docketing Statements*

Each docketing statement identifies only one appellant: “The State of Texas ex rel. Durden in his Official Capacity as County Attorney.” The sole appellant is identified as an organization, not a person, and each statement identifies Todd A. Durden as lead attorney, not an appellant.

## 4. *Post-Notice Motions*

After the notices of appeal were filed, on December 10, 2019, Durden filed the “State’s First Amended Motion to Stay” in all three appeals complaining of certain trial court orders. The consolidated motion begins with “COMES NOW Appellant THE STATE OF TEXAS, represented by the County Attorney of Kinney County, Texas, and makes this *State’s First Amended Motion for Stay.*” The motion confirms a single appellant: “Appellant is the State of Texas.”

## **B. Applicable Law**

“The filing of a notice of appeal by any party invokes the appellate court’s jurisdiction over all parties to the trial court’s judgment or order appealed from.” TEX. R. APP. P. 25.1(b); *Phillips v. Bramlett*, 407 S.W.3d 229, 235 (Tex. 2013). But “[a] party who seeks to alter the trial court’s judgment . . . must file a notice of appeal.” TEX. R. APP. P. 25.1(c); *accord Brooks v. Northglenn Ass’n*, 141 S.W.3d 158, 171 (Tex. 2004). Otherwise, “[t]he appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.” TEX. R. APP. P. 25.1(c); *accord Boucher v. Thacker*, 609 S.W.3d 206, 219 (Tex. App.—

Texarkana 2020, no pet.). And “[a]ny party’s failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.” TEX. R. APP. P. 25.1(b); *see Sw. Galvanizing, Inc. v. Eagle Fabricators, Inc.*, 447 S.W.3d 473, 477–78 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Berry v. Baytank Houston, Inc.*, No. 14-98-00676-CV, 1999 WL 233353, at \*4 (Tex. App.—Houston [14th Dist.] Apr. 22, 1999, no pet.) (mem. op., not designated for publication).

### C. Analysis

In his appeals, Durden seeks relief from the trial court’s judgments dismissing his claims and assessing court costs and attorney’s fees against him.

#### 1. Notices Not in Individual Capacity

But Durden did not file notices of appeal in his individual capacity. *Cf. Johnson ex rel. MAII Holdings, Inc. v. Jackson Walker, L.L.P.*, 247 S.W.3d 765, 771 (Tex. App.—Dallas 2008, pet. denied) (determining that a plaintiff’s failure to file a notice of appeal in his individual capacity meant his individual claims were not before the court). Each notice of appeal identifies a single appellant, the State of Texas, and none indicates Durden was an appellant in his individual capacity. *Cf. TEX. R. APP. P. 25.1(c)* (requiring “[a] party who seeks to alter the trial court’s judgment . . . [to] file a notice of appeal”); *Johnson ex rel. MAII Holdings*, 247 S.W.3d at 771. Although the notices of appeal conclusively establish that Durden did not file notices of appeal in his individual capacity, we also note that Durden’s docketing statements and post-notice motions are consistent with only one appellant—the State of Texas.

#### 2. Ineffective Extension

Remarkably, each notice of appeal recites that “[t]his [notice of appeal] is a comprehensive appeal of all issues and as to all parties affected by the Order.” If Durden intended this assertion

to mean that the notice of appeal included him as an appellant in his individual capacity, he provides no authorities to support his proposition.

It seems self-evident that Durden's statement cannot serve as a notice of appeal for the appellees—who were “parties affected by the Order”—any more than it can perfect an appeal for Durden in his individual capacity. *See Boucher*, 609 S.W.3d at 219 (“Because Thacker failed to file a notice of appeal, we dismiss Thacker’s cross-appeal.”); *Johnson ex rel. MAII Holdings*, 247 S.W.3d at 771 (“Because Johnson did not perfect appeal in his individual capacity as a shareholder, the only appellant before this Court is Johnson acting in his representative capacity for MAII.”); *Love v. Mills Cty. State Bank*, No. 03-97-00020-CV, 1997 WL 657300, at \*2 (Tex. App.—Austin Oct. 23, 1997, pet. denied) (mem. op., not designated for publication) (determining that an independent executor who filed a notice of appeal as executor “did not perfect appeal in his individual capacity”).

### 3. *Durden, Individually, Not an Appellant*

Because Durden failed to file notices of appeal in his individual capacity, his complaints about the trial court's assessment of costs and attorney's fees against him in his individual capacity are not properly before us, and we cannot grant him any more favorable relief than did the trial court. *See* TEX. R. APP. P. 25.1(c); *Brooks*, 141 S.W.3d at 171; *Johnson ex rel. MAII Holdings*, 247 S.W.3d at 771; *In re Estate of Anderson*, Nos. 13-07-112-CV, 13-07-131-CV, 2008 WL 3894653, at \*1 (Tex. App.—Corpus Christi Aug. 25, 2008, pet. denied) (mem. op.) (noting two parties who did not file notices of appeal were “not proper appellants in this case and will not be afforded any relief”).



## CAPACITY TO INITIATE SUIT FOR STATE

Having concluded that Durden did not appeal in his individual capacity, we turn to whether Durden had the capacity to initiate the underlying suits on behalf of the State of Texas.<sup>3</sup> To the trial court and on appeal, the State relies in part on the Texas Constitution for Durden’s authority to bring civil suits in the name of the State of Texas.

### A. Applicable Law

Article V, section 21 reads in part as follows:

The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.

TEX. CONST. art. V, § 21. But “if a county is within a judicial district in which there is a district attorney, article V’s mandate that county attorneys ‘represent the State in all cases in the District and inferior courts in their respective counties’ has no application.” *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 600 (Tex. App.—Austin 2000, pet. ref’d).

Further, section 21

does not give [a county attorney] authority to *institute* a proceeding in the name of the state unless he is authorized or directed so to do by some statute. . . . The distinction between the granting of authority to represent the [S]tate in all cases in the district and inferior courts, and the authority to *institute* important litigation in the name of the state, is, we think, clear, and such distinction has been recognized in the decisions of our appellate courts.

*Wexler v. State*, 241 S.W. 231, 233 (Tex. App.—Galveston 1922, no writ) (emphasis added) (citing *Duncan v. State*, 67 S.W. 903, 905–06 (Tex. App.—Fort Worth 1902, no writ); *Goar v. City of Rosenberg*, 115 S.W. 653, 655 (Tex. App.—Houston 1909, no writ); *Looscan v. County of Harris*,

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<sup>3</sup> Before we decide whether Durden was authorized to act for the State below or on appeal, for purposes of our discussion at this point, we refer to Durden’s claims at trial and issues on appeal as the State’s.

58 Tex. 511, 516 (1883)). For a suit on behalf of the county, “where no statute gives county or district attorneys power to sue on behalf of the county, the commissioners’ court alone has the right to determine whether such suit shall be brought.” *Ward Cty. v. King*, 454 S.W.2d 239, 241 (Tex. App.—El Paso 1970, writ dismissed) (addressing an analogous circumstance).

Moreover, like our sister court, “[w]e do not think that the [cited] constitutional and statutory provisions making it the duty of the County Attorney to represent the State in civil proceedings in the district and inferior courts of the County, confers upon the County Attorney the power or duty to file and prosecute a suit for the State or in the name of the State unless authorized by some statute to do so.” *A.B.C. Rendering, Inc. v. State*, 342 S.W.2d 345, 347–48 (Tex. App.—Houston 1961, no writ).

As courts have long recognized, the constitution “delegates to the Legislature the power to fix the respective duties of county attorneys and district attorneys,” and absent express legislative authority, county attorneys (in counties with district attorneys) lack authority to institute suits on behalf of the State. *State v. Tex. Cent. R.R. Co.*, 130 S.W. 663, 664 (Tex. App.—Fort Worth 1910, no writ) (concluding that the county attorney lacked authority to institute a civil suit on behalf of the State because “we have been cited to no statute, nor have we found one, which, under such circumstances, confers upon county attorneys authority to institute suits in behalf of the [S]tate”).

## **B. Discussion**

The State argues that Durden, acting in his official capacity as Kinney County Attorney, had the legal authority to initiate suits on its behalf. The State relies on section 21 as authority to act, but it acknowledges that when a district attorney serves in a county, such as Kinney County, the legislature defines the duties of the county attorney. The State also acknowledges that there is no specific legislative grant of authority to the Kinney County Attorney in civil suits such as the ones Durden initiated. *See Tex. Cent. R.R. Co.*, 130 S.W. at 664.

We note that in each suit, the Office of the Attorney General was served, and we conclude the State was aware of the suits. Given the state of the law, the Office of the Attorney General would have understood that the Kinney County Attorney had no authority to initiate a suit on behalf of the State absent express authorization from the legislature or a request from the Office of the Attorney General. *See* Tex. Att’y Gen. Op. No. GA-0507 (2007) (recognizing that “judicial opinions suggest that a county attorney has no independent authority to initiate a suit on behalf of the state” absent the State’s request for “the initiation and prosecution” of such a suit).

On behalf of the State, had it wished to do so, the Office of the Attorney General might have attempted to ratify Durden’s actions to initiate and prosecute the suits, but there is no evidence that the State authorized Durden to either initiate or prosecute these suits.

We conclude as a matter of law that Durden had no legal authority to initiate or prosecute the underlying suits. *See id.*; *see also* *Wexler*, 241 S.W. at 233; *Tex. Cent. R.R. Co.*, 130 S.W. at 664. Thus, the trial court did not err in granting Appellees’ motions for summary judgment, and Durden’s notices of appeal filed in the name of the State were filed without the State’s authority.

Because Durden lacked the legal authority to initiate or prosecute any of the suits on the State’s behalf, we need not address the remaining, dependent complaints in the appellate issues.

We overrule the three issues.

#### **CONCLUSION**

Under the Texas Constitution, when acting in his official capacity as Kinney County Attorney, Todd Durden was not authorized to institute a civil suit on behalf of the State of Texas absent express authorization by the legislature or the Office of the Attorney General. Because the record conclusively proves neither the legislature nor the Office of the Attorney General granted the Kinney County Attorney authority to institute or prosecute the underlying suits, the trial court did not err in granting Appellees’ motion for summary judgment and motion to dismiss. Further,

because Durden did not file notices of appeal in his individual capacity, we cannot grant Durden any relief individually. Therefore, we dismiss these appeals. All pending motions in these appeals are denied as moot.

Patricia O. Alvarez, Justice