# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-15-00293-CV**

ESTATE OF ANNE FARISH
HUFFHINES, DECEASED

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FROM THE PROBATE COURT OF DENTON COUNTY
TRIAL COURT NO. PR-2013-00921-02

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## MEMORANDUM OPINION[1]

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Appellant Estate of Anne Farish Huffhines, Deceased (the Estate), appeals from the trial court's order granting summary judgment in favor of Appellees DATCU Credit Union (DATCU), Minor & Jester, P.C. (M&J), and Jill Jester (collectively, Appellees) and from the trial court's orders imposing sanctions against the Estate and the Estate's attorney. We affirm the trial court's judgment

[1]*See* Tex. R. App. P. 47.4.

and sanctions orders and grant Appellees' motion for damages based on the Estate's frivolous appeal.

## I. BACKGROUND

In May 2013, Anne Farish Huffhines married Anthony Farish. Soon thereafter, they opened a checking account and a savings account with DATCU, both of which were joint accounts with rights of survivorship. Both Huffhines and Farish made deposits into the accounts. Three months later, Farish shot and killed Huffhines and then turned the gun on himself, committing suicide.

### A. THE FARISH PROCEEDING

Farish's sister, Natalie Garcia, began a suit to administer Farish's estate, along with an heirship proceeding (the Farish proceeding). The Estate's executor, Frank Mordente, filed a claim in the Farish proceeding, seeking to prevent an award of the Estate's assets to Farish's heirs and requesting a constructive trust on the marital assets for the benefit of the Estate. Charles Paternostro, the Estate's attorney, attempted to accomplish this through an ex parte request to the trial court's court coordinator, asking that he add a sentence to a proposed order to provide that "any estate assets in the name of . . . Huffhines are the property of the . . . Estate to the exclusion of the Estate of Anthony Tod Farish."[2] The court coordinator responded that he was not allowed

[2]Paternostro represented to the trial court and this court that he made his request to the court coordinator because the attorney for Farish's estate "would never give permission to have the order changed."

to add content to proposed orders. In any event, the trial court dismissed the Farish proceeding at Garcia's request without prejudice.

### B. THE HUFFHINES PROCEEDING

Meanwhile, Mordente filed a petition to probate Huffhines's will (the Huffhines proceeding). Mordente contacted DATCU and requested that all of the funds in the joint accounts be released to the Estate. The accounts contained approximately $15,000. DATCU contacted an attorney, Jester with M&J, seeking legal advice about releasing the funds in the accounts. Jester researched the issue and advised DATCU to release half the funds in the joint accounts to the Estate and freeze the other half pending a determination of its proper ownership.[3] To that end, DATCU requested that the Estate supply proof that the funds in the accounts were Huffhines's separate property or obtain a court order determining ownership of the remaining half of the funds. Although Paternostro offered to provide to DATCU a "hold harmless agreement" signed by the beneficiaries of the Estate in an attempt to gain release of the remaining funds, DATCU never received a signed agreement. DATCU then filed a petition in intervention in the Huffhines proceeding, requesting that ownership of the remaining funds in the accounts be determined by the court.

Paternostro repeatedly contacted Jester and DATCU requesting that the remaining half of the accounts' balances—$7,500—be released to the Estate.

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[3]DATCU released half the funds as advised.

Paternostro consistently asserted that the law did not allow a murderer or his estate to benefit from his crime—the “Slayer Rule”—and that all the funds deposited in the accounts had been Huffhines’s separate property. He also contended that because Farish’s estate had made no affirmative claim on the funds in the Farish proceeding, the remaining funds could be released to the Estate. The record does not reflect if the trial court has addressed DATCU’s request or if it has finally disposed of the Huffhines proceeding.[4] The Estate asserts that throughout the Huffhines proceeding, Paternostro and Mordente approached DATCU and Jester multiple times seeking a “settlement” of the issue to no avail.

### C. THE ANCILLARY PROCEEDING

Because DATCU would not release the remaining $7,500 to the Estate based on Jester’s legal advice, the Estate filed a petition against Appellees, raising claims for violations of the Deceptive Trade Practices Act (DTPA) and gross negligence.[5] The Estate included in its petition a motion for sanctions

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[4]As we explain later, the current appeal concerns a separate proceeding from the Huffhines proceeding; thus, we would not expect the record to include pleadings from the Huffhines proceeding.

[5]In the trial court and on appeal, Appellees conscientiously attempt to brief other, possible claims raised in the Estate’s rambling and narrative petition. However, the only claims that the Estate clearly alleged in its petition that gave fair and adequate notice and that may be reasonably inferred against Appellees were DTPA violations and gross negligence. *See Moneyhon v. Moneyhon*, 278 S.W.3d 874, 878 (Tex. App.—Houston [14th Dist.] 2009, no pet.). As Appellees pointed out in the trial court, the Estate failed to plead the elements of negligence. Of course, a gross-negligence claim is dependent upon a finding of

against Appellees. This proceeding was ancillary to the Huffhines proceeding, but the Estate did not specifically request a judicial determination of ownership of the remaining $7,500. In its petition, the Estate recognized that its request for a constructive trust over the funds had been filed in the Farish proceeding. Appellees filed a counterclaim, alleging that the Estate had filed its DTPA claim in bad faith.

Appellees filed a no-evidence and traditional motion for summary judgment regarding the Estate's claims and a traditional motion for summary judgment on their counterclaim. They also filed a motion for sanctions against the Estate and Paternostro based on their conduct and pleadings in the ancillary proceeding.

The Estate moved for a traditional and no-evidence summary judgment; however, the motion is simply a lengthy restatement of the factual allegations made in the Estate's petition—as well as the Slayer Rule—apparently in an attempt to show that it established its claims as a matter of law and that Appellees had no evidence to support their counterclaim. Appellees responded to the Estate's motion, objecting to much of the Estate's summary-judgment evidence attached to its motion and arguing that the Estate failed to proffer any summary-judgment evidence showing its right to judgment as a matter of law.

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a legal duty owed to the plaintiff, which is a necessary element of negligence; thus, gross negligence cannot be sustained absent liability for negligence. *See Mary E. Bivins Found. v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 111 (Tex. App.—Dallas 2014, no pet.).

The Estate replied, answering Appellees' objections to its evidence and again restating the facts of its claim, including the Slayer Rule.

The trial court denied the Estate's summary-judgment motion and its motion for sanctions. The trial court then granted Appellees' motion for sanctions, finding that Paternostro filed harassing pleadings, Paternostro and the Estate brought groundless claims in bad faith, Paternostro and the Estate abused the discovery process, Paternostro and the Estate included factual statements in the pleadings that they knew were false, and Paternostro engaged in inappropriate communications with DATCU while it was represented by counsel. *See* Tex. Civ. Prac. & Rem. Code Ann. § 10.004 (West 2002); Tex. R. Civ. P. 13, 215.3. As part of the sanctions, the trial court entered a separate order striking several portions of the Estate's pleadings deemed to be "frivolous and derogatory comments and complaints" regarding Appellees. *See* Tex. R. Civ. P. 13, 215.2(b)(5). The trial court also granted Appellees' no-evidence motion for summary judgment regarding the Estate's claims,[6] granted Appellees' traditional motion for summary judgment regarding the Estate's claims and Appellees' counterclaim, and dismissed the Estate's claims with prejudice. The Estate's subsequent motion for reconsideration of the order granting summary judgment

[6]In granting the motion, the trial court specifically found that the Estate had not filed a response to Appellees' motion. The trial court also stated that although it previously had sustained Appellees' objections to the Estate's summary-judgment evidence, the consideration of that evidence would not have altered its decision to grant Appellees judgment as a matter of law.

in favor of Appellees and of the sanctions orders and its motion to modify the damages award against the Estate were overruled by operation of law. *See* Tex. R. Civ. P. 329b(c).

### D. Appeal in the Ancillary Proceeding

The Estate filed a notice of appeal from the order dismissing its claims in the ancillary proceeding.[7] One month after filing its notice of appeal, the Estate filed a motion in the ancillary proceeding for a "final determination of the rightful, legal owner of the $7,500.00." The record contains no ruling on this motion.

The Estate raises seven issues on appeal, arguing that the trial court erred by granting Appellees summary judgment and dismissing the Estate's claims. The Estate also contends that the trial court erred by concluding that the Estate failed to respond to Appellees' summary-judgment motion, by not ruling on the ownership of the $7,500, and by failing to impose a constructive trust as requested. Finally, the Estate asserts that the sanctions orders were erroneous.

## II. FAILURE TO RULE ON OWNERSHIP AND CONSTRUCTIVE TRUST

In its third issue, the Estate argues that the trial court abused its discretion by refusing to rule on its two requests for the imposition of a constructive trust. As Appellees point out, the Estate's request for a constructive trust was filed in

[7]Although the Estate did not specify that it also was appealing from the trial court's order denying its motion for summary judgment or from the sanctions orders, we have jurisdiction over this appeal based on the Estate's timely notice of appeal. *See* Tex. R. App. P. 25.1(b); *In re J.M.*, 396 S.W.3d 528, 530 (Tex. 2013).

the Farish proceeding, and we note that the Estate made no effort to consolidate the Farish proceeding and the ancillary proceeding. Although the Estate filed a motion to determine the owner of the funds in the ancillary proceeding forty-nine days after the trial court granted Appellees judgment as a matter of law, the Estate does not argue that the trial court abused its discretion by failing to rule on this motion. The Estate only argues that the trial court committed error by failing to rule on the requests filed in the Farish proceeding.[8] Any complaint that the trial court in the Farish proceeding did not impose a constructive trust is not appropriately raised in this appeal, which is from the ancillary proceeding. *See Henderson v. Shanks*, 449 S.W.3d 834, 840–41 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding local probate rules of Harris County, which are similar to Denton County's local probate rules, resulted in ancillary proceeding being separate from core proceeding absent some judicial action to consolidate ancillary matter with core matter), *cert. denied*, 136 S. Ct. 46 (2015); *see also* Denton Cty. (Tex.) Probate Ct. Loc. R. 1.2(a), 1.4(b) (defining ancillary proceeding and explaining assignment of ancillary proceedings). We overrule issue three.

In its fourth issue, the Estate argues that the trial court erred by failing to rule "on whether the true owner of the $7,500 frozen funds was . . . Garcia." As

[8]Indeed, the pleadings that the Estate relies on to establish it raised this issue in the ancillary proceeding were filed in the Farish proceeding. The Estate seems to recognize this in its brief when it states that these requests occurred during its "Legal Fight with the Farish Estate."

with its third issue, the Estate relies only on requests that either it made in the Farish proceeding or DATCU made in the Huffhines proceeding. These specific requests raised by the Estate on appeal were not before the court in the ancillary proceeding. *See Henderson*, 449 S.W.3d at 840–41. We overrule issue four.

## III. SUMMARY JUDGMENT

In its first, fifth, and seventh issues, the Estate argues that the trial court erred by granting Appellees' summary-judgment motion and by denying its motion. The Estate also asserts in its second issue that the trial court abused its discretion by failing to consider its reply, filed in support of its motion for summary judgment, to be a summary-judgment response to Appellees' motion.

### A. FAILURE TO FILE RESPONSE

The Estate argues that the trial court abused its discretion by refusing to construe the Estate's reply, filed in support of its hybrid motion for summary judgment, as the Estate's response to Appellees' hybrid motion for summary judgment. The Estate contends that the failure to consider its reply in determining Appellees' motion resulted in an impermissible default summary judgment.

As we previously stated, the Estate and Appellees both filed hybrid motions for summary judgment. The Estate did not file a response to Appellees' motion. Appellees filed a response to the Estate's summary-judgment motion and objected to much of the Estate's summary-judgment evidence. Although the

Estate filed a reply in support of its motion, it was filed on July 9, 2015—less than seven days before the trial court's July 13 summary-judgment hearing.

At the July 13 hearing, the court and Appellees recognized that the Estate had not filed a response to Appellees' motion for summary judgment. Paternostro then proffered the Estate's July 9 reply to "satisfy" the response requirement. The trial court stated that because it was a reply in support of the Estate's motion, it would not be considered a response in opposition to Appellees' motion. Later in the hearing, Paternostro again handed a copy of its reply to the trial court, asking if the reply would "work" as a response. The trial court simply stated, "No." Later, when the trial court asked Paternostro to give legal arguments in support of the Estate's summary-judgment motion, Paternostro again raised the reply-response issue:

> THE COURT: . . . Mr. Paternostro, you may proceed [on the Estate's summary-judgment motion].
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> MR. PATERNOSTRO: Well, I have nothing to - - none, your Honor. Thank you.
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> THE COURT: . . .[W]ith respect to [the Estate's] No Evidence and Traditional Motion for Summary Judgment, the Court denies [it].
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> . . . .
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> . . . Now, Mr. Paternostro, I've heard [Appellees'] argument, and [Appellees have] rested on [their] amended no evidence and traditional motion for summary judgment. And basically, Mr. Paternostro, I'm ready to grant their motion, but I'll give you one more chance, sir, to make an argument to me with respect to [Appellees'] No Evidence and [Appellees'] Traditional Motion for Summary Judgment.

> MR. PATERNOSTRO: I'll just have to find - - I'm pretty sure I prepared a reply [sic] to their motion for summary judgment. And I'll just have to look through my files. And then if I do find it, just file a motion for new trial showing that it was available.

The trial court then orally granted Appellees' motion.

The trial court later memorialized these rulings in signed orders. In its order granting Appellees judgment as a matter of law, the trial court specifically stated that even if it considered the Estate's summary-judgment motion and reply as a response to Appellees' motion, "there would be no genuine issue of material fact as to any of [the Estate's] claims, and [Appellees] would be entitled to summary judgment thereon." The Estate filed a motion to reconsider the trial court's order granting summary judgment in Appellees' favor and argued that the Estate's reply in support of its motion should be construed as a response to Appellees' motion because the difference between a response and a reply is not substantive and because summary judgment may not be granted by default. The record does not show that the trial court expressly ruled on this motion. *See* Tex. R. Civ. P. 329b(c).

The Estate's reply in support of its summary-judgment motion, which it contends should have been construed to be a response in opposition to Appellees' motion, was filed less than seven days before the trial court's summary-judgment hearing and without leave of court. *See* Tex. R. Civ. P. 166a(c). Therefore, the Estate is arguing that the trial court should have not only construed its reply to be a response, but also should have sua sponte allowed

this recharacterized response to be considered timely filed. We review these decisions for an abuse of discretion. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002) (op. on reh'g). The Estate further asserts that even if the reply is not construed as a response to Appellees' motion for summary judgment on the Estate's claims, the trial court abused its discretion by granting summary judgment because default summary judgments are not allowed.

We conclude that the trial court did not abuse its discretion. *See, e.g.*, *id.* at 687–88; *Swett v. At Sign, Inc.*, No. 2-08-315-CV, 2009 WL 1425161, at *2 (Tex. App.—Fort Worth May 21, 2009, no pet.) (mem. op.); *Crooks v. Moses*, 138 S.W.3d 629, 635–36 (Tex. App.—Dallas 2004, no pet.) (op. on reh'g). First, the summary judgment in favor of Appellees on the Estate's claims was not an impermissible default summary judgment. Appellees moved for summary judgment on the Estate's claims—"claim[s] . . . on which an adverse party would have the burden of proof at trial." Tex. R. Civ. P. 166a(i). Therefore, the trial court was required to "grant the motion unless the respondent produce[d] summary judgment evidence raising a genuine issue of material fact," which the Estate failed to do, as we explain in a later section. *Id.*; *see Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (op. on reh'g) ("[T]he traditional prohibition against summary judgment by default is inapplicable to motions filed under Rule 166a(i)."). Second, the Estate's summary-judgment filings, which were nothing more than a restatement of its

factual allegations against Appellees, did not address Appellees' arguments raised in their summary-judgment motion, which belies the Estate's argument that the response-reply difference is purely one of semantics. Third, the Estate filed its reply less than seven days before the summary-judgment hearing and did not attempt to show good cause for failing to timely file the pleading. Finally, the trial court would have granted summary judgment in favor of Appellees even if the Estate's summary-judgment pleadings were considered to be responsive to Appellees' motion. *See Adame v. Vista Bank*, No. 07-14-00098-CV, 2014 WL 5839893, at *2 (Tex. App.—Amarillo Nov. 10, 2014, no pet.) (mem. op.) ("Even if the trial court would have considered the Adames' late-filed response to the bank's motion for summary judgment, that response did not include evidence [raising an issue of material fact]."); *Duerr v. Brown*, 262 S.W.3d 63, 77 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Even if [the expert's] report had been considered, that expert report could not forestall summary judgment because [the expert] failed to [raise an issue of material fact]."). We overrule issue two.

**B. STANDARD AND SCOPE OF REVIEW**

We review a trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Here, the parties filed hybrid, cross-motions for summary judgment. We therefore consider the entire record and determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact on each element of the challenged claims and on all questions presented by the parties. *See* Tex. R.

Civ. P. 166a(c), (i); *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 & n.2 (Tex. 2012); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In short, our "ultimate question is simply whether a fact issue exists." *Buck*, 381 S.W.3d at 527 n.2.

### C. THE ESTATE'S CLAIMS

We look first to the Estate's claims and whether the summary-judgment evidence raised a genuine issue as to any material fact. The Estate raised claims against Appellees for DTPA violations and gross negligence. The elements of a DTPA claim are "(1) the plaintiff is a consumer, (2) the defendant engaged in false, misleading, or deceptive acts, and (3) these acts constituted a producing cause of the consumer's damages." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). Gross negligence includes two elements: (1) viewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *See U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). The Estate's claims against Appellees center on its contention that the remaining half of the funds in Huffhines and Farish's joint accounts clearly and unequivocally were to be awarded to the Estate based on the Slayer Rule and because all funds deposited

had been Huffhines's separate property. The Estate further argued that because the Farish proceeding had been dismissed, the Farish heirs had no interest in or standing to contest the accounts; therefore, the remaining funds automatically should go to the Estate.

The Estate is incorrect that the dismissal without prejudice of the Farish proceeding operated to automatically vest any right to the remaining funds in the Estate. If Farish died testate, his estate had four years to probate his will; thus, the Farish heirs would have until August 2017 to attempt to probate Farish's will. *See* Tex. Est. Code Ann. § 256.003 (West Supp. 2015). If Farish died intestate, his heirs could file an heirship proceeding at any time. *See id.* § 202.0025 (West 2014). Further, Farish's beneficiaries' or heirs' interest in Farish's estate vested immediately upon his death. *See id.* § 101.001 (West 2014). Therefore, this contention does not raise a genuine issue of material fact as to the Estate's claims against Appellees.

The Estate's separate-property argument is similarly unavailing. The uncontradicted summary-judgment evidence shows that both Huffhines and Farish made deposits into the accounts, not just Huffhines. Although the Estate alleged in its petition that tracing of the "original funds . . . showed that all monies were the sole and separate property of . . . Huffhines before the marriage," the only evidence before the trial court showed that Farish also made deposits in the accounts, which precludes a finding that the entirety of the funds in the accounts were properly characterized as Huffhines's separate property. *See City of*

*Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) ("Pleadings do not constitute summary judgment proof.") Thus, ownership of the remaining funds in the accounts was not clear. *See* Tex. Est. Code Ann. § 121.152 (West 2014) (providing if property—including community property with right of survivorship—is owned by two joint owners, neither of whom survives the other by 120 hours, the "property shall be divided into as many equal portions as there are joint owners"). As Appellees correctly noted in the trial court, "[i]f ownership of the funds is in fact unclear and DATCU therefore behaved reasonably and in good faith when it froze the funds and held them safe pending a determination of ownership, then all of Plaintiff's claims of wrong doing must fail." *Cf. Brown v. Bank of Galveston, Nat'l Ass'n*, 963 S.W.2d 511, 514 (Tex. 1998) (finding no evidence to support DTPA claim because defendant Bank's foreclosure actions were "within its legal rights" under a contract), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45–46 (Tex. 2007). Further, the Estate failed to offer evidence that Jester and M&J owed any duty to the Estate—a represented third party—or that their actions were anything more than representation of their client—DATCU—within the bounds of law. *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (explaining lawsuits against opposing counsel discouraged and noting attorneys are not liable to non-client third parties for legal malpractice).

Similarly, the Slayer Rule does not raise a genuine issue on the Estate's claims against Appellees. As it did in the trial court, the Estate relies on a sole case to establish as a matter of law the Estate's ownership of the remaining $7,500: *Pritchett v. Henry*, 287 S.W.2d 546 (Tex. Civ. App.—Beaumont 1955, writ dism'd). Indeed, *Pritchett* stands for the general proposition that a husband or wife who murders his or her spouse may not inherit under the spouse's will as a beneficiary. *Id.* at 550–51. However, the court was careful to state that an heir must plead for the imposition of a constructive trust over the property to be inherited by the murderer. *Id.*; *see also Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977). Until the constructive-trust issue is proven and decided, the Estate's claim to the remaining $7,500 is not conclusive such that (1) Appellees engaged in false, misleading, or deceptive acts by failing to release the funds to the Estate at Paternostro's request[9] or (2) Appellees had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of the Estate. *See* 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 7.8 (3d ed. 2015) ("A person asserting a constructive trust must strictly prove the elements of a constructive trust including the unconscionable conduct, the person in whose favor the constructive trust should be imposed, and the assets to be covered by the constructive trust. Mere

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[9]The Estate's DTPA claim also fails as a matter of law because it did not have standing to bring such a claim, which Appellees raised in the trial court. *See, e.g.*, *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 408 (Tex. 1997).

proof of conduct justifying a constructive trust is insufficient.") The bare right to move for a constructive trust based on Farish's conduct does not equate to a judicial conclusion that a constructive trust on the remaining funds is warranted.[10] *See id.* In other words, the summary-judgment evidence shows that reasonable minds could differ on the appropriate disposition of the remaining funds in the joint accounts, justifying a conclusion that there is no genuine issue of material fact regarding the Estate's claims against Appellees for failure to release those funds in the absence of a court order.

Accordingly, based on the summary-judgment evidence, the trial court did not err by granting Appellees' motion for summary judgment on the Estate's claims or by denying the Estate's motion for summary judgment on its claims. We overrule issues one, five, and seven to the extent they challenge the trial court's summary judgment on the Estate's claims.

### D. APPELLEES' COUNTERCLAIM

Appellees raised a bad-faith counterclaim against the Estate for filing a groundless DTPA claim against them as required to support an award of attorney's fees to Appellees. *See* Tex. Bus. & Com. Code Ann. § 17.50(c) (West 2011). The trial court granted Appellees judgment as a matter of law on this counterclaim. A DTPA claim is brought in bad faith if the claim has no basis in law or fact and is not warranted by a good-faith argument for the extension,

[10]Indeed, as Appellees point out, the imposition of a constructive trust on these facts, even if properly requested, is not a foregone conclusion.

modification, or reversal of existing law. *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634, 637 (Tex. 1989) (equating groundless claims under the DTPA to sanctionable, groundless pleadings in rule 13). "A person acts in bad faith [by bringing a DTPA claim] when he has knowledge of enough facts and circumstances to know that his or her actions are wrong, and with such knowledge, acts with intentional disregard for the rights of others." *McClung v. Wal-Mart*, 866 F. Supp. 306, 311 (N.D. Tex. 1994). Bad faith includes "willful disregard of and refusal to learn the facts when available and at hand." *Citizens Bridge Co. v. Guerra*, 258 S.W.2d 64, 69–70 (Tex. 1953). Whether a DTPA claim was brought in bad faith, was groundless, or was brought for harassment purposes is a question of law for the trial court. *See* Tex. Bus. & Com. Code Ann. § 17.50(c); *Donwerth*, 775 S.W.2d at 637 n.3.

As we previously discussed, the Estate was unable to provide any evidence raising a fact issue on its DTPA claim. Throughout the ancillary proceeding, DATCU and Jester repeatedly attempted to inform Paternostro that a court order declaring the appropriate and legal ownership of the remaining funds in the joint accounts was required to release the funds. Paternostro, heedless to this information, tried to have the court coordinator in the Farish proceeding add content to proposed orders declaring ownership of the funds, repeatedly contacted DATCU and Jester asserting that the funds were entirely comprised of Huffhines' separate property, and ultimately filed the ancillary proceeding based solely on his assertion that *Pritchett* usurped any and all law regarding marital

property and inheritance. On appeal, Paternostro continues to argue that any legal inquiry as to the remaining funds in the accounts starts and stops with *Pritchett*: "[Appellees] have turned a blind eye to the truth that all Texas community and separate property laws relating to normal marriage and divorce resulting in the division of separate and community property (as well as the laws of intestate succession) are now precluded and replaced by the case law of *Pritchett v. Henry*."

The evidence before the trial court, along with the absence of any evidence supporting Paternostro's allegations that Appellees disregarded the law by failing to automatically release the funds at Paternostro's request, showed that Appellees established the elements of their counterclaim as a matter of law. *See, e.g.*, *Gibson v. Ellis*, 126 S.W.3d 324, 335–36 (Tex. App.—Dallas 2004, no pet.) (upholding attorney's fee award under section 17.50(c) against attorney's client in legal-malpractice action where evidence showed client requested attorney to take action about which client complained); *Schlager v. Clements*, 939 S.W.2d 183, 190–91 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (concluding trial court's conclusion that legal-malpractice claim brought under the DTPA was groundless justified by evidence that attorney had advised client not to file suit and based on pro se litigant's conduct during litigation); *Transp. Indem. Co. v. Orgain, Bell & Tucker*, 846 S.W.2d 878, 882–83 (Tex. App.—Beaumont) (finding that plaintiff filed DTPA claim in bad faith and to harass upheld where plaintiff was obviously excluded as a DTPA consumer but continued to maintain

action), *writ denied*, 856 S.W.2d 410 (Tex. 1993) (neither approving nor disapproving bad-faith holding). Accordingly, summary judgment in Appellees' favor on their counterclaim was not in error. We overrule the remaining portions of issues one, five, and seven complaining of the trial court's summary judgment as to Appellees' counterclaim.

**IV. SANCTIONS ORDERED IN THE TRIAL COURT**

In its sixth issue, the Estate argues that the trial court erred by striking portions of the Estate's pleadings as a sanction and by imposing sanctions of $32,500 in attorney's fees against Paternostro and the Estate, jointly and severally.[11] The Estate argues the orders were an abuse of discretion because its actions were protected by the litigation privilege and because the trial court failed to state the good cause justifying the sanctions as required by rule 13. *See* Tex. R. Civ. P. 13.

Appellees filed a motion in the trial court seeking sanctions for the Estate's frivolous and harassing pleadings and for discovery abuse. The trial court held a hearing and made the following written findings:

1. Paternostro filed pleadings for an improper purpose, including harassment and to needlessly increase the litigation costs. This conduct

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[11]In this issue, the Estate also complains of the $3,500 in attorney's fees awarded to Appellees and argues it was a sanction. This amount was not a sanction but was awarded as attorney's fees as authorized by the summary judgment on Appellees' bad-faith counterclaim. In challenging the summary judgment granted on Appellees' counterclaim, the Estate does not specifically attack the propriety of the amount of attorney's fees awarded under section 17.50(c). Thus, we will not review this award.

was sanctionable under section 10.004 of the civil practice and remedies code.

2. The Estate and Paternostro brought claims that were groundless, pursued in bad faith, and for the purpose of harassment. This conduct was sanctionable under rule 13.

3. The Estate and Paternostro abused the discovery process by serving frivolous, oppressive, and harassing discovery requests.[12] This conduct was sanctionable under rule 215.3.

4. The Estate and Paternostro abused the legal process by including factual statements in pleadings that both the Estate and Paternostro actually knew were untrue. This conduct was sanctionable under the trial court's inherent powers.

5. Paternostro abused the legal process by directly communicating with DATCU while it was represented by counsel. This conduct was sanctionable under the trial court's inherent powers.

The trial court awarded Appellees $32,500 as reasonable and necessary attorney's fees against the Estate and Paternostro, jointly and severally, as a sanction. *See* Tex. R. Civ. P. 215.2(b)(8). Later, based on Appellees' request in their motion for sanctions and based on the evidence proffered at the hearing on the motion, the trial court ordered that approximately ninety statements regarding Jester and DATCU be stricken from the Estate's pleadings. *See* Tex. R. Civ. P. 215.2(b)(5). The stricken statements, in general, characterized Jester's actions in failing to advise DATCU to turn over the funds without a court order and DATCU's failure to release them as "unconscionable," "reprehensible,"

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[12]In the span of approximately four months, the Estate served at least thirteen separate discovery requests on Appellees.

"malicious," "spiteful," "desperate," "uncaring," "haughty," "outrageous," "unbending," "illogical," "spoiled," "stubborn," and the like.[13]

We review a trial court's sanctions order for an abuse of discretion. *See Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). We consequently do not determine whether the presented facts were appropriately subject to sanctions; rather, we look to whether the trial court's action in imposing sanctions was arbitrary or unreasonable. *See id.* at 838–39.

The litigation privilege is not applicable such that the Estate and Paternostro would be shielded from a sanctions award. As we discussed above, a third party does not have an independent right of recovery against an attorney for its litigation conduct on behalf of the third party's opponent. *See Alpert*, 178 S.W.3d at 406. But the third party does have the right to seek sanctions for that very same conduct. *See id.*

The Estate's argument under rule 13 is likewise unavailing. The trial court sanctioned the following conduct under rule 13: (1) the Estate's pleadings used

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[13]The trial court later granted Appellees' motion to substitute and ordered the trial court clerk to "substitute" the redacted pleadings for the previously filed pleadings subject to the redactions. Although Appellees did not support their substitution request with any authority allowing such an order, and we are aware of none, the Estate does not cogently attack the trial court's authority to enter the substitution order, focusing instead on the previous redaction order and the attorney's fees awarded as a sanction. *See generally* Tex. R. Civ. P. 25, 26, 65, 75, 76a. Accordingly, we will not address the propriety of the substitution order because the Estate has not placed the issue before us. We note, however, that the substitution did not occur—the unredacted pleadings remain in the clerk's record.

intemperate language regarding Appellees' conduct "for which [the Estate] had no supporting evidence or reasonable belief that it would discover such supporting evidence" and (2) the Estate and Paternostro brought claims that were groundless, pursued in bad faith, and for the purpose of harassment. Even if these sanctions were not supported by sufficient good cause stated in the orders, the Estate failed to object in the trial court to the need for particularized findings and, thus, waived this argument. *See Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 817–18 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Booth v. Malkan*, 858 S.W.2d 641, 644 (Tex. App.—Fort Worth 1993, writ denied). We overrule issue six.

## V. APPELLATE DAMAGES

Appellees have filed a motion requesting damages for the Estate's frivolous appeal. *See* Tex. R. App. P. 45. They point to several of the Estate's appellate arguments, asserting that they are based on no legal grounds or evidence, and request $15,340 in attorney's fees as damages against the Estate. The Estate did not respond.

We have the discretion to assess damages for frivolous appeals against a party, but we must exercise that discretion with caution. *See id.*; *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc op. on reh'g). In deciding whether an award of damages is appropriate, we consider the record from an advocate's point of view to determine whether the Estate had reasonable grounds to believe that the

challenged orders could and should be reversed. *See Glassman*, 347 S.W.3d at 782. We may also consider the fact that the Estate failed to respond to Appellees' motion requesting appellate damages. *See Compass Expl., Inc. v. B-E Drilling Co.*, 60 S.W.3d 273, 280 (Tex. App.—Waco 2001, no pet.).

The right to appeal is valuable and should be protected. *See Glassman*, 347 S.W.3d at 782. But frivolous appeals burden the parties and the courts. *See id.* at 782–83. Here, the Estate has litigated its alleged right to a $7,500 balance in the joint accounts in three different trial proceedings, leading to the instant appeal. The Estate filed an appendix in this court that included documents not submitted to the trial court in the ancillary proceeding, filed approximately ninety pages of briefing in which it merely restated its rambling and intemperate allegations raised in the trial court, and attempted to challenge pleadings and rulings made in the Farish proceeding and the Huffhines proceeding, not the ancillary proceeding that is the sole subject of this appeal. The specious and scattershot nature of the Estate's appellate briefing in this court caused Appellees to guess at what arguments the Estate was attempting to raise and address each possible issue. The Estate's continued position that the $7,500 could only be the Estate's property based on a 1955 court of appeals case that it asserted "usurped" all community-property and inheritance law is not a reasonable ground upon which an appeal from the summary judgment of the Estate's DTPA and gross-negligence claims could be based. The Estate's arguments in this court and violations of the rules of appellate procedure as

noted above required Appellees to incur appellate attorneys' fees that are unjust. The trial court recognized the groundless, bad-faith, and abusive nature of the Estate's arguments and sanctioned Paternostro and the Estate, which did not deter either from raising the same arguments here. Finally, the Estate did not file a response to or otherwise dispute Appellees' motion for just damages as a prevailing party. We conclude this is a frivolous appeal and award damages to Appellees against the Estate in the requested amount of $15,340 as just damages.

## VI. CONCLUSION

Having overruled Appellant's issues, we affirm the trial court's summary-judgment and sanctions orders. *See* Tex. R. App. P. 43.2(a). We also grant Appellees' motion for damages and award Appellees just damages against the Estate in the amount of $15,340 for its frivolous appeal. *See* Tex. R. App. P. 45.

PER CURIAM

PANEL: GABRIEL, WALKER, and SUDDERTH, JJ.

DELIVERED: April 28, 2016