No. 20-20209

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

JOANNA BURKE; JOHN BURKE

Plaintiffs-Appellants,

v.

MARK DANIEL HOPKINS; SHELLEY HOPKINS;
HOPKINS LAW, P.L.L.C.

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston
Division; USDC No. 4:18-CV-4543

APPELLANTS INITIAL BRIEF [AMENDED]

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Pro Se Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Joanna Burke; John Burke

Pro Se Appellants

John Burke
Joanna Burke

Defendants-Appellees

Mark Daniel Hopkins; Shelley Hopkins; Hopkins Law, P.LL.C.

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/s/ Joanna Burke
Joanna Burke
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/s/ John Burke
John Burke
Pro Se Plaintiff

STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a trial court order dismissing the Burkes' case 'for want of prosecution' [ROA.1158]. Plaintiffs-Appellants submit that oral argument is not necessary to restore the civil action to its correct place - on the docket at the State court - and ensure it proceeds without further interruption or delay to a jury trial. *Middlesex County Ethics Comm. v. Bar Assn.,* 457 U.S. 423 (1982);

"A proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

The reason; As Justice Clarence opined in *Gramble v US* 587 US (2019), the Texas Constitution and United States Constitution both[1] command superiority. As the lower court clearly erred in its decision(s) which is usurped by both state and federal Constitution(s), no oral argument is necessary to

[1] For example, see: THE HERITAGE GUIDE TO THE DUE PROCESS CLAUSE; "From the 1940s onward, however, the view that the Fourteenth Amendment's Due Process Clause literally "incorporates" the text of various provisions of the Bill of Rights rapidly gained steam; by the 1960s, what we know today as the "incorporation doctrine" was complete. Under current law, most provisions of the Bill of Rights are deemed applicable to the states in precisely the same manner that they are applicable to the federal government.

correct these superior written word(s). This assumes the Court of Appeals judicial panel will adhere tothe Constitution and refrains from substituting the law for their own pleasure.

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I. STATEMENT OF JURISDICTION

This is an appeal of a final judgment from a district court exercising jurisdiction pursuant to 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II. INTRODUCTION

A. A Bounty Hunter Comes to Court

Shortly after Deutsche Bank and their lawyers, BDF, were defeated at the bench trial to the *pro se* Burkes in March 2015, the Hopkins & Williams, PLLC law firm arrived in order to bully the judge into opening evidence previously unavailable for four years. When that approach failed, Hopkins filed an appeal with the 5th Circuit on behalf of Deutsche Bank National Trust Co.[2]

[2] *Deutsche Bank Nat'l Tr. Co. v. Burke*, 655 F. App'x 251 (5th Cir. 2016); Judge Higginson was not only part of the 3-panel who reversed in favor of Hopkins and 'Deutsche Bank', he was the author in an error laden unpublished opinion which called Deutsche Bank the 'mortgage servicer' (15-20201, June 9th, 2016). This had to be reissued after Hon. Stephen Wm. Smith questioned the opinion. The second amended opinion was released on July 19th, 2016. He's now been identified as a member of this 3-Panel. That's very noticeable and very questionable, especially when Judge Higginson was again also the author and part of the majority in the *All American Check Cashing* case (with Judge Higginbotham).

Judge Jerry Smith dissented, **"This case is absolutely about power. The majority declares open season on the en banc court."** *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc*., No. 18-60302, at *19 (5th Cir. Mar. 3, 2020). The majority (Higginson and Higginbotham) were reversed en banc by the full Fifth Circuit. The *All American* case is tentatively scheduled for oral

At that time, the Burkes vehemently contested the legitimacy of Hopkins & Williams, PLLC. Over the objection of the Burkes they were allowed to proceed. This was error. Time has proven the Burkes to be true and correct on their findings.

What has transpired in the intervening period is that Hopkins & Williams, PLLC, after finally updating to Hopkins Law, PLLC and belatedly replacing the trial attorney for BDF some 15 months later with Shelley Hopkins, had fraudulently asserted the role of lead counsel in the lower court case and then fraudulently appealed it (for the same reason).

Hopkins still repeats these fraudulent acts to this day, 5 years on, claiming "I'm a lawyer, I get absolute attorney immunity and I am not a debt collector or third party debt collector". That's a false claim.

It should be remembered, when the judge entered his opinion, it was in favor of the Burkes. (i) Hopkins elected to take the case. (ii) Hopkins could have rejected the case. (iii) Hopkins volunteered. (iv) Hopkins elected to appeal the case. (v) Hopkins is liable for all past, present and future acts as the case is now "assigned" to their firm. (vi) Mark Hopkins personally made a decision to use Hopkins & Williams PLLC, rather than Hopkins Law, PLLC (vii) Hopkins chose to maliciously conceal evidence, which is not protected by attorney immunity (the mortgage file)

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argument in September 21, 2020 and ordered the parties file supplemental briefs. It's relevant to both the Burkes appeal now before the 5th Circuit as well as his past involvement in the Burkes case(s). Judge Higginson should not be a panel member in this case.

and he made that admission brazenly on the record (when the Burkes were not in court but were represented by counsel). (viii) Hopkins decided to implement a system, scheme or plan to fabricate and introduce 'newly discovered evidence' after trial (ix) All these decisions were made for financial avarice and to increase Hopkins reputation. Hopkins would ensure he would win the case by any means necessary for a financial windfall and to enhance their resumes and rolodex.

B. Why is there a Bounty Hunter in Court?

That's a very good question, one that the Burkes initially thought would be obtained by reaching out to Texas Government. That's proved extremely difficult, to date. The Burkes first went to TXSOS and found out this/these Hopkins entities didn't have the required license to operate in Texas and which requires a valid surety bond. The former trial lawyers who lost, BDF, did. Something does not add up.

Based on this information, the Burkes entered into lengthy email communication with TXSML and via fast-track onboarding training learned about licensing and surety bonds and what TXSML can cover as far at the Texas Finance Code (and important information like the CFPB oversees this state agency). The chapter of the code relevant to the Burkes, they stated, was not part of their scope. It required that the Burkes send the Texas Office of the Attorney General a written request to answer the questions raised and at the outside they would reply within 55

days. The Burkes duly complied. After the time period went by to receive an answer, there was pure silence. Follow ups were snubbed and nobody responsible at TXAG has replied.

C. The Truth Seekers became Keepers

The Burkes thought, well, they'll recover this information from Hopkins in either of the two civil actions raised against *Ocwen* and *Hopkins*. Hopkins has attached themselves to both cases, *pro se* attorneys in Hopkins and as counsel of record in the Ocwen case.

The Burkes were confident, the facts are so indisputable that the truth seekers, the judge(s), will demand a fair and impartial proceeding. After all, it's only confirming their credentials. How big of an ask is that? Well, when it comes to Texas foreclosure mills, actually it's a highly protected access area when you're a *pro se* homeowner in Texas litigating from the opposite side. The truth seekers have ultimately abused their powers and denied the Burkes access to justice.

For example, Judge Bray referenced the Burkes dispute with the court about Hopkins Law, PLLC legitimacy (5 years ago) and stated that the Burkes arguments were rejected. According to Judge Bray, based on all the information presented, now five years later, there is no requirement to ask Hopkins to show authority for the lawyers on the case. That's plain error. The Burkes have presented more than sufficient evidence to obtain a simple verification of Hopkins authority to act for

Deutsche Bank and Ocwen.

D. April's Bonus Surprise

~~Joanna Burke received an email from Shelley Hopkins with attaching PDF. When she opened the PDF, it looked like Hopkins had sent the Burkes an invoice at first glance but after reading the portable document in its entirety, it would confirm, there was no invoice for the Burkes. Rather, it was the complete billing record for BDF cases and 'general legal work' for the month of April 2020.[3] This adds another layer of invaluable information which was previously unavailable from Hopkins or refused by the court. It will be discussed in more detail in this brief and reaffirms the courts abuse of discretion in the subsequent M&R and Orders.~~

As this brief will cover in detail, Hopkins have lied in practically every filing they have submitted in this case ~~and the~~ SURPRISE.PDF ~~just affirms the~~

[3] ~~D.C. Bar Ethics Opinion 256 Inadvertent Disclosure of Privileged Material to Opposing Counsel Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's attention, the receiving lawyer engages in no ethical violation by retaining and using those documents. Precedent from other jurisdictions is in accord with our conclusion that no ethical violation arises from a lawyer's use of inadvertently disclosed material, where the receiving lawyer had no knowledge that the materials were inadvertently disclosed before they were read. *Aerojet-General Corp. v. Transport Indemnity Ins.*, 22 Cal. Rptr. 862 (Ct. App. 1993).~~

~~Burkes arguments~~. Most certainly, Mark Hopkins conduct has been extremely reprehensible before these senior citizens as witnessed by members of the lower court. But S.D. Tex. clearly hasn't internally circulated *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) in recent years, or some judges are not reading the memos.

E. The Roman Candle Orders[4] are Still Dropping ~~like it's Utah Beach~~

> ~~"Utah Beach; The westernmost of the D-Day beaches, Utah [codename] was added to the invasion plans at the eleventh hour so that the Allies would be within striking distance of the port city of Cherbourg. In the predawn darkness of June 6, thousands of U.S. paratroopers dropped inland behind enemy lines. Weighed down by their heavy equipment, many drowned in the flooded marshlands at the rear of the beach, and others were shot out of the sky by enemy fire." Credit; HISTORY.COM~~

The Burkes have/had an initial deadline (7/13/2020) to file the initial brief despite the Burkes pending matters related to Judge Hittner. The Burkes filed a motion to stay which was denied by the clerk and the Burkes filed a reconsideration on Friday (7/10/2020) which was also denied on 7/13/2020. Still, perusing the stay will give this court the background information as to the reasons why the Burkes formally object to this deadline. On 7/14/2020, Hopkins filed a motion to strike and seal which was granted by single Judge Clement and refiling

[4] Airborne term when your Paratrooper colleagues' parachute fails to open during a jump.

of the Brief revised to 7/30/2020. The Burkes filed a reconsideration of the single judges' order and that decision has been denied by the 3-Panel of Judges Clement[5], Elrod[6] and Higginson on 7/29/2020 at 14.03 hrs and in contravention of the rule of law, the due process clause and the United States Constitution.[7]

The most egregious act to date by [unconstitutional] Senior Judge Hittner was the cancellation of the scheduled pretrial conference and entry of judgment for Hopkins[8] and after Gov. Abbotts' executive order.[9]

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[5] A Senior Judge. A Senior Judge is Unconstitutional. In part; It is a violation of a citizen's rights to have their claims decided by a judge, who has accepted "senior" status and who lacks both the Article III "tenure" protections and the statutory authorization of jurisdiction by Congress. The congressional scheme for "senior judges" is by design violative of the Article III protections that are necessary to preserve a judge's independence from undue pressures guaranteed to active judges under federal law. Judge that voluntarily requested and accepted "senior" status and upon that transition lost the protections of Article III. Without these protections s/he no longer has jurisdiction to hear and decide matters in federal court.

[6] The Burkes discussed Judge Elrod's book and subsequent opinion, where she did not follow her own recommendations in the *Burke v. Ocwen*, 19-20267 (2020), Document: 00515032985, Page: 56/57 incl. footnotes, Date Filed: 07/14/2019 regarding remanding cases back to the State Court(s).

[7] See Justice Brennan's concurring opinion, in part; "The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. **This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.**" -*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986)

[8] See *Hyman v. Regenstein*, 222 F.2d 545, 546 (5th Cir. 1955).

[9] In discussing the independence of the Judiciary in his famous Lectures on Law, James Wilson, an Associate Justice of the Supreme Court, said this: "When the decisions of courts of justice are

F. More Parties than Expected

As a result of the events in the Burkes Texas cases and the Florida intervention, now on appeal, what is clear is that when the Burkes first came to court, their respect and regard for the judiciary was without question. Unfortunately, due to intervening events it has now become a case where specific judges and specific lawyers have gone rogue. This case is a prime example. Two judges and at minimum, two law firms, BDF Hopkins have a known system, scheme or plan to ensure *pro se* homeowners don't get to discovery when they ask questions and list expert witnesses that would bring the creditors right foreclosure mills into disrepute.

The Burkes have read the *Anderson v. Valdez*, 913 F.3d 472 (5th Cir. 2019) case before 3-Panel Judges Higginbotham, Willett and Graves, reversing the lower court Judge Randy Crane in favor of the former alleged double-dipping (expenses) Chief Judge at the Thirteenth COA. It's authored by Judge Higginbotham. The Burkes started at the first appeal *Anderson v. Valdez*, 845 F.3d 580 (5th Cir. 2016) before Judges Weiner, Higginson and Jones (dissenting) where the majority sided with the brave employee and former Asst. District Attorney who was prepared to report judicial misconduct.

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made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial." 1 JAMES WILSON, Of Government (1790), reprinted in COLLECTED WORKS OF JAMES WILSON 689, 703 (Kermit L. Hall & Mark David Hall eds., 2007).

~~In comparison, when the Burkes consider they received an email on Thursday from BODA regarding their reconsideration of the dismissal of the grievance against Mark Hopkins, Jackie Truitt, Executive Asst, stated "If you wish to file an amended grievance, you should send it to the Chief Disciplinary Counsel". The arguments presented therein were mainly based on the rules, ABA, State and Federal (Appendix A and Footnote 2 specifically, as well as generally).~~

However, the Anderson decision, has more of a feeling of intimidation and geared to suppress those in offices where they witness or are advised of potential troubling matters regarding judges and lawyers they work with. The same can be said in the case here.

The lower court judges assigned to the case are not truth seekers, they are truth keepers to effectively end a case and circumvent the rule of law. As such, the Burkes were compelled to report those responsible (and for liberty to be preserved).

III. ISSUES PRESENTED

The Burkes have meticulously detailed the docket of the lower court case, highlighting the errors from the moment the Burkes state court case parachuted into the federal court from an illegal snap-removal by Hopkins. They have listed and addressed all the issues during the lower court proceedings. Repetition is not necessary here.

However, the Burkes do wish to highlight major and quantifiable issues

of grave constitutional concern which injure and impact the Burkes' rights to an impartial and fair hearing and threatens their lives, property and liberty. These are perplexing events from both the lower court and prior to filing this brief in this appellate court.

The Lower Court: (i) Why the lower court judges (Hittner and Bray) did not report Mark Daniel Hopkins for his reprehensible court conduct[10] is inexcusable and it also showed Hopkins character and win-no-matter-what crime or abuse[11] against elderly citizens is committed; (ii) Judge Hittners' personal bias led to cancellation of the pretrial conference, in violation of both due process[12] and an emergency executive order by the State of Texas. (iii) Bray

[10] "Now, what is the offence with which the petitioner stands charged? It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve." - *Ex Parte Wall*, 107 U.S. 265, 273-74 (1882).

[11] "The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision." - *Ex Parte Wall*, 107 U.S. 265, 288 (1882).

[12] A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a

ignored the majority of the Burkes pleadings and key arguments that Hopkins is not protected by attorney immunity for several reasons, including Mark Hopkins voluntary statement confirming he withheld the mortgage file from the Burkes, which is not protected by attorney immunity. Neither is Shelley Hopkins[13] due to her on-again-off-again work history and resume. The Burkes provided sufficient pleadings for discovery and trial to proceed and repel Hopkins motion(s) to dismiss – by these conniving *pro se* attorney defendants.

The Fifth Circuit: (i) First, this appeal should have been stayed pending *Burke v. Ocwen* for several reasons as previously highlighted in motions erroneously denied before this court. (ii) The complaint before the Chief Judge at the Fifth Circuit re [unconstitutional] Senior Judge David Hittner is currently pending after a technical hitch required resubmission of the original complaint and any decision is likely to impact the Burkes' brief(s) and motion(s). The Burkes seek impeachment[14] of Judge Hittner as well as listing their other

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meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. - *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[13] See Case: 19-20267, Document: 00515032985,Page: 33, incl. **Footnote 15**, (emphasis added) Date Filed: 07/14/2019.

[14] "These duties, we submit, although defined by statute as to the time and place of performance, are an integral part of the constitutional office of judge. For refusal to hold court as required by law, a judge may be impeached." - *Booth v. US* (1934).

grievances in the 5-page complaint. (iii) Why the lower court judges (Hittner and Bray) did not report Mark Daniel Hopkins for his reprehensible court conduct, is inexcusable.[15] (iv) This courts' order(s) to file into the *Burke v Hopkins* case is premature and the most recent denial of reconsideration by the 3-panel is a violation of due process and the Burkes constitutional and civil rights, especially when the Burkes residence and enjoyment of their property is at risk.[16]

IV. SUMMARY OF THE ARGUMENT

This appeal should be focused on the case the Burkes commenced against a rogue, unbonded, unlicensed debt collecting law firm and the attorneys

[15] Indeed, this type of communication is not made for the "purpose of facilitating the rendering of legal services[,]" *Spencer*, 700 F.3d at 320, but rather, is usually done to harass, intimidate, coerce, warn, or frighten the intended victim of the threat or a person who hears the threat. Therefore, we agree with the Ninth Circuit's observation that a "[defendant's] threats to commit violent acts against [alleged victims are] clearly not communications in order to obtain legal advice." *United States v. Alexander*, 287 F.3d 811, 816 (9th Cir. 2002). – *United States v. Ivers*, No. 19-1563 (8th Cir. July 23, 2020). Hopkins intent is clear, he wanted the Burkes jailed by his self-admitted courtroom lies.

[16] "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries *138-140. Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today." - *Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972).

therein. Dishonorably and shockingly, it has now become a desperate search for judges who can provide a fair and impartial hearing before the United States federal judiciary and follow their Oaths and Canons.[17]

That said, the Burkes still remain hopeful that there are independent minds in these panel focused appellate proceedings, as found at the Fifth Circuit, who are honest judges and who are prepared to challenge 'colleagues' on the merits of each case and apply the correct law(s). Unfortunately, it is already evident that the majority in this panel does not appear to have that foundation nor ethical compass. With that said, the statement of the case follows.

V. STANDARD OF REVIEW

The standard of review;

> "This court reviews a Federal Rule of Civil Procedure 41(b) dismissal for failure to prosecute or to comply with any court order for abuse of discretion. *McCullough v. Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988). " *Torres v. Krueger*, 596 F. App'x 319, 4 (5th Cir. 2015).
>
> "This circuit has consistently held that Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of "`a clear record of delay or contumacious conduct by the plaintiff," *Rogers v. Kroger Co*., 669 F.2d 317, 320 (5th Cir. 1982). – ROA.1186.

[17] See for example; Judge Mark Mahon's unconstitutional orders; cited in part; "Demonstrations or dissemination of materials that degrade or call into question the integrity of the Court or any of its judges (e.g., claiming the Courts, Court personnel or judges are "corrupt," biased, dishonest, partial, or prejudiced), thereby tending to influence individuals appearing before the Courts, including jurors, witnesses, and litigants, shall be prohibited on the Duval County Courthouse grounds…. The order further stated that anyone exercising such a First Amendment right could be "found in criminal contempt of Court." – Techdirt, July 2015 and Wikipedia. The Burkes have experienced similarly outrageous constitutional violations in orders from the lower court and this circuit as discussed herein and related motions and case briefs (*Burke v. Ocwen*).

It should be noted Judge Hittner failed to review the magistrate judges M&R '*de novo*';

> "Furthermore, the statute requires the district court to make a "de novo determination" of the enumerated dispositive matters which are referred to the magistrate under § 636(b). A civil trial on the merits is certainly a dispositive matter. Accordingly, we infer that any power to refer dispositive matters under § 636(b)(3) carries with it a requirement of "de novo determination" by the district judge of the portions of the magistrate's findings to which a party objects." - *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 (5th Cir. 1980). - ROA.1185.

VI. STATEMENT OF THE CASE

A. Summary of the Docket

The Burkes now detail the issues from the docket during the short and bizarre period the Burkes case was in court.

B. Appeal of Snap Removal / Remand Denied

The Burkes emailed Hopkins just after 9am on Friday requesting their service waiver or details. They ignored the email. Snap removal may now include stalking according to this court, but intentional failure to communicate is unethical. The remand was based on deception and hiding (this time themselves).

~~Furthermore, when reviewing Hopkins Law, PLLC, Invoice with supporting documentation; BDFTE No. 8959298; FIRM DEFENSE; *Quinton T. Caver, Willie*~~

~~*H. Smith EL, III, and U.S. v. BDFTE, Caliber, et al*; Cause No. 20-DCV-272267 in the 458th Judicial District Fort Bend County; Client Contact: Robert Forster.~~

~~The detailed invoice shows Hopkins representing BDF and suggesting to Caliber the default BDF Hopkins strategy of 'snap removal'. The counsel for Caliber is shown as the law firm, SettlePou. After agreement and removal to S.D. Tex., the case was assigned to Chief Judge Lee Rosenthal. The case settled shortly after and the agreement is being finalized.~~

~~What stands out here is the addresses shown for eservice for Mark Hopkins and Shelley Hopkins. An extract screenshot of page 119 shows that at the date of filing, Mark Hopkins is still using the firm name of Hopkins & Williams, PLLC.~~

On review of the Burkes motion to remand [ROA.172–203] and related documentation presented to the lower court e.g. [ROA.399-400], it is now clear that Hopkins has found another deceptive system to remove all his cases to federal court. Namely, use a secondary address to *filter* the mail and identify which post can be ignored while a 'snap removal' is being expedited.

C. The Conference was a ruse

Both sides appeared on February 6, 2019 and were advised the only activity would be to Schedule. The stacked motions would not be discussed and not even a future hearing was set on the pending motions. A minute entry was recorded

[ROA.3]. The Conference lasted 3 minutes for two cases (*Burke v. Ocwen, Civil Action H-18-4544 (S.D. Tex., 2019)* and *Burke v. Hopkins, Civil Action H-18-4543 (S.D. Tex., 2019)*).

~~"We remember our first meeting with Judge Bray, where he went from telling Hopkins in a packed courtroom at the initial scheduling conference something along the lines of; "I hear you don't like magistrate judges...Well, we'll deal with that later." - to his complete reversal at the September 2019 conference discussed herein." - Extract from BODA~~ ~~RECONSIDERATION LETTER. p.3.~~

D. Motion to Substitute Service and Motion for Extension of Time to Effect Service

Recognizing the fact Ocwen denied receiving service from the State court and aware the 90-day limit to effect service was fast approaching, the Burkes' diligently filed the above motions [ROA.480-512]. The lower court added a court only, private entry. Court only) ***Motion(s) terminated: 22 (p.480) MOTION to Substitute Service MOTION for Extension of Time To Effect Service. (ealexander, 4) (Entered: 03/28/2019). Questionably it shows March 19 as the docket date [ROA.4].

E. If You're Extremely Ill and Elderly, Forget About any Compassion from a Judge Who's Wife is a Doctor

On 14th March, 2019, the Burkes' filed a Motion for Extension of Time [ROA.516] as Joanna Burke was extremely ill and the Burkes' legal diary timeline was overloaded. A short recess of 60 days would help Joanna Burke recover. Judge

Hittner would deny the motion for extension of time [ROA.529] and a week later, on 27th March, Joanna Burke was rushed to hospital via Ambulance and the Doctor said she most likely would have died without urgent care and treatment. (See Affidavit, [ROA.713]).

F. Hopkins 'Supplemental Response, without leave, was only to attack the Burkes again

> "In this case, Plaintiffs claims, brought against their adversary's counsel, are all *baseless*. Plaintiffs have not filed a response to Attorney Defendants Motion to Dismiss [Doc. 6] and have apparently requested stay of this case *in bad faith*." [ROA.231-392].

G. Hopkins improper conduct continues and also refuses to accept trial before a Magistrate Judge

At the time of filing their case management plan, Hopkins summarized the case;

> "Plaintiffs allege that Defendants, the attorneys for their mortgagee (Deutsche Bank) and mortgage servicer (Ocwen) are liable to them for violation of (1) legal malpractice, (2) civil conspiracy, (3) fraud, (4) negligent misrepresentation, (5) violation of Tex. Civ. Prac. & Rem. Code §12.002, (6) violation of Texas Finance Code and (7) violation of the Fair Debt Collection Practices Act."

Hopkins responds to the following question;

> "Magistrate judges may now hear **jury** and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge."
>
> RESPONSE: Defendants do not consent to trial before a magistrate

judge.

As a result of Hopkins premeditated actions, the Burkes had to file their own case management plan due to Hopkins engaging in conduct unbecoming a member of the Bar and is unable to conduct litigation properly. [ROA.393-512].

H. Hopkins Motion to Dismiss in Light of Recent Cases

See. [ROA.691-712] For example, as the Burkes cite below, *In re Ray*, No. 4:19-MC-015-A (N.D. Tex. July 15, 2019) details a similar case which confirms that attorney immunity can be pierced. It certainly does not cover Hopkins in this case, based on the record.

> "[P]laintiff and his counsel [Ryan Ray] engaged in misconduct in this case that "completely sabotaged the federal trial machinery, precluding the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure." [*Rozier v. Ford Motor Co*., 573 F.2d 1332, 1346 (5th Cir. 1978).] And, as in Rozier, "[i]nstead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by [plaintiff's] selective disclosure of information,"; and:
>
> The court finds by clear and convincing evidence that plaintiff and his counsel pursued an unconscionable plan or scheme which was designed to improperly influence this court in its decision, and then the Fifth Circuit in its decision.The court has found from clear and convincing evidence that the judgment of the Fifth Circuit was obtained through fraud, misrepresentation, or other misconduct on the part of plaintiff and his counsel. Their inappropriate conduct led to the trial record that caused the Fifth Circuit to make the ruling it did in favor of plaintiff. The court finds from clear and convincing evidence that the conduct of

plaintiff and his counsel prevented defendant from fully and fairly presenting its defense at trial, which, in turn, prevented the Fifth Circuit from having a full, complete, and honest record upon which to base its decision.

All of the findings expressed in the September 1, 2017 memorandum opinion and order, the March 20, 2019 order, and the May 20, 2019 memorandum opinion and order were based on clear and convincing evidence. Those clear and convincing evidence findings are adopted here, and they provide clear-cut evidence that Ray repeatedly engaged in conduct unbecoming a member of the Bar and unethical behavior, and is unable to conduct litigation properly. All findings made in this order are based on clear and convincing evidence.

Ray sat silently by when, at oral argument in the Fifth Circuit during the initial appeal, one of the panel members asked the attorney for Results if there was any evidence in rebuttal to plaintiff's claim that his trip to the emergency room the morning of July 15, 2013, was to receive medical attention for a back injury he sustained over the weekend, to which the attorney for Results was forced to respond "there is no other real evidence one way or the other." Doc. 19 at 5 n.2. Only an attorney completely devoid of an ethical or moral sense of right and wrong would have sat quietly by as Results's attorney was required to make that sort of answer, bearing in mind that Ray had in his possession documents, which he had withheld from Results, showing that the real reason Hernandez went to the hospital that morning was for a condition that was unrelated to his military service the preceding weekend."

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As you will note from the brief extract above, Hopkins actions have been very

similar *e.g.* with him remaining silent when the Burkes were facing Judge Bray who accused the Burkes of not answering the Motion to Dismiss, which was incorrect. Mark Hopkins was certainly not silent when he wanted to speak at this wretched hearing.

The main difference is the evidence withheld by Mark Hopkins was the Burkes mortgage loan file. This is not hearsay or speculation, it was said in front of the bench and memorialized in a court transcript. A mortgage file is not privileged and attorney immunity does not apply.

Secondly, Shelley Hopkins [nee Douglass] worked at BDF as head of the foreclosure litigation department for the duration of the Burkes case until she married Mark Hopkins. Exhibit #AttorneyImmunity [ROA745-756] details the issues with Shelley Hopkins as an on-again-off-again lawyer for BDF and Hopkins during their honeymoon period. The Burkes provided a detailed argument which was completely discounted by the lower court. Shelley Hopkins does not benefit from attorney immunity and the court was in error when it invoked an evidentiary standard of pleading when the information the Burkes presented is clear and adequate to repel the motion to dismiss.

I. Burkes' Claim for Unjust Enrichment are Valid

Hopkins attempts to wordsmith. See [ROA.704]. This is rebuffed in the

Burkes response. [ROA.763].

J. When You Tell the Truth, You Never Forget;

> "Though the Burkes complain repeatedly about a loan application and its alleged falsification along with the wet ink note, the record of the Foreclosure Litigation [4:11-CV-01568] clearly indicates that the Hopkins Defendants did not appear in the case until after the close of trial and evidence. Attorney Defendants are unclear how the Burkes fixation on the alleged fraudulent loan application and alleged fraudulent wet ink note are related in any manner to judgment for judicial foreclosure. As stated previously, any issues with the foreclosure judgment issued in the Prior Litigation are procedurally improper to bring forth in this action." [ROA.708, footnote 8].

The above statement is completely inaccurate. Firstly, the attempts by Hopkins to open the record to place the forged and fabricated 'wet ink' note was after BDF's bench loss. This was a quite miraculous discovery. After all, 4 years and a trial had passed with no evidence, no witnesses (*e.g.* no Bank representative), and a couple of rejected affidavits which the court found were not believable (the Burkes call it perjury).

This Hopkins system would subsequently be applied to the PNC case [ROA.863- 948] where Mark Hopkins was listed counsel along with Robert Forster and Brian Engel (the expert witnesses for Hopkins. Mark Hopkins added himself as an expert witness too - [ROA.836-839]).

The bankers are non-existent in the Burkes Deutsche Bank loan…but the

lower court is more than willing to accept their falsehoods rather than performing perfunctory requests to confirm Hopkins does represent these parties and in what capacity. It raises a red flag.

Secondly, the 'withholding evidence' by Mark Hopkins was later. This disclosure was announced by Hopkins during the conference hearing after *Deutsche I* returned from this court, and representing the Burkes were Connie Pfeiffer, Ali Hassan and from the bench, Hon. Smith. In the court transcript Mark Hopkins admits to withholding the mortgage file to specifically keep it away from the Burkes. [ROA.1104]. The mortgage file is not privileged, he waived privilege and the lawyer acted unethically and in bad faith towards the Burkes.

K. The attacks continue, and the Fifth Circuit's quote gets republished, again

> "Unhappy with the outcome of their decade long dispute with their mortgage company, the Burkes filed this subsequent lawsuit to air their *ad hominem attacks* against legal counsel for the mortgage company (and its mortgage servicer). *Texas law provides attorneys with qualified immunity from the attacks of vexatious litigants, like the Burkes*, who struggle to accept responsibility for their own conduct.". ROA.802.
>
> Footnote 2; "Given nearly a decade of free living by the Burkes, there is no injustice in allowing that foreclosure to proceed." - *Deutsche Bank National Trust Co., v. Burke,* 902 F.3d 548 (5th Cir. 2018).

L. Opposing the Burkes Motion to Amend, apparently the theme was, well, the usual

"For the Burkes to argue that more time is now needed for them to investigate their claims, after over ten years of litigation, is *disingenuous*."

"*Bad faith* or *dilatory motive*. One factor a court should examine in evaluating whether to grant a motion for leave to amend is whether the request is brought in *bad faith* or as a *dilatory motive* on the part of the movant. The Burkes' repeated efforts at "re-litigating" their case against their mortgage company (and anyone tangentially connected to the mortgage company) is *vexatious*. The Burkes' attempts to cause delay through their dilatory tactics has already been recognized by the Fifth Circuit. See, *Deutsche Bank National Trust Co. v. Burke, 902 F.3d 548* (5th Cir. 2018)("*Given nearly a decade of free living by the Burkes, there is no injustice in allowing that foreclosure to proceed*.)."

"At a minimum, the Burkes continued their *vexatious* ways in at least five lawsuits (as identified above) in the past year alone."

"The Burkes have had their day(s) in court and are well aware of the legal deficiencies in their pleadings." – [ROA.807-808].

M. Motion to Strike Burkes Experts

The case rapidly heated up when the Burkes announced their experts, namely Honorable Stephen Wm. Smith, Connie Pfeiffer, Fatima Hassan Ali, Benjamin J. Siegel, Ben M. Harrington, Steve W. Berman, Joanna Burke, John Burke, Edward L. Kuo, Khilan Pindoria, and Swapan Dubey. The list includes respected lawyers, a

former judge and medical treatment experts who would help reinforce the Burkes case before a jury. Hopkins rushed to quash but the arguments presented by Hopkins were so inadequate, it didn't allow Hittner to issue a turnaround order. It was added to the increasing stack of pending filings. [ROA.812].

N. Hopkins Expert list includes Mark Hopkins, Robert Forster and Brian Engel

Despite many courts preventing *pro se* attorneys and their work colleagues from being experts, Hopkins tried to rebuff the Burkes motion to strike. These are the 3 "expert" lawyers in *PNC Mortg. v. Howard, No. 05-17-01484-CV* (Tex. App. June 24, 2019) which mirrored the fraudulent actions in the Burkes case. What's clear is a strategy for these rogue lawyers is to find a system, scheme or plan and run with it for as long as possible for financial avarice. [ROA.836-853].

O. Burkes Motion to Supplement PNC v. Howard case and the approved filing

[ROA.854-860] Hopkins system of fraud against the Burkes is also implemented in this high value, highly profiled foreclosure case in Texas. [ROA.863-948].

P. A Search for the Truth was Quickly Extinguished

[ROA.949-1006] The Burkes filed the Request for Admissions for Mark

Hopkins which asked the questions the Burkes believed would clear up the many simple but unanswered questions. This escalated the courts' interest. Within twenty-four hours of the RFA being uploaded to the docket, Judge Hittner sent it back to MJ Bray who immediately stayed discovery and ordered as "status" conference. The disastrous events thereafter are documented below.

The bottom line is that there was no way Hopkins would be answering the RFA, denying the Burkes due process and right to a fair and impartial jury trial. The question raised by the Burkes would help seek out the truth and from the reaction, too much truth. Until this date, Hopkins motions and filings did not produce a single piece of evidence. This includes Hopkins authority to act for Deutsche Bank and Ocwen, his alleged clients. As Judge John McBryde stated in a very similar case *In re Ray*, No. 4:19-MC-015-A (N.D. Tex. July 15, 2019);

> "Their conduct prevented Results "from fully and fairly presenting its defense at trial, which, in turn, prevented the Fifth Circuit from having a full, complete, and honest record upon which to base its decision. Because of the dishonest conduct of Ray and his client, "[i]nstead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a **hypothetical fact situation** imposed by [Hernandez's and Ray's] selective disclosure of information."
>
> In re NO. 4:19-MC-015-A 07-15 2019
> Possible Discipline of Ryan Eugene Ray JOHN McBRYDE United States District Judge MEMORANDUM OPINION and ORDER

In this case, however, Judges Bray and Hittner are equal catalysts. They have

abused their discretion, shown pervasive bias and erroneously denied the Burkes any information for their meritorious claims against Hopkins.

Q. Burkes Motion to Stay

[ROA.1077] – Steve Vladek confirms Dodd Frank Act could be stricken, rejecting Hopkins arguments that the Burkes were incorrect and it had nothing to do with the FDCPA/TDCA. The Burkes are yet to read a motion that is believable or factually correct from this law firm.

R. Hopkins Reply to Motion to Dismiss

[ROA.691] Hopkins Replied? According to the court, the Burkes didn't submit any response to Hopkins Motion to Dismiss, which was error.

S. Burkes Reply to Hopkins

[ROA.733] Why did Mark Hopkins say nothing to the Judge about the fact the Burkes had answered? And then Hopkins replied again, in usual format.[ROA.801].

T. Motion to Clarify Brays Unruly Court Conference

Bullet points of note:

- Judge not prepared for the case despite assuring otherwise.
- Changed status hearing into motion hearing without notice.
- Delay and doctoring of transcript(s).

- No reimbursement of fees.
- Why did the judge refuse to turn on his microphone?
- Why Hopkins remained silent when the question of answering his motion to dismiss was raised?

- No civility regarding Joanna's medical schedule and other court filing deadlines.
- Hopkins lied at the conference when he stated the Fifth Circuit case re Ocwen 'was fully briefed'.
- Gorsuch quote; "we the people" not "we the judges". [ROA.1012]

U. Constitutional Challenges

[ROA.1018-1043] These were submitted as the Texas AG refused to reply to the Burkes formal question on advice/referral from TX SML. Note; Ken Paxton calls the CFPB a 'rogue' agency. [ROA.1022]. What does Hopkins think about that?

V. Challenge to AG Texas

> "In fact, because under Texas law a notice of default and opportunity to cure must precede a foreclosure sale, *see* Tex. Prop. Code Ann. § 51.002(d) (West Supp. 2010), foreclosure actions inevitably involve a debt collection aspect. Therefore, it appears that the TDCPA applies to foreclosure actions." *Biggers v. BAC Home Loans Servicing, LP*,767 F.

Supp. 2d 725, 732 (N.D. Tex. 2011).

Fed. R. Civ. P. 5.1; The court MUST certify to the appropriate AG that the statute has been raised. 28 U.S. Code § 2403. Below confirms the court sat on the Challenges and then denied as moot several months later. Unlike this court, who adhered to the strict timeline to issue letters to each AG.

65 (p.1098)	MEMORANDUM AND RECOMMENDATIONS re 28 (p.691) MOTION to Dismiss 27 (p.531) Amended Complaint/Counterclaim/Crossclaim etc. and denying as moot 38 (p.829) MOTION to Strike 36 (p.812) MOTION *Expert Designations*, 54 (p.1012) MOTION for Clarification, 61 (p.1076) MOTION to Stay, 55 (p.1018) MOTION PLAINTIFF'S MOTION AND INCORPORATED MEMORANDUM TO INVITE THE VIEWS OF THE ATTORNEY GENERAL of the United States, 40 (p.840) MOTION to Strike, 56 (p.1026) PLAINTIFF'S MOTION AND INCORPORATED MEMORANDUM TO INVITE THE VIEWS OF THE ATTORNEY GENERAL for the State of Texas MOTION (Signed by Magistrate Judge Peter Bray) Parties notified.(jmarchand, 4) (Entered: 02/24/2020)

W. The mandated 15-page response to MJ Brays' Erroneous Order

[ROA.1044] Footnote 2 suggests not acting on the Burkes Constitutional Challenges [ROA.1018-1043] would be unconstitutional. Generally, the Burkes argue the conference should be void for the detailed reasons provided. The Burkes also reference the *Selia Law* case, which at that time, was before the US Supreme Court. [19-7].

X. Fact Checking Hopkins (Lie Detector Test)

For confirmation of the constant deception by Hopkins, the Burkes reply herein fact checks Hopkins. [ROA.1089]

Y. Memorandum & Recommendations Report from MJ Bray

[ROA.1098] On the 24th of February, 2020, the M&R was released. In short summary, the case was dismissed by MJ Bray: Accordingly, the court recommends that Defendants' motion to dismiss (D.E. 28) be GRANTED and that this case be dismissed with prejudice. All other pending motions (D.E. 38, 40, 54, 55, 56, 61) are DENIED as MOOT.

> Categorized by Bray under Attorney Immunity: "The Burkes have not provided any facts alleging that Defendants engaged in the type of conduct that may fall outside of the attorney-immunity doctrine. Because all of Defendants' conduct was within the scope of representation and was "not foreign to the duties of an attorney," attorney immunity applies to all of the Burkes' common law claims. *See Cantey Hanger, LLP,* 467 S.W.3d at 485. Thus, the court recommends that the Burkes' claims of fraud, civil conspiracy, and unjust enrichment be dismissed."
>
> Categorized by Bray under FDCPA and TDCA Claims: The court therefore recommends that the Burkes' statutory claims be dismissed.

Z. The Final Alarm Went Off, But the Radio was Playing Johnny Cash; 'Bad News'

The Burkes filed their Motion to Alter or Amend the Judgment [ROA.1178] on May 1st, 2020 The music lyrics the Burkes' woke up to from the radio started out; "Well bad news travels like wildfire, good news travels slow…" They'd heard that song before. [ROA.1230].

VII. ARGUMENT

Allen v. Dovenmuehle Mortg., Inc., Civil Action No. 3:13-CV-4710-L, at *19 (N.D. Tex. July 21, 2014) See [ROA.1040].

> "The TDCPA requires "[t]hird-party debt collectors" to obtain a $10,000 "surety bond" from an authorized surety company and file a copy with the secretary of state prior to engaging in debt collection. Tex. Fin. Code Ann. § 392.001 (West 2006).
>
> In *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722-23 (5th Cir. 2013), the court noted that, while the TDCPA defines third-party debt collectors by expressly referencing the FDCPA definition of debt collectors found in 15 U.S.C. § 1692a(6), "the TDCA's definition of debt collector is broader than the FDCPA's definition." Id. The court in Miller therefore concluded that mortgage servicers and debt assignees are debt collectors under the TDCPA irrespective of whether a plaintiffs' mortgage is already in default at the time of assignment. Id. at 723. Thus, regardless of whether Plaintiffs' mortgage was in default when it was assigned to Defendants, the court determines that Defendants, as the mortgage servicer and debt assignee of Plaintiffs' Note and Deed of Trust, are debt collectors under the TDCPA."

> "The court also determines that Plaintiffs' TDCPA claim, based on Defendants' failure to obtain a bond, fails for a reason not addressed by Defendants. The court therefore moves sua sponte to dismiss this claim. Plaintiffs allege that they suffered damages as a result of Defendants' inaccurate reporting of the amount due under their Note; however, Plaintiffs do not allege that they suffered any actual damages as a result of Defendants' failure to file a bond."
>
> [ROA.1113-1114] "The Burkes also argue that Defendants failed to file a copy of a surety bond with the Texas Secretary of State as required by Tex. Fin. Code Ann. § 392.101. This statute only applies to "third-party debt collectors" or credit bureaus engaged in debt collection. The Burkes have not provided facts to show that Defendants are "third-party debt collectors" engaged in debt collection. *In any event, the Burkes have failed to show how Defendants' failure to have a surety bond on file caused them any injury.*"

The Burkes statement of the case, runs in parallel with the pending Ocwen case before this court (19-20267). As such, the Burkes would respectfully ask the court reference this section of the Initial (Ocwen) Brief and which provides valuable details pertaining to this case (particularly in the opening sections). It is a substantial reason why the Burkes requested a stay.

The two lower court judges (one pending) are facing judicial misconduct charges before this court and abhorrent lawyer, Mark Daniel Hopkins, has been reported directly to the Bar. That matter is ongoing.

Truly, it's not a position the Burkes take any satisfaction from. That stated, the facts uncovered in Texas and more recently in Florida have left the Burkes in

complete astonishment. *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp*., No. 9:17-CV-80495- MARRA-MATTHEWMAN (S.D. Fl.) and *Burke v. Consumer Financial Protection Bureau v. Ocwen Financial Corp., et al*, 19-13015 (11th Cir., 2020).

"OCWEN IS A DEBT COLLECTOR"
UNITED STATES DISTRICT JUDGE MIDDLEBROOKS

Booze v. Ocwen Loan Servicing, LLC, Case 9:20-cv-80135-DMM, Doc. 12 (M.D. Fla, March 2, 2020)

Perjury, withholding evidence and a 'win at all costs' attitude because *I'm a lawyer* has severely impacted the lives of millions of homeowners and citizens. That's just not fair and it's destroying millions of families.

The Burkes also wish to state they view the entire brief as the 'statement of the case'. By analysis of the docket, the Burkes have provided the court easy bookmarks to the trigger points, from the appellants view.

Below the Burkes address the summary issues, and the 'abuse of discretion' standard for cases such as these.

A. Dismissal with Prejudice

> "Dismissal with prejudice, however, is an extreme sanction that deprives a litigant of the opportunity to pursue his claim. Although on an appeal from the imposition of such a sanction this court will confine its review to a determination of whether the district court abused its discretion, we have consistently held that dismissal with prejudice is

> warranted only where "a clear record of delay or contumacious conduct by the plaintiff" exists, *Durham v. Florida East Coast Railway Co*., 385 F.2d 366, 368 (5th Cir. 1967), and "a lesser sanction would not better serve the interests of justice," *Brown v. Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970). See *Silas v. Sears, Roebuck Co*., 586 F.2d [382] at 385 [5th Cir. 1978]; *Boazman v. Economics Laboratory, Inc*., 537 F.2d 210, 212 (5th Cir. 1976); *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976), cert. denied, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977); *Connolly v. Papachristid Shipping Ltd*., 504 F.2d 917, 920 (5th Cir. 1974); *Flaksa v. Little River Marine Construction Co.*, 389 F.2d [885] at 888 [5th Cir. 1968]. 610 F.2d at 247 (emphasis added). - *McGowan v. Faulkner Concrete Pipe Co*., 659 F.2d 554, 556 (5th Cir. 1981).

There was absolutely no justification for the lower court to DWOP *Ocwen* **without** prejudice and *Hopkins* **with** prejudice. There was no delay on behalf of the Burkes, nor contumacious conduct. That would be a case of mistaken identity. No, that conduct would match opposing counsel. The decision was an abuse of discretion.

B. Dismissal under Rule 41(b)

> "Rule 41(b) of the Federal Rules of Civil Procedure permits a defendant to move for dismissal when the plaintiff fails to prosecute or to comply with a court order. This court in *Gonzalez v. Firestone Tire Rubber Co*., 610 F.2d 241 (5th Cir. 1980) indicated the harshness of this sanction. - *McGowan v. Faulkner Concrete Pipe Co*., 659 F.2d 554, 556 (5th Cir. 1981)."

In these proceedings, it was dismissed for failure to prosecute without regard

for the law or the pleading standards. The lower court expected evidentiary (higher pleading standards) which is higher than the law demands to defeat a motion to dismiss. Instead they DWOP'd with prejudice.

The Burkes are aware of the undertone message, especially with Hopkins constantly quoting from this court's last sentence in the *Deutsche II*, [18-20026] opinion and continually attacking the Burkes with statements like "they've had their last day(s) in court..." It would appear, falsely accusing the elder Burkes of "wanting certain judges to be shot" is how you win a case these days.

C. Denial of Remand

The Burkes' have articulated the reasons the lower court erred in dismissing the case for want of prosecution in earlier portions of this brief. Denial of remand was error. The main objection is the Burkes were extremely diligent in tracking and following up the alleged failed delivery. At just after 9am on the said Friday the Burkes emailed Hopkins requesting a correct address or a waiver and they refused to reply. This was to allow them to finalize the paperwork that day/and/or over the weekend to file it in S.D. Texas on the Monday. Where does it say in the rules that lawyer(s) can behave like that?

D. The RFA's Should have Continued

The RFA prepared [ROA.949] initially for Mark Hopkins would have answered many of the basic questions in order to ascertain Hopkins role in the 'organizational tree'. As soon as the Burkes RFA's hit the desk in S.D. Texas, the court went into overdrive to ensure that receipt of information would not be forthcoming.

That said, the Burkes can confirm they are clearly correct that these two entities are merged ~~*e.g.* BDF Hopkins. (Equivalent to Ocwen Altisource). The SURPRISE.PDF shows Mark D. Hopkins working on insurance liability reports for BDF's auditors and Shelley L. Hopkins is billing time for assisting on substitute trustee specific motions.~~

E. The Memorandum & Recommendation Report

The Burkes' have articulated the reasons the lower court erred in dismissing the case for want of prosecution in their responses; [ROA.1116] and [ROA.1178] and [ROA.1184].

F. The Orders and Judgment(s) by Judge David Hittner

The Burkes' have articulated the reasons the lower court erred in dismissing the case for want of prosecution in their responses; [ROA.1178] and [ROA.1184].

The judges orders; adopting the M&R [ROA.1157] and final judgment [ROA.1158].

G. The 'Blind Draw' System in S.D. Texas

When the Burkes filed in State court, the two cases were assigned to individual judges. Why did both the Burkes cases end up back in Judge Hittner's court and both before MJ Smith when there is supposed to be a 'blind draw' system?

H. The Constitutional Challenges Were Not Sent by the Court

The Burkes' have articulated the reasons the lower court erred in not sending the constitutional challenges earlier in this brief. [ROA.1018-1043].

I.Shelley Hopkins Interest in the Burkes case started in 2011. She doesn't benefit from 'Attorney Immunity'

The Burkes' have articulated the reasons why Shelley Hopkins does not receive attorney immunity. See Exhibit #AttorneyImmunity. [ROA.745-756].

J. Why did Magistrate Bray not Report Hopkins for his conduct? Why did he Not Void the Conference?

See post status conference order [ROA.1009] and motion to clarify [ROA.1012].

VIII. CONCLUSION

The lower court case was sabotaged and the Burkes were not afforded a fair or impartial hearing. As far as Magistrate Judge Bray and opposing counsel, their actions on the fateful September 10, 2019 conference have left scars and mental anguish.

It is inexcusable that Judge Bray would attack the Burkes rather than question Hopkins outrageous and false statements. It is far beyond elder abuse. As seniors and law-abiding citizens who have lived all over the world, they have never, ever been treated with such derision. This would later be confirmed by the war crime acts of Judge Hittner after the proclamation of a pandemic in Texas.

For the foregoing reasons, and the fact the Constitution is the superior law, the Burkes request that the lower court judgment be reversed and remanded to the State Court so that due process and the right to a fair jury trial may be taken.

Respectfully submitted,

DATED: July 30th, 2020

JOANNA BURKE

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CERTIFICATE OF SERVICE

I hereby certify that, on July 30, 2020, a true and correct copy of the foregoing Brief of Appellees was served via the Court's EM/ECF system on the following counsel of record for Appellees:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font, with the exception of footnotes, which are in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **9,287** words, excluding the parts exempted under Fed. R. App. P. 32(f).

s/ John Burke
JOHN BURKE