

No. \_\_\_\_\_

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**In the Supreme Court of Texas**

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*In Re Dolcefino Communications, LLC*

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*On Petition for Writ of Mandamus from the First Court of Appeals—Houston  
Cause No. 01-20-00382-CV*

*Original Proceeding from Cause No. 19-CV-0814  
in the 405<sup>th</sup> Judicial District Court of  
Galveston County, Texas*

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**PETITION FOR WRIT OF MANDAMUS**

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**IDENTITY OF PARTIES AND COUNSEL**

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**Represented by:**

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**2. Respondent:**

The Honorable Jared Robinson  
Judge, 405th Judicial District Court  
Galveston County Civil Courthouse  
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**3. Real Party in Interest:**

Friendswood Police Department

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## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL .....	i
TABLE OF CONTENTS .....	iv
INDEX OF AUTHORITIES .....	v
RECORD REFERENCES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF JURISDICTION .....	4
SUMMARY OF ARGUMENT .....	5
ISSUES PRESENTED .....	6
STATEMENT OF FACTS .....	6
ARGUMENT .....	9
A. THE RECORD BEFORE THE COURT OF APPEALS DID AND DOES CONTAIN EVIDENCE OF DOLCEFINO’S AUTHORITY TO BRING THIS ACTION. ....	9
B. THIS IS A CAPACITY ISSUE, IF AN ISSUE AT ALL, AND NOT A STANDING ISSUE THAT IMPLICATES SUBJECT MATTER JURISDICTION.....	10
C. PERFECTING APPEAL ONLY IN THE NAME OF DOLCEFINO DOES NOT JUSTIFY DISMISSAL. ....	12
D. TO THE EXTENT THAT AN ACTUAL STANDING ISSUE EXISTS, THE APPROPRIATE MEASURE IS TO REMAND TO CURE, NOT DISMISSAL.....	14
E. THE PANEL’S DECISION TO DENY RELATOR’S REQUEST TO SUPPLEMENT THE RECORD WITH THE POWER OF ATTORNEY FORMS WAS IN ERROR.....	15
CONCLUSION AND PRAYER .....	16
APPENDIX.....	20

**INDEX OF AUTHORITIES**

**CASES**

*Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005)..... 10, 11

*AVCO Corp. v. Interstate Southwest Ltd.*, 251 S.W.3d 632, 649 (Tex. App.—  
Houston [14<sup>th</sup> Dist.] 2007, pet. denied)..... 10

*In re Cauley*, 437 S.W.3d 650, 655 (Tex. App.—Tyler 2014, orig. proceeding)... 10

*In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)..... 15

*McRoberts v. Ryals*, 863 S.W.2d 450 (Tex. 1993)..... 16

*Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 776 (Tex.  
2005) ..... 11

*Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661  
(Tex.1996)..... 10, 11

*Rodarte v. Investeco Group, LLC*, 299 S.W.3d 400 (Tex. App.—Houston [14<sup>th</sup>  
Dist.] 2009, no pet.) ..... 11, 13

*RSL Funding v. Pippins*, 499 S.W.3d 423, 429 (Tex. 2016) ..... 14

*Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex.2012) ..... 14

*Warwick Towers Council of Co–Owners ex rel. St. Paul Fire & Marine Ins. v.  
Park Warwick, L.P.*, 244 S.W.3d 838, 839 (Tex.2008) (per curiam) ..... 13

*Westbrook v. Penley*, 231 S.W.3d 389, 394–95 (Tex.2007)..... 14

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**PETITION FOR WRIT OF MANDAMUS**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, Relator, Dolcefino Communications, LLC, by and through written power of attorney for Mindy Lee Comstock, Joseph Manley and Bonnie Manley, and files petitions this Court to grant review on writ of mandamus of the decision of the Houston Court of Appeals [1<sup>st</sup> Dist.] regarding its decision to dismiss Relator’s Petition for Writ of Mandamus based on their incorrect assertion that the record lacked evidence that Relator had authority to act on behalf of the real parties in interest, and that Relator lacked standing to assert such an action. As such, Relator would respectfully show the Court the following:

## **RECORD REFERENCES**

For the Court’s reference, citations to [OP:\_\_\_\_] are references to the Memorandum Opinion of the First Court of Appeals in Cause No. 01-20-00382-CV, *In Re Dolcefino Communications, LLC, Relator*, Original Proceeding from Cause No. 19-CV-0814 in the 405th Judicial District Court of Galveston County, Texas, issued on September 10, 2020. All other record cites are indicated by [volume][court record]:[page] (e.g. 3CR:1234). The Appendix to the Petition for Writ of Mandamus will be referenced as “App-[letter].” The Record in Support of Relator’s Petition for Writ of Mandamus will be referenced as “R[tab number]:[page number].” Citations to the Appendix of this Petition for Review will be referenced as “APX:[number].”

## **STATEMENT OF THE CASE**

Joseph Manley resides in a home with his wife Bonnie Manley, daughter Mindy Comstock, and two grandchildren (the children of Mindy Comstock and her now ex-husband, Houston Police Department Officer Allan Comstock). Friendswood Police Department unlawfully detained Joseph Manley and forcibly removed his grandchildren presumptively at the sole direction of Allan Comstock and with the cooperation of one or more members of Friendswood PD and/or Friendswood PD as an entity. Dolcefino Consulting, Relator, at the direction of the Manleys and through power of attorney, sought production of documents and “body cam” footage through a Texas Public Information Act request, which did not result



in the production of the “body cam” footage.

Subsequently, Relator filed a verified petition for pre-suit deposition under Texas Rule of Civil Procedure 202 seeking depositions of members of the Friendswood PD with subpoena *duces tecum* for the production of certain records related to the incident including “body cam” footage, to establish (or vitiate) the contentions that Friendswood PD, and/or one or more of its officers, acted at the sole request of Mr. Comstock and without authority of law, that any of the officers acted independently in a manner that is actionable, and as well, to investigate the potentially actionable claims against Allan Comstock. Judge Robinson denied Relator’s Rule 202 Petition, for which the relief herein is sought. APX:C

Relator filed a Petition for Writ of Mandamus. Although supported by evidence *in the Court of Appeals’ record*, the Court of Appeals dismissed the Petition for lack of evidence supporting the fact that Dolcefino Communications had authority to act on behalf of the aggrieved parties, finding that Dolcefino lacked standing to assert the Petition. APX:A. Relator seeks review of this decision. It is also of note that, in addition to the evidence in the Court of Appeals’ record of Dolcefino’s authority to act on behalf of the Manleys, Relator moved the Court of Appeals to supplement the Court’s record with the written power of attorney forms giving Dolcefino such authority. The Court of Appeals denied Relator’s request even though the documents proffered for supplementation of the record have nothing to

do with the merits of Relator's Petition and are only relevant to his right to act on behalf of the Manleys. APX:B.

Relator's Petition for Writ of Mandamus was filed on May 15, 2020.

Relator's Petition was heard in the Houston Court of Appeals (1<sup>st</sup> Dist.) and the judges who participated in the decision were Justices Keyes, Lloyd and Landau.

The Houston Court of Appeals issued a Memorandum Opinion on September 10, 2020.

The Court of Appeals' decision was to dismiss Relator's Petition for Writ of Mandamus. The Court of Appeals further denied rehearing and refused to allow supplementation of the record to include the actual written power of attorney forms, which would not have impacted the case on any substantive issue, but which would have clarified the capacity and/or standing issue.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal under Texas Government Code § 22.001 and Texas Rule of Appellate Procedure 24.4 and/or 56.1 for the following reasons:

- (1) Per Texas Rule of Appellate Procedure 24.4, a party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case. A party may seek review of the court of appeals' ruling on the motion by petition for writ of mandamus in the Supreme Court.

- (2) The opinion of the First Court of Appeals conflicts with its own prior precedent as well as precedent from this Court on fundamental standing and capacity issues affecting parties' rights to bring actions in this State;
- (3) The opinion of the First Court of Appeals conflicts with its own prior precedent as well as precedent from this Court regarding bona fide attempts to perfect an appeal;
- (4) The opinion of the First Court of Appeals conflicts with its own prior precedent as well as precedent from this Court regarding the method for curing or addressing standing issues;
- (5) The opinion of the First Court of Appeals was both factually and legally incorrect, and is of sufficient importance to the state's jurisprudence that it should be corrected; and
- (6) The opinion of the First Court of Appeals could impermissibly restrict the Open Courts provision of the Texas Constitution.

### **SUMMARY OF ARGUMENT**

The record before the Court of Appeals does contain evidence of Dolcefino's authority to bring this action on behalf of the aggrieved parties through his testimony, which is already a part of the Court of Appeals' record, making the dismissal of the mandamus based on a lack of evidence in the record improper. Further, the Court has addressed the issue of Dolcefino's authority to bring this action as a standing issue, however, it is a capacity issue and, hence, has no impact on subject matter jurisdiction. Capacity has never been challenged in the trial court or in the Court of Appeals, it is, further, a waived issue. As well, even if this were

an actual capacity issue, the appropriate remedy is abatement to provide Relator an opportunity to cure any pleading defect resulting in a standing or capacity issue.

### **ISSUES PRESENTED**

Relator raises the following issues requested for review by this Court:

- ISSUE 1. The record *did* contain evidence that Dolcefino had power of attorney to bring this action on behalf of the aggrieved parties.
- ISSUE 2. The Court of Appeals' decision conflicts with prior precedent. Any issues regarding Dolcefino's authority to file this Petition are issues pertaining to capacity, not standing, which is not a jurisdictional issue.
- ISSUE 3. The Court of Appeals' decision conflicts with prior precedent. Perfecting appeal solely in the name of Relator does not warrant dismissal as there should be no confusion in this Court as to Dolcefino's capacity, and certainly a bona fide attempt to invoke the appellate court's jurisdiction was made, which should properly and sufficiently perfect this appeal.
- ISSUE 4. The Court of Appeals' decision conflicts with prior precedent. If there is a curable defect in a standing issue, which was raised *sua sponte* by the Court of Appeals, the Supreme Court's prescribed remedy is to remand to provide an opportunity to cure the defect, not dismissal.
- ISSUE 5. The Court of Appeals' decision to deny Relator's request to supplement the record with the power of attorney documents was in error.

### **STATEMENT OF FACTS**

Allan Comstock is a Houston Police Department officer and the ex-husband of Mindy Lee Comstock.

On July 31, 2018, Allan Comstock apparently filed or made two separate reports of “incidents” or “disturbances” with Friendswood PD. R11-Ex.1-C; R11-Ex.1-D. The first complaint regarded his then 16-year-old daughter (whose mother is Mindy Lee Comstock) wherein he specifically requested to speak with Friendswood PD Officer Cory McCombs, and then requested Friendswood PD, under a claim of a “disturbance,” to go to his daughter’s boyfriend’s house and forcibly remove her. R11-Ex.1-D. They did, through Officer McCombs, and with the assistance of one or more Friendswood PD officers, and with Mr. Comstock present and also assisting. Mr. Comstock then dropped off his 16-year old daughter at the residence of Mindy Lee Comstock, where she resides with and her parents (the grandparents, Joseph and Bonnie Manley), and her two children she had with Allan Comstock.

Later *that same day* (July 31, 2018), Mr. Comstock made another report to Friendswood PD *only a few hours later*, once again, complaining of a “disturbance,” but this time at the Manley residence. R11-Ex.1-B. Both his then 16-year old daughter (who he dropped off at this residence shortly before) and his then 13-year old son (both the children of Allan and Mindy) were home and asleep. Mr. Comstock requested that Friendswood PD remove both of his children from the home. With the assistance of Friendswood PD, *again through Officer Cory McCombs* and others, Joseph Manley (who is elderly, is a cardiac bypass patient, has poor vision and

hearing impaired, and did not have his hearing aids) was *handcuffed* and *detained* while the children were forcibly removed from the residence and turned over to Mr. Comstock. R11-Ex.1-B. After the children were removed from the home, Mr. Manley was released and never charged with a crime.

Relator filed a Verified Petition pursuant to Texas Rule of Civil Procedure 202 (the “Rule 202 Petition”) seeking discovery by way of depositions of the officers present and subpoena *duces tecum* requesting the “body cam” footage from the event and related documents. The Rule 202 Petition sought to investigate potential claims as well as whether one or more criminal complaints should be filed. Specifically, the Rule 202 sought a limited amount of discovery to investigate potential claims for: (1) violations of Texas Penal Code § 37.08 (False Report to a Peace Officer); (2) violations of Texas Penal Code § 20.02 (False Imprisonment); (3) false imprisonment (civil); (4) violations of 42 USC § 1983; (5) violations of Texas Penal Code § 22.01 (Assault); (6) assault (civil); (7) conspiracy (civil); (8) violations of Texas Penal Code § 7.02; and (9) aiding and abetting (civil).

At the hearing, the trial court entertained arguments and considered documentary evidence submitted by Relator but *declined* to hear testimony from the present live witnesses: Joseph Manley, Bonnie Manley, and Mindy Comstock’s daughter. App-B; R9:14, 40. Relator voluntarily offered to reduce the scope of the discovery sought to production of the “body cam” footage through the subpoena

*duces tecum* attached to the deposition on written questions as an intermediary and non-intrusive/non-burdensome “first step” (to verify whether additional discovery would be necessary). R9:23. Further, Relator even consented to the trial court’s idea that the “body cam” footage would be produced pursuant to a protective order. R9:28–29. Instead, without stating a basis for the decision, the trial court denied all the requested discovery, including depositions of the relevant fact witnesses and production of the “body cam” footage, which is clearly the best and most direct evidence of the events in question.

### **ARGUMENT**

**A. THE RECORD BEFORE THE COURT OF APPEALS DID AND DOES CONTAIN EVIDENCE OF DOLCEFINO’S AUTHORITY TO BRING THIS ACTION.**

Although the Court of Appeals found that no evidence existed establishing “that relator had the authority to act in such representative capacity [of the aggrieved parties],” it did and does. In addition to the assertions in Relator’s Verified Original Petition Pursuant to Texas Rule of Civil Procedure 202 (*see* R-1:1-2), as well as the unchallenged assertions of same in the Reporter’s Record from the hearing on this matter (*see* App-B:4), the record also contains sworn testimony of Wayne Dolcefino who verified the Petition through his sworn testimony. Mr. Dolcefino testifies that he is “the representative of Mindy Lee Comstock, Joseph Manley and Bonnie Manley by way of written Power of Attorney.” R-1:15. This testimony has not been

challenged at any time in this action either. It is clear that the record does contain evidence “that relator had the authority to act in such representative capacity,” making the Court of Appeals’ decision in error.

**B. THIS IS A CAPACITY ISSUE, IF AN ISSUE AT ALL, AND NOT A STANDING ISSUE THAT IMPLICATES SUBJECT MATTER JURISDICTION.**

To the extent that there is any issue related to Dolcefino’s ability to bring both the underlying action and this mandamus, such is a capacity issue, not a standing issue. “Standing is not to be confused with capacity. ‘A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.’” *AVCO Corp. v. Interstate Southwest Ltd.*, 251 S.W.3d 632, 649 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, pet. denied) (quoting *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex.1996)). As the court continued, “[c]apacity concerns ‘a party’s personal right to come into court,’ while standing concerns ‘the question of whether a party has an enforceable right or interest.’” *Id.* (quoting *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005) (quoting 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1559, at 441 (2d ed.1990))). As the court concluded, “[t]hus, a plaintiff with no legally cognizable interest in the outcome of the case lacks standing to sue on its own behalf, but may



be authorized to sue on behalf of another.” *Id.* (citing *Nootsie*, 925 S.W.2d at 661; *Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005)).

The difference between standing and capacity, as set out by the Court in *AVCO*, has been a consistent interpretation of standing versus capacity by Texas courts. This issue was directly addressed by the Texas Supreme Court in *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005). The Supreme Court in *Lavato* also illustrated this issue by addressing noting that a representative has capacity when an aggrieved party “grants another party the capacity to sue on their behalf.” *Id.* at 849. Such is the case here. The record clearly indicates that Dolcefino was granted “the capacity to sue on [the Manley’s] behalf.” While it is stipulated that Dolcefino could not have brought his claim on his own for a lack of standing, his ability to do so in this instance, therefore, is a question of capacity, not of standing because his ability to do so was based on the legal grant of power of attorney to him by Bonnie and Joseph Manley as well as Mindy Lee Comstock, as is delineated by his testimony. And capacity has never been challenged in this action. Hence, the Court of Appeals’ treatment of this issue as a standing issue instead of a capacity issue is in error, and a capacity issue “must be raised by a verified pleading in the trial court,” which it was not. *Id.*

This issue was addressed in the precise same context in *Rodarte v. Investeco Group, LLC*, 299 S.W.3d 400 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009, no pet.).

*Rodarte* involved a case where a party brought suit on behalf of his brother through power of attorney, which was challenged on a standing basis. In concluding that this issue was not a standing issue, but rather a capacity issue, and in concluding that the party bringing suit did have capacity to do such, the Court wrote:

In addition, *the scope of Victor's authority under the special and general powers of attorney is a question of capacity, not standing*...Standing is not to be confused with capacity...Capacity concerns “a party's personal right to come into court,” while standing concerns “the question of whether a party has an enforceable right or interest’...”A plaintiff with no legally cognizable interest in the outcome of the case lacks standing to sue on its own behalf, but may be authorized to sue on behalf of another...Appellees have not challenged Victor's capacity to bring suit on his brother's behalf.

We conclude that Victor has standing as Gregorio's attorney-in-fact to litigate his brother's claims.

*Id.* at 406-07 (citations omitted) (emphasis added) (citing *AVCO, Austin Nursing Ctr.* and *Nootsie*). This case is no different and the Court of Appeals’ decision is in direct conflict with this Court’s prior precedent as well as its own.

### **C. PERFECTING APPEAL ONLY IN THE NAME OF DOLCEFINO DOES NOT JUSTIFY DISMISSAL.**

The Court of Appeals, in its opinion, also takes issue that the writ of mandamus “was brought solely by” Relator. Such is not a basis to justify either a lack of standing or capacity sufficient to warrant dismissal of the mandamus. This issue was also addressed directly in *Rodarte*. The Houston Court of Appeals stated:

Appellees also contend that Victor perfected appeal in his individual capacity only and does not have standing in this court because he

has no interest in the subject property. ***While it is true that Victor did not state in the notice of appeal that he was representing his brother, he has sued below only in a representative capacity; there is no confusion as to his capacity before this court.*** Having made a bona fide attempt to invoke the appellate court's jurisdiction after prosecuting this suit solely in a representative capacity on his brother's behalf, Victor effectively has perfected an appeal. See *Warwick Towers Council of Co-Owners ex rel. St. Paul Fire & Marine Ins. v. Park Warwick, L.P.*, 244 S.W.3d 838, 839 (Tex.2008) (per curiam).

*Rodarte*, 299 S.W.3d at 407 (emphasis added).

This is, again, an identical situation. The underlying action was brought by Dolcefino “as Representative of Mindy Lee Comstock, Joseph Manley, and Bonnie Manley” in its style. R-1:1. The petition recites on its first page that the action was brought “as representative of MINDY LEE COMSTOCK, JOSEPH MANLEY and BONNIE MANLEY by way of power of attorney.” R-1:1-2. Further, it is supported by the declaration of Wayne Dolcefino who verified the Petition through his sworn testimony and directly testifies that he is “the representative of Mindy Lee Comstock, Joseph Manley and Bonnie Manley by way of written Power of Attorney.” R-1:15. Announcement was made on the record at the hearing as well, at the very outset of same, that the action was brought by way of the power of attorney. App-B:4. As is the case in *Rodarte*, there should be no confusion in this Court as to Dolcefino’s capacity, and certainly a bona fide attempt to invoke the appellate court's jurisdiction was made, which should properly and sufficiently perfect this appeal.

Again, the Court of Appeals’ decision is in direct conflict with this Court’s

prior precedent as well as its own.

**D. TO THE EXTENT THAT AN ACTUAL STANDING ISSUE EXISTS, THE APPROPRIATE MEASURE IS TO REMAND TO CURE, NOT DISMISSAL.**

The Texas Supreme Court has set forth the appropriate remedy if a standing issue perceptibly exists, is raised for the first time on appeal, but the possibility of curing such seems probable. Namely, in such instance, the appellate court is to remand the case to provide an opportunity to cure the standing issue, not dismissal.

The Supreme Court has held:

[W]here jurisdiction is challenged for the first time on appeal, we have noted that plaintiffs do not have the same opportunities to replead, direct discovery to, or otherwise address the jurisdictional issue as they have when standing is raised in the trial court. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex.2012) (“[A] plaintiff may not have had fair opportunity to address jurisdictional issues by amending its pleadings or developing the record when the jurisdictional issues were not raised in the trial court.”). Thus, when an appellate court is the first to consider jurisdictional issues, it construes the pleadings in favor of the plaintiff and, if necessary, reviews the record for evidence supporting jurisdiction. *Id. If standing has not been alleged or shown, but the pleadings and record do not demonstrate an incurable jurisdictional defect, the case will be remanded to the trial court where the plaintiff is entitled to a fair opportunity to develop the record relating to jurisdiction and to replead. See id. at 96–97; Westbrook v. Penley*, 231 S.W.3d 389, 394–95 (Tex.2007).

*RSL Funding v. Pippins*, 499 S.W.3d 423, 429 (Tex. 2016) (emphasis added).

Although it is clearly contended that the issue in this case is, at best, one of capacity,

which has been waived, given the status of the record, this case could have been remanded, replead, and the record supplemented with the written power of attorney forms. The Supreme Court supports this remedy, not dismissal.

**E. THE PANEL'S DECISION TO DENY RELATOR'S REQUEST TO SUPPLEMENT THE RECORD WITH THE POWER OF ATTORNEY FORMS WAS IN ERROR.**

Relator sought permission to supplement the Court of Appeals' record with the written power of attorney forms granted to Relator by the Manley's and Ms. Comstock based on the TRAP authority allowing parties to supplement the record after the record is filed. The Court of Appeals denied this request based on the fact that such documents were not presented to the trial court, and the general prohibition against a reviewing court's review of records not presented to the trial court, citing *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016). While this is the state of the law, the reliance on this rule to exclude the power of attorney forms is misplaced.

The power of attorney forms have no relevance to the substantive dispute at issue in the Petition filed by Relator but relate only to Relator's ability to bring the mandamus action on behalf of the Manley's and Ms. Comstock. For this reason, the prohibition against reviewing information not presented to the trial court has no relevance to whether the court can, or should, review the power of attorney forms. Texas Courts have long favored expansive readings of the Rules to not invalidate bona fide attempts to appeal. See, e.g., *McRoberts v. Ryals*, 863 S.W.2d 450 (Tex.

1993). The authority cited by the Court of Appeals on this issue are both related to the reviewing of substantive documentation related to the substantive issues.

Second, it is still of note that Real Party in Interest never contested Dolcefino's authority to bring this action at the trial court, wherein affidavit evidence of Dolcefino's authority was presented, which is also a part of this Court's and the Court of Appeals' record.

Simply, if the Court of Appeals had these power of attorney forms, they would in no way be relevant to this issues that are to be decided by the Court of Appeals. Without them, the Court of Appeals contends it cannot review the substantive issues. By reviewing the power of attorney forms, the Court of Appeals would note that the only basis on which the Court declined to hear this mandamus is a non-event as Relator had authority. This is further compounded error based on the fact that the Court of Appeals has evidence in its record establishing Relator's authority anyway, which was overlooked when the mandamus action was dismissed.

This issue is exactly the kind of issue that the Supreme Court considers wherein an expansive reading of the Rules is indicated to avoid invalidating a bona fide attempt to appeal and, in this case, over an issue that was not an issue to the trial court or the Real Party in Interest.

### **CONCLUSION AND PRAYER**

It is apparent on this record that Relator had legal authority to bring this action

on behalf of the aggrieved parties. His testimony is clear that such authority was by way of written power of attorney. And the record is clear that Relator *did* bring this action on behalf of the aggrieved parties. As such, this issue, if it is an issue, is an issue of capacity, not standing. And still, the capacity issue was both waived and does not implicate subject matter jurisdiction. Relator's testimony, already present in this record, *does* establish his legal authority to do so as well, in contravention of the Court's opinion. To the extent that a defect exists, the remedy for such is to remand to allow Relator an opportunity to cure, not dismissal. That being said, given that this is a capacity issue, not a standing issue, such issue was waived, and a clear, bona fide attempt to invoke the Court of Appeals' jurisdiction was made, dismissal should not have resulted.

WHEREFORE, Relator, Dolcefino Communications, LLC. respectfully requests that this court review this matter, and grant Relator's Writ of Mandamus, and for such other and further relief to which Relator is justly entitled.

Respectfully submitted,

**JEFF DIAMANT, P.C.**



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*Attorneys for Relator*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief has been compiled using a computer program with 14-point font conventional typeface for the body of the brief and 12-point font for footnotes. Excluding the applicable portions of this motion not counted by T.R.A.P. 9(i)(1), this brief contains 3,205 words.



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Jeff Diamant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served on the below parties in accordance with the Texas Rules of Appellate Procedure 9.5(c) on May 17, 2021.



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Jeff Diamant



**VERIFICATION**

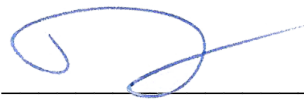
STATE OF TEXAS                   §  
   §  
COUNTY OF HARRIS           §

BEFORE ME, the undersigned authority, on this day appeared Jeff Diamant, personally known to me, who after being duly sworn upon his oath, stated as follows:

1. My name is Jeff Diamant. I am over twenty-one years of age, of sound mind, and in all ways competent to make this verification. I am the attorney of record for Relator, Dolcefino Communications, LLC in the Related Case, Cause No. 19-CV-0814, *In re Friendswood Police Department*, first pending in the 405<sup>th</sup> Judicial District Court of Galveston County, Texas as well as the Petition of Writ of Mandamus heard by the Houston Court of Appeals [1<sup>st</sup> Dist.], Cause No. 01-20-00382-CV. I have personal knowledge of the facts stated in this verification and those facts are true and correct.

2. I have reviewed the foregoing Petition for Writ of Mandamus. In my personal knowledge, every factual statement in the motion is true and correct and supported by competent evidence in the appendix or record. All exhibits attached to the foregoing brief are true and correct copies of same.

Further affiant sayeth not.

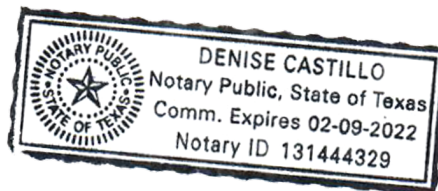


\_\_\_\_\_  
Jeff Diamant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 17th day of May, 2021.



\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS



## **APPENDIX**

- A. *In re Dolcefino Communications, LLC, Relator*, No. 01-20-00382-CV (Memorandum Op.) issued September 10, 2020.
- B. Order of the First Court of Appeals issued December 22, 2020.
- C. Order of the 405<sup>th</sup> Judicial District Court of Galveston County, Texas Denying Plaintiff's Rule 202 Petition issued on September 27, 2019.

## **APPENDIX A**

Opinion issued September 10, 2020



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-20-00382-CV

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**IN RE DOLCEFINO COMMUNICATIONS, LLC, Relator**

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**Original Proceeding on Petition for Writ of Mandamus**

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**MEMORANDUM OPINION**

Relator, Dolcefino Communications, LLC, has filed a petition for a writ of mandamus asserting that the trial court abused its discretion by denying relator's petition for pre-suit discovery pursuant to Rule 202 of the Texas Rules of Civil Procedure (the "Rule 202 Petition"). *See* TEX. R. CIV. P. 202.

We dismiss relator’s petition for writ of mandamus for lack of subject-matter jurisdiction.<sup>1</sup>

“Standing is implicit in the concept of subject matter jurisdiction.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Standing is a constitutional prerequisite to obtaining judicial relief, and courts have no jurisdiction over and thus must dismiss claims made by parties who lack standing to assert them. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *see also Nephrology Leaders & Assocs. v. Am. Renal Assocs. LLC*, 573 S.W.3d 912, 914 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

To have standing to assert a claim, a party must generally demonstrate that it possesses an interest in the conflict distinct from that of the general public, such that it sustained a specific or particular injury. *See Linegar v. DLA Piper LLP (US)*, 495 S.W.3d 276, 279 (Tex. 2016); *see also Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000) (“[A]n appealing party may not complain of errors that do not injuriously affect it or that merely affect the rights of others.”). Just as a plaintiff must have standing to seek relief in the trial court, a party on appeal must have standing to challenge an order or judgment of the trial court. *Tex. Quarter*

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<sup>1</sup> The underlying case is *In re: Friendswood Police Department*, Cause No. 19-CV-0814, in the 405th District Court of Galveston County, Texas, the Honorable Jared Robinson presiding.

*Horse Ass'n v. Am. Legion Dep't of Tex.*, 496 S.W.3d 175, 181 (Tex. App.—Austin 2016, no pet.) (citing *State v. Naylor*, 466 S.W.3d 783, 787 (Tex. 2015)).

The Rule 202 Petition was filed in the trial court by relator “as representative of Mindy Lee Comstock, Joseph Manley, and Bonnie Manley.” However, the mandamus record does not include any evidence which establishes that relator had the authority to act in such representative capacity, and as such, relator lacked standing to bring the Rule 202 Petition. *See Timbertech Inc. v. Wallboards Inc.*, No. 14-98-00422-CV, 1999 WL 649116, at \*3 (Tex. App.—Houston [14th Dist.] Aug. 26, 1999, pet. denied) (not designated for publication) (“Without the authority to sue in a representative capacity, [appellants] had no standing to sue at all.”).

Further, the petition for writ of mandamus was brought solely by “Relator, Dolcefino Communications, LLC.” The mandamus record fails to establish that relator is, itself, an “aggrieved party,” giving it standing to seek relief, either from the trial court or from this Court. *See Torrington Co.*, 46 S.W.3d at 843; *Ghaffari v. Empire Petroleum Partners LLC*, No. 02-17-00164-CV, 2018 WL 1005237, at \*3 (Tex. App.—Fort Worth Feb. 22, 2018, pet. denied) (“A party lacks standing when it is not personally aggrieved.”) (citing *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848–49 (Tex. 2005)).

Because relator lacks standing to obtain the relief sought, we dismiss relator's petition for writ of mandamus for lack of subject-matter jurisdiction. All pending motions are dismissed as moot.

**PER CURIAM**

Panel consists of Justices Keyes, Lloyd, and Landau

## **APPENDIX B**





**COURT OF APPEALS FOR THE  
FIRST DISTRICT OF TEXAS AT HOUSTON**

ORDER

Appellate case name: In re Dolcefino Communications, LLC  
Appellate case number: 01-20-00382-CV  
Trial court case number: 19-CV-0814  
Trial court: 405th District Court of Galveston County

Relator, Dolcefino Communications, LLC's filed petition for writ of mandamus challenging the trial court's order denying relator's petition for pre-suit discovery pursuant to Rule 202 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 202. On September 10, 2020, this Court issued an opinion dismissing relator's mandamus petition for lack of subject-matter jurisdiction. Subsequently, relator filed a "Motion to Supplement Record in Support of Petition for Writ of Mandamus, or in the Alternative, Motion for Leave to Supplement the Record in Support of Petition for Writ of Mandamus." In the motion, relator seeks to supplement the mandamus record to include "written power of attorney documents."

Relator's motion states that the mandamus record can be supplemented pursuant to rule 52.7 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 52.7(b) ("After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record."). However, the "written power of attorney documents" which relator seeks to supplement were neither presented to the trial court, nor provided to this Court as a part of the mandamus record. In determining whether a trial court has erred, we are limited to considering only the record presented to the trial court. *See In re M-I L.L.C.*, 505 S.W/3d 569, 574 (Tex. 2016) ("In determining whether a trial court abused its discretion, a reviewing court is generally bound by the record before the trial court at the time its decision was made."); *In re Sanchez*, 571 S.W.3d 833, 836–37 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding).

Accordingly, relator's motion to supplement the mandamus record, or for leave to supplement the mandamus record, is **denied**.

It is so ORDERED.

Judge's signature:       /s/ Evelyn V. Keyes        
 Acting individually     Acting for the Court

Date:       December 22, 2020

## **APPENDIX C**

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## CAUSE NO. 19-CV-0814

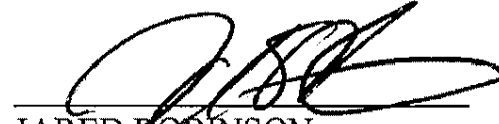
IN RE: FRIENDSWOOD POLICE § IN THE DISTRICT COURT  
DEPARTMENT § GALVESTON COUNTY, TEXAS  
§ 405<sup>th</sup> JUDICIAL DISTRICT

## ORDER

After considering Plaintiffs' verified original petition pursuant to Texas Rule of Civil Procedure 202, admitted evidence, argument of counsel, and relevant briefing, the Court holds the petition should be **DENIED**. It is therefore:

**ORDERED** that no deposition is authorized.

SIGNED on this 27 day of September, 2019.

  
\_\_\_\_\_  
JARED ROBINSON  
DISTRICT JUDGE

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Jeff Diamant on behalf of Jeff Diamant  
Bar No. 795319  
jeff@jeffdiamantlaw.com  
Envelope ID: 53505059  
Status as of 5/17/2021 1:21 PM CST

#### Case Contacts

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