COPY

NO. CV-11-1349

WALLBUILDER PRESENTATIONS, INC.	§	**IN THE DISTRICT COURT**
THROUGH	§	
ITS PRESIDENT, DAVID BARTON	§	
and	§	
WALLBUILDERS, L.L.C.	§	
THROUGH	§	
ITS PRESIDENT, DAVID BARTON	§	
and	§	
DAVID BARTON, INDIVIDUALLY	§	
	§	**PARKER COUNTY, TEXAS**
Plaintiffs	§	
	§	
vs.	§	
	§	
W. S. SMITH,	§	
and	§	
JUDY A. JENNINGS,	§	
and	§	
REBECCA E. BELL-METEREAU	§	**415TH JUDICIAL DISTRICT**
	§	
Defendants	§	

MOTION FOR FINAL DEFAULT JUDGMENT

COMES NOW as movants, Plaintiffs, Wallbuilder Presentations, Inc., through its President, David Barton, and Wallbuilders, L.L.C., through its President, David Barton, and David Barton, Individually [collectively: Wallbuilders] through this MOTION FOR FINAL DEFAULT JUDGMENT and would respectfully ask the Court to grant this motion as to Defendant W.S. Smith for the reasons of law and fact which follow.

A. Background and reason for this motion

1. Background

a. This suit was filed on September 1, 2011

b. Through the ORDER ON UNOPPOSED MOTION TO SEVER and AGREED FINAL JUDGMENT entered by this Court on August 11, 2014, Judy A. Jennings nor Rebecca Bell-Metereau are no longer part of this suit and are not subject to this motion.

c. Plaintiffs and former-Defendants Jennings and Bell-Metereau previously requested the court enter an AGREED LEVEL 3 DISCOVERY CONTROL PLAN which included a jury trial setting for February 10, 2015. The court did so on January 24, 2014 and that trial setting pertains now exclusively to Defendant W.S. Smith.

d. On February 1, 2012, the Court entered an ORDER AUTHORIZING SERVICE OF PROCESS BY PUBLICATION concerning Defendant, W.S. Smith ("Smith"). As indicated by the AFFIDAVIT OF SERVICE with attached PUBLISHER'S AFFIDAVIT, Plaintiffs completed service of Smith on or about April 15, 2012. [**Exhibit A** which is incorporated herein for all purposes not inconsistent with the intent of this motion]

e. Smith has not filed an ANSWER.[1]

2. Reason for this motion. This suit is over 38 months along and there has been no effort by Smith to respond judicially. There has not been any discovery of or by him apart from Plaintiffs' exhaustive due diligence to determine the physical location of Smith's business or residential address in the effort to have him served. Based on reasonable belief and information, it appears Smith is aware of the suit but has chosen to avoid any involvement.[2] [**Exhibit B** which is incorporated herein for all purposes not inconsistent with the intent of this motion] This MOTION FOR NO-ANSWER FINAL DEFAULT JUDGMENT seeks to dispose of the remaining claims and Defendant as a matter of judicial economy impacting both the court's crowded docket and costs of litigation to the parties.

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[1] For clarification: An individual named William Scott Smith (W.S. Smith) of Keller, Texas, was served and did file an ANSWER on or about April 5, 2012. That particular W.S. Smith was determined to not be the individual alleged in PLAINTIFFS' ORIGINAL PETITION and a NOTICE OF PLAINTIFFS' PARTIAL NONSUIT was filed on April 18, 2012 regarding William Scott Smith. The trial court's ORDER AUTHORIZING SERVICE OF PROCESS BY PUBLICATION (February 1, 2012) was executed concerning the W.S. Smith alleged in PLAINTIFFS' ORIGINAL PETITION and that individual has not filed an ANSWER and is not a signatory to the AGREED LEVEL 3 DISCOVERY CONTROL PLAN.

[2] Chris Rodda, Huffington Post Politics, October 4, 2011, claims she was contacted by W.S. Smith and, that among other things, he discussed the lawsuit with her and provided her a written statement concerning the suit. Allegedly, W.S. Smith stated in the writing published by Chris Rodda: "***My name is W.S. Smith (yes, that is my real name; not a pseudonym) and I am being sued for libel by David Barton.***"

B. Law, Facts, and Argument

3. TEX. R. CIV. P. § 107(h). A court may grant a no-answer default judgment when the defendant's deadline to file an ANSWER has expired and the citation and proof of service have been on file with the clerk at least ten days, not including the day of filing and the day of judgment.

a. The deadline for Smith to file an ANSWER was 10:00 A.M., Monday, May 7, 2012.

b. The citation for service by publication and the proof of service have been on file with the clerk for at least ten days.

4. TEX. R. CIV. P. § 244. Where service has been made by publication, and no timely ANSWER has been filed nor appearance entered, a court shall appoint an attorney to defend the suit in behalf of the defendant. *"Neither the case law nor language of [TRCP 244] reveals any indication that the burden is on the attorney to move the court to make such an appointment."*[3]

5. TEX. R. CIV. P. § 131. The successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided.

6. TEX. R. CIV. P. § 141. The court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules.

7. Argument

a. Mindful of the language in § 244 and *Barnes*, Movants, through counsel, are expressly not asking the court to appoint an attorney to defend Smith in this suit. The court may nonetheless still choose to do so under authority of § 244 and this case will proceed through the court's calendar into 2015. Movants respectfully suggest there is a more prudent alternative as discussed below.

[3] *Barnes v. Domain*, 875 S.W. 2d 32, 33 (Tex.App.—Houston {14th Dist.} 1994, no writ).

b. Smith, apparently well aware of his being named as a defendant, [**Exhibit B**] has purposefully avoided service of process, leading to the citation and service by publication. Boasting of his desire to respond in court to the allegations, Smith has instead, maintained his defense from the obscure sanctuary of the blogosphere[4] where talk is cheap and his statements unchallenged by scrutiny in a trial court of law.

c. Movants seek to dispose of the remaining claims and Defendant through a final default judgment in this suit as a matter of judicial economy. This would favorably impact the court's crowded docket, the costs of litigation to the parties, and the additional costs to be taxed in the form of mandatory reasonable attorney's fees under § 244 if the court does appoint an attorney to defend Smith.

d. If an attorney is appointed to defend Smith and, if judgment in favor of Plaintiffs is subsequently entered, the attorney's fees as taxable costs would very likely never actually be paid by Smith. As Smith has demonstrated during this suit, those costs could be avoided through his residence in obscurity. To avoid that outcome, the court might then confront three repugnant options: 1) don't allow for Smith's attorney to receive a reasonable fee, 2) order that costs to be paid by Plaintiffs, or 3) order that costs be split between the prevailing / successful party and the other party.[5]

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[4] "Blogosphere" – all of the blogs on the Internet as a collective whole. [http://www.merriam-webster.com/dictionary/blogosphere]

[5] **1)** If the court were not to allow a reasonable attorney's fees to defend Smith, this would run counter to § 244, be unjust to the appointed attorney, and would discourage other attorney's from accepting similar assignments; **2)** if the court ordered Plaintiffs to bear the costs of defending Smith, it would subvert TEX. R. CIV. P. § 131 where the "*...underlying purpose is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs.*" *Furr's Supermkts., Inc. v. Bethune*, 53 S.W. 3d 375, 376 (Tex. 2001); or **3)** if the costs to defend Smith were divided between the prevailing and losing party, in addition to activating the same negative implications from **1)** and **2)**, such an assignment as to Plaintiffs as prevailing party would require good cause. [TEX. R. CIV. P. § 141] Any incidental benefit to Plaintiffs would not be enough to show good cause. Absent a showing that Plaintiffs unnecessarily prolonged the proceedings, unreasonably increased costs, or otherwise did something that should be penalized, assigning the costs to defend Smith would not be proper. *Roberts v. Williamson*, 111 S.W. 3d 113, 124 (Tex. 2003) and *Furr's* 53 S.W. 3d 375 at 376-377.

e. To the extent this motion asks the court to not comply with § 244, Movants allege there is basis in law for this request and that the request is warranted by good faith argument for the extension, modification, or reversal of existing law.[6] The situation under the facts and law create an irresolvable conflict between two sets of rules: one set governing the appointment of an attorney when service has been made through publication and the other addressing the subject of costs from a suit:

* § 244 clearly directs the court to appoint an attorney to defend the suit in behalf of Smith and to allow such attorney a reasonable fee for his services to be taxed as costs;

* § 131 clearly mandates the court to award the successful party recovery of his costs incurred from the adversary, except where otherwise provided; and

* § 141, just as clearly, invests discretionary authority with the court, to adjudge the costs otherwise than as provided by law or these rules.

f. Construing the Rules of the irresolvable conflict

(1) When confronted with such conundrums, courts often consult the Code Construction Act [TEX. GOV. CODE, Title 3, Chapter 311] for possible insight towards resolution. In this situation, although the Code Construction Act is arguably applicable to the Texas Rules of Civil Procedure[7], there is no directly on-point guidance to resolve the irreconcilable portions of the rules under this set of facts.

(2) There are at least two portions of the Code Construction Act which suggest authority for a court to employ presumption and appropriate implication.

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[6] TEX. R. CIV. P §13.

[7] GOVT. CODE § 311.002. Application indicates Chapter 311 applies to each code enacted by the 60th or a subsequent legislature and to each rule adopted under a code. [TEX. R. CIV. P. §§ 131, 141, & 244 were each originally adopted by the Supreme Court of Texas on September 1, 1941, subsequent to rulemaking authority passed during the 46th Legislature. {Rules of Practice Act}] However, the authority for rulemaking has most recently been authorized by the 82nd legislature. [Acts 2011, 82nd Leg., R.S., Ch. 203 (H.B. 274), Sec 1.01; R.S., Ch. 203 (H.B 274), Sec. 2.01; & R.S., Ch. 906 (S.B. 791), Sec. 1, all eff. September 1, 2011]

(3) § 311.021. Among other things, § 311.021 provides: "*In enacting a statute, it is presumed that: .... (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.*" In the matter at bar, when balancing the fact Movants seek a no-answer final default when Smith was served by publication, with the fact that Smith has purposefully avoided service or making an appearance, a just and reasonable result would be to grant the motion. This is particularly true where compliance with § 244 would almost certainly result in the taxable cost of the reasonable fee for the attorney being either unpaid or fully / partially paid by Movants, albeit, as the successful parties. Accordingly, achieving a just and reasonable result, a result feasible of execution, would not be the product as intended by the legislature and rulemaking authority. In addition, there is a public interest in fostering and / or favoring efficient, appropriately flexible trial court procedures which allow a suit to be expeditiously and appropriately disposed. Notwithstanding § 244, this public interest should prevail over the private interest of Smith to, in effect, add further delay and expense to the suit through the appointment of a attorney to defend him.

(4) § 311.023. Among other things, § 311.023 provides: "*In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; .... .*" In this situation, the object (s) sought to be attained by the two competing sets of rules is (are): the appointment of an attorney when service has been made through publication [§ 244] and, the other, addressing the subject of costs from a suit. [§§ 131 & 141] These otherwise irresolvable object(s) can be harmonized only under the unlikely circumstance: 1) the court would appoint an attorney to defend Smith and allow a reasonable fee to be assessed and taxed as a cost; 2) Movants / Plaintiffs, if the

successful parties, were not assessed those costs, and 3) where Smith actually paid the reasonable fee to the attorney. Based on the law and totality of facts and other circumstances in this suit, that harmony cannot be reached because Smith will almost certainly not actually pay the reasonable fee to the attorney appointed by the court.

C. Conclusion as to adjudging liability in this situation

8. The court may cut the 'Gordian Knot' created through this set of facts and the irresolvable conflict of these long-established rules by granting this motion as to liability[8] and signing the ORDER ON FINAL DEFAULT JUDGMENT affixed as **Attachment One**.

D. Damages

9. Based on the pleadings and facts before the Court, nominal damages are available to Plaintiffs in this situation. In an action such as here, for defamation *per se*, a plaintiff can recover nominal damages.[9]

10. Nominal damages are appropriate when there has been a violation of a legal right, but the injured party has not sustained any actual loss from that defendant or when the plaintiff cannot prove the amount of the loss. The nominal damages are designed to vindicate the plaintiff's character and reputation by obtaining a judgment in its favor.[10] This is precisely the situation in the present instance concerning Defendant W.S. Smith.

11. When a plaintiff prevails in a defamation suit with only nominal damages, the plaintiff can recover court costs if the nominal damages are at least twenty dollars ($20).[11] The general purpose of awarding nominal damages is to tax court costs against the defendant.[12]

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[8] Damages are discussed in Section D. Damages of this motion.
[9] *Hancock v. Variyam*, 400 S.W. 3d 59, 65 (Tex. 2013).
[10] *Hancock*, 400 S.W. 3d at 65; *MBM Fin. Corp. v. Woodlands Oper. Co.*, 292 S.W. 3d 660, 665 (Tex. 2009).
[11] *Maass v. Sefcik*, 138 S.W. 2d 897, 900 (Tex.App.—Austin 1940, no writ.)
[12] *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W. 2d 248, 257 (Tex.App.—Dallas 1990, no writ.).

12. In this motion, Plaintiffs respectfully request the Court find nominal damages of $20, adjudge all court costs against Defendant W.S. Smith, and sign the ORDER ON FINAL DEFAULT JUDGMENT affixed as **Attachment One**.

E. Prayer

13. For these reasons of law and fact, Plaintiffs request the Court:

a. set this matter for hearing or; in the alternative

b. set this matter for hearing via telephone or; in the further alternative

c. consideration on submission;

d. after consideration of the law, facts, and argument grant this motion and enter the ORDER GRANTING FINAL DEFAULT JUDGMENT included herein as **Attachment 1**; and

e. grant all other relief at law or in equity to which Plaintiffs may be justly entitled.

Respectfully submitted,

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