fax filed 1-23-13 (7)

08-12-00331-CV

No. 08-12-00331-CV

IN THE COURT OF APPEALS
FOR THE EIGHTH DISTRICT OF TEXAS

LAURA S. WASSMER AND STEPHEN B. HOPPER,
Appellants,

v.

JO N. HOPPER,
Appellee/Cross-Appellant,

v.

JPMORGAN CHASE BANK, N.A.,
Appellee.

On Appeal from Cause No. PR-11-3238-3
In the Probate Court No. 3, Dallas County, Texas
Honorable Michael E. Miller, Presiding Judge

APPELLEE/CROSS-APPELLANT JO N. HOPPER'S REPLY TO: APPELLANT LAURA S. WASSMER AND STEPHEN B. HOPPER'S RESPONSE TO APPELLEE/ CROSS-APPELLANT JO N. HOPPER'S MOTION TO DISMISS FOR LACK OF STANDING; AND, OBJECTION TO APPELLANTS' AFFIDAVITS

TO THE HONORABLE EL PASO COURT OF APPEALS:

COMES NOW Appellee/Cross-Appellant Jo N. Hopper ("Mrs. Hopper") and files this *Appellee/Cross-Appellant Jo N. Hopper's Reply to: Appellant Laura S. Wassmer and Stephen B. Hopper's Response to Appellee/Cross-*

Appellant Jo N. Hopper's Motion to Dismiss for Lack of Standing; And, Objection to Apppellants' Affidavits ("Reply") and would show this Honorable Court of Appeals as follows:

PREAMBLE

Appellants' Response admits away their **entire** Appeal. Appellants admit that they voluntarily chose to transfer their interest in Robledo to Quagmire, LLC ("Quagmire"), an independent and separate legal entity. Upon said transfer, the Appellants instantly lost standing to pursue their Appeal. The Appellants contend that because they still wholly own and control Quagmire, this Court should somehow determine Appellants still have standing for their Appeal to go forward. Appellants, however, neither do nor can offer case law to support this naked contention. In fact, the case law is the exact opposite – the transfer of the Appellants' interest in Robledo to Quagmire, wholly owned or not, instantly deprived this Court of jurisdiction to hear the Appellants' Appeal, as Appellants have not maintained standing "*throughout*"[1] the pendency of their Appeal.

ARGUMENT AND AUTHORITIES

I. APPELLANTS LACK STANDING TO PURSUE THEIR APPEAL.

A. Appellants admit that they conveyed all of their interest in Robledo.

Appellants' *Response to Motion to Dismiss* ("Response") directly admits the truth of the gravamen of Mrs. Hopper's Motion to Dismiss in its second sentence. [Response, p. 2] That is, Appellants voluntarily conveyed their

[1] *See* quote *infra* at p. 9 from *Hart*.

respective interests in Robledo, for reasons of their own, at the very onset of this appeal.

In that regard, perhaps the single most startling and completely incorrect statement in the entire Response is as follows:

> In other words, appellants' transfer of the interests to an entity wholly owned and controlled by them has no effect on this appeal.

[Response, p. 3]

There is absolutely no legal support cited or that exists for this proposition. There is good reason for this failure of citation, in that the law soundly rejects this absurd assertion.

When the Appellants admittedly conveyed into an entity, with consideration received – even if *arguendo* their claim to own and control the entity at all times were true –Appellants ceased to have an ownership interest in Robledo. Of equal importance, the Appellants ceased to hold an ownership interest as heirs. Literally, Appellants cannot have their cake, and eat it too.

B. Transferring interest in real property to an entity bars later asserting rights in the property, even if one remains a shareholder in the entity to which it is transferred.

The analysis set forth in *Singh v. Duane Morris, LLP,* 338 S.W.3d 176, 181, 182 (Tex. Civ. App. – Houston [14th Dist.] 2011, pet. denied) ("*Singh*") forecloses the Appellants' arguments – both that the conveyance has "no effect" and that the Court should "disregard" Quagmire because they are its sole shareholders. *Singh* states as follows:

> In support of this contention, **appellant asserts** that since Singh Corporation is a Subchapter S corporation and **he is the sole shareholder, this court can ignore the existence of the corporation, a separate legal entity**, and determine that he was "harmed directly by the actions of [appellees] and he has standing to recover damages." **We disagree.**
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> The Texas Supreme Court has held that an **individual shareholder, even a sole shareholder such as appellant, has no standing to recover personally** for damages incurred by the corporation. See *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990). ("Ordinarily, the cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation, as distinguished from its stockholders, even though it may result indirectly in loss of earnings to the stockholders.").
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> A corporation is a separate legal entity from its shareholders, officers, and directors. *Sparks v. Booth*, 232 S.W.3d 853, 868 (Tex. App. – Dallas 2007, no pet.). A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's contractual obligations. Id. However, **another bedrock principle of corporate law is that a corporation cannot be used when it benefits the stockholders and be disregarded when it is to the advantage of the organizers to do so.** See *Eastwood Model Market v. State*, 359 S.W.2d 294, 296 (Tex. Civ. App. – Austin 1962), aff'd, 365 S.W.2d 781 (Tex. 1963); *see also Adams v. Big Three Industries, Inc.*, 549 S.W.2d 411, 413 (Tex. App. – Beaumont 1977, writ ref'd n.r.e.) ("It is obvious that Adams, Jr. **deliberately chose to operate his business as a corporation,** and we are of the opinion that it would be inequitable now to allow him to recover attorney's fees as an individual.").

Id. at 181, 182 [bold emphasis added]

Singh makes clear that the Appellants' alleged control and ownership of Quagmire in no way erases the fatal failure of "no standing." *See id.* In *Singh*, the appellant asserted the Appellants' very same argument – that he was "really" the corporation and thus "had" standing. *Id.* The court nonetheless found he had no

"standing to recover damages." *Id.* Appellants have likewise lost their personal right to recover damages or prosecute this appeal "as if" they were still owners or heirs as to Robledo, when they have divested themselves of Robledo, and they are no longer either owners or heirs for the purposes of Robledo. *Singh* proves the truth of the above aphorism that one may not have his cake, and eat it too.

Singh is not an isolated case in Texas' jurisprudence. For example, this Honorable Court has noted that "[a] corporation is a separate legal entity from its shareholders, officers and directors." *Penhollow Custom Homes, LLC, et al. v. Cornelius Kim and Jong Kim,* 320 S.W.3d 366, 372 (Tex. App. – El Paso, 2010, no pet.) (*"Penhollow")* (citing *Sparks v. Booth*, 232 S.W.3d 853, 868 (Tex. App. – Dallas 2007, no pet.)).

The case of *Tourneau Houston, Inc. v. Harris County Appraisal District*, 24 S.W.3d 907, 908, 909 (Tex. App. – Houston [1st Dist.] 2000, no pet.) (*"Tourneau")* highlights another critical deficiency in Appellants' Response. In *Tourneau*, a wholly owned subsidiary of a corporation was found *not* to have standing to challenge the county's appraisal of business personal property owned by the corporation. *Id.* at 908, 909. While there were issues also involved in the reasoning in that case (which are not present on the instant facts) such as specific tax statutues, the overarching and inherent point underlying the entire case analysis is that a subsidiary and its parent cannot simply be "lumped together" as if they were one and the same for purposes of exercising a right that could have

been invoked, if invoked by the correct party – a party with actual standing. *Id.* In short, "entities mean something."

Simply put, Quagmire is a distinct legal entity that now owns a ½ undivided fee interest in Robledo. Mrs. Hopper owns the other ½ of the fee, along with her Constitutional Homestead[2] in the whole of Robledo. The Appellants undisputedly now *own nothing* regarding Robledo. These are the facts and the law, regardless of the ownership interest and control that Appellants claim in the entity Quagmire.

C. Appellants are no longer heirs as to Robledo.

Also buttressing this same principle that conveyance irrevocably deprived Appellants of standing, the heirship as to Robledo ended upon conveyance. *See City of Laredo v. R. Vela Exxon, Inc. d/b/a Vela-Comer Exxon,* 966 S.W.2d 673, 679 (Tex. App. – San Antonio, 1998, pet. denied) ("*City of Laredo*"). There, where the lessee and owner had a compensable interest in real property taken by eminent domain, they had standing to sue to assert rights and attack an unlawful taking by eminent domain. *Id.* But a mere shareholder of the owner or lessee does not have a property interest, and thus lacks standing to sue for unlawful taking. *Id.* Those rights were *personal in nature. Id.* In this appeal, whatever rights or claims Appellants might have had, they were likewise personal in nature based on their (then-) status as heirs and owners, and thus extinguished by the

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[2] A Constitutional Homestead is itself an estate in land. *See Laster v. First Huntsville Properties,* 826 S.W.2d 125, 129 (Tex. 1991) ("In Texas, the homestead right constitutes an estate in land"). *Laster* confirms that the Homestead is an estate in land, and the Texas Constitution confirms it vests at the moment of death.

conveyances. *See id.; see also Hart v. L.B. Foster Co.*, No. 14-08-00812-CV, 2010 WL 2681713, at *4, *5, *6 (Tex. App.—Houston [14th Dist.] July 8, 2010, no pet.) (mem. op.) ("*Hart*"). Further, given their own analysis as set forth in their Appeal, the Appellants' status as "heirs" is crucial to their arguments (even if those arguments are, in any event, wholly misplaced and wrong). The Appellants are the heirs of the estate, thus any conveyance of Robledo by, through or under them was that of an heir conveying to a third party. By that same token, any future conveyance thereafter of the same property interests (1/2 of the total fee in Robledo) from any third party either back into them or to anyone else, is not the conveyance of an "heir." It is merely the conveyance of an owner of a property interest: nothing more, nothing less. The Appellants' claimed rights as set out in their Appeal, if any, would only have sprung from ownership of Robledo *as heirs*. The Appellants cannot, willy nilly, disregard the existence of Quagmire to suit their purposes, whenever they please. *See, e.g., Singh*, 338 S.W.3d at 181-82; *Penhollow*, 320 S.W.3d at 372; *Sparks*, 232 S.W.3d at 868; *City of Laredo*, 966 S.W.2d at 679.

D. Appellants' lack of standing bars their Appeal in its entirety, as to *all* Issues.

Appellants now lack direct standing to pursue herein any rights or claims involving Robledo, as a matter of law – and thus their Appeal entirely. *See, e.g., Singh*, 338 S.W.3d at 181-82; *Penhollow*, 320 S.W.3d at 372; *Sparks*, 232 S.W.3d at 868; *City of Laredo*, 966 S.W.2d at 679. This is certainly true as to Issue No. 1,

which comprises 43 pages of their Brief, and is without question "all about" Robledo. It addresses the Appellants' interest in Robledo and how it (in their view) should have been/should be partitioned and treated,[3] both previously and on a "going forward" basis. Given the conveyances, Issue No. 1 must be dismissed for want of standing.

Further, Appellants' Response directly admits as follows:

> *Issue number three is tied into issue number two as well as issue number one so that it remains viable as to the prior distributions as well as the undivided interests.*

[Response, p. 3].

Appellants thus judicially admit all their Issues center on Robledo – in which they no longer hold a protectable, justiciable legal interest. None of Appellants' Issues are no longer "viable", as Appellants lack standing. Given their admission, the analysis in Mrs. Hopper's Motion to Dismiss was entirely correct [*see* Motion to Dismiss, pp. 6, 10, 11]: Appellants completely lack standing on all Issues, and their entire Appeal should be dismissed.[4]

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[3] Robledo is the foundation for the Appellants' entire argument, inasmuch as Appellants' Brief's apparent centerpiece topic is a proposed Texas Probate Code §150 partition, which on these facts and their view of the law, is in fact a "Robledo-centered" analysis. *See also* – Response p. 3, quoted *infra* at p. 5.

[4] In fact Issue No. 3 directly mentions and focuses on Robledo, and lacking standing to appeal regarding Robledo, the Appellants' Issue No. 3 must be dismissed. Likewise as admitted, Issue No. 2 and No. 3 are "tied into" each other, as the analysis set forth therein implicitly and inherently relies on the value of Robledo being considered for the purposes of the relief requested as to the partition of the "estate" as suggested by Appellants. As such, the Appellants' Issue No. 2 also cannot be further pursued on appeal, as Appellants lack standing.

E. Standing must be maintained *throughout* the pendency of an appeal.

The Appellants clearly have no further legal standing to pursue any of their Issues, as a matter of law. *Hart v. L.B. Foster Co.*, No. 14-08-00812-CV, 2010 WL 2681713, at *4 (Tex. App.—Houston [14th Dist.] July 8, 2010, no pet.) (mem. op.) ("In order to maintain its claims, a party must maintain standing *throughout* the proceedings, even during the pendency of the appeal.") (italic emphasis added). That quotation from *Hart* directly encapsulates Appellants' fatal problem: standing must be maintained "*throughout*" the course of litigation and appeal. *Id.* In fact, in such a case, uncontroverted proof that a party has conveyed his entire interest in the property during the pendency of the case (such as a deed) conclusively establishes that the party no longer has standing. *See id.* at *6 (citing *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004)).

Any interruption in standing, however momentary, is fatal. *Id.* These holdings are dispositive on the instant facts. Thus, Appellants' claims were extinguished the moment the property was conveyed.

II. APPELLANTS ARE ALSO ESTOPPED FROM PURSUING THEIR APPEAL.

In addition to their lack of standing, Appellants are also estopped from pursuing their Appeal. In responding to Mrs. Hopper's Motion to Dismiss on this topic, Appellants incorrectly assert that the estoppel/"acceptance of benefits doctrine" does not apply here. [Response, pp. 9, 10]. But they misstate and

misidentify the nature of the "benefit" Mrs. Hopper pointed out. In fact, the estoppel doctrine squarely applies.

In this regard, the issue relevant to Mrs. Hopper's Motion to Dismiss is not whether Appellants "wished" to be vested with an interest in Robledo, a benefit they say they did not want. Rather, the actual "benefit" in fact at issue, per Mrs. Hopper's Motion to Dismiss, is tied to what they received in exchange for their deliberately, purposefully deeding their interest in Robledo to Quagmire. As to this "benefit" and transaction, Appellants voluntarily chose to transfer their interest, and to receive, *that express benefit*. They not only received a benefit in return, but in fact they wanted that *substantial benefit* ". . . to protect Appellants from unwanted liability. . . ." [Response p. 4] Indeed, in Mrs. Hopper's Motion to Dismiss, she correctly and presciently anticipated exactly that very motive and *benefit*. Mrs. Hopper's Motion to Dismiss stated:

> But they have conveyed their respective interests for consideration, and presumably other benefits (including protection from 3rd party liability) of selling a real property interest to a limited liability company.

[Motion to Dismiss, p. 10].

Appellants have the very consideration and *substantial benefit* they bargained for, and thus the estoppel doctrine independently bars (in addition to lack of standing) Appellants from further pursuing their Appeal.

III. APPELLANTS' ARGUMENTS REGARDING MOOTNESS ARE IRRELEVANT.

Appellants cannot evade the dispositive case law barring their appeal for lack of standing. Their Response does not even try to do so. Rather, it just ignores their clear lack of standing, and instead asserts that their Appeal is simply "not moot."

But mootness and standing are not the same concepts, nor interchangeable. And the difference is critical here. Mootness is defined by a judicial decision having no practical effect on the controversy, or when there is no longer a justiciable controversy. *See* Black's Law Dictionary 1008 (6th ed. 1990). In other words, mootness focuses on the subject matter of the action.

Standing is about "who": whether a particular party seeking to bring an action possesses sufficient ownership in that interest and thus has the *right* to bring that action, such that the court may properly exercise its jurisdiction over that matter. *See* Black's Law Dictionary 1405-06 (6th ed. 1990). It may, however, turn out to be that even with standing by a party, an issue can still ultimately be or become moot.

Appellants are trying to confuse the issue, claiming that the test for whether an appeal is moot is whether a court's actions on the merits "cannot affect the rights of the parties." [Response, p. 4]. This was the exact argument that the appellant in *Hart* unsuccessfully advanced. In rejecting the argument that the appeal was not moot (in response to the appellee asserting lack of

standing), the *Hart* court stated that *". . . the trial court lost jurisdiction because [the appellant] lost standing when it sold the property, not because the issues themselves became moot."* *Hart,* 2010 WL 2681713, at * 5 n. 6. (emphasis added). In other words, where there is no standing, the issue of mootness, as in the instant cause as to Appellants, never arises, and thus does not need to be addressed.

In stark contrast to Mrs. Hopper, the Appellants have "no skin in the game." They are no longer heirs or owners[5] pertaining to Robledo, as they have conveyed their interests to Quagmire for a real and admitted benefit (i.e. protection against liability). Therefore, they lack standing to pursue their Appeal.

IV. APPELLANTS' LACK OF STANDING FOREVER BARS THEIR APPEAL, AS WELL AS ANY BACKDOOR FUTURE ATTEMPT BY QUAGMIRE TO PURSUE THE SAME OR SIMILAR RIGHTS.

Based on *Hart,* "interruption in standing" is not only fatal to Appellants' Appeal as of this moment, but forever bars asserting rights regarding Robledo, through any other attempted pathway, as well. More specifically, even were Quagmire a party, it could never assert rights in Robledo as a purported heir. This is because Quagmire is not an "heir", and it is not and never has been a party to this appeal, nor could it ever be as a matter of law. There is no possible way in which Quagmire could ever have had standing to assert the kind of claims made by Appellants, even if it had been somehow named and joined as a party in the underlying cause before the trial court, long ago. Those arguments/claims as

[5] Unlike Mrs. Hopper, an owner.

possessed by Appellants could be asserted *only* by them in their capacities as heirs under the Texas Probate Code, not by others acting as transferees for value (or otherwise). Appellants' arguments and potential claims are personal to them as Decedent's Children, as heirs. *See, e.g., City of Laredo*, 966 S.W.2d at 679. And in any event, no rights in property transfer to a subsequent purchaser unless there is an express assignment:

> For more than 100 years, this Court has recognized that a cause of action for injury to real property accrues when the injury is committed. The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action.

Exxon Corporation v. Emerald Oil & Gas Company, L.C., 331 S.W.3d 419, 424 (Tex. 2010).

There being no such assignment even contemporaneously attempted here (*see* Special Warranty Deeds, Exhibits "A" and "B" to Counsel's Affidavit attached in support of Mrs. Hopper's Motion to Dismiss), any injury Appellants purportedly suffered from issuance of the Deed of June 25, 2012, as it was delivered by the IA to both Appellants and Mrs. Hopper as to Robledo, would not and could not legally inure to the benefit of Quagmire.

Appellants likewise cannot consent to Quagmire asserting any claims (even were the Stepchildren to try and bring Quagmire, into this appeal and by and with their consent attempt to "confer standing" on Quagmire, to assert their former claim) when it in fact has no standing and cannot, as a matter of law. *See,*

e.g., Tourneau, 24 S.W.3d at 910 (subject matter jurisdiction "cannot be conferred by consent, waiver or estoppel"). When the conveyance occurred, Appellants' purported claims as to Robledo were extinguished and instantly evaporated. *See Hart,* 2010 WL 2681713, at *4-6.

V. APPELLANTS' AFFIDAVITS SHOULD BE STRUCK AND DISREGARDED.

The Appellants' Affidavits offered in support of their Response are a misguided and improper attempt to provide this Court with self-serving, conclusory, irrelevant, and hearsay evidence. They do not overcome Appellants' lack of standing to pursue their Appeal, or estoppel arguments.

Notwithstanding, the Affidavits are fatally defective. The Affidavits should be struck entirely. Mrs. Hopper offers the following specific objections to said Affidavits in support of their being struck or not considered, in their entirety. Footnote "1" in their Response is not well taken, in that the record cannot be accepted with defective Affidavits.

A. The Stephen B. Hopper Affidavit

Mrs. Hopper objects to paragraph 2 because (allegedly) "why" the Appellants' transferred their interests to Quagmire is not relevant. Furthermore, it is not relevant as to what Appellants' (alleged) future intent is with respect to Quagmire. In addition, paragraph 2 contains improper conclusory statements.

Mrs. Hopper objects to paragraphs 3, 4, 5, 6, 7, 11 because they are not relevant to any issue before this Court and contain hearsay statements.

Mrs. Hopper objects to paragraphs 8, 10, 12 and 13 because they are not relevant to any issue before this Court.

Mrs. Hopper objects to paragraph 9 because it is not relevant to any issue before this Court and contains improper conclusory statements.

Mrs. Hopper objects to paragraph 12, which states Appellants' appellate counsel was "unaware" of the transfer, because it is not based on personal knowledge, lacks foundation and calls for speculation.

B. The Laura A. Wassmer Affidavit

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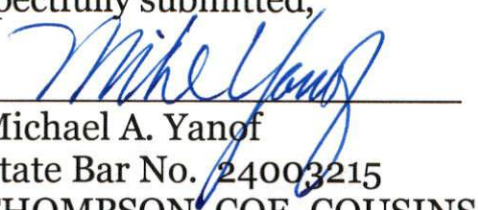
PRAYER

Appellee/Cross-Appellant Mrs. Hopper prays that Appellants Stephen B. Hopper's and Laura S. Wassmer's Appeal be dismissed in its entirety with prejudice, and not considered further, and that the Court issue an order that no other party to this appeal will be hereafter required to respond with any briefing with or to any of the points/Issues, as dismissed, previously raised by said Appeal, and for such further relief as may be appropriate in the premises.

Respectfully submitted,

By: 

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ATTORNEYS FOR JO N. HOPPER
[APPELLEE/CROSS-APPELLANT]

CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 23rd day of January, 2013 as follows.

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Id. at 181, 182 [bold emphasis added]

Singh makes clear that the Appellants' alleged control and ownership of Quagmire in no way erases the fatal failure of "no standing." *See id.* In *Singh*, the appellant asserted the Appellants' very same argument – that he was "really" the corporation and thus "had" standing. *Id.* The court nonetheless found he had no

"standing to recover damages." *Id.* Appellants have likewise lost their personal right to recover damages or prosecute this appeal "as if" they were still owners or heirs as to Robledo, when they have divested themselves of Robledo, and they are no longer either owners or heirs for the purposes of Robledo. *Singh* proves the truth of the above aphorism that one may not have his cake, and eat it too.

Singh is not an isolated case in Texas' jurisprudence. For example, this Honorable Court has noted that "[a] corporation is a separate legal entity from its shareholders, officers and directors." *Penhollow Custom Homes, LLC, et al. v. Cornelius Kim and Jong Kim,* 320 S.W.3d 366, 372 (Tex. App. – El Paso, 2010, no pet.) (*"Penhollow"*) (citing *Sparks v. Booth,* 232 S.W.3d 853, 868 (Tex. App. – Dallas 2007, no pet.)).

The case of *Tourneau Houston, Inc. v. Harris County Appraisal District,* 24 S.W.3d 907, 908, 909 (Tex. App. – Houston [1st Dist.] 2000, no pet.) (*"Tourneau"*) highlights another critical deficiency in Appellants' Response. In *Tourneau,* a wholly owned subsidiary of a corporation was found *not* to have standing to challenge the county's appraisal of business personal property owned by the corporation. *Id.* at 908, 909. While there were issues also involved in the reasoning in that case (which are not present on the instant facts) such as specific tax statutues, the overarching and inherent point underlying the entire case analysis is that a subsidiary and its parent cannot simply be "lumped together" as if they were one and the same for purposes of exercising a right that could have

been invoked, if invoked by the correct party – a party with actual standing. *Id.* In short, "entities mean something."

Simply put, Quagmire is a distinct legal entity that now owns a ½ undivided fee interest in Robledo. Mrs. Hopper owns the other ½ of the fee, along with her Constitutional Homestead[2] in the whole of Robledo. The Appellants undisputedly now *own nothing* regarding Robledo. These are the facts and the law, regardless of the ownership interest and control that Appellants claim in the entity Quagmire.

C. Appellants are no longer heirs as to Robledo.

Also buttressing this same principle that conveyance irrevocably deprived Appellants of standing, the heirship as to Robledo ended upon conveyance. *See City of Laredo v. R. Vela Exxon, Inc. d/b/a Vela-Corner Exxon,* 966 S.W.2d 673, 679 (Tex. App. – San Antonio, 1998, pet. denied) ("*City of Laredo*"). There, where the lessee and owner had a compensable interest in real property taken by eminent domain, they had standing to sue to assert rights and attack an unlawful taking by eminent domain. *Id.* But a mere shareholder of the owner or lessee does not have a property interest, and thus lacks standing to sue for unlawful taking. *Id.* Those rights were *personal in nature. Id.* In this appeal, whatever rights or claims Appellants might have had, they were likewise personal in nature based on their (then-) status as heirs and owners, and thus extinguished by the

[2] A Constitutional Homestead is itself an estate in land. *See Laster v. First Huntsville Properties,* 826 S.W.2d 125, 129 (Tex. 1991) ("In Texas, the homestead right constitutes an estate in land"). *Laster* confirms that the Homestead is an estate in land, and the Texas Constitution confirms it vests at the moment of death.

conveyances. *See id.; see also Hart v. L.B. Foster Co.*, No. 14-08-00812-CV, 2010 WL 2681713, at *4, *5, *6 (Tex. App.—Houston [14th Dist.] July 8, 2010, no pet.) (mem. op.) ("*Hart*"). Further, given their own analysis as set forth in their Appeal, the Appellants' status as "heirs" is crucial to their arguments (even if those arguments are, in any event, wholly misplaced and wrong). The Appellants are the heirs of the estate, thus any conveyance of Robledo by, through or under them was that of an heir conveying to a third party. By that same token, any future conveyance thereafter of the same property interests (1/2 of the total fee in Robledo) from any third party either back into them or to anyone else, is not the conveyance of an "heir." It is merely the conveyance of an owner of a property interest: nothing more, nothing less. The Appellants' claimed rights as set out in their Appeal, if any, would only have sprung from ownership of Robledo *as heirs*. The Appellants cannot, willy nilly, disregard the existence of Quagmire to suit their purposes, whenever they please. *See, e.g., Singh*, 338 S.W.3d at 181-82; *Penhollow*, 320 S.W.3d at 372; *Sparks*, 232 S.W.3d at 868; *City of Laredo*, 966 S.W.2d at 679.

D. Appellants' lack of standing bars their Appeal in its entirety, as to *all* Issues.

Appellants now lack direct standing to pursue herein any rights or claims involving Robledo, as a matter of law – and thus their Appeal entirely. *See, e.g., Singh*, 338 S.W.3d at 181-82; *Penhollow*, 320 S.W.3d at 372; *Sparks*, 232 S.W.3d at 868; *City of Laredo*, 966 S.W.2d at 679. This is certainly true as to Issue No. 1,

which comprises 43 pages of their Brief, and is without question "all about" Robledo. It addresses the Appellants' interest in Robledo and how it (in their view) should have been/should be partitioned and treated,[3] both previously and on a "going forward" basis. Given the conveyances, Issue No. 1 must be dismissed for want of standing.

Further, Appellants' Response directly admits as follows:

> *Issue number three is tied into issue number two as well as issue number one so that it remains viable as to the prior distributions as well as the undivided interests.*

[Response, p. 3].

Appellants thus judicially admit all their Issues center on Robledo – in which they no longer hold a protectable, justiciable legal interest. None of Appellants' Issues are no longer "viable", as Appellants lack standing. Given their admission, the analysis in Mrs. Hopper's Motion to Dismiss was entirely correct [*see* Motion to Dismiss, pp. 6, 10, 11]: Appellants completely lack standing on all Issues, and their entire Appeal should be dismissed.[4]

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[3] Robledo is the foundation for the Appellants' entire argument, inasmuch as Appellants' Brief's apparent centerpiece topic is a proposed Texas Probate Code §150 partition, which on these facts and their view of the law, is in fact a "Robledo-centered" analysis. *See also* – Response p. 3, quoted *infra* at p. 5.

[4] In fact Issue No. 3 directly mentions and focuses on Robledo, and lacking standing to appeal regarding Robledo, the Appellants' Issue No. 3 must be dismissed. Likewise as admitted, Issue No. 2 and No. 3 are "tied into" each other, as the analysis set forth therein implicitly and inherently relies on the value of Robledo being considered for the purposes of the relief requested as to the partition of the "estate" as suggested by Appellants. As such, the Appellants' Issue No. 2 also cannot be further pursued on appeal, as Appellants lack standing.

E. Standing must be maintained *throughout* the pendency of an appeal.

The Appellants clearly have no further legal standing to pursue any of their Issues, as a matter of law. *Hart v. L.B. Foster Co.*, No. 14-08-00812-CV, 2010 WL 2681713, at *4 (Tex. App.—Houston [14th Dist.] July 8, 2010, no pet.) (mem. op.) ("In order to maintain its claims, a party must maintain standing *throughout* the proceedings, even during the pendency of the appeal.") (italic emphasis added). That quotation from *Hart* directly encapsulates Appellants' fatal problem: standing must be maintained "*throughout*" the course of litigation and appeal. *Id.* In fact, in such a case, uncontroverted proof that a party has conveyed his entire interest in the property during the pendency of the case (such as a deed) conclusively establishes that the party no longer has standing. *See id.* at *6 (citing *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004)).

Any interruption in standing, however momentary, is fatal. *Id.* These holdings are dispositive on the instant facts. Thus, Appellants' claims were extinguished the moment the property was conveyed.

II. APPELLANTS ARE ALSO ESTOPPED FROM PURSUING THEIR APPEAL.

In addition to their lack of standing, Appellants are also estopped from pursuing their Appeal. In responding to Mrs. Hopper's Motion to Dismiss on this topic, Appellants incorrectly assert that the estoppel/"acceptance of benefits doctrine" does not apply here. [Response, pp. 9, 10]. But they misstate and

misidentify the nature of the "benefit" Mrs. Hopper pointed out. In fact, the estoppel doctrine squarely applies.

In this regard, the issue relevant to Mrs. Hopper's Motion to Dismiss is not whether Appellants "wished" to be vested with an interest in Robledo, a benefit they say they did not want. Rather, the actual "benefit" in fact at issue, per Mrs. Hopper's Motion to Dismiss, is tied to what they received in exchange for their deliberately, purposefully deeding their interest in Robledo to Quagmire. As to this "benefit" and transaction, Appellants voluntarily chose to transfer their interest, and to receive, *that express benefit*. They not only received a benefit in return, but in fact they wanted that *substantial benefit* ". . . to protect Appellants from unwanted liability. . . ." [Response p. 4] Indeed, in Mrs. Hopper's Motion to Dismiss, she correctly and presciently anticipated exactly that very motive and *benefit*. Mrs. Hopper's Motion to Dismiss stated:

> But they have conveyed their respective interests for consideration, and presumably other benefits (including protection from 3rd party liability) of selling a real property interest to a limited liability company.

[Motion to Dismiss, p. 10].

Appellants have the very consideration and *substantial benefit* they bargained for, and thus the estoppel doctrine independently bars (in addition to lack of standing) Appellants from further pursuing their Appeal.

III. APPELLANTS' ARGUMENTS REGARDING MOOTNESS ARE IRRELEVANT.

Appellants cannot evade the dispositive case law barring their appeal for lack of standing. Their Response does not even try to do so. Rather, it just ignores their clear lack of standing, and instead asserts that their Appeal is simply "not moot."

But mootness and standing are not the same concepts, nor interchangeable. And the difference is critical here. Mootness is defined by a judicial decision having no practical effect on the controversy, or when there is no longer a justiciable controversy. *See* Black's Law Dictionary 1008 (6th ed. 1990). In other words, mootness focuses on the subject matter of the action.

Standing is about "who": whether a particular party seeking to bring an action possesses sufficient ownership in that interest and thus has the *right* to bring that action, such that the court may properly exercise its jurisdiction over that matter. *See* Black's Law Dictionary 1405-06 (6th ed. 1990). It may, however, turn out to be that even with standing by a party, an issue can still ultimately be or become moot.

Appellants are trying to confuse the issue, claiming that the test for whether an appeal is moot is whether a court's actions on the merits "cannot affect the rights of the parties." [Response, p. 4]. This was the exact argument that the appellant in *Hart* unsuccessfully advanced. In rejecting the argument that the appeal was not moot (in response to the appellee asserting lack of

standing), the *Hart* court stated that ". . . *the trial court lost jurisdiction because [the appellant] lost standing when it sold the property, not because the issues themselves became moot.*" *Hart*, 2010 WL 2681713, at * 5 n. 6. (emphasis added). In other words, where there is no standing, the issue of mootness, as in the instant cause as to Appellants, never arises, and thus does not need to be addressed.

In stark contrast to Mrs. Hopper, the Appellants have "no skin in the game." They are no longer heirs or owners[5] pertaining to Robledo, as they have conveyed their interests to Quagmire for a real and admitted benefit (i.e. protection against liability). Therefore, they lack standing to pursue their Appeal.

IV. APPELLANTS' LACK OF STANDING FOREVER BARS THEIR APPEAL, AS WELL AS ANY BACKDOOR FUTURE ATTEMPT BY QUAGMIRE TO PURSUE THE SAME OR SIMILAR RIGHTS.

Based on *Hart*, "interruption in standing" is not only fatal to Appellants' Appeal as of this moment, but forever bars asserting rights regarding Robledo, through any other attempted pathway, as well. More specifically, even were Quagmire a party, it could never assert rights in Robledo as a purported heir. This is because Quagmire is not an "heir", and it is not and never has been a party to this appeal, nor could it ever be as a matter of law. There is no possible way in which Quagmire could ever have had standing to assert the kind of claims made by Appellants, even if it had been somehow named and joined as a party in the underlying cause before the trial court, long ago. Those arguments/claims as

[5] Unlike Mrs. Hopper, an owner.

possessed by Appellants could be asserted *only* by them in their capacities as heirs under the Texas Probate Code, not by others acting as transferees for value (or otherwise). Appellants' arguments and potential claims are personal to them as Decedent's Children, as heirs. *See, e.g., City of Laredo*, 966 S.W.2d at 679. And in any event, no rights in property transfer to a subsequent purchaser unless there is an express assignment:

> For more than 100 years, this Court has recognized that a cause of action for injury to real property accrues when the injury is committed. The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action.

Exxon Corporation v. Emerald Oil & Gas Company, L.C., 331 S.W.3d 419, 424 (Tex. 2010).

There being no such assignment even contemporaneously attempted here (*see* Special Warranty Deeds, Exhibits "A" and "B" to Counsel's Affidavit attached in support of Mrs. Hopper's Motion to Dismiss), any injury Appellants purportedly suffered from issuance of the Deed of June 25, 2012, as it was delivered by the IA to both Appellants and Mrs. Hopper as to Robledo, would not and could not legally inure to the benefit of Quagmire.

Appellants likewise cannot consent to Quagmire asserting any claims (even were the Stepchildren to try and bring Quagmire, into this appeal and by and with their consent attempt to "confer standing" on Quagmire, to assert their former claim) when it in fact has no standing and cannot, as a matter of law. *See,*

e.g., *Tourneau*, 24 S.W.3d at 910 (subject matter jurisdiction "cannot be conferred by consent, waiver or estoppel"). When the conveyance occurred, Appellants' purported claims as to Robledo were extinguished and instantly evaporated. *See Hart*, 2010 WL 2681713, at *4-6.

V. APPELLANTS' AFFIDAVITS SHOULD BE STRUCK AND DISREGARDED.

The Appellants' Affidavits offered in support of their Response are a misguided and improper attempt to provide this Court with self-serving, conclusory, irrelevant, and hearsay evidence. They do not overcome Appellants' lack of standing to pursue their Appeal, or estoppel arguments.

Notwithstanding, the Affidavits are fatally defective. The Affidavits should be struck entirely. Mrs. Hopper offers the following specific objections to said Affidavits in support of their being struck or not considered, in their entirety. Footnote "1" in their Response is not well taken, in that the record cannot be accepted with defective Affidavits.

A. The Stephen B. Hopper Affidavit

Mrs. Hopper objects to paragraph 2 because (allegedly) "why" the Appellants' transferred their interests to Quagmire is not relevant. Furthermore, it is not relevant as to what Appellants' (alleged) future intent is with respect to Quagmire. In addition, paragraph 2 contains improper conclusory statements.

Mrs. Hopper objects to paragraphs 3, 4, 5, 6, 7, 11 because they are not relevant to any issue before this Court and contain hearsay statements.

Mrs. Hopper objects to paragraphs 8, 10, 12 and 13 because they are not relevant to any issue before this Court.

Mrs. Hopper objects to paragraph 9 because it is not relevant to any issue before this Court and contains improper conclusory statements.

Mrs. Hopper objects to paragraph 12, which states Appellants' appellate counsel was "unaware" of the transfer, because it is not based on personal knowledge, lacks foundation and calls for speculation.

B. The Laura A. Wassmer Affidavit

Mrs. Hopper objects to paragraph 2 because (allegedly) "why" the Appellants' transferred their interests to Quagmire is not relevant. Furthermore, it is not relevant as to what Appellants' (alleged) future intent is with respect to Quagmire. In addition, paragraph 2 contains improper conclusory statements.

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Mrs. Hopper objects to paragraph 12, which states Appellants' appellate counsel was "unaware" of the transfer, because it is not based on personal knowledge, lacks foundation and calls for speculation.

PRAYER

Appellee/Cross-Appellant Mrs. Hopper prays that Appellants Stephen B. Hopper's and Laura S. Wassmer's Appeal be dismissed in its entirety with prejudice, and not considered further, and that the Court issue an order that no other party to this appeal will be hereafter required to respond with any briefing with or to any of the points/Issues, as dismissed, previously raised by said Appeal, and for such further relief as may be appropriate in the premises.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 23rd day of January, 2013 as follows.

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Re: No. 08-12-00331-CV; *Stephen B. Hopper and Laura S. Wassmer v. Jo N. Hopper v. JP Morgan Chase Bank, N.A.*

Dear Ms. Pacheco:

Attached is *Appellee/Cross-Appellant Jo N. Hopper's Reply to: Appellant Laura S. Wassmer and Stephen B. Hopper's Response to Appellee/Cross-Appellant Jo N. Hopper's Motion to Dismiss for Lack of Standing; and, Objection to Appellants' Affidavits*. We are fax filing this document by permission from your office, and will also send an overnight copy by federal express.

Thank you for allowing us to fax file this document. I have also served a copy on all counsel of record.

Please do not hesitate to contact me with any questions.

Very truly yours,

Mike Yanof

Michael A. Yanof

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Re: No. 08-12-00331-CV; *Stephen B. Hopper and Laura S. Wassmer v. Jo N. Hopper v. JP Morgan Chase Bank, N.A.*

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