

TO THE HONORABLE JUDGES OF THE THIRD COURT OF APPEALS:

In her latest attempt to impede, hinder (delay) the due course of justice, without regard to the costs to her client, the present attorney for the Defendant-Appellant has been allowed by the clerk of our Court of Appeals to file a post submission brief. This necessitates a Reply and Judicial Notice to the members of this Court.

**BREIF RESTATEMENT OF APPELLEE’S ARGUMENT
(See Appellee’s Brief for additional authorities)**

**‘Actual Innocence’ is an Inherent Right of people
on a land governed by the Rule of Law.**

STANDARD FOR DETERMINING ACTUAL INNOCENCE

As a Matter of Law = It is ‘a question of fact’, not ‘a question of law’

‘Actual Innocence’ is not a Right subject to abrogation by those the sovereign of this State have trusted with employment in the government of our State. The premise that ‘Actual Innocence’ can be arbitrarily, capaciously, conferred or denied by people in positions of public trust is a proposition that destroys the Rule of Law. Law secures ‘Actual Innocence’ an Inherent Right, a Natural, Right, making it a Substantive Right.

The Rule of Law limits the authority / decision making power (discretion) of government employees, whether elected or hired, regardless of position, to honor the law - to protect the inherent Right of the Human / Natural Person, to dignity. The premise that persons employed in government, by election or hire, ‘are’ the law, rather than ‘servants’ of the law, destroys liberty and eliminates the prospect of Justice.

The Law at Issue

The Law codified as §103.102 “Standard of Proof” in our Texas Civil Practice and Remedies Code is clear to anyone competent to be licensed to practice law in our State. ‘Actual Innocence’ is ‘a question of fact’ to be determined by “a preponderance of the evidence”. Where in a criminal proceeding the government of the State must prove guilt “beyond a reasonable doubt”, the government’s burden is less in defense of the civil proceeding on a claim for compensation for wrongful imprisonment. The government must only prove guilt by a preponderance of the evidence. The government / defendant presented no evidence (facts), new or otherwise, at either trial; the trial on actual innocence, held on July 16, 2003, or trial on damages, heard on July 25th and August 10th of 2005. No facts are of record before this Court for ‘actual guilt’ as a defense to liability.

The Facts at Issue

The defendant government has not presented any evidence (facts) of Heimlich’s guilt by any standard. There is no evidence (facts) of Heimlich’s guilt of record on this appeal, or anywhere in the public record. To the contrary, the evidence (facts) of public record reveal Heimlich’s innocence can not be anything other than ‘Actual’. The opinion reversing the conviction specifically stated “**Heimlich remained the only person with a legal ownership interest in the thing of value**”.... “**The State's argument, however, is based on an erroneous view of commercial paper law**”and “ **it points to the absurdity of the State's logic**” . These statements, beyond any possible reasonable dispute, reveal “Actual Innocence” regardless of any legislative, executive, judicial / ‘technical’ definition applied to the meaning of the phrase.

In the underlying case of [the government of] the State of Texas v. Heimlich, of Public Record in file No. 674066, and in Heimlich’s counter-claim, of Public Record in

file No. GN100142, now up for a second review by this Court, the question has previously been answered by the Facts of Public Record. This was noted by prior review of the Honorable Judges serving in our Court of Appeals for the Fourteenth Supreme Judicial District, of Public Record in file NO. 14-95-01369-CR. This finding of facts was reviewed by our highest court in our Land of Texas, our Court of Criminal Appeals sharing equal jurisdiction with our Texas Supreme Court and is of Public Record in file no. PD-0715-99. It was then noted by the Honorable Judges serving in our Court of Appeals for our Third Supreme Judicial District, THIS COURT, on review of the Facts of Public Record in file No. 03-02-00151-CV. **This is res judicata and Law of the Case.**

The Facts of Public Record clearly reveal that in this case, not only is Heimlich's Actual Innocence established by a 'preponderance of the evidence', meaning a greater weight than not, but that **his Actual Innocence is absolute beyond any question of fact.** By virtue of a lawful contract between Heimlich and the alleged complainant, it was impossible for Heimlich to commit a crime, or even attempt a crime. Heimlich was not in breach of the contract and, therefore, was not even subject to 'suspicion' or an allegation of criminal or civil wrong. None, and certainly not the government of the State of Texas, had lawful authority, or factual foundation, for any accusation that Heimlich had committed a wrong (tort). Nor that Heimlich was even preparing to commit a wrong.

Heimlich's innocence is factual AND legal = Actual in every sense.

The contract between the parties (of public record¹) established the intent of the parties and, providing their contract was for lawful purposes, the intent of the parties to it was not subject to any outside speculation.

¹ This contract was written, and promulgated, by Attorneys for the State of Texas employed in the State Agency, Texas Real Estate Commission. Effective consent given by alleged complainant. And it's lawfulness has not been challenged. It provides absolute proof of Heimlich's legal title to the property, was attached to the seizure warrant and filed in the Public Records in every proceeding, including this one.

A person sufficiently competent in the knowledge of law to secure a license to practice law must know and understand contract law. A lay person, with no or limited knowledge of contract law, might be misled, as the jurors were in the underlying criminal proceeding by an Attorney employed by the government of our State of Texas (prosecutor) for which the entity, government of the State of Texas, is responsible.

Heimlich's Actual Innocence is a Fact that has been established as a Truth,

A truth that cannot be reasonably denied by one sufficiently competent

In the knowledge of law to be licensed to practice law.

JUDICIAL NOTICE

The “post-submission brief” that was filed in the Public Records on September 6, 2006, by Attorney for the Defendant-Appellant, Cynthia Alexander, is clearly, simply, the latest in a long series of attempts by Alexander to induce the Honorable Judges, and/or other members of this Court, to join her in a conspiracy for the purpose of “impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny [to me, Heimlich, a citizen of this State and of the United States] the equal protection of the laws”. See Federal Law, codified as 42 USC §1985. And her filing is another violation of the Texas Lawyers’ creed, IV (Lawyer to Judge) (6);

I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

Contrary to the assertion of the Attorney for the Appellant, In Re Trayson Wooden, Relator, Case No. 06-0656 (“Wooden”) does **NOT** raise an issue germane to this case, of record as 03-05-00827-CV, now before you.

(1) Wooden concerns an Administrative Claim, pursuant to subchapter B of Chapter 103 of our Texas Civil Practice and Remedies Code. Heimlich's claim is pursuant to subchapter C of Chapter 103. Therefore, **the cases are not similar**. See §103.002 "Choice of Compensation Method".

The definition of the phrase "actual innocence" in an Administrative Claim is subject to determination by a District Attorney or, in Wooden, the Comptroller. That method puts the District Attorney and/or Comptroller in the position to judge the preponderance of the evidence. The Executive Division of government, rather than the Judicial Division. In a case brought pursuant to subchapter C, as in this, Heimlich's case now before this court, the definition is a fact determination to be determined by the Judicial Division, by a Trier of Fact, Judge or Jury, in a trial of the evidence on a preponderance of the evidence. This is pursuant to §103.102 "Standard of Proof".

(2) Of record in our cause is the prior Judgment of this Court of Appeal, in the Fourteenth District of our State, NO. 14-95-01369-CR. While the opinion did use the phrase "legal insufficiency of the evidence", the opinion also reveals the fact of the existence of a lawful contract between the alleged complainant, and Heimlich and that Heimlich was not in breach of this contract. Therefore, no crime, either civil or criminal in nature, was possible. Thus Heimlich's innocence, as Actual, is an established fact of public record. Additionally; The Law, including the private Law of contract, is a FACT of Public Record that cannot be denied even by those licensed as Attorneys who are employed in government.

Therefore; Heimlich's innocence is by these facts absolute, regardless of any technical definition that might be applied to the phrase "Actual Innocence", as it is a Constitutional right secured to Heimlich Law of Section 20 in Article I, Texas Constitution Bill of [Individual] Rights providing Heimlich with this protection of the law; "***No citizen shall be outlawed***". To assert that Heimlich was not protected by lawful Contract Law between the parties, and inherently entitled to anything other than "Actual Innocence", is to put Heimlich outside the protection of the Law. To declare him "outlawed", violates our Texas Constitution., and is a discretion this Court does not have; a power not delegated by the sovereign of our State by the Texas Constitution that governs.

- (3) This district of our Appellate Court, the Third, noted the foregoing in prior review of this case, of public record as 03-02-00151-CV in finding that Heimlich has a claim against the government of the State of Texas for wrongful imprisonment, due to Actual Innocence revealed by review of the underlying facts in our Fourteenth District. THIS COURT noted that "Actual Innocence" is the key, threshold, issue to liability of the Defendant-Appellant and used the phrase therein without any prompting by Heimlich. See opinion of record January 30, 2003.

As this was based on a review that had been submitted to the highest Court in our Land of Texas, the Texas Court of Criminal Appeals, our Court of Appeals in this District, the Third, is without jurisdiction to reverse the prior finding of facts. Pursuant to TRAP 19, plenary power of this Court of Appeals to rehear, or reverse, the Judgment of it's self, this Court, in 03-02-00151-CV, has expired. Pursuant to TRAP 53.7 (a), time for Petition for Review has expired. The Lawyer

for the Defendant-Appellant, as one licensed by the bar, cannot assert ignorance of the Rules, and of record is notice of the rules applicable to this issue, to her.

- (4) To make absolutely certain there was no misunderstanding on this Issue, Heimlich moved for trial in the district court on this sole issue, via Motion for No Evidence Summary Judgment. Trial on the question of Heimlich's 'Actual Innocence' was had before the bench on July 16, 2003 and Final Judgment was entered into the public record on August 14, 2003. This is of record in this Appellate Court on the pending review. Because this was a Judgment establishing the liability of a government entity, the Attorney for the Defendant had a legal duty, §51.014 TCPRC, to appeal, or waive right to appeal. The Defendant-Appellant did not appeal this Judgment, and time for Appellate review has now expired. The Rules of Due Process of Law / Due Course of Law, and Heimlich's Constitutional right to same, provide Heimlich with legal protection from a review of that Judgment on Actual Innocence at this late date. The doctrine of Res Judicata applies.
- (5) The prior Attorney for the Defendant-Appellant, in pleadings of public record, both in written pleadings and verbal record recorded at trial, and now part of the Appellate Record in this Court, confessed to Judgment on this issue, the liability of the defendant-appellant. Liability under Chapter 103 exist only if the Innocence of the plaintiff-appellee is actual. Therefore, confession of liability is acknowledgment of Actual Innocence and it is now an undisputed fact².

Thus the issue of Heimlich 'Actual Innocence' is not properly before this court, and is not subject to further review by this court, or any other.

² Texas Lawyers Creed, III (15:) I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

FORM OVER SUBSTANCE

Heimlich's Actual Innocence is a matter of substance. Attorney for the Defendant-Appellant attempts to put form, a technical definition of the phrase, over the substance of the facts of public record that reveal Heimlich's Innocence to be Actual. This Inherent, fundamental, common-law, substantive Right of Actual Innocence of the Human / Natural Person, one of the people, an Individual, a citizen of this State, is secured by the Constitution and Laws of the United States and of this State, is not subject to abrogation. This is a Constitutional Right secured Heimlich as a citizen of this State of Texas by §20 of Article I prohibiting a citizen from being outlawed = put outside the protection of the law, or an act that would disenfranchise him in violation of his State citizen right secured by §19 of Article I, to his property, now in the custody of the government of the State of Texas, to which he is by fact and law entitled.

ATTORNEY'S ARGUMENT IS ALSO IN VIOLATION OF THE FOLLOWING:

In addition to her most recent misrepresentation, the Attorney for the Defendant-Appellant, Cynthia Alexander, has, by her post-submission brief, continued to display an attitude that she, by virtue of a license to practice law combined with employment in a position of public trust, is above the Law. The Law governing the conduct of Attorneys, including those employed in government, includes the following:

Texas Lawyers Creed, section III:

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

Attorney for the Defendant-Appellant's post submission brief is a violation of the following provisions of the Texas Rules of Disciplinary Conduct, Section 8.04 titled **"Misconduct"**;

(a) A lawyer shall not:

- (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;**
- (4) engage in conduct constituting obstruction of justice;**
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;**
- (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law. [Texas Lawyers' Creed]**

The Honorable Judges and other members of this Court are bound to and by the Texas Constitution. A Lawyer, licensed by the government of the State of Texas by and through our Texas Supreme Court, and employed in the government of the State of Texas, has no privilege to induce the members of this Court to violate Heimlich's Rights secured by the Texas Constitution; or, to violate Federal Law that protects him from conspiracy between an Attorney employed in the government of our State of Texas, and members of the Court of our State of Texas, whereby they join her in "impeding, hindering, obstructing" "the due course of justice in any State" – this State of Texas.

This litigation is now costing the Client of the Attorney for the Defendant-Appellant, the government of our State of Texas, (and indirectly the public / people of the State of Texas) not less than \$117 a day, \$3,500 per month, \$43,000 a year in post-

judgment interest (more in event of a reformed judgment that conforms the facts of record to the law) until Heimlich's property is recovered by him, while the Attorney for the Defendant-Appellant proceeds, in violation of Texas Rules of Civil Procedure 13 in her experiment to get an opinion of the Court that, she hopes, will deprive the citizens of this State of their inherent, fundamental, substantive, as well as Constitutionally secured Right to protection of the Law. Her letter of September 6, 2006, is the most recent example of her positions on this appeal that unreasonably increase the costs or other burdens of the case, and unreasonably delay resolution of the matter, in direct violation of Rule 3.02 of the Texas Disciplinary Rules of Professional Conduct.

Rule 3.02 Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

CONCLUSION

The Wooden case in our Texas Supreme Court is irrelevant, immaterial, not germane to the review pending in this Court of Appeals because:

1. Wooden is prosecuting his claim through the Executive Division via Administrative Process, pursuant to Subchapter B of Chapter 103. Heimlich is prosecuting his claim through the Judicial Division, pursuant to Subchapter C.
2. Heimlich, unlike Wooden, is protected by a lawful contract between him and the alleged complainant in the underlying criminal case. This contract, that remains legal and enforceable private law, establishes Heimlich's innocence as not only actual, but an absolute protection of a citizen of this State, and for people in a Land governed by the Rule of Law.

3. This court is, by Article II of our Texas Constitution, Independent; and must remain so regardless of attempts by the Executive Division, by and through Cynthia Alexander of the Office of the Attorney General, to make it less than.

CONCLUSION WITH NOTICE

The position of the lawyer for the Defendant-Appellant that the Judges of this Court, and/or other members of, should delay their review pending a finding of our Texas Supreme Court in” Wooden” on the question of whether or not “legal sufficiency of the evidence” is a phrase synonymous in meaning with the phrase “Actual Innocence” is, pursuant to the foregoing, the facts of public record, and prior adjudications in this case, clearly unreasonable. And would unreasonably increases the costs and other burdens of the case; not only to the Plaintiff-Appellee, but to Cynthia Alexander’s client, the government of the State of Texas and, ultimately, the sovereign this entity represents – the people of the State of Texas who own the treasury of our State that is appropriated to provide emoluments to Cynthia Alexander for her services to them, the public.

NOTICE IS GIVEN that the persons employed in our Court of Appeals, referred to by the Attorney for the Defendant-Appellant, Cynthia Alexander, as “members of the court” for the Third Supreme Judicial District of our State, be they elected or appointed (includes those hired) may be subject to prosecution, in their personal capacity, for what they do or neglect to do, pursuant to the Law that protects Heimlich, and other members of his class (those not licensed as Attorneys and/or not employed in government). That action may be pursuant to Law codified in Chapter 7 of our Civil Practice and Remedies Code for our State of Texas, titled “Liability of Court Officers” or the law referenced in therein, Federal Law codified in Title 42 USC 1985, 1986, or other Law including those

that impose penal sanctions; See Law codified in Chapter 39 of Texas Penal Code referring law that impose duties or govern the conduct of public servants (those receiving emoluments – pay and benefits – from appropriated Treasury of our State of Texas).

These actions may proceed in either jurisdiction of the sovereign, the people, of this Land. The Jurisdiction of our State, or the Jurisdiction of our United States, in criminal and/or civil venue. These actions may be prosecuted by public servants of either jurisdiction, or by one of the people, a citizen, of these jurisdictions on his own behalf and/or ex rel, as a ‘private attorney general’, on behalf of his people, the people of the State of Texas and/or his people of the United States of America.

WHEREFORE, PREMISES CONSIDERED, the Clerk of this Court is instructed to take notice and distribute copies of this Notice to the members of the Court that received the post-submission brief of the Attorney for the Defendant-Appellant. And, respectfully requested to file this Reply with public record maintained under file number 03-05-00827-CV, as this is an equitable entitlement in a land where each Individual is entitled to “Equal Justice under the Law” (carved in stone above our Courthouse known as the Supreme Court of the United States of America). I respectfully request of this Court all additional relief, in law and/or equity, to which I am entitled.

Certificate of Service

I certify a copy of the foregoing was served on Defendant, by and through Counsel of Record, on this the 11th day of September, 2006, via email and postal mail.

Respectfully Submitted,

Edmund Bryan Heimlich