THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

Patsy Spaw

AUG 05 2023

CLERK OF THE COURT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT
TO ALL ARTICLES OF IMPEACHMENT

In Texas, an impeachment trial is legally considered a criminal proceeding. The House Managers, of course, have argued to the contrary when it suits them. In other Motion practice, Attorney General Paxton has argued that, because this is a criminal proceeding, it is evident that the House has wholly failed to properly articulate—as they are required to do—what the actual legal claims are being brought against General Paxton, have wholly failed to adequately articulate the elements of those legal claims, and have wholly failed to even attempt to establish how General Paxton's conduct runs afoul of any such legal claims. The difficulty of defending this case for General Paxton is not that he acted contrary to the law—far from it. The difficulty here is trying to decipher what the House is even claiming he did wrong. Respondents to an impeachment proceeding should not be required to sift through nonsense to determine what is being alleged. As established in other Motion practice, the Impeachment Articles put forth by the House Managers are incredibly vague, rife with demonstrably wrong conclusions of law (almost laughable), and demonstrate an almost alarming ignorance of how the Attorney General's Office even works.

Nevertheless, in the event this Court considers this proceeding to be akin to a civil matter, Attorney General Kenneth Paxton asks this Court to require the House Managers to do what they should have done in the first place—set forth the actual legal claims, set forth the elements of those claims, and provide actual evidence that prevents dismissal of those claims before a jury of the Senate is forced to sit through forty-eight hours of testimony to reach the ultimate conclusion that is now evident—this entire proceeding is nothing but an ill-advised, shoddily cobbled together, flimsy sham.

After receiving more than 180,000 pages of discovery, Attorney General Warren Kenneth Paxton, Jr. files this Motion for No-Evidence Summary Judgement as to all pending Articles of

Impeachment brought forward by the Texas House of Board Managers. In support, General Paxton respectfully shows the following:

I. INTRODUCTION

The Managers and its counsel have publicly stated that the evidence against the Attorney General is "clear, compelling and decisive" and "ten times worse than what has been public." However, the Managers' 180,000 pages of production tells a far different story. In fact, after review of the production**, it is apparent they have no evidence** to support any Articles of Impeachment against the Attorney General.

Accordingly, General Paxton now moves for a No-Evidence Motion for Summary Judgment as to each Article brought by the Managers. The Managers have no evidence of wrongdoing by the Attorney General and no evidence to support any Article of impeachment brought against him.

II. STANDARD OF LAW

After adequate time for discovery, a court must grant a motion for no-evidence summary judgment if the adverse party has not produced evidence of one or more essential elements of a claim. Tex. R. Civ. P. 166a(i). The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. *Id.* A no evidence motion should be granted when there is a complete absence of evidence of a vital fact; the only evidence offered is inadmissible under the law or the rules of evidence; no more than a mere scintilla of evidence is offered as to a vital fact; or the evidence conclusively establishes summary judgment in the moving party's favor. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). The evidence must "rise to a level that would enable reasonable and fair-minded people to differ in their conclusions" to defeat the summary judgment motion. *Id*. Evidence is considered in the light most favorable to the non-movant, but the Court cannot disregard evidence and inferences favoring

the movant that a jury could not ignore. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248 (Tex. 2013).

Importantly, unsworn testimony is inadmissible and cannot raise a genuine issue of material fact sufficient to defeat a no-evidence motion, because it cannot be tested for perjury. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *see also Mayo v. Suemaur Exploration & Prod. LLC*, 2008 WL 4355259, at *5 (Tex. App.--Houston [14th Dist.] 2008) (holding that "[u]nauthenticated or unsworn documents, or documents not supported by any affidavit" do "not properly present any evidence for consideration"). Unsworn statements by attorneys are not admissible evidence either. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997). So the House General Investigating Committee's purported "evidentiary hearing" transcript is not admissible as evidence since there is none of those testifying were under oath. The usnworn statements of various witnesses cannot be relied upon either. *See also* Tex. Gov't Code § 301.022.

Here, an adequate time for discovery has passed. Indeed, Presiding Officer Lieutenant Governor Dan Patrick ordered the Managers to present all of their evidence in a discovery order issued on July 12th, 2023. To date, the Managers have produced a voluminous amount of discovery, totaling more than 180,000 pages. However, out of the 180,000 pages, the Managers have not—and cannot—produce raise a fact issue for trial that could support a finding against General Paxton. Therefore, the Attorney General is entitled to summary judgment on the Articles.

III. ARGUMENT

1. Disregard of Official Duty – Protection of Charitable Organization

The Managers allege that Attorney General Paxton "fail[ed] to act as public protector of charitable organizations as required by Chapter 123, Property Code" and that "Paxton caused employees of his office to intervene in a lawsuit" between the Mitte Foundation and Nate Paul

entities. Further, they allege "Paxton harmed the Mitte Foundation in an effort to benefit Paul." The Attorney General has no duty to protect charitable organizations like the Mitte Foundation; to the contrary, the Attorney General at times sues charitable organizations for mismanagement of charitable funds and for violations of law. In fact, then-Attorney General Abbott sued the Mitte Foundation for misuse of charitable funds and mismanagement of funds. Absent evidence of a duty that the Attorney General breached, Article I must be dismissed.

Further, the Managers have produced no evidence that Paxton wrongfully intervened in the Mitte case, harmed the Mitte Foundation, or benefited—or attempted to benefit—Nate Paul in any way. The Attorney General's Office briefly intervened in the lawsuit, attempted to facilitate mediation and a settlement amongst the parties, and when those attempts were unsuccessful a notice of nonsuit was filed. During the Attorney General's short-term involvement in the case, the Mitte Foundation continued to press motions in the district court and have outstanding matters heard. There is also no evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office, requiring dismissal of any disregard of official duty claim. Simply put, no evidence exists to this Article. It must be dismissed.

2. Disregard of Official Duty – Abuse of the Opinion Process

The Managers allege "Paxton caused employees of his office to prepare an opinion" to avoid the foreclosure of Nate Paul properties, and that Paxton "concealed" such actions. As set forth in other Motion practice, the House Managers cite to Subchapter C, Chapter 402 of the Government Code, but fail to comprehend that Attorney General Paxton never issued a legal opinion, but instead issued informal guidance—as the office had done for other COVID related issues and continues to do. On that basis alone, this Article fails. *Byrd v. State*, 336 S.W.3d 242,

246 (Tex. Crim. App. 2011) ("A [material] variance . . . is actually a failure of proof because the indictment sets out one distinct offense, but the proof shows an entirely different offense").

The Managers have not produced the aforementioned "opinion," they cannot produce any such opinion because no such opinion exists, and have no evidence that Paxton caused his employees to act in any way or attempted to concealed his actions in doing so. Additionally, there is no evidence that the foreclosure opinion was issued specifically to avoid "impending foreclosures" on properties owned or affiliated with Nate Paul or that he directed employees of his office to "reverse" their legal conclusion "for Nate Paul's benefit." The informal guidance on foreclosures had statewide effect. Additionally, several of the counties where Nate Paul's properties were in foreclosure already had orders in place that did not permit foreclosure sales to go forward, so the informal guidance letter had no impact on those sales. Since there is no evidence that the informal guidance was issued solely to benefit Nate Paul, as opposed to all Texans at risk of having their real property sold out from under them in small, unfair public sales due to a nationwide pandemic, summary judgment on Article II should be granted. Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. There is no evidence to support this Article. It also must be dismissed

3. Disregard of Official Duty – Abuse of the Open Records Process

The Managers allege "Paxton directed employees of his office to act contrary to law" in rendering a decision relating to a public information request. The Managers have not put forth any evidence showing that Paxton directed his employees in any way relating to a public records decision, much less that he directed them contrary to law or standards. There is no evidence any decision was improper, given the "completely unique" circumstances surrounding the requested

ruling by DPS, including violations of the PIA by both DPS and the FBI. Tex. Govt. Code §552.305. The same is true for the decision releasing the FBI's unredacted letter. *Id.*; *Arlington ISD v. Tex. Atty. Gen*., 37 S.W.3d 152, 157 (Tex. App—Austin 2001, no pet.). Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. There is no evidence to support this Article. Dismissal is proper.

4. Disregard of Official Duty – Misuse of Information

The Managers allege Paxton improperly obtained access to nonpublic information to the benefit of Nate Paul. Again, the Managers have not produced and cannot produce any evidence showing that General Paxton obtained access to any information that wasn't publicly disclosed or publicly available, that he did so improperly, or that it was "for the purpose" or "benefit of Nate Paul." The Managers have not even identified what "information" that is referred to in this Article—nor can they. The Managers only purported "evidence" related to this Article are witness statements that were taken contrary to law, and therefore are inadmissible. Tex. Gov't Code § 301.022. Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. Accordingly, there is no evidence to support a finding against the General in Article IV. It must be dismissed.

5. Disregard of Official Duty – Engagement of Cammack

The Managers allege, among other things, that Paxton appointed Brandon Cammack as a prosecutor pro tem. As shown elsewhere, Brandon Cammack was never a "prosecutor pro tem." This again demonstrates a level of ignorance of the facts and the law which require dismissal. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011) ("A [material] variance . . . is actually a failure of proof because the indictment sets out one distinct offense, but the proof shows an entirely

different offense"). Moreover, the Managers have not identified which laws were "violated" by engaging Cammack, *cf. Terrell v. Sparks*, 135 S.W. 519, 522 (Tex. 1911), have not provided evidence showing that the subject complaint was "baseless," and cannot demonstrate that a subordinate's disagreement with the Attorney General violated any law. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 924 (Tex. Crim. App. 1994). Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. Again, there is no evidence to support this Article. It must be dismissed.

6. Disregard of Official Duty – Termination of Whistleblowers

Here, the House Managers allege, among other things, that Paxton terminated employees without good cause and in retaliation for reporting "illegal acts and improper conduct." Additionally, the House Managers allege "Paxton engaged in a public and private campaign to impugn the employees' professional reputations or prejudice their future employment."

The House Managers cannot provide any evidence that these employees were wrongfully terminated, because, as a matter of law, the Whistleblower Act does not protect employees against adverse employment actions taken by an elected official. *See* Tex. Gov't Code § 554.002(a). Additionally, the House Managers have not articulated or shown any evidence that Paxton engaged in a "campaign" to "impugn" the referenced individuals. Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. There is no evidence to support this Article. It must be dismissed.

7. and 15. Misapplication of Public Resources – Whistleblower Investigation and Report

The House Managers allege that "Paxton directed employees of his office to conduct a sham investigation into whistleblower complaints." There is no evidence of this, and will never be any such evidence. As the House conceded, the evidence shows that First Assistant Attorney

General Brent Webster "was the person who conducted that investigation, attempted to clear the attorney general's office, and wrote the report"—not the Attorney General. Transcript at 119:3-7, *In re Paxton*. The House does not have evidence that the Attorney General purportedly "directed" a "sham investigation" or "directed employees of his office . . . to create and publish" a "report containing false or misleading statements." Art. VII. Likewise, the House does not have any evidence that the Attorney General "made or caused to be made multiple false or misleading statements . . . to mislead both the public and public officials." Art. XV. Moreover, the House does not identify any such "false or misleading statements" in either Article. There is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. Or that the Attorney General knowingly made a false entry in a government record. Tex. Pen. Code § 37.10. There is no evidence the Attorney General made any false statement in the OAG Report at all, let alone that he knowingly did so. As such, there is no evidence to support this Article. It must be dismissed.

8. Disregard of Official Duty – Settlement Agreement

The House Managers can produce no evidence to suggest that any of their allegations contained in Article VIII are based in fact. The Managers have no evidence that the Attorney General "entered into a settlement agreement" with the intent to "conceal[]" any of his actions. The Managers have no evidence that the settlement agreement—entered into *after* the November 2022 election—"deprived the electorate of its opportunity to make an informed decision when voting for attorney general." To the contrary, General Paxton won the most recent election for Attorney General in a landslide, even after the whistleblower lawsuit was already public knowledge based on extensive media scrutiny and political campaigning. The Managers have no evidence that a settlement agreement entered into *after* that election had any bearing on the

electorate's choice for Attorney General in 2022. And the House Managers have no evidence that the Attorney General "misuse[d]" any "official power" by "enter[ing] into a settlement agreement" with the so-called "whistleblowers." Indeed, the House Managers do not even identify who the purported "whistleblowers" are. Finally, there is no admissible evidence that the Attorney General acted with the requisite intent of *knowingly or intentionally* violating a law related to his office. There is no evidence to support this Article. It must be dismissed.

9. and 10. Constitutional Bribery – Paul's Employment of Mistress

The House Managers have produced no evidence that Attorney General Ken Paxton was bribed or conferred a benefit from any relationship he allegedly had with Nate Paul. The House Managers' reckless and baseless allegations are wholly unsupported by any evidence to suggest this because no such evidence exists. The House Managers did not even bother to obtain sworn testimony in their "investigation" of these allegations. There is no evidence of a bilateral agreement—essentially an illegal contract to exchange a benefit as consideration for the performance of an official function. *McCallum v. State*, 686 S.W.2d 132, 133-34 (Tex. Crim. App. 1985). There is no evidence of a personal benefit; the Attorney General paid for the House renovations central to Article X. *Gandara v. State*, 527 S.W.3d 261, 268 (Tex. App.—El Paso 2016). There is no evidence of what the Attorney General was purportedly bribed to do—namely what exercise of his office was obtained. Tex. Penal Code § 36.02(a)(1); *McCallum*, 686 S.W.2d at 136. There is simply no evidence of the requisite quid pro quo. *Cox v. State*, 316 S.W.2d 891,

894 (Tex. Crim. App. 1958). There is no evidence to support this Article and it should be dismissed as a result.

16 – 20. Overly Vague and Indiscernible Articles

In the remaining Articles, as best as General Paxton can tell, the House Managers allege generally conspiracy, misappropriation of public resources, dereliction of duty, and abuse of the public trust. The House Managers make no effort whatsoever to articulate the factual bases of such claims, make no effort to set out the elements of such claims, and, importantly, provide no evidence in support of such claims. Setting aside the vague nature of these allegations, there is no and can be no evidence to support them. For example, there is no evidence to support any element Article XVI's conspiracy claim: an intent that a felony be committed, an agreement to commit the criminal offense, or an overt act in pursuance of the agreement. Tex. Penal Code § 15.02(a); *Brown v. State*, 576 S.W.2d 36, 43 (Tex. Crim. App. 1978). No evidence shows that the Attorney General agreed with anyone to commit a criminal offense and took a step towards that illicit goal. Article XVII does not allege that the Attorney General acted with intent to obtain a benefit or to harm or defraud another. Tex. Penal Code § 39.02. And none of them allege any actions by the Attorney General that *intentionally or knowingly* violated a law related to his office. These Articles should also be dismissed.

CONCLUSION AND REQUESTED RELIEF

The Managers have no evidence that Attorney General Kenneth Paxton committed any wrongdoing or illegal acts, and have no evidence to support any of the pending Articles of Impeachment. To avoid summary judgment, such evidence is necessary for the House Managers to continue with the prosecution of these Articles. Summary judgment is proper with regard to all claims.

Respectfully submitted.

/s/ Tony Buzbee
Tony Buzbee
Thomas Colby Holler
Anthony Dolcefino
The Buzbee Law Firm
JP Morgan Chase Tower
600 Travis Street, Suite 7500
Houston, Texas 77002
tbuzbee@txattorneys.com

Judd E. Stone II
Christopher D. Hilton
Allison M. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazzara

STONE|HILTON PLLC
P.O. Box 150112
Austin, Texas 78715
(737) 465-3897
judd.e.stone@proton.me
christopher.d.hilton@proton.me
allison.collins23@proton.me
amy.s.hilton@proton.me
kateland.jackson@proton.me
joseph.mazzara86@proton.me

Dan Cogdell
Cogdell Law Firm
1000 Main St., Suite 2300
Houston, TX 77002
dan@cogdell-law.com

Counsel for the Attorney General

CERTIFICATE OF SERVICE

This motion was served via email on the House Board of Managers' counsel: Rusty Hardin, rhardin@rustyhardin.com, and Dick DeGuerin, ddeguerin@aol.com, on August 5, 2023.

/s/ Tony Buzbee
Tony Buzbee