

**CAUSE NO. 02-24-00090-CV**

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IN THE COURT OF APPEALS FOR  
THE SECOND JUDICIAL DISTRICT OF TEXAS  
IN FORT WORTH, TEXAS

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**NEAL RAUHAUSER**

**v.**

**JAMES MCGIBNEY & VIAVIEW, INC.**

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*Arising from Cause No. 067-270669-14  
in the 67th District Court of  
Tarrant County, Texas*

---

**APPELLANT'S BRIEF ON APPEAL**

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**ORAL ARGUMENT NOT REQUESTED**

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## **STATEMENT OF THE ISSUE**

The trial court should have granted the new trial and reinstated the case post-dismissal for want of prosecution because Plaintiff's counsel's failure to appear was not the result of inexcusable neglect or conscious indifference, but was instead the result of technical difficulties that were resolved within three minutes of the trial court's order of dismissal.

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**TO THE HONORABLE ELEVENTH COURT OF APPEALS:**

**STATEMENT OF THE CASE**

**NATURE OF THE CASE:** This case has a long and storied history. In its most recent appearance before this Court prior to the instant case, This Court ruled that the attorney’s fees and sanctions imposed following a successful Texas Citizens Participation Act (“TCPA”) challenge were unreasonable. *See McGibney v. Rauhauser*, 549 S.W.3d 816, 839 (Tex. App.—Fort Worth 2018, pet. denied).

**COURSE OF PROCEEDINGS:** This Court remanded the case to the 67th District Court for a new hearing on fees. *McGibney v. Rauhauser*, 549 S.W.3d 816, 839 (Tex. App.—Fort Worth 2018, pet. denied). On October 22, 2021, Mr. Rauhauser obtained new counsel (C.R. 775).

New counsel sought a final hearing on fees (C.R. 783). On August 9, 2023, the trial court set the matter for a final hearing on November 16, 2023 via Zoom (C.R. 794-95).

Consistent with the scheduling order, the parties submitted their pre-trial filings the week before trial (C.R. 797-1083).



**THE DAY OF THE  
HEARING:**

On the morning of November 16, 2023, Mr. Rauhauser's counsel experienced technical difficulties with regard to his Internet connection at his office (C.R. 1084). Counsel was able to rectify the problems by 9:20 a.m., merely 20 minutes after the hearing started (C.R. 1084-85). Nevertheless, the trial court dismissed the case for want of prosecution (C.R. 1090).

**POST-HEARING  
PROCEDURES:**

Mr. Rauhauser's counsel filed an immediate motion for new trial as soon as he learned the case had been dismissed (C.R. 1084-86). The trial court never ruled on the motion for new trial, overruling it by operation of law 75 days after it was filed (C.R. 1089). Mr. Rauhauser gave his notice of appeal (C.R. 1093).

## STATEMENT OF FACTS

On August 9, 2023, the trial court set this case for a final hearing via the Zoom remote proceedings app on November 16, 2023, at 9:00 a.m. (C.R. 794). The Court allowed three hours for the trial (C.R. 794).

The morning of trial, Plaintiff's counsel experienced technical issues with his internet connection being lost temporarily and his cell phone not obtaining service in his portion of his office building (C.R. 1084-85). Because of this, counsel was unable to call either the Court or opposing counsel to inform them of the issues. Counsel was further unable to send any sort of message at all (*id.*). Working quickly, however, counsel was able to restore service by 9:20 a.m., merely 20 minutes after the case was first called and well within the timeframe specifically allotted for the case (C.R. 794).

These matters were raised before the trial court by **immediate** motion for new trial (C.R. 1084-85). The trial court did not act upon that motion for new trial, preferring instead to dismiss this case for want of prosecution despite significant evidence that both parties were

prepared to try the case, in the form of the voluminous pre-trial filings of affidavits, exhibits, and argument concerning the availability of, appropriateness of, and amount of attorney's fees and sanctions to be awarded as per this Court's most recent remand in *McGibney v. Rauhauser*, 549 S.W.3d 816 (Tex. App.—Fort Worth 2018, pet. denied).

## **SUMMARY OF THE ARGUMENT**

Neither Tex. R. Civ. Proc. 165a nor the trial court's inherent power to dismiss a case for want of prosecution permitted it to dismiss a case when counsel was late for a remote hearing appearance by less than thirty minutes, and counsel provided an adequate excuse of technical difficulties.

## ARGUMENT

### 1. A TRIAL COURT ABUSES ITS DISCRETION WHEN IT DISMISSES A CASE FOR WANT OF PROSECUTION WITHOUT PROPER AUTHORITY.

A trial court derives its authority to dismiss a suit for want of prosecution from two independent sources: (1) Tex. R. Civ. Proc. 165a and (2) the trial court's inherent power to maintain and control its own docket. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.3d 628, 630 (Tex. 1999); *Sellers v. Foster*, 199 S.W.3d 385, 390 (Tex. App.—Fort Worth 2006, no pet.). Under Rule 165a, a trial court may dismiss a case based on either the “failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice” or the case's failure to be “disposed of within time standards promulgated by the Supreme Court.” *See* Tex. R. Civ. Proc. 165a(1), (2). Independent of Rule 165a, the common law vests a trial court with the inherent power to dismiss when a plaintiff fails to prosecute his case with due diligence. *Villarreal*, 994 S.W.2d at 630; *Sellers*, 199 S.W.3d at 390-91.

A dismissal for want of prosecution is reviewed for an abuse of discretion. *Sellers*, 199 S.W.3d at 390.

**1.1. Tex. R. Civ. Proc. 165a(3) requires reinstatement in cases where the failure to appear is justified by accident, mistake, or other reasonable excuse.**

A motion to reinstate following a dismissal for want of prosecution and a motion for new trial complaining of the dismissal are functionally the same motion. *See General Motors Corp., Chevrolet Division v. Lane*, 496 S.W.3d 533, 534 (Tex. 1973); *Dollert v. Pratt-Hewitt Oil Corp.*, 179 S.W.2d 346 (Tex. App. 1944, writ ref'd). In this case, Mr. Rauhauser's trial counsel filed a motion for new trial requesting reinstatement of the case within the time frame originally set for the hearing: between 9:00 a.m. and 12:00 p.m. on November 16, 2023 (C.R. 1084-86).

Like reviewing a dismissal for want of prosecution, reviewing courts review a denial of a motion to reinstate/motion for new trial for an abuse of discretion. *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied) (per curiam). To

determine whether there is an abuse of discretion, a reviewing court must consider whether the trial court acted without reference to any guiding rules or principles. *Franklin*, 53 S.W.3d at 401-02.

In this case, the purported dismissal for want of prosecution as a dismissal under Tex. R. Civ. Proc. 165a(1), or for failure to appear at the hearing (C.R. 1090). Under that order, the trial court stated that it first called the case at 9:00 a.m. and asked for announcements at 9:09 a.m. (C.R. 1090). The Court then recessed less than 10 minutes to give Mr. Rauhauser and counsel time to appear; but at 9:17 a.m., the Court granted an oral motion to dismiss (*id.*).

However, under Tex. R. Civ. Proc. 165a(3), the trial court must reinstate upon a motion that establishes that the “failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to accident or mistake or that the failure had been otherwise reasonably explained.” *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995) (per curiam). This is essentially the same standard as setting aside a default judgment. *Mansaray v.*

*Phillips*, 626 S.W.3d 402, 405 (Tex. App.—Dallas 2021, no pet.).

Conscious indifference means more than mere negligence. *Smith*, citing *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (1939). A failure to appear is not intentional or due to conscious indifference even if it deliberate; it must be without adequate justification. *Id.* Proof of such justification, such as accident, mistake, or other reasonable explanation, negates the intent or conscious indifference upon which reinstatement may be denied. *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992).

Merely being late is not a reason for a sanction such as dismissal of an entire case. *See In re Montelongo*, 586 S.W.3d 513, 521-22 (Tex. App.—Houston [14th Dist.] 2019, no pet.). In this case, Mr. Rauhauser's counsel provided a short, succinct, and reasonable excuse for being late: computer trouble (C.R. 1084). This information was provided well before the time allotted for the hearing expired, a mere three minutes after the case was dismissed (C.R. 1084). Under such circumstances, the failure to reinstate was an abuse of discretion



because Mr. Rauhauser met the standard for reinstatement under Tex. R. Civ. Proc. 165a(3).

**1.2. The trial court's inherent power to control its own docket does not permit it to dismiss case where the plaintiff has exercised reasonable diligence.**

Even if this Court believes instead that the trial court's dismissal was not under Tex. R. Civ. Proc. 165a(1) but rather its inherent power, reinstatement was still proper and the failure to reinstate still a violation of Mr. Rauhauser's rights. *Veterans Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976). The standard to be applied in such a case is whether the plaintiff has exercised "reasonable diligence" in prosecuting his suit. *Id.*, citing *Bevil v. Johnson*, 307 S.W.2d 85 (Tex. 1957).

In this case, Mr. Rauhauser indicated his willingness and diligence to prosecute the suit by filing, only a week earlier on November 9, 2023, voluminous pre-trial notices, including a list of exhibits, caselaw, witnesses, and a list of proposed questions for the trial court to answer (C.R. 1018-21; C.R. 1023-83). Furthermore, counsel filed a motion to reinstate by 9:45 a.m. on the date of trial, 45 minutes

after the case was first called and less than a half-hour after the case was dismissed (C.R. 1084). Clearly, Mr. Rauhauser was ready, able, and willing to appear within the timeframe set by the trial court; a delay of merely three minutes separated the case from being heard and not being heard. If a three-minute delay can be held as proof of a lack of reasonable diligence, then the term “reasonable diligence” has ceased to have all meaning and there is no such thing as excusable tardiness when appearing in court, no matter the reason. Since this would swallow the common-law rule and Tex. R. Civ. Proc. 165a(3), the only reasonable conclusion is that reinstatement was proper and the trial court abused its discretion by failing to do so.

## CONCLUSION AND PRAYER

For the reasons herein stated, Neal Rauhauser asks this Court to reverse the dismissal of the trial court for want of prosecution and reinstate the case for a final hearing.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2023, a true and correct copy of the foregoing brief was served on counsel for the Appellee at [evan@stonevaughnlaw.com](mailto:evan@stonevaughnlaw.com).



**LANE A. HAYGOOD**

Attorney for Mr. Rauhauser

## **CERTIFICATE OF COMPLIANCE WITH RULE 9.4**

I hereby certify that this document complies with the requirements of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because there are 1,375 words in this document, excluding those portions of the document excepted from the word count by Rule 9.4(i)(1), as calculated by the Microsoft Word processing program used to prepare it. This document was prepared using M. Butterick's Typography for Lawyers font pack, which includes the sans serif font Concourse in 14 point for section headings, 12 point for headers and footers; the serif font Equity Text in 14 point for the body; the monospaced font Triplicate, 14 point, for quotations from the reporter's record; and the font Advocate, 14 point or larger, for titles.



**LANE A. HAYGOOD**

Attorney for Mr. Rauhauser

**APPENDIX**

Order Appealed From..... Tab 1  
Motion for New Trial ..... Tab 2

**Tab 1**  
Order Appealed From

067-270669-14

067-270669-14

JAMES MCGIBNEY and  
VIAVIEW, INC.

VS.

NEAL RAUHAUSER

§  
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§  
§

IN THE DISTRICT COURT

67<sup>TH</sup> JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

**ORDER OF DISMISSAL**

On this day FINAL TRIAL was called. A record was made. The trial took place by Zoom since all parties and attorneys did not reside in Tarrant County, Texas and the case was a non-jury bench trial. Attorney Evan Stone and his client James McGibney appeared on screen at 9:00 AM. The Court called this matter to final trial at 9:09AM and attorney Stone and his client McGibney announced that they were ready to proceed to final trial. The Court recessed to give attorney Haygood and his client time to appear. At 9:17AM the Court reconvened without attorney Haygood and his client. An oral Motion to Dismiss was made by attorney Stone and the Motion was granted. Therefore,

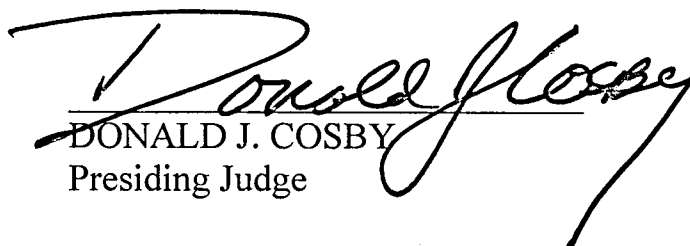
IT IS HEREBY ORDERED, ADJUDGED and DECREED that Cause No. 067-270669-14, styled James McGibney and Viaview, Inc. vs. Neal Rauhauser, is DISMISSED WITHOUT PREJUDICE.

Each party shall bear their own costs of court.

All other relief requested by the parties is denied.

This a FINAL JUDGMENT that is appealable.

SIGNED November 16, 2023 at 10:00 AM.

  
DONALD J. COSBY  
Presiding Judge



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**Tab 2**  
Motion for New Trial

067-270669-14

**NO. 067-270669-14**

**JAMES MCGIBNEY AND VIAVIEW, INC.**  
**Plaintiffs,**

**v.**

**NEAL RAUHAUSER**  
**Defendant.**

§  
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**IN THE DISTRICT COURT**  
  
**67TH JUDICIAL DISTRICT**  
  
**OF TARRANT COUNTY, TEXAS**

**MOTION FOR NEW TRIAL**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**NOW COMES** Defendant, Neal Rauhauser, as Movant herein, and files this Motion for New Trial, and would show the Court:

**I.**

This case was set for a final hearing on November 16, 2023, at 9:00 a.m., via Zoom. Counsel had Internet issues at his office beginning at 7:30 a.m. when he arrived and continuing until very nearly 9:00 a.m.

The email containing the zoom link was sent at 8:08 a.m., but did not arrive in counsel's email box until after 9:00 a.m.

During this time, counsel attempted to call Mr. Stone and the court to advise, but counsel had a weak cell phone signal and no landline in the office to make the call. Emails were attempted to send but would not go out with the lack of cell phone signal.

Counsel finally got sufficient internet service restored at 9:20 a.m., and attempted to log in and finally got a phone call to Mr. Stone, who informed counsel that the case had been called and dismissed for want of prosecution.

II.

The fault in the case is not that of the litigant, and he should not bear the costs of counsel's technical issues. Given the technical issues, this case should be reset for a shorter final hearing (also via Zoom) and a penalty assessed against movant for additional fees, which counsel will pay.

III.

**THEREFORE** Movant prays this Court grant the new trial in this matter.

Respectfully submitted,

**HAYGOOD LAW FIRM**

By: /s/ Lane Haygood

**LANE A. HAYGOOD**

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Attorney for Neal Rauhauser

**VERIFICATION**

My name is Lane A. Haygood. My date of birth is 09/19/1983. I am the attorney for Neal Rauhauser in this matter. My principal office address is 620 N. Grant Ave., Suite 913, Odessa, Texas 79761. I make all statements herein subject to the penalty for perjury.

Signed on Nov. 16, 2023, in Ector County, Texas.

/s/ Lane Haygood

**LANE A. HAYGOOD**

**CERTIFICATE OF SERVICE**

I certify that on November 16, 2023, a true and correct copy of the Motion for New Trial was served on Evan Stone, counsel for Plaintiffs, electronically through the electronic filing manager.

/s/ Lane Haygood

**LANE A. HAYGOOD**

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Filing Description: Motion for New Trial  
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Associated Case Party: THEVIA VIEW INC

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Associated Case Party: NEALRAUHAUSER

Name	BarNumber	Email	TimestampSubmitted	Status
Lane AndrewHaygood		lane@haygoodlawfirm.com	11/16/2023 9:45:29 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lane Haygood	24066670	lane@haygoodlawfirm.com	11/16/2023 9:45:29 AM	SENT