

COTI MATTHEWS, et al.,

Plaintiffs,

VS.

KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity as Superintendent,

Defendants.

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IN THE DISTRICT COURT

356<sup>th</sup> JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

**NO EVIDENCE MOTION FOR SUMMARY JUDGMENT OF KOUNTZE ISD AND KEVIN WELDON ON DAMAGES**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendants Kountze Independent School District and Kevin Weldon, in his official capacity, (hereinafter “Kountze ISD,” “the School District,” or “Defendant”), and files this their No Evidence Motion for Summary Judgment on Damages pursuant to Texas Rule of Civil Procedure 166a(i), seeking dismissal of all claims for actual, nominal or compensatory damages against them, with prejudice. In support of this motion, the School District would respectfully show unto the Court as follows:

**I. SUMMARY**

By filing this its No Evidence Motion for Summary Judgment, the School District challenges Plaintiffs to come forward and present sufficient evidence to rebut this motion as to each element of each of their claims for actual, nominal or compensatory damages.

In regard to Plaintiffs’ request for actual, nominal or compensatory damages, the School District specifically challenges Plaintiffs to come forward and present sufficient evidence to rebut the School District’s contentions that

1. No damages are recoverable under the Texas Constitution;
2. No damages are recoverable under Chapter 106 of the Texas Civil Practice and Remedies Code;
3. No damages are recoverable under Chapter 110 of the Texas Civil Practice and Remedies Code because Plaintiffs did not provide 60-days notice prior to filing suit;
4. No damages are recoverable under Chapter 25 of the Education Code;
5. No damages are recoverable under Chapter 37 of the Texas Civil Practice and Remedies Code; and
6. Plaintiffs cannot establish that Kountze ISD injured Plaintiffs.

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### **III. BACKGROUND**

1. The live petition in this case is Plaintiffs' Third Amended Petition and Application for Permanent Injunction ("Plaintiffs' Petition").

2. Plaintiffs' Petition alleges the following causes of action: (1) Texas Constitution – Article I, Section 6; (2) Texas Constitution – Article I, Section 8; (3) Texas Constitution – Article I, Section 3; (4) Chapter 106 of the Texas Civil Practice and Remedies Code; (5) Chapter 110 of the Texas Civil Practice and Remedies Code, also known as the Texas Religious Freedom Restoration Act (Texas RFRA); (6) Chapter 25 of the Texas Education Code, also known as the Religious Viewpoints Anti-Discrimination Act (RVAA); and (7) Chapter 37 of the Texas Civil Practice and Remedies Code, also known as the Uniform Declaratory Judgments Act.

**IV.**  
**ARGUMENTS AND AUTHORITIES**

**A. Standard for no evidence summary judgment.**

A party may move for summary judgment, after adequate time for discovery and without presenting summary judgment evidence, on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 718 (Tex. App. – Fort Worth 2008, pet. filed). The motion must specifically state the elements for which there is no evidence. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *City of the Colony*, 272 S.W.3d at 718; *Page v. State Farm Lloyds*, 259 S.W.3d 257, 261 (Tex. App. – Waco 2008, pet. filed).

A no-evidence motion will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In order to provide sufficient evidence, the summary judgment evidence must “rise to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *King Ranch, Inc.*, 118 S.W.3d at 751 (quoting *Merrell Dow Pharms.*, 953 S.W.2d at 711).

By filing this its No Evidence Motion for Summary Judgment, Kountze ISD challenges Plaintiffs to come forward and present sufficient evidence to rebut this motion as to each element of each of their claims for actual, nominal or compensatory damages.

**B. Plaintiffs cannot sustain their burden of proof as to their request for actual, nominal or compensatory damages.**

**1. The Texas Constitution does not provide for the recovery of damages.**

Plaintiffs cannot sustain their burden of proof as to their request for damages because the Texas Constitution does not provide for the recovery of damages. Suits under the Texas Constitution are generally limited to requests for declaratory or injunctive relief. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). Suits alleging a violation of the Texas Constitution are limited to the relief specifically provided by the Constitution. *Nueces County v. Ferguson*, 97 S.W.3d 205, 217 (Tex. App. – Corpus Christi 2002, no pet.); see, e.g., *Bouillion*, 896 S.W.2d at 149 (no implied private cause of action for damages under Texas Constitution for violation of rights of speech and assembly); see also *City of Arlington v. Randall*, 301 S.W.3d 896, 908-09 (Tex. App. – Fort Worth 2009) (immunity does not bar declaratory-judgment action for violation of Texas Constitution).

**2. Chapter 106 does not provide for the recovery of damages.**

Plaintiffs cannot sustain their burden of proof as to their request for damages because Chapter 106 of the Texas Civil Practice and Remedies Code does not provide for the recovery of damages. TEX. CIV. PRAC. & REM. CODE § 106.002 (no actual or nominal damages under Chapter 106).

**3. Texas RFRA only permits the recovery of damages if plaintiffs provide 60-days notice before filing suit, which Plaintiffs did not do.**

Plaintiffs cannot sustain their burden of proof as to their request for damages because the Texas Religious Freedom Restoration Act only permits the recovery of damages if a plaintiff complies with its 60-day notice provision, which Plaintiffs did not provide. TEX. CIV. PRAC. & REM. CODE § 110.006. Texas RFRA is the only statute cited by Plaintiffs in Plaintiffs' Petition as a basis for recovery of compensatory damages, but, Plaintiffs cannot establish that they

complied with the 60-day notice provision because, as is clear from their Original Petition and their request for a temporary restraining order, they did not comply with it.

**4. The RVAA does not provide for the recovery of damages.**

Plaintiffs cannot sustain their burden of proof as to their request for damages because the Religious Viewpoints Anti-Discrimination Act (RVAA) does not provide for the recovery of damages. TEX. EDUC. CODE § 25.151 *et seq.*

**5. The UDJA does not provide for the recovery of damages.**

Plaintiffs cannot sustain their burden of proof as to their request for damages because the Uniform Declaratory Judgments Act does not provide for the recovery of damages. TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

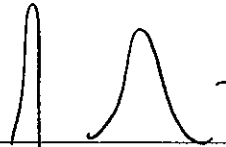
**6. Plaintiffs cannot sustain their burden of proof as to their request for damages because they were not injured by Kountze ISD**

Plaintiffs cannot sustain their burden of proof as to their request for actual, nominal or compensatory damages because they were not injured by Kountze ISD. None of the Plaintiffs was ever prevented from displaying any banner or religious messages by Kountze ISD. Consequently, Plaintiffs cannot sustain their burden of proof as to their request for damages.

WHEREFORE, PREMISES CONSIDERED, the Kountze Independent School District and Kevin Weldon, in his official capacity, respectfully pray that after hearing, the Court grant their motion, enter a take-nothing judgment on all of the Plaintiffs' claims for actual, nominal or compensatory damages against them, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

**FANNING HARPER MARTINSON  
BRANDT & KUTCHIN, P.C.**



**THOMAS P. BRANDT**  
State Bar No. 02883500

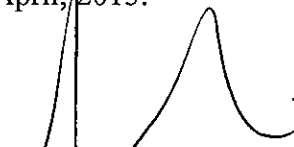
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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument has been mailed, telecopied, or hand delivered to all attorneys of record, in compliance with Rule 21a of the Texas Rules of Civil Procedure, on the 4th day of April, 2013.



**JOSHUA A. SKINNER**



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HARDIN COUNTY, TEXAS

FIAT

IT IS ORDERED that a hearing on the foregoing Defendants Kountze Independent School District's and Kevin Weldon's, in his official capacity, No Evidence Motion for Summary Judgment on Damages is set for the \_\_\_\_\_ day of \_\_\_\_\_, 2013 at \_\_\_\_\_ o'clock \_\_.m. in the Courtroom of the 356th District Court in Hardin County, Texas.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
JUDGE PRESIDING