IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-5614

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JERRY MEDINA and BETTE MEDINA,
individually and as next friend of
Melissa Medina, a minor,

Plaintiffs-Appellants,

versus

GUADALUPE COUNTY, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Western District of Texas
(SA-90-CA-278)

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(October 12, 1994)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:**

Plaintiffs-appellants Jerry Medina and Bette Medina (plaintiffs or Medinas), individually and as next friend of their minor child, Melissa Medina (Melissa), and appellant Daniel R.

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* Judge John R. Brown, a member of the panel before whom this case was orally argued, died following the argument, and this decision is accordingly being rendered by a quorum. 28 U.S.C. § 46(d).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rutherford (Rutherford), their attorney below (and on appeal), bring this appeal from the judgments and orders of the magistrate judge, authorized by consent of the parties to take all action in the case pursuant to 28 U.S.C. § 636(c)(1), granting the motions for summary judgment of defendants-appellees Guadalupe County, Texas (the County), Guadalupe County Deputy Sheriff LaVerne Taft (Taft), and City of Seguin, Texas, police officer Billy Rodriguez (Rodriguez); dismissing plaintiffs claims under 42 U.S.C. § 1983 with prejudice and dismissing their state law claims without prejudice; and ordering Rutherford to pay attorneys' fees and expenses of $17,704.51 to Taft and the County collectively and $7,323.26 to Rodriguez.[1]

However, the only arguments made by appellants on appeal relate solely to the award of attorneys' fees against Rutherford. Consequently, this is the only matter addressed. This fee award was made pursuant to FED. R. CIV. P. 11. Although the magistrate judge also found the section 1983 suit was frivolous, unreasonable and groundless, so as to authorize an award to defendants of attorneys' fees under 42 U.S.C. § 1988, he elected to award fees only against Rutherford under Rule 11.

The suit below sought recovery for injuries Melissa, then thirteen years of age, received on April 15, 1988, when she, a pedestrian, was accidentally struck by or collided with a County patrol vehicle driven by Taft in the course of employment shortly

[1] The City of Seguin, the county seat of Guadalupe County, was originally also named a defendant below, but was dismissed on plaintiffs' motion before the magistrate judge rendered his summary judgment.

before 9:15 p.m. in the City of Seguin. Melissa suffered a broken ankle, and was eventually taken to a local hospital about 10:00 p.m. that evening.

The magistrate judge's summary judgment order gives the following accurate description, *viz*:

> "Plaintiffs sue under Title 42 U.S.C. Section 1983 alleging a denial of due process and equal protection, and also assert a pendant state claim of negligence. Defendants have filed motions to dismiss and for summary judgment.
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> . . .
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> On April 15, 1988, Taft's patrol vehicle collided with Melissa Medina as she crossed a street in Seguin. Shortly after the accident, Rodriguez arrived and conversed with Taft and with Melissa. The mother of Melissa's friend, Dayla Nicole Reeves, took Melissa home. Subsequently she was taken to a local hospital where she underwent surgery for a fractured ankle.
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> Plaintiffs claim that the collision was a result of Taft's negligence. They assert that, after the accident, Taft sat in his car for a short time, then came to where Melissa was sitting on the curb screaming in pain, but Taft failed to render aid in violation of Tex. Rev. Civ. Stat. Ann. article 6701d, sections 38 and 40. At about this same time, Rodriguez appeared and conferred with Taft. He then told the bystanders to leave, that Melissa was not seriously hurt. No police report was made at the scene and the report eventually filed erroneously, according to plaintiffs, blamed Melissa for the accident. Plaintiffs contend Rodriguez violated article 6.06 of the Texas Code of Criminal Procedure (concerning a peace officer's duty to prevent injury) by not rendering aid or requiring Taft to render aid. They also allege that Taft and Rodriguez conspired to 'cover up the incident.' Because of defendants' actions, Melissa was 'denied immediate medical attention which prolonged her agony and resulted in surgical complications.'
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> Defendants raise various defenses. They assert that plaintiffs have alleged only negligence and that no federal substantive right has been implicated. Both individual defendants seek the protection of qualified immunity, and Guadalupe County points to the absence of allegations of a policy or custom, a necessary prerequisite to entity liability.

. . .

The only other federal constitutional right allegedly violated was Melissa's right to equal protection of the laws. Plaintiffs contend she was not rendered aid in accordance with State law in the same manner as other persons in the same or similar circumstances. . . .

To state a claim under the Equal Protection Clause, a section 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class. *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989). Plaintiffs do not contend they belong to any protected group nor do they allege that Melissa was denied medical assistance because of her membership in a protected class. Thus, there is no basis for finding a violation of the Equal Protection Clause.

. . .

Plaintiffs allege that Taft and Rodriguez engaged in a conspiracy to deny plaintiffs their right to due process. As acts in furtherance of the conspiracy, plaintiffs assert Taft and Rodriguez failed to render aid, failed to timely file a written report, and failed to obtain the names of witnesses. Also, Rodriguez allegedly instructed witnesses to leave the scene, prepared an inaccurate and incomplete report, and reported to newspapers that Melissa was at fault.

According to the evidence presented by the parties, Taft saw two persons running towards his vehicle and felt something strike the vehicle. (Taft deposition, p. 16). He stopped and immediately called the police in the event someone was hurt. (*Id*.). Rodriguez was dispatched to the scene. When he arrived, Taft approached him and walked with him toward Melissa. (Rodriguez affidavit). Taft told Rodriguez the girl ran into the back of his car. (*Id*.). Taft also said he had spoken with the girl who said she was not hurt and did not need an ambulance. (*Id*.; Rodriguez deposition, p. 37).

Several kids were standing around blocking the entrance to a shopping center. (Rodriguez affidavit). Rodriguez asked if there were witnesses; no one came forward. (*Id*.). He then told the people to leave, for safety purposes. (*Id*.).

Rodriguez went up to Melissa, who he recognized, and saw that she was nervous and scared, but not crying. (*Id*.). There was no indication she was in pain. (*Id*.).

She had a slight abrasion and dirt on her leg but no other visible injuries. (*Id*.). According to Rodriguez, he asked about her condition and whether she needed an ambulance. (*Id*.). She said she was okay and did not need one. (*Id*.). Melissa denies that either Taft or Rodriguez ever mentioned an ambulance. (Melissa Medina deposition, p. 150).

Rodriguez asked the dispatcher to call Melissa's mother. (Rodriguez affidavit). She was not at home (*Id*.). Melissa left the scene with a friend, Dayla Nicole Reeves, and her friend's mother. (*Id*.). Rodriguez completed a handwritten report at the scene. (*Id*.). He then sought and located Melissa's mother and informed her of what had happened. (*Id*.).

Later, at the police station as he worked on his report, Melissa's mother called and asked that Rodriguez contact her at the hospital, where Melissa had been taken (*Id*.). They talked regarding the incident. (*Id*.). The next day he learned that Melissa sustained a fractured ankle. (*Id*.). Also on the next day, he completed his report after talking to Dayla Reeves and obtaining the medical information regarding Melissa's injury. (*Id*.).

Uncontroverted evidence disproves certain of plaintiffs' allegations of conspiracy. Rodriguez did not fail to timely file a report. He prepared a handwritten report at the scene and a complete, typewritten report the next day. He also attempted to learn the names of witnesses. Rodriguez' instruction for persons to disburse was given after this attempt for safety reasons and not in an attempt to get rid of witnesses. Taft did not prepare a report or seek witnesses but he was not obligated to. According to the affidavit of James E. Sagebiel, the county judge, Guadalupe County had no authority to investigate the automobile accident which occurred in the City of Seguin. Although plaintiffs dispute this assertion, it does not change the fact that Rodriguez, not Taft, was the proper investigating officer.

Rodriguez prepared his report based upon his conversations with Taft and Dayla Reeves. He did not ask Melissa how the accident occurred. (Melissa Medina deposition, p. 151). His conclusions were based on his investigation and were not the result of a conspiracy with Taft. (Rodriguez affidavit). Even if the report improperly placed blame for the accident on Melissa, this is not a constitutional violation. *Griggs v. Lexington Police Department*, 672 F.Supp. 36, 38 (D. Mass. 1987), *affirmed*, 867 F.2d 605 (1st Cir. 1988). Rodriguez made no report to the newspapers regarding the accident.

(Rodriguez affidavit).

The only claim remaining which could even arguably constitute a denial of due process is the alleged failure to render aid. State law requires the driver of a vehicle involved in an automobile accident resulting in injury or death, to stop at the scene. Tex. Rev. Civ. Stat. Ann. article 6701d, section 38. He must provide information and render reasonable assistance to any person injured, including the carrying, or the making of arrangements for the carrying, of such person for medical treatment if it is apparent such treatment is necessary or if the injured person so requests. *Id*., at section 40. A failure to comply is a criminal violation.

The undisputed evidence establishes that Taft did stop at the scene. He immediately radioed the Seguin police, who had jurisdiction, to get help in case someone was injured. Before Rodriguez arrived, Taft checked on Melissa's condition. There was no need for emergency treatment at the scene. Taft did all he was obligated to do to render aid. Thus, Rodriguez did not, as plaintiffs allege, observe the commission of an offense against state law. *See* Article 6.06, Tex. Code Crim. Proc.

Once Rodriguez arrived, it became his responsibility to tend to Melissa's medical needs. He stated that there was no indication she was in pain, and her only visible injuries were minor. When asked, Melissa told him she was okay. Rodriguez told the dispatcher to find Melissa's mother and, when it was determined where her mother was located, went there to tell her about the accident.

The only disputed evidence concerns whether Rodriguez and Taft asked Melissa if she needed an ambulance. Even if they did not, this would not establish a constitutional violation. Melissa did not ask Rodriguez to call an ambulance (Melissa Medina deposition, p. 134) and did not say anything to him or Taft about her ankle. (*Id*., at p. 75). The undisputed evidence showed no need for emergency medical service. Melissa's doctor testified that she suffered no aggravation of her injury as a result of any delay in being treated. (White deposition, p. 75). At worst, defendants' failure to call an ambulance was an inadvertent failure to provide adequate medical care which, even as to prisoners, does not violate the constitution. *Estelle v. Gamble*, 429 U.S. 97, 105-106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976).

The summary judgment evidence establishes that Taft and Rodriguez did not violate clearly established rights

> of Melissa's. Plaintiffs have not carried their burden of showing defendants did violate her constitutional rights. Taft and Rodriguez, individually, are immune from suit under Section 1983.
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> . . .
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> A local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Liability must be based upon the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. *Id*., at 695, 98 S.C.t at 2037-38. Plaintiffs do not allege that either Guadalupe County or the City of Seguin have a policy of covering up their responsibility for automobile accidents in which their agents are involved. In fact, plaintiffs make no claim that either entity had any type of policy which caused their alleged constitutional violations. Therefore, the Section 1983 claims against Guadalupe County and against Taft and Rodriguez in their official capacity must be dismissed."

Our review of the record confirms that the magistrate judge's quoted analysis of the facts and the law is accurate.

The suit was filed March 15, 1990. On April 11, 1990, the County and Taft filed their answer and motion to dismiss under FED. R. CIV. P. 12(b)(6), with supporting brief, urging, *inter alia*, that the suit was frivolous under section 1988 and was filed contrary to Rule 11 and that they were accordingly entitled to attorneys' fees. A motion to dismiss under Rule 12(b)(6) was also that date filed by the City of Seguin and Rodriguez, with supporting memorandum. These filings fully pointed out the deficiencies in plaintiffs' case. Plaintiffs on May 9, 1990, moved to file an amended complaint, which motion was granted. The amended complaint was little changed from the original, and did nothing to remedy its defects. The County and Taft on June 28, 1990, renewed their

previous motion to dismiss and again asserted that the suit was frivolous under section 1988 and Rule 11. The City of Seguin and Rodriguez likewise filed a supplemental motion to dismiss. On June 28, 1990, on plaintiffs' motion, the City of Seguin was dismissed with prejudice. In November 1990, the defendants all moved for summary judgment. In February 1991, plaintiffs filed their response.

On April 9, 1991, the magistrate judge issued his well considered opinion granting the motions for summary judgment on the section 1983 claims, and holding that under Rule 11 defendants were awarded their attorneys' fees and expenses incurred in defending the section 1983 claims. In this latter connection, the opinion states, *inter alia*:

> "This case was filed 23 months after the accident, more than enough time for an investigation. Even now, after discovery has been completed, no facts have been uncovered which justify the filing of the constitutional claim. Counsel chose to believe, without factual support, that 'the only conclusion' which could be reached was that defendants conspired to cover up the incident. The allegations made in support of this conclusion are either untrue or explained with undisputed evidence. The issues are not complex. This is, and always has been, a negligence case only. The equal protection claim is clearly frivolous as a matter of law and, had he made a reasonable inquiry into the facts, counsel would have found the due process claim to be wholly meritless."

On April 9, 1991, judgment was entered dismissing the section 1983 claims with prejudice and the state law claims without prejudice.[2] On April 29, 1991, defendants filed their applications for attorneys' fees for defending the section 1983 claims,

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[2] Notice of appeal from this order was filed on April 29, 1991.

supported by affidavits and detailed billing records. On May 6, 1991, plaintiffs filed their response, which was not verified or supported by affidavit or the like. The response essentially argued that defendants were not entitled to attorneys' fees. The response "disputes" the rate of the "legal assistant" and "questions" the number of hours billed, mentioning specifically only over twenty hours in preparation of the County and Taft's answer, and states that some time was "obviously directed to the pendent claims." On May 13, 1990, the magistrate judge issued his order awarding attorneys' fees, noting that the request isolated services on the section 1983 claims and where a given service was related to both the section 1983 claims and the pendent claims, only half the amount was sought. Fees were awarded only against Rutherford, as there was no showing the plaintiffs personally misled him.[3]

Discussion

We review the trial court's ruling for abuse of discretion. *Thomas v. Capital Securities Services*, 836 F.2d 866, 872 (5th Cir. 1988).

Rutherford's first complaint on appeal is that sanctions were improper because the equal protection claim was arguable. However, as noted, it was never alleged that any action or inaction by defendants was to any extent class based or motivated. See *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989). Moreover, even if the

[3] Judgment was entered for fees and expenses ($17,704.51 to the County and Taft together and $7,323.36 to Rodriguez) on May 13, 1991, and notice of appeal therefrom was filed May 23, 1991.

theory that the failure of a deputy on duty to render aid to a pedestrian accidentally and fortuitously struck in an ordinary vehicle-pedestrian accident by the deputy's vehicle, contrary to Tex. Rev. Civ. Stat. Ann. article 6701d, §§ 38 & 40, and the further failure of the deputy and a police officer of the city where the accident occurred to prevent the sections 38 and 40 violation, contrary to the duty imposed by article 6.06 of the Texas Code of Criminal Procedure, amounted to an arguable equal protection or due process violation, it is plain beyond any doubt that such was not clearly established in 1988. Accordingly, it was unarguably plain from the beginning that defendants Taft and Rodriguez were entitled to qualified immunity.[4] See *Anderson v. Creighton*, 107 S.Ct. 3034 (1987). Plaintiffs' argument below that the duty imposed by sections 38 and 40 and article 6.06 was clearly established is wide of the mark, because what must be clearly established is the *federal* right sued on. *Davis v. Scherer*, 104 S.Ct. 3012, 3019-20 (1984).

As to the County, although it did not enjoy qualified immunity, there was never alleged any basis for municipal liability, nor was any such suggested by any of the summary judgment evidence. No custom or policy or action of the County itself was alleged or shown to be involved. Plaintiffs were trying to impose *respondeat superior* liability on the County, but it has long been settled that such is not available in a section 1983 action. *Monell v. Department of Social Services*, 98 S.Ct. 2018

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[4] The only relief sought from any defendant was damages.

(1978).

Further, and in any event, as the magistrate judge noted, there was simply no evidence, and no reason for plaintiffs to have believed, that Taft failed in any obligation to render aid or that Rodriguez violated any law or that they conspired with each other. The magistrate judge did not abuse his discretion in determining that Rutherford failed to carry out his Rule 11 mandated affirmative duty to conduct a reasonable inquiry into the facts and the law before filing the suit. See *Thomas* at 874; *Jennings v. Joshua ISD*, 877 F.2d 313, 321 (5th Cir. 1989).

Rutherford next contends that the magistrate judge in determining that Rutherford violated Rule 11 erroneously applied a "continuing obligation" theory, rather than a "snapshot" approach focusing only on when his complaint was filed, as required by *Thomas*. We disagree. The argument is based primarily on the fact that the magistrate judge relied on summary judgment evidence to demonstrate that there was no arguable section 1983 claim. However, as above noted, Rule 11 imposes an obligation to conduct a reasonable inquiry into the facts. As we stated in *Thomas*,

> "we do not mean to imply that withholding a sanctions decision until the end of trial is in all instances inappropriate . . . . For instance, a determination of whether or not a pleading is well founded in law and fact may not be feasible until after an evidentiary hearing on a motion for summary judgment or even after the parties have presented their case at trial." *Id*. at 881.

See also, e.g., Jennings at 321 ("There was simply no basis for suspicion that the school was in collusion with the police"); *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) ("Blind reliance on the client is seldom a sufficient

inquiry . . . . Appellants sued . . . apparently hoping that later discovery would uncover something. If Rule 11 is to mean anything, and we think it does, it must mean an end to such expeditionary pleadings"). As the magistrate judge correctly noted, "This is, and always has been, a negligence case only." Rutherford has pointed to nothing which misled him or gave him reasonable cause to believe there was a valid basis for a section 1983 suit.[5] Rutherford's "snapshot" argument also overlooks several other matters, including his amended complaint and his opposition to the motions for summary judgment, and the fact that he never alleged any arguable basis for liability on the part of the County or for denying qualified immunity to either Taft or Rodriguez.

Rutherford also complains that he was not given adequate notice that sanctions might be imposed. We stated in *Thomas* "a judge is not obliged to raise the sanctions issue initially before applying sanctions *sua sponte*." *Id*. at 881. In *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 246-47 (5th Cir. 1990), we observed that "[a]n attorney who files court papers with no basis in fact does not need any more notice than that which is provided by the existence of Rule 11," but that where the sanctionable conduct "involves the submission of" an argument "without any basis in law . . . there must be specific notice of the reasons for

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[5] Rutherford has filed with his record excerpts his affidavit dated June 12, 1991, nineteen days after the last notice of appeal in this case. Of course, this document was never filed or tendered for filing or otherwise before the court below, and there is nothing in it which could not have been presented to the court below. No reason is given why it was not so presented. We grant appellees' motion to strike this document.

contemplating sanctions." Here any requirement for notice was plainly more than met by appellees' motions to dismiss filed shortly after the complaint and renewed promptly after the amended complaint, specifically seeking attorneys' fees under Rule 11 because there was no possibly valid section 1983 case. "'Notice may be in the form of a personal conversation, an informal telephone call, a letter *or a timely Rule 11 motion*.'" *Veillon v. Explorative Services, Inc.*, 876 F.2d 1197, 1202 (5th Cir. 1989) (quoting *Thomas* at 880; emphasis by *Veillon*). We also observe that under local rule CV-7(f) Rutherford was on notice that he had ten days to respond to the Rule 11 motion. Rutherford received all the notice he was entitled to concerning when the Rule 11 motion might be ruled on. The complaints of lack of notice are rejected.

Rutherford also complains that he was not allowed an oral hearing. However, he never requested one, as he was authorized to do under local rules CV-7(h) & (j)(3). Moreover, we have held that an opportunity to respond in writing is all that is required. See *Spiller* at 347 ("Simply giving a chance to respond to the charges through submission of a brief is usually all that due process requires."). This complaint lacks merit, both as to the determination that Rule 11 had been violated and as to the determination of the sanction.

Rutherford's sole remaining contention is that the magistrate judge failed "to perform a diligent inquiry" into the six factors set out in *Thomas* at 875, as follows:

> "The determination of whether a reasonable inquiry into the facts has been made in a case will, of course, be dependent upon the particular facts; however, the

> district court *may* consider such factors as the time available to the signer for investigation; the extent of the attorney's reliance upon his client for the factual support for the document; the feasibility of a prefiling investigation; whether the signing attorney accepted the case from another member of the bar or forwarding attorney; the complexity of the factual and legal issues; and the extent to which development of the factual circumstances underlying the claim requires discovery." (Emphasis added).

Plainly, this is not a list of necessarily controlling factors, but rather simply a statement of examples of what the trial court "may" consider. In any event, the magistrate judge's April 9, 1991, order expressly reflects that he did consider these factors.[6] Rutherford argues that the April 9, 1991, order, by stating that the 23 months between the accident and the suit was "more than enough time for an investigation," overlooks the fact that he was not retained until December 14, 1988, four months before suit was filed. However, this overlooks the fact that there was no showing of when Rutherford was retained until his May 6, 1991, opposition to appellees' April 29, 1991, motion to fix the amount of their recoverable attorneys' fees. Moreover, that opposition does not explain why four months (five months until limitations would

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[6] The order states:

> "The evidence previously discussed establishes that counsel for plaintiffs did not make a reasonable inquiry into the facts of this case before it was filed. Factors which bear on this determination are: (1) the time available for investigation, (2) the extent of the attorney's reliance upon his client for factual support, (3) the feasibility of a prefiling investigation, (4) whether the signing attorney accepted the case from another attorney, (5) the complexity of the factual and legal issues, and (6) the extent to which development of the factual circumstances underlying the claim requires discovery. *Id*. [*Thomas*], at 875."

expire) was an inadequate time to investigate this rather simple case (nor does it, or anything else of record, show what investigation was attempted); absent any such explanation, that period of time was plainly adequate. In his argument in this connection, Rutherford relies primarily on his June 12, 1991, affidavit; however, for the reasons stated in note 5 above, we decline to consider that instrument. We reject Rutherford's contentions concerning the cited *Thomas* factors.

Conclusion

None of Rutherford's points on appeal have merit. While the amount awarded may seem high to us (and we might have awarded less if the matter were before us in the first instance), Rutherford has no point on an appeal urging that the award was excessive, and, given the record before the magistrate judge when the fee award was fixed, we do not in any event see how an abuse of discretion in this respect could be found.

The trial court's judgments are accordingly in all things

AFFIRMED.