No. 06-20-00082-CV
Court of Appeals Sixth Appellate District of Texas at Texarkana

Antolik v. Antolik

625 S.W.3d 530 (Tex. App. 2021)
Decided May 7, 2021

No. 06-20-00082-CV

05-07-2021

Victor ANTOLIK and SGN Investment Trust, Appellants v. Dennis ANTOLIK, Appellee

Adam Pugh, Austin, for Appellants SGN Investment Trust. Cleveland Burke, Mark C. Taylor, Austin, for Appellee. Jeremy Sandoval, Michael T. Howell, N. West Short, Georgetown, for Appellants Antolik, Victor. B. Russell Horton, Austin, for Mercer, Kell C.

Opinion by Justice Burgess

Adam Pugh, Austin, for Appellants SGN Investment Trust.

Cleveland Burke, Mark C. Taylor, Austin, for Appellee.

Jeremy Sandoval, Michael T. Howell, N. West Short, Georgetown, for Appellants Antolik, Victor.

B. Russell Horton, Austin, for Mercer, Kell C.

Before Morriss, C.J., Burgess and Stevens, JJ.

OPINION

Opinion by Justice Burgess

This is an appeal from a post-judgment order granting a receiver's motion for authority to sell the receivership estate's interest in certain property, from which the debtor appeals. Although we conclude that the trial court had jurisdiction over the trust at issue, we nevertheless conclude that, because the sale has already taken place, the debtor's substantive complaints regarding the propriety of the sale order are moot.

I. Factual and Procedural Background

A. The Underlying Judgment and Appointment of Receiver

In 2018, the 345th Judicial District Court of Travis County entered a $250,000.00 final judgment in favor of Plaintiff Dennis Antolik against Defendant Victor Antolik.[1] The judgment was affirmed on appeal. *See Antolik v. Antolik* , 06-18-00096-CV, 2019 WL 2119646 (Tex. App.—Texarkana May 15, 2019, pet. denied) (mem. op.).[2] Following the appeal, Dennis filed an application for post-judgment turnover and the appointment of a receiver pursuant to Chapter 31 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b). After concluding that Victor owned non-exempt property that could not readily be attached or levied on by ordinary legal process, the trial court granted the application. The order

533 appointed Kell C. Mercer as the receiver (Receiver), established *533 a receivership estate, and required Victor, and all third parties holding non-exempt property belonging to Victor, to turn over to the Receiver all such property within five days.[3]

[1] Originally appealed to the Third Court of Appeals in Austin, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* Tex. Gov't Code Ann. § 73.001. We are unaware of any conflict between precedent of the Third Court of Appeals and that of this Court on any relevant issue. *See* Tex. R. App. P. 41.3.

[2] According to the Receiver, "as of February 1, 2020, with all credits and offsets applied, including all components (principal, interest, fees, and costs awarded, including costs of the receivership), the outstanding balance owed by Judgment Debtor and Defendant Victor Antolik under the Final Judgment [was] approximately $312,000.00."

[3] The entry of the Receivership Order created "a receivership estate wherein all of the respective non-exempt property of [Victor Antolik was] held in *custodia legis* , by the receivership as of the date of the Order." The order gave the Receiver the authority to take possession of "all of Defendant's nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." The order stated,

> Receiver's authority applies, but is not limited to, the following non-exempt property of Defendant: (1) all documents or records, including financial records, related to property that is in the actual or constructive possession or control of Defendant; (2) all financial accounts (bank account), certificates of deposit, money-market accounts, accounts held by any third party; (3) all securities; (4) all real property, equipment, vehicles, boats, and planes; (5) all safety deposit boxes or vaults; (6) all cash; (7) all negotiable instruments, including promissory notes, drafts, and checks; (8) causes of action or choses of action; (9) contract rights, whether present or future; (10) shares, stock and membership interests; and (11) accounts receivable.

B. The Receiver's Motion to Sell SGN Investment Trust's Interest in Bucephalas Partners II, LLC

In 2020, the Receiver filed a motion for authority to sell the receivership estate's interest in Bucephalas Partners II, LLC (BP II), and the receivership estate's promissory note claim against BP II. In support of that motion, the Receiver alleged that Victor had previously held, in his name, a membership interest in BP II and that BP II's primary asset consisted of an apartment complex in Gonzales County with an appraised value of $659,380.00. The Receiver further explained that Victor had assigned his membership interest in BP II to "a non-exempt, non-spendthrift 'trust' identified by ... Victor ... as the ... 'SGN Investment Trust.' " The Receiver claimed that the SGN Investment Trust (SGN) was a self-settled trust formed by Victor as settlor, for the benefit of Victor as SGN's primary beneficiary. SGN owned Victor's membership interest in BP II as well as a promissory note payable to BP II in the original amount of $385,103.00 (the Note). BP II was comprised of two members—Scott A. Stevens and SGN.[4] The motion for authority to sell sought the trial court's authorization to sell the membership interest held by SGN (for Victor as beneficiary of the SGN Trust)[5] to Stevens.

[4] SGN and Stevens each owned a fifty-percent interest in BP II. On February 29, 2016, SGN loaned $385,103.00 to BP II, the owner of a twenty-eight-unit apartment complex. Monthly payments were scheduled at $2,436.33. The Receiver testified that the transaction between BP II and SGN that resulted in the Note was Victor's attempt to put "his liquid assets somewhere where they could not be reached by the federal government."

[5] At the time of the hearing and throughout the trial court case, Victor was incarcerated for making and subscribing false tax returns.

C. The Hearings on the Receiver's Motion and SGN Trustee's Appearance

Following a hearing on March 11, 2020, the trial court expressed concern that SGN was not represented at the
534 hearing.[6] As a *534 result, the hearing was re-set for May 14, 2020. All parties, including SGN's trustee, were represented at the May hearing. Attorney Adam Pugh announced his appearance on behalf of "Don Fillman, the trustee of the SGN Investment Trust." Pugh presented arguments to the trial court, but he prefaced those arguments with the following acknowledgment: "[T]he reason I'm here today is at the court's invitation based on Your Honor's inherent desire to afford due process to the parties." Pugh argued, "[The Receiver] is attempting to have the court declare that this trust should be disregarded pursuant to its terms, and determine what law is applicable to the trust instrument and whether or not it should be disregarded." Pugh acknowledged, "[W]e're in the inherent jurisdiction of this court, as stated by Section 115.001 of the Texas Property Code."[7] Pugh further claimed that this was "a transaction to sell a note for far less than the face value. And it's my client's [SGN's] note. And so, for that reason, we absolutely object." Pugh concluded, "[F]or those reasons, I don't think the court has jurisdiction to make this order; but I think the order, even if we were a party, would be improper and we ask the court to deny the motion." At the conclusion of the hearing, the trial court took the matter under advisement.[8]

6 The record reflects that both the attorney for Victor and the Receiver unsuccessfully attempted to provide SGN's trustee with notice of the hearing. The Receiver specifically testified that the mail sent to the trustee was returned due to a bad address for the SGN Investment Trust. The Receiver's motion for authority to sell the receivership estate's interest in BP II stated,

> The so-called "**SGN Investment Trust** " is a self-settled "trust" formed by Judgment Debtor and Defendant Victor Antolik. Judgment Debtor and Defendant Victor Antolik is the sole beneficiary of the "SGN Investment Trust." After creating the "SGN Investment Trust," Judgment Debtor and Defendant Victor Antolik assigned his membership interest in BP II to the "SGN Investment Trust." According to the books and records of BP II and the Texas Secretary of State, the sole current members of BP II are Scott A. Stevens of Austin, Texas, and the "SGN Investment Trust." The "SGN Investment Trust" holds the membership interest in BP II for the benefit of Judgment Debtor and Defendant Victor Antolik. The company agreement of BP II contains customary restrictions on transfer of membership units.
>
> ....
>
> .... Upon being appointed, the Receiver made demand upon Judgment Debtor and Defendant Victor Antolik for all information regarding the "SGN Investment Trust." In particular, the Receiver made demand upon Judgment Debtor and Defendant Victor Antolik for any and all documentary proof, if any, that Judgment Debtor and Defendant Victor Antolik's interest in the "SGN Investment Trust" is not property of the Receivership Estate. A copy of the Receivership Order was included with the demand. Judgment Debtor and Defendant Victor Antolik failed to respond or to provide any such documentary proof.
>
> ....
>
> .... Upon being appointed, the Receiver also sent demand to the "SGN Investment Trust" at the address[ ] listed at the Texas Secretary of State for any and all documentary proof, if any, that the Judgment Debtor and Defendant Victor Antolik's interest in the "SGN Investment Trust" is not property of the Receivership Estate. The demand also included a request for all documents evidencing and/or governing the "SGN Investment Trust." A copy of the Receivership Order was attached to the demand made upon the "SGN Investment Trust." The "SGN Investment Trust" failed to respond or to provide any documentation.

7 Pugh also claimed that SGN was not before the court and that it needed to be sued. Pugh made additional arguments that a charging order was the exclusive remedy of a creditor.

8 Before the hearing concluded, though, the trial court indicated disappointment that Stevens did not come forward with another offer.

In the meantime, Victor filed an original petition for bill of review and request for disclosure in the 261st Judicial District Court of Travis County in cause number D-1-GN-20-003056, on June 9, 2020. The crux of Victor's claim was that he had a meritorious defense to the underlying lawsuit that resulted in a $250,000.00 final judgment against him based on Dennis's alleged fraud. On June 30, 2020, SGN filed its supplement to the record in the receivership case in which it asked the trial court to "take judicial notice of the Bill of Review, specifically, the allegations of fraud *535 with respect to the judgment obtained in the instant case." SGN also asked the trial court to "hold this matter in abeyance until the Bill of Review can be more thoroughly adjudicated, since it is a direct attack on the underlying judgment."[9]

9 On August 28, 2020, the 261st Judicial District Court of Travis County entered an order dismissing the first amended petition for bill of review with prejudice.

In August 2020, the Receiver filed an amended and supplemental motion for authority to sell the receivership estate's interest in BP II and the Note and deed of trust against BP II. The amended and supplemental motion indicated that Stevens made a revised offer to purchase the Note (rather than compromise it) and to purchase the fifty percent interest in BP II.[10] On September 10, 2020, the trial court held a hearing on the amended and supplemental motion. At the hearing, Pugh announced his appearance "on behalf of SGN Investment Trust." The Receiver then informed the court of a new, higher offer to purchase the receivership estate's interest in BP II, the Note, and the deed of trust. After the Receiver concluded his remarks, the trial court asked, "[W]ho else would like to speak on this proposed sale?"

10 The face value of the Note was $334,210.79; the revised offer was for $500,000.00. BP II was the owner of the Gonzales County property and Note secured by the Gonzales County property; it had no other material assets.

Pugh responded and affirmatively joined "in Victor Antolik's brief in opposition to this motion." Pugh went on to argue, "First and foremost, the court shouldn't grant this motion, even if it could, because what we're talking about is selling the interest of an entity whose sole asset is real property. And the real property in question has never been appraised."[11] Pugh further argued that "a creditor can only get at a debtor's LLC interest through a charging order. That is the sole and absolute remedy that a creditor can have against the debtor." Arguing further, Pugh claimed that Section 112.035(d) of the Trust Code provides that a creditor "can only get to the settlor's interest in a trust, and that's only if the settlor has an interest." Pugh concluded by asking the court not to approve the sale. He continued,

11 Pugh acknowledged, though, that they had been "using the Appraisal District's estimated value in this instance."

> And if the court disagrees and is of a mind to dispose [sic] my client, who is not a party to this lawsuit, of its interest, then I would simply ask the court to at least consider requiring the appraisal of the real property first so that we can ascertain whether or not this value makes sense.

In final conclusion, Pugh again asked that the trial court "not approve [the] sale at [that] time."

D. The Trial Court's Order Granting the Receiver's Motion

Following the hearing, the trial court entered its order granting the Receiver's amended and supplemental motion for authority to sell the receivership estate's interest in BP II and in the Note and deed of trust against BP II (the Sale Order).[12] The Sale Order specifically found as follows:

12 The trial court's order stated,

> The Receiver served the Motion on the following parties: Judgment Creditor – Dennis Antolik; Judgment Debtor and Defendant – Victor Antolik; Don Fillman, "Trustee" of the "SGN Investment Trust"; James M. Miller, Substitute Trustee under the Deed of Trust relating to the Property, and [BP II].

(i) there has been due and sufficient notice of the Motion, (ii) the relief

536 *536

sought by the Receiver in the Motion is well taken, (iii) any property of the SGN Investment Trust held for the benefit of Judgment Debtor and Defendant Victor Antolik is not exempt under Chapters 41 and/or 42 of the Texas Property Code, or otherwise under Texas law, (iv) any property of the SGN Investment Trust held for the benefit of its settlor and sole present beneficiary, Judgment Debtor and Defendant Victor Antolik, is property of the Receivership Estate and is subject to the Receiver's power of sale, (v) the Receiver has exercised reasonable business judgment in negotiating the sale and prosecuting the Motion, (vi) the Receiver and Purchaser, Scott A. Stevens, have acted in good faith, (vii) the sale being approved hereby was the result of arms-length negotiations and represents the highest and best available offer for the assets being sold, (viii) it is in the best interests of the receivership estate for the Receiver, on behalf of the Judgment Debtor and Defendant Victor Antolik, to enter into the transactions approved in this Order pursuant to the authority granted under the Receivership Order, and (ix) the Motion should be granted.

E. The Receiver's Sale of SGN's Interest in BP II

Following the entry of the Sale Order, Victor and SGN (Appellants) filed a joint notice of appeal. In December 2020, the Receiver filed a motion to dismiss the appeal as moot, claiming, "No party to the Antolik Matter sought or obtained a stay of the Sale Order." The Receiver further claimed that, as a result, "[t]he Receiver and other third parties have acted in accordance with and in consummation of the transactions authorized and approved by the Sale Order. Those actions and the consummation of the transactions authorized and approved by the Sale Order render this appeal moot under applicable law." The consummation of the transactions authorized by the Sale Order resulted in a transfer of BP II's fifty-percent-membership interest, held for Victor's benefit by SGN, to Stevens; a transfer and assignment of the Note to Stevens; and an assignment of the deed of trust to Stevens. As required by the Sale Order, the purchase price for the transactions was $500,000.00. Those funds were advanced to Stevens by Guaranty Bank. Stevens thereafter released the deed of trust lien on the assets of BP II, and as part of financing the purchase price paid by Stevens, Guaranty Bank recorded a new lien on the property held by BP II.[13]

13 The appendix to the motion to dismiss, verified by the declaration of Mercer pursuant to Section 132.001 of the Texas Civil Practice and Remedies Code, included the following documents:

• Order Requiring Turnover and Appointing Receiver, filed June 26, 2019;

• Order Granting Receiver's Amended and Supplemental Motion for Authority To Sell Receivership Estate's (I) Interest in Bucephalas Partners II, LLC and (II) Promissory Note and Deed Of Trust Against Bucephalas Partners II, LLC, filed September 10, 2020;

• Assignment of the fifty percent membership interest in BP II, held for Victor's benefit by SGN, to Scott A. Stevens;

• Allonge with attached promissory note to Scott A. Stevens evidencing transfer and assignment of the promissory note to Stevens;

• Recorded Assignment of Deed of Trust to Scott A. Stevens to secure payment of the promissory note;

• Recorded Release of Lien executed by Scott A. Stevens following the Assignment of Deed of Trust; and

• Guaranty Bank Deed of Trust.

Appellants filed a response to the motion to dismiss, claiming that (1) the Receiver sold assets that belonged to SGN over which Victor had no control, (2) the trial court did not have jurisdiction over *537 SGN, and, as a result, (3) the trial court's order was void and the Trust's due process rights had been violated. This Court denied the motion to dismiss and directed the parties to address the issue of mootness in their respective appellate briefs.

F. This Appeal

On appeal, Appellants claim that the trial court erred in granting (1) the Receiver authority to sell more than the settlor's interest in an irrevocable spendthrift trust to satisfy a judgment creditor, contrary to Section 112.035(d) of the Texas Property Code, (2) the Receiver authority to sell a membership interest in an LLC owned by an irrevocable spendthrift trust to satisfy a judgment creditor, contrary to Section 101.112 of the Texas Business Organizations Code, and (3) the Receiver's motion to sell the assets of a non-party irrevocable spendthrift trust when neither the trust nor any of its trustees were parties to the proceeding. Appellants, therefore, ask this Court to declare the trial court's order void based on lack of jurisdiction over SGN.

The Receiver and Dennis Antolik (Appellees)[14] filed a single brief in which they claim that (1) this appeal is moot because the transaction contemplated by the Sale Order has taken place, (2) the Sale Order complied with Texas law, and (3) the Trustee participated in the hearings that led to the Sale Order.

[14] Although Dennis is the named appellee in the style of the appeal, the Receiver is the real party in interest.

II. Appellant's Claim that the Sale Order is Void Is Not Moot

Because the question of mootness implicates this Court's subject-matter jurisdiction, which is essential to our power to decide this case, we address it first. *See State v. Naylor* , 466 S.W.3d 783, 791–92 (Tex. 2015) (citing *Bland Indep. Sch. Dist. v. Blue* , 34 S.W.3d 547, 553–54 (Tex. 2000)); *Feist v. Gutierrez* , No. 03-18-00474-CV, 2019 WL 3436996, at *1 (Tex. App.—Austin July 31, 2019, no pet.) (mem. op.) ("courts have no jurisdiction to decide moot cases"). "Mootness occurs when events make it impossible for the court to grant the relief requested or otherwise 'affect the parties' rights or interests.' " *Feist* , 2019 WL 3436996, at *1 (quoting

State ex rel. Best v. Harper , 562 S.W.3d 1, 6 (Tex. 2018) (quoting *Heckman v. Williamson Cty.* , 369 S.W.3d 137, 162 (Tex. 2012))). The question of mootness is reviewed de novo. *John Gannon, Inc. v. Tex. Dep't of Transp.* , No. 03-18-00696-CV, 2020 WL 6018646, at *4 (Tex. App.—Austin Oct. 9, 2020, no pet.) (mem. op.).

It is undisputed that Appellants did not seek a stay of the Sale Order, file a supersedeas bond, or otherwise suspend the enforcement of the Sale Order. The sale about which appellants complain has therefore been consummated. As a result, Appellees claim that this appeal is moot and should be dismissed. Yet, mootness is not always a zero-sum game; it is possible that certain appellate issues can be moot without mooting the entire appeal. *See generally Aaron v. Aaron* , No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31, 2012, no pet.) (mem. op.) (while sale of property during pendency of appeal mooted certain issues, other appellate issues were unaffected). In this case, appellants claim that, in addition to their substantive claims regarding the propriety of the sale to Stevens, the trial court did not have jurisdiction over
538 SGN and that, as a result, the Sale Order is void.*538 "An order is void when a court has no power or jurisdiction to render it." *Urbish v. 127th Judicial Dist. Court* , 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding). "In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance." *Mapco, Inc. v. Carter* , 817 S.W.2d 686, 687 (Tex. 1991) (citing TEX. R. CIV. P. 124). "A judgment is void ... 'when it is apparent that the court rendering judgment had no jurisdiction [over] the parties....' " *In re D.S.* , 602 S.W.3d 504, 512 (Tex. 2020). Although we do not have jurisdiction "to address the merits of appeals from void orders or judgments," we do "have jurisdiction ... to determine" whether an "order or judgment underlying the appeal is void and make appropriate orders based on that determination." *Freedom Commc'ns, Inc. v. Coronado* , 372 S.W.3d 621, 623 (Tex. 2012) (per curiam). The entirety of this appeal is, therefore, not moot as appellees suggest. *See id.* ; *see also Lee v. Lee* , 528 S.W.3d 201, 209 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (appeal is not moot when the parties continue to have live controversy for which appellate relief is potentially available).

III. The Sale Order Is Not Void Because the Trial Court Had Jurisdiction Over SGN

"Texas law is clear that in all suits 'by or against a trustee and *all proceedings concerning trusts* ,' the trustee is a necessary party to the action." *Tomlinson v. Khoury* , No. 01-19-00183-CV, 2020 WL 6277305, at *6 (Tex. App.—Houston [1st Dist.] Oct. 27, 2020, no pet.) (mem. op.) (emphasis added) (quoting TEX. PROP. CODE ANN. §§ 115.001(a), 115.011(b)(4)); *see Ray Malooly Tr. v. Juhl* , 186 S.W.3d 568, 570 (Tex. 2006) (per curiam) ("The general rule in Texas (and elsewhere) has long been that suits against a trust must be brought against its legal representative, the trustee."); *In re Estate of Webb* , 266 S.W.3d 544, 548 (Tex. App.—Fort Worth 2008, pet. denied) ("The Texas Trust Code provides that in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party if a trustee is serving at the time the action is filed.").

The Appellants rely on *Khoury* in support of their claim that, because the trustee was not added as a party, the trustee's due process rights were violated. *See Khoury* , 2020 WL 6277305, at *6 ("[W]here the trustee is not properly before the court as a result of service, acceptance, waiver of process, or an appearance, Texas courts have invalidated orders that grant relief against a trust."). In *Khoury* , the judgment creditor moved the trial court to modify the trial court's turnover order after discovering a spendthrift trust of which Tomlinson was the trustee and a beneficiary and asked the trial court to invalidate the trust. *Id.* at *2. The trial court invalidated the spendthrift trust and ordered Tomlinson, in his individual capacity, to turn over all trust assets, even though neither the trust nor its trustee were parties to the turnover proceedings and were not judgment debtors. *Id.* at *1. On appeal, Tomlinson argued that the trial court never obtained jurisdiction over the trust and, as a result,

claimed that the turnover order invalidating the trust and requiring turnover of the trust assets was void. *Id.* at *4. The appellate court agreed and concluded that "the trial court lacked jurisdiction over the Trust and thus erroneously invalidated the Trust, and erroneously required the turnover of Trust assets." *Id.* at *8. The record in *Khoury* was clear that Tomlinson, in his capacity as trustee, was never before the trial court.

539 In this case, however, the question is whether SGN generally appeared *539 before the trial court, thereby imbuing the court with personal jurisdiction over SGN.[15] "Whether personal jurisdiction exists is a question of law that we review de novo." *J.O. v. Tex. Dep't of Family & Protective Servs.* , 604 S.W.3d 182, 187 (Tex. App.—Austin 2020, no pet.).

15 For purposes of this discussion, we assume, but do not decide, that the trial court entered relief against SGN.

"[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court." *Schoendienst v. Haug* , 399 S.W.3d 313, 317 (Tex. App.—Austin 2013, no pet.) (quoting *Exito Elecs. Co. v. Trejo* , 142 S.W.3d 302, 304 (Tex. 2004)) (per curiam) (citing *Dawson-Austin v. Austin* , 968 S.W.2d 319, 322 (Tex. 1998)); *see* TEX. R. CIV. P. 120 (providing that defendant may, in person or by attorney, enter appearance in open court and that this appearance "shall have the same force and effect as if the citation had been duly issued and served as provided by law").

Here, as previously outlined, SGN was represented by Pugh at the May 14, 2020, hearing and at the September 10, 2020, hearing. At each of those hearings, SGN presented argument to the trial court and otherwise actively participated. SGN invoked the judgment of the court when it affirmatively asked the court not to approve the sale and to at least consider requiring the appraisal of the real property. SGN sought affirmative action from the court when it filed its supplement to the record on June 30, 2020, and asked the court to take judicial notice of the bill of review and to hold the issue of the sale in abeyance until the bill of review was adjudicated. Finally, in accordance with Rule 120 of the Texas Rules of Civil Procedure, SGN's appearance in open court (by Pugh) was noted by the court upon its docket and entered in the minutes. *See* TEX. R. CIV. P. 120. The trial court's docket entry for May 14, 2020, indicated the appearance of "Adam Pugh, Atty for Trustee." The trial court's docket entry for September 10, 2020, likewise reflected Pugh's appearance on behalf of the "Trust."

This record clearly reflects that SGN was given an opportunity to participate in the post-judgment proceedings that resulted in the Sale Order, that it indeed participated in those proceedings, and that it invoked the judgment of the trial court and sought affirmative action from the trial court. We, therefore, conclude that SGN generally appeared before the trial court and was subject to the jurisdiction of the trial court. *See Mays v. Perkins* , 927 S.W.2d 222, 225 (Tex. App.—Houston [1st Dist.] 1996, no writ).

IV. Appellants' Remaining Complaints Regarding the Propriety of the Sale Order Are Moot

We now turn to two discrete issues that the Receiver claims have been mooted by the sale of the subject property: (1) whether the trial court erred in granting the Receiver authority to sell more than the settlor's
540 interest in an irrevocable spendthrift trust, contrary to Section 112.035(d),[16] and (2) whether the trial court *540 erred in granting the Receiver authority to sell a membership interest owned by an irrevocable spendthrift trust,
541 contrary to Section 101.112 of the Texas Business Organizations Code. [17] *541 "A case becomes moot if a controversy ceases to exist between the parties at any stage of the proceedings, including the appeal." *In re Kellogg Brown & Root, Inc.* , 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding) ; *see Fry Sons Ranch, Inc. v. Fry* , No. 03-19-00684-CV, 2020 WL 6685772, at *1 (Tex. App.—Austin Nov. 13, 2020) (mem. op.) ("Put

simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." (quoting *Heckman v. Williamson Cty.* , 369 S.W.3d 137, 162 (Tex. 2012))). "An appellate court is prohibited from deciding moot controversies." *Fry* , 2020 WL 6685772, at *1 (citing *Nat'l Coll. Athletic Ass'n v. Jones* , 1 S.W.3d 83, 86 (Tex. 1999)). We, therefore, examine the question of whether appellee's merits claims have been mooted by the sale.

16 Section 112.035(d) of the Texas Property Code provides:

> (d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate.

Tex. Prop. Code Ann. § 112.035(d). In the trial court the Receiver claimed and on appeal the Receiver claims that, because Victor was both the settlor and the beneficiary of SGN, SGN was a self-settled trust that fell within the parameter of Section 112.035(d) of the Texas Property Code. *See Bank of Dallas v. Republic Nat'l Bank of Dallas* , 540 S.W.2d 499, 500–02 (Tex. App.—Waco 1976, writ ref'd n.r.e.) (discretionary spendthrift trust defeated by self-settling); *Glass v. Carpenter* , 330 S.W.2d 530, 533 (Tex.App.—San Antonio 1959, writ ref'd n.r.e.) ("[O]ne cannot settle upon himself a spendthrift or other protective trust, or purchase such a trust from another, which will be effective to protect either the income or the corpus against the claims of his creditors, or to free it from his own power of alienation."); *see also In re Shurley* , 115 F.3d 333, 337 (5th Cir. 1997) (beneficiary's interest in spendthrift trust is not subject to creditors' claims under Texas law unless settlor creates the trust and makes himself beneficiary because debtor should not be able to "have his cake and eat it too"). The terms of the SGN trust, the Receiver points out, permit the trustee to distribute the whole of the corpus of the trust to Victor.

Conversely, Victor claims that SGN does not fall within the purview of Section 112.035(d) because, in 2007, the Texas Legislature amended the statute to clarify that it was only the settlor's interest that could be reached by a creditor when the settlor was also the beneficiary of a spendthrift trust. Victor cites no caselaw in support of this assertion. The following are the pertinent 2007 amendments to Section 112.035(d) :

> (d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of *the settlor's* [~~his~~] beneficial interest does not prevent *the settlor's* [~~his~~] creditors from satisfying claims from *the settlor's* [~~his~~] interest in the trust estate.

Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 4, Tex. Gen. Laws 801, 802 (eff. Sept. 1, 2007) (additions italicized). Victor claims that the foregoing revisions effected a fundamental change in the law resulting in a creditor's limited recourse to reach only the settlor's interest in a self-settled trust. Victor then claims that, because the settlor of SGN (Victor) retained no interest in its assets, the Receiver was not permitted to sell those assets. At trial, the Receiver presented the trial court with the 2008 Legislative Council Drafting Manual, which "indicates that one of its guiding principles was to remove masculine pronouns and to replace them with the status of the actor." The Receiver also claims that Victor's argument is unsupported by any change in relevant case law since 2007. *See In re Cyr* , 602 B.R. 315, 333 (Bankr. W.D. Tex. 2019) ("Therefore, while spendthrift trusts are enforceable under Texas law, to the extent a beneficiary also contributes property to such trust, the assets contributed by the beneficiary-settlor are deemed 'self-settled' and subject to the claims of creditors.") (citing *Shurley* , 115 F.3d at 338). The trial court rejected Victor's argument. Because we hold that Appellant's complaints are moot, we do not reach the merits of those arguments.

17 Section 101.112(d) states, "The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest." Tex. Bus. Orgs. Code Ann. § 101.112(d). Victor claims, under that provision, the Receiver's sole remedy (assuming the trust is disregarded) was to obtain a charging order against his membership interest in BP II. The

> Receiver maintains that Section 101.112 does not apply because the Receiver is not a judgment creditor. Instead, as a Receiver, he stands in the shoes of the judgment debtor, Victor, and was empowered by the Receivership Order to sell Victor's non-exempt membership interests. Although the Receivership Order—signed on June 26, 2019—specifically referenced the ability to sell membership interests, the Receiver points out that such order was not appealed. The trial court was of the opinion that "the time to object to the receiver's ability to make this sale was at the time of [the Receiver's] appointment and what was in the order appointing him...." *See Fortenberry v. Cavanaugh* , No. 03-07-00310-CV, 2008 WL 4997568, at *24 (Tex. App.—Austin Nov. 26, 2008, pet. denied) (mem. op.) (receivership order must be appealed within twenty days from entry of order); *see In re Davis* , 418 S.W.3d 684, 688 n.1, 689 (Tex. App.—Texarkana 2012, no pet.) (appellate court did not have jurisdiction to consider complaints regarding order appointing receiver after deadline to file accelerated appeal had passed).

In support of his contention that such claims have been mooted, the Receiver relies on *Shaw v. Allied Finance Co.* , 319 S.W.2d 820, 821–22 (Tex.Civ. App.—Fort Worth 1958, no writ) (per curiam), among other authorities. *Shaw* involved a suit for debt and mortgage foreclosure. *Id.* at 821. The order appointing a receiver empowered the receiver to sell a certain vehicle. *Id.* After the debtor perfected an appeal of the receivership order, the receiver sold the vehicle and placed the proceeds in the receivership estate. *Id.* The appellate court pointed out that no supersedeas bond was filed and that "[t]here was no 'stay' order sought or secured as would be requisite under our procedure." *Id.* The appellate court further stated, "The sale was completed and the receiver's report thereof has been filed of record and approved, and said receiver now holds the proceeds of said sale for disposition according to future orders of the lower court." *Id.* The court continued, "The automobile has now passed into the hands of person or persons unknown, and we have no way of ascertaining by the record the identity of the holder of the title thereto." *Id.* In concluding that it would "be futile" to address the question of whether the trial court should have granted injunctive relief and that such question was moot, the court recognized,

> The appellant can derive no benefit from the judgment of this court. The object of the order has been attained. The order has been executed and its force spent. There is no redress which this court can give to the appellant, even if we thought the order appointing the receiver was erroneous. The purchaser is in possession of the mortgaged premises. The sale has been confirmed by the Chancellor. We are powerless to change the existing status. Under the facts, a judgment of this court would be an empty and profitless act.

Id. at 822 (quoting *Machlin Essex Park Realty Co.* , 1927, 101 N.J. Eq. 776, 139 A. 32 (1927) (citing C.J.S., Appeal and Error § 1362, p. 447)).

Here, as in *Shaw* , the sale was ordered and consummated. Unrelated third parties, including Guaranty Bank and Stevens, acted in reliance upon the Receiver's authority, and the Receiver is in possession of the proceeds of the sale and has accounted to the trial court for those proceeds. This course of events leads us to conclude that appellee's merits issues have been mooted by the sale. Additional authority in support of this conclusion includes *Estate Land Co. v. Wiese* , 546 S.W.3d 322, 325 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Because appellants did not seek an emergency stay, supersedeas bond, or otherwise suspend the enforcement of the trial court's post-judgment orders, the sale of the property at issue was completed and, as such, the issues
542 in this case must be dismissed as moot."); *542 *Bass v. Bass* , No. 05-15-01362-CV, 2016 WL 1703007, at *1 (Tex. App.—Dallas Apr. 27, 2016, pet. denied) (mem. op.) ("Because the property that was the subject of the appealed interlocutory order appointing a receiver has been sold, the appeal from that order is now moot."); *Aaron v. Aaron* , No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31, 2012, no pet.) (mem. op.) (parties sold property while appeal pending rendering issues moot); *Foster v. Foster* ,

583 S.W.2d 868, 870 (Tex.App.—Tyler 1979, no writ) (question of whether trial court erred in ordering unsecured debts paid from proceeds of homestead moot in light of sale of subject property); and *State v. Jackson* , 101 S.W.2d 346, 347 (Tex.App.—Austin 1937, no writ) (per curiam) (appeal dismissed when property was already sold by receiver).

Yet, Appellants claim that this case is different from those cited above because the "issues before this court do not necessarily request relief dependent on possession of the property and are not rendered moot by Receiver Appellee's wrongful sale of the Realty." Appellants contend that the transactions could be reversed and undone. In support of this assertion, appellants cite to *Lee v. Lee* , 528 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). In that case, the parties entered into a settlement agreement, and in accordance with that agreement, one of the parties conveyed his interests in two properties to a trust. *Id.* at 209. The conveying party also signed a promissory note and made the first payment of the cash portion of the settlement. Further, the receiver filed a satisfaction of the judgment. *Id.* These facts, the court held, did not render the appeal moot because the record did not indicate "that anything [had] been done that [could not] be undone, or that the parties' dispute about the settlement [had] ceased to be a live controversy." *Id.* at 210. The court reasoned, " [T]he promissory note can be rescinded; money paid can be refunded; and a 'satisfaction of judgment' can be set aside." *Id.* at 209.

We are not persuaded that the case before us is in line with *Lee* . In *Lee* , the settlement agreement was an agreement between the two litigants. Likewise, one party had conveyed his interests in certain property to a testamentary trust of which he and the other litigant were beneficiaries. *Id.* at 205, 207. That same party executed a promissory note to the other party and had made a payment toward the cash portion of the settlement agreement. *Id.* at 207. The only third party involved in those transactions was the testamentary trust, of which both litigants were beneficiaries. In this case, however, two third parties were involved, including Guaranty Bank, who loaned money to Stevens and executed a deed of trust to secure its lien on BP II. Those transactions, unlike those described in *Lee* , cannot simply be undone and are more akin to the situation described in *Shaw* .

Other cases upon which appellants rely in support of their assertion that their merits claims are not moot are distinguished from this one because those cases rely on an exception to the mootness rule that "recognizes that a sale of property that forms the basis of the litigation will not render moot such issues related to separate claims for damages that do not depend on possession of the property." *Dominguez v. Dominguez* , 583 S.W.3d 365, 371 (Tex. App.—El Paso 2019, pet. denied). In *Dominguez* , for example, the appellant raised three issues regarding (1) the damage award, (2) the trial court's failure to issue written findings of fact and conclusions of law, and (3) tortious interference with a contract, which were not rendered moot by the sale of the property at issue. *Id.* ; *see also Kyle v. Strasburger* , 522 S.W.3d 461, 466–67 (Tex. 2017) (per curiam) (sale of property at
543 issue in appeal *543 did not render appellant's claims to declare lien and special warranty deed invalid where invalidity of those documents provided basis for several of appellant's remaining claims involving fraud, Texas Finance Code violations, and Texas Deceptive Trade Practices Act violations); *River & Beach Land Corp. v. O'Donnell* , 632 S.W.2d 885, 888 (Tex. App.—Corpus Christi 1982, no pet.) (property foreclosure did not render appellant's issues regarding money damages moot); *Medrano v. Hinojosa* , No. 04-14-00913-CV, 2016 WL 3085935, at *2–3 (Tex. App.—San Antonio June 1, 2016, no pet.) (mem. op.) (even though real property at issue on appeal had been foreclosed, appellant's challenges to evidentiary rulings were not moot as they would affect claims for breach of contract, fraud, and unjust enrichment). Here, appellants do not present any "stand apart" issues, nor do they attempt to explain how this case is in line with any of the foregoing cases. We, therefore, conclude that appellants' complaints regarding the propriety of the sale order are moot.

V. Conclusion

Although the trial court had jurisdiction over SGN, therefore causing it to be subject to the Sale Order, we dismiss the appellant's complaints regarding the propriety of the Sale Order as moot.

NO. 03-17-00292-CV
TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Barton Food Mart, Inc. v. Botrie

Decided Oct 25, 2018

NO. 03-17-00292-CV

10-25-2018

Barton Food Mart, Inc., Appellant v. Nejla Botrie, Appellee

Cindy Olson Bourland, Justice

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT NO. D-1-GN-15-005615 , HONORABLE TIM SULAK, JUDGE PRESIDING MEMORANDUM OPINION

Barton Food Mart, Inc. (BFM) appeals from a judgment in favor of its landlord, Nejla Botrie. Botrie sought declaratory relief that BFM had defaulted on its lease and an award of attorney's fees. The trial court rendered judgment declaring that BFM had defaulted twelve times and awarded Botrie $131,146.93 in attorney's fees. For the reasons that follow, we will affirm.

BACKGROUND

Botrie owns a small shopping center located in Austin. In 2000, Shaukat Prasla and Imtiyaz Dhuka took over the lease of a tenant that was operating a convenience store and reopened as Barton Food Mart.[1] In 2010, Botrie
2 executed a new lease with Prasla's corporation KLM *2 Enterprises, Inc., d/b/a/ Barton Food Mart (the Lease). Prasla signed the Lease as President of KLM and executed a separate document personally guaranteeing KLM's obligation to pay rent.

[1] To avoid confusion, we refer to appellant as "BFM" and the physical store as "Barton Food Mart."

Later the same year, KLM assigned the lease to BFM, a newly created corporation. Prasla executed the assignment for both entities. Per the Lease and the assignment, Prasla's guarantee remained in effect. Four years later, BFM and Botrie executed an amendment extending the lease term to 2020.

Barley Bean

Botrie, a resident of Canada, employs Consolidated Management Solutions (CMS) to manage the shopping center. CMS employees send Botrie monthly reports on the status of the property. On March 3, 2015, Prasla emailed Botrie and two CMS employees, Carla Neel and Diana Chastain, that BFM was:

> planning to introduce "BARLEY BEAN" at Barton Food Mart. This brand will include Coffee, Sandwich, and Pizza etc. I have attached lay out as to how this Deli counter will look like. We would like to put a small sign outside next to our regular sign. I have attached the logo [of the] sign.

Chastain replied:

> I have discussed these changes with Nejla. The interior changes/addition of product sound like they will be a good complement to your current model.
>
> Unfortunately, we are unable to permit additional exterior signage at the property. The storefront facade is to be reserved for tenant specific (as named in the Lease) illuminated signage per the sign criteria. We
>
> 3 *3
>
> can, however, permit an interior sign to be installed in the window as long as it is a clean, professional appearing sign.

Botrie and Neel subsequently testified that they believed BFM would offer pre-prepared Barley Bean food products and add a single Barley Bean sign to the interior of a window. In July of 2015, CMS employees discovered that BFM added five signs advertising Barely Bean and two exterior speakers. BFM modified the interior to add food preparation areas, wall-mounted menus, a new sink and lighting fixtures, a television, and customer seating, and hired two new employees to prepare food to order.

Lawsuit

Article 23.1 of the Lease provides that certain circumstances "shall be deemed to be events of default" and entitle Botrie to possession of the premises. Under article 23.1(b), BFM defaults by violating a provision of the Lease (other than those applying to payment of rent) and failing to cure the violation within fifteen days of receiving notice. By letter dated August 10, 2015, Botrie notified BFM that it had violated nine provisions of the Lease and gave BFM fifteen days to cure.

On December 11, 2015, Botrie filed suit seeking declaratory relief that BFM had violated the Lease by offering made-to-order food and making the modifications to the store described above, and that each violation amounted to a default under article 23.1(b). BFM answered and asserted promissory estoppel as a defense.

In December of 2016, BFM deposed Chastain by agreement. BFM's counsel asked Chastain about some of her
4 communications with Botrie. Botrie's counsel objected that all of *4 Chastain's communications with Botrie from February 2015 were "work product and therefore not discoverable" and instructed Chastain not to answer. *See generally* Tex. R. Civ. P. 192.5. BFM's counsel then adjourned the deposition.

In January of 2017, BFM filed an amended pleading asserting counterclaims for tortious interference with present contracts, civil conspiracy, and suit for accounting, and requested a declaration that it had not defaulted under article 23.1(b).

Botrie filed a traditional and no-evidence summary judgment motion on all of BFM's counterclaims the following month. In the same motion, Botrie moved to dismiss BFM's counterclaims for tortious interference and civil conspiracy under the Texas Citizens' Participation Act (TCPA). *See generally* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011. The trial court granted the motion to dismiss on March 10, 2017. By separate order signed the same day, the trial court granted summary judgment on the same counterclaims but denied relief as to the other counterclaims.

Fifteen days after the trial court's ruling, BFM filed a motion to continue the trial setting to resume Chastain's deposition and a separate motion to compel. The trial court denied the motion for a continuance but did not rule on the motion to compel.

During this process both BFM and Botrie amended their pleadings to add additional claims. On March 2, 2017—thirty-two days before trial—BFM filed an amended pleading adding a counterclaim for breach of contract. Botrie filed a motion to strike and special exceptions. The trial court denied the motion to strike but did not rule on the special exceptions. *5

On March 6, 2017, Botrie filed an amended pleading requesting declaratory relief stating that BFM had defaulted under article 23.1(a) by paying rent late. Article 23.1(a) provides that BFM defaults if it pays rent late and does not correct the problem within five days of receiving notice and that any subsequent failure in the following twelve-month period becomes a default with no additional notice required. Botrie also sought an award of attorney's fees under section 37.009 of the Uniform Declaratory Judgment Act (UDJA) or article 23.7 of the Lease.

On March 21, 2017, BFM filed another pleading asserting a counterclaim entitled "fraud in a real estate transaction." Botrie filed a separate motion to strike the fraud claim as untimely. The trial court granted Botrie's motion at the pretrial conference on April 3, 2017.[2]

[2] BFM added CMS as a third-party defendant in January 2017 and asserted civil conspiracy and fraud causes of action against it as crossclaims. Botrie's counsel appeared for CMS and filed an answer but CMS did not explicitly join Botrie's pretrial motions. In their briefs to us, the parties treat the motions as joint. Regardless, the judgment is final because it expressly states that it disposes of all claims and parties. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).

Trial

The parties agreed that the jury would decide whether BFM had defaulted under article 23.1(b) of the Lease. After receiving the jury's answers, the trial court would then decide whether BFM had defaulted under article 23.1(a) and whether to award Botrie her attorney's fees.

BFM argued to the jury that the defaults Botrie alleged were excused by its reliance on Botrie's agreement—conveyed by Chastain in the email reproduced above—to allow BFM to introduce Barley Bean and related signage into the store.

The trial court submitted two questions to the jury. The first asked the jury to individually decide whether seven of the alleged defaults had occurred. The second asked the jury *6 to decide whether any of the defaults that it found under the first question were excused by BFM's reliance on Botrie's promise. The jury found that five of the seven defaults occurred but that three of the above were excused.

The trial court then heard argument concerning whether BFM defaulted by paying rent late and on attorney's fees. Botrie offered, and the trial court admitted, evidence reflecting that CMS notified BFM by letter on January 13, 2016 that its rent was late and that BFM did not pay the rent within the five-day period. The trial court admitted other communications from CMS reflecting that it did not receive rental payments in subsequent months.

The trial court signed a final judgment declaring that BFM had defaulted five times under article 23.1(b), of which three were excused, and had defaulted ten times under article 23.1(a) by paying rent late. The judgment awarded Botrie $131,146.93 in attorney's fees under article 23.7 of the Lease and, "to the extent necessary," under section 37.009 of the UDJA.

BFM filed a timely motion for new trial. Seventy-one days after the trial court signed the final judgment, BFM filed a motion to abate for defect in parties, a motion to dismiss for want of jurisdiction, and a motion for judgment notwithstanding the verdict. The trial court allowed the motion for new trial to be overruled by operation of law and never ruled on the remaining motions.

BFM appeals from the final judgment in fifteen issues.

BRIEFING WAIVER

We first address Botrie's assertions that BFM waived its issues through inadequate briefing. An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). Botrie argues *7 that BFM never cites to the reporter's record and frequently omits the standard of review. Botrie is correct about the deficiencies of BFM's brief, but the Texas Supreme Court instructs us to be "hesitant to find waiver and, when possible, construe briefing reasonably, yet liberally, so that the right to appellate review is not lost by waiver." *Anderson v. Durant*, 550 S.W.3d 605, 617 (Tex. 2018). We will address the merits of BFM's issues to the extent possible. *See Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam) ("[A]ppellate courts should reach the merits of an appeal whenever reasonably possible.").

PRETRIAL RULINGS

BFM challenges various pretrial and evidentiary rulings in its eighth through twelfth issues.[3]

[3] We address BFM's issues in the chronological order in which they arose during the case.

Tortious Interference and Civil Conspiracy

BFM argues in its eleventh and twelfth issues that the trial court erred in granting Botrie's no-evidence motion for summary judgment in part and its motion to dismiss under the TCPA.[4] *8

[4] Botrie argues that BFM waived its challenges to the trial court's orders because BFM only stated the date of the final judgment in its notice of appeal. *See* Tex. R. App. P. 25.1(d)(2) (providing that notice of appeal must "state the date of the judgment or order appealed from"). More information was not necessary because the trial court's interlocutory orders merged into the final judgment. *See Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924 & n. 10 (Tex. 2011). By specifying that it was appealing from the final judgment, BFM preserved its challenge to the interlocutory rulings. *See Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam) (holding that appellants "were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions" but only "the date of the judgment or order appealed from—in this instance the order dismissing their suit").

In its eleventh issue, BFM argues that it did not have adequate time to conduct discovery before the trial court granted summary judgment. *See* Tex. R. Civ. P. 166a(i) (authorizing party to move for no-evidence summary judgment only "[a]fter adequate time for discovery"). We review a trial court's determination that there has been adequate time for discovery for an abuse of discretion. *Haven Chapel United Methodist Church v. Leebron*, 496 S.W.3d 893, 901 (Tex. App.—Houston [14th Dist.] 2016, no pet.). A trial court abuses its discretion if it acts without reference to guiding rules or principles. *Bennett v. Grant*, 525 S.W.3d 642, 653 (Tex. 2017), *cert. denied*, 138 S. Ct. 1264 (2018).

"[T]he rules do not mandate a minimum period of time a case must be pending before a motion may be filed, as long as there was adequate time for discovery." *Restaurant Teams Int'l, Inc. v. MG Sec. Corp.*, 95 S.W.3d 336, 340 (Tex. App.—Dallas 2002, no pet.). When analyzing whether an abuse of discretion occurred we may consider the nature of the case, the materiality and purpose of the discovery sought, the length of time the case

and motion for summary judgment have been on file, the amount of the discovery that has already taken place, and whether the party requesting more time has exercised due diligence to obtain the discovery sought. *Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see Akhter v. Schlitterbahn Beach Resort Mgmt., LLC*, No. 03-13-00117-CV, 2013 WL 4516130, at *3 (Tex. App.—Austin Aug. 22, 2013, no pet.) (mem. op.).

Botrie contends that the length of time the case was on file strongly indicates that there had been adequate time for discovery. This case had been on file for thirteen months when Botrie filed her motion for summary
9 judgment in February of 2017. The trial court granted the *9 motion in part the next month. *See, e.g., Buholtz v. Field*, No. 03-17-00232-CV, 2018 WL 700058, at *4 (Tex. App.—Austin Jan. 31, 2018, pet. denied) (mem. op.) (finding no abuse of discretion when case had been on file for six months when motion for summary judgment was filed and court did not rule "until almost a year after"). BFM argues that the ruling was nevertheless premature because BFM only discovered the need for more discovery during Chastain's deposition in December of 2016. According to BFM, the invocation of the work-product privilege by Botrie's counsel implied the existence of a plot between Botrie and CMS "to wrongfully evict [BFM] from the leased premises by inducing it through promises and conduct to take certain actions which Botrie would later claim amounted to defaults under the Lease." Botrie responds that BFM's failure to use diligence to obtain information about this plan supports the trial court's ruling. BFM filed several amended pleadings in the following months but did not file a motion to compel Chastain's deposition or ask the trial court to rule on the asserted privilege even after Botrie filed her motion. *See Muller v. Stewart Title Guar. Co.*, 525 S.W.3d 859, 867 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (holding failure to file motion to compel discovery demonstrates lack of diligence); *Akhter*, 2013 WL 4516130, at *4 (stating that failure to utilize available discovery procedures showed lack of diligence). On the record before us, we cannot say that the trial court abused its discretion. We overrule BFM's eleventh issue. We do not reach BFM's twelfth issue because our resolution of BFM's eleventh issue makes it
10 unnecessary to do so. *See* Tex. R. App. P. 47.1. *10

Motion for a Continuance

Five days after the trial court ruled on Botrie's motion for summary judgment and motion to dismiss, BFM filed a verified motion for a continuance of the trial to obtain Chastain's deposition. BFM appeals the denial of that motion in its tenth issue.[5]

> [5] BFM simultaneously filed a separate motion to compel Chastain's deposition and requested that the trial court rule that Botrie's communications with Chastain were not privileged. The trial court denied the motion for a continuance by written order but never ruled on the motion to compel. Because the trial court neither ruled on nor refused to rule on the motion to compel, we conclude that BFM failed to preserve error, if any. *See* Tex. R. App. P. 33.1(a).

We review a trial court's ruling on a motion for a continuance for an abuse of discretion. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). When the movant sought time to conduct additional discovery, we determine whether an abuse of discretion occurred by considering the same nonexclusive factors relevant to whether adequate time for discovery passed before summary judgment. *See Lee v. Lee*, 528 S.W.3d 201, 221 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs.*, 416 S.W.3d 217, 223 (Tex. App.—Fort Worth 2013, no pet.).

BFM argues that denying the motion deprived it of its only opportunity to obtain evidence from Chastain. As discussed in our analysis of BFM's eleventh issue, nothing in the record indicates that BFM acted to resume Chastain's deposition until BFM filed its motion to compel four months after the end of the deposition. BFM also fails to explain why the substance of Chastain's testimony was unobtainable through other witnesses. Carla

Neel, Chastain's supervisor, testified extensively at trial regarding the relationship between Botrie, CMS, and BFM. We conclude that the trial court did not abuse its discretion in denying BFM's motion for a continuance. *See Rocha* *11 *v. Faltys*, 69 S.W.3d 315, 319 (Tex. App.—Austin 2002, no pet.) ("A party who fails to diligently use the rules of discovery is not entitled to a continuance." (citing *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988))). We overrule BFM's tenth issue.

Evidentiary Issues

BFM argues in its eighth issue that the trial court erred by allowing Botrie to put on evidence of the condition of Barton Food Mart on any date except for December 11, 2015. In its ninth issue, BFM argues that the trial court abused its discretion when it excluded evidence of damages on its breach-of-contract counterclaim. We review a trial court's evidentiary ruling for an abuse of discretion. *Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727 (Tex. 2016).

Admission of Botrie's Evidence

Shortly after the beginning of trial, BFM filed a motion to exclude any evidence of the condition of Barton Food Mart on any date other than December 11, 2015, which is the date the lawsuit was filed. According to the motion, Botrie "temporally narrowed the scope of this lawsuit to the condition of the property" by her discovery answers.

BFM based this argument on Botrie's answers to Interrogatories 9 and 10. Those interrogatories concerned Botrie's allegations that BFM violated provisions of the Lease requiring it to keep the premises "neat and clean" and to ensure it does not "have an unsightly appearance." In both interrogatories, BFM asked Botrie to "identify each manner (by time, date, and the nature of the incident) by which [BFM] has caused" the premises to violate either provision "since *12 December 1, 2014." Botrie objected to both as seeking irrelevant information because her suit "is based on the state of the Demised Premises as of the date that the lawsuit was filed. The appearance of the Demised Premises at any other time has no bearing." BFM cites to no support for this assertion. We conclude that BFM waived this issue through inadequate briefing. *See* Tex. R. App. P. 38.1(i) (providing that an appellant's brief must contain "appropriate citations to authorities").

Exclusion of BFM's Evidence

BFM next argues that the trial court erred by excluding evidence of BFM's damages from Botrie's alleged breaches of the Lease. Dhuka—BFM's corporate representative—testified at trial that Botrie allegedly breached the Lease by not maintaining the shopping center's common area, among other violations, but was unable to provide any estimate of BFM's damages. The next day, BFM asked for leave to allow Dhuka to testify to BFM's damages, and Botrie objected on several grounds. BFM argues that sustaining the objection was an abuse of discretion because Botrie "opened the door" by its cross-examination. *See generally Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 234 (Tex. 2011) (observing that "a party may not complain on appeal of the admission of improper evidence if the party 'opened the door' by introducing evidence that is the same or similar in character"). BFM does not address the other grounds Botrie asserted for excluding the evidence of damages. *See Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012) (stating courts must uphold evidentiary rulings "if there is any legitimate basis for the ruling"). Botrie also objected to Dhuka's testimony on the ground that BFM failed to timely amend its disclosures to include damages for its breach-of-contract counterclaim. *13

"A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed" unless the trial court finds either good cause or the absence of unfair surprise or unfair prejudice. Tex. R. Civ. P. 193.6(a). The burden is on the proponent of the evidence to establish an exception. *Id*. R. 193.6(b). BFM did not amend its disclosures to add its damages until eleven days before trial and four months after the end of the discovery period.[6] The exclusion is automatic unless the proponent of the evidence establishes an exception, which BFM makes no effort to do. *See*, *e.g*., *In re First Transit Inc*., 499 S.W.3d 584, 595 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding [mand. denied]). The trial court did not abuse its discretion by excluding BFM's evidence of contract damages.[7]

6 Botrie elected to conduct discovery under the Level 2 deadlines and the trial court never issued a scheduling order modifying them. *See* Tex. R. Civ. P. 190.3(b)(1)(B) (providing that the discovery period begins when suit is filed and continues until the earlier of nine months after "the due date of the first response to written discovery" or thirty days before trial).

7 In a single paragraph of its ninth issue, BFM challenges a separate ruling preventing it from putting on evidence that the shopping center would flood during rains. BFM asserted the flooding as one of Botrie's alleged breaches of the Lease. We do not address this argument because without evidence of damages BFM's counterclaim for breach of contract would fail as a matter of law. *See*, *e.g*., *Scott v. Sebree*, 986 S.W.2d 364, 372 (Tex. App.—Austin 1999, pet. denied) (observing that damages are essential element of breach-of-contract claim).

We overrule BFM's eighth and ninth issues.

JUDGMENT

In its remaining issues, BFM challenges various aspects of the final judgment and the trial court's failure to
14 grant its motion for judgment not withstanding the verdict. *14

Sufficiency of the Evidence

BFM argues in its sixth, fourteenth, and fifteenth issues that legally insufficient evidence supports the findings that it defaulted under article 23.1(a) and (b) of the Lease.

Preservation of Error

Before addressing the merits of these arguments we must determine if BFM preserved its challenges to the jury's findings. A complaint that legally insufficient evidence supports jury findings must be preserved by (1) a motion for directed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial. *T.O. Stanley Boot Co*., *v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992).

As previously discussed, the Lease provides that a default occurs when there is a violation of the Lease that remains uncured a certain number of days after the tenant receives notice of the violation. BFM argues in its fourteenth issue that the evidence is insufficient because the record conclusively shows that the August letter did not comply with the Lease's notice requirement.[8] BFM challenges the jury's finding that BFM defaulted by putting up the five exterior signs in its fifteenth issue. BFM raised both of these arguments for the first time in its motion for judgment notwithstanding the verdict but failed to obtain a ruling. However, BFM moved for a directed verdict at the close of evidence on the ground "that notice of default was not properly given." We
15 construe BFM's fourteenth issue as renewing that complaint but conclude that BFM *15 failed to preserve the

sufficiency challenge in its fifteenth issue. *See id*.; *see also Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018) ("Rules of error preservation should not be applied so strictly as to unduly restrain appellate courts from reaching the merits of a case.").

[8] BFM makes the same argument regarding the trial court's findings in its sixth issue. A legal-sufficiency challenge following a bench trial may be made for the first time on appeal. *See* Tex. R. App. P. 33.1(d).

Merits

In a legal-sufficiency challenge we review the evidence in the light most favorable to the verdict, "crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). A legal-sufficiency challenge will be sustained when, relevant here, the evidence conclusively establishes the opposite of a vital fact. *Southwest Energy Prod.*, 491 S.W.3d at 713.

BFM first argues that the notices of default were ineffective because they did not comply with article 26 of the Lease. Article 26.1 provides:

> Wherever any notice is required or permitted under this Lease, such notice shall be in writing. Any notice or document required or permitted to be delivered under this Lease shall be deemed to be delivered when it is actually received by the designated addressee or, if earlier and regardless of whether actually received or not, when it is either (i) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, or (ii) delivered to the custody of a reputable messenger service or overnight courier service, addressed to the applicable party to whom it is being delivered . . . .

BFM interprets this language to mean that notice must be sent addressed to BFM via certified mail or a courier service. BFM asserts that neither the August 10, 2015 letter (regarding Barley Bean) or the January 13, 2016 letter (regarding late rent) complied because the August letter was addressed to "KLM Enterprises" rather than BFM, and the January letter was delivered by email. *16

16

We construe the unambiguous language of a lease "according its plain, grammatical meaning unless doing so would clearly defeat the parties' intentions." *Anadarko Petrol. Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002). The plain language of the Lease provides three circumstances where a notice will be deemed delivered: (1) "when it is actually received by the designated addressee," (2) when it is sent by certified mail, or (3) when it is delivered to a reliable messenger or courier service. It is undisputed that both letters were received by the designated addressee—BFM—at the designated address. Even if article 26.1 could be read to prohibit deliveries of notices by email, the trial court admitted a copy of the January 13, 2016 letter accompanied by a receipt reflecting that it was sent to BFM by certified mail. The evidence does not conclusively establish that the notices were ineffective.

Prior Material Breach

BFM next contends that the evidence establishes that Botrie breached the Lease before BFM's untimely payment, thus excusing any of its breaches. "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co., v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). By contrast, a non-material breach does not excuse further performance but gives rise to a claim for damages for breach of contract. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017). The Lease explicitly addresses the effect of a breach by Botrie on BFM's obligation to pay rent: "the

obligations of [Botrie] under this Lease are independent of [BFM's] obligations except as may be otherwise
17 expressly provided in this Lease." In the next sentence, BFM "waives all rights which it *17 might otherwise have to withhold" rental payments. The unambiguous language of the Lease provides that Botrie's failure to perform any of her obligations does not excuse BFM's failure to timely pay rent. *See*, *e.g.*, *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (orig. proceeding) ("An unambiguous document will be enforced as written."). Applying this provision, we conclude that the defense of prior material breach is unavailable to BFM. *See Ramaker v. Abbe*, No. 03-10-00713-CV, 2013 WL 3791491, at *3 (Tex. App.—Austin July 18, 2013, no pet.) (mem. op.) ("The covenant breached must be part of mutually dependent promises in order to excuse further performance by the nonbreaching party." (citing *Hanks v. GAB Bus. Servs., Inc.*, 644 S.W.2d 707, 708 (Tex. 1982))). The trial court's findings that BFM defaulted under article 23.1(a) of the Lease are therefore supported by legally sufficient evidence.

We overrule BFM's sixth, fourteenth, and fifteenth issues.

Joinder of Prasla

BFM argues in its thirteenth issue that the trial court erred in failing to grant its motion to dismiss for want of jurisdiction and its verified motion to abate. The UDJA provides that "[w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." Tex. Civ. Prac. & Rem. Code § 37.006(a). If a party is absent, the question "is not whether jurisdiction is lacking . . . but whether the trial court should have refused to enter a judgment." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162 (Tex. 2004). This "prudential question" is governed by Texas Rule of Civil Procedure 39. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 911 n.3 (Tex. 2017). A complaint that Rule 39 requires joinder must be
18 raised in the trial court or it is waived. *See Brooks*, 141 S.W.3d at 163-64; *Simpson* *18 *v. Afton Oaks Civic Club, Inc.*, 145 S.W.3d 169, 170 (Tex. 2004) (per curiam). BFM first raised this issue in a motion to dismiss for want of jurisdiction and a motion to abate seventy-one days after the trial court signed the final judgment. We conclude that BFM has waived this complaint and overrule its thirteenth issue. *Cf. In re J.W.M.*, 153 S.W.3d 541, 546 (Tex. App.—Amarillo 2004, pet. denied) (holding that appellant waived joinder issue by not raising it until motion for new trial).

Conformity of the Judgment to the Verdict

BFM argues in its first issue that the judgment does not conform to the jury's answers because it "gives no legal effect to the jury's findings that [BFM] substantially relied to its detriment" on Botrie's promises. *See* Tex. R. Civ. P. 301 (providing that the court's judgment must "conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity").

The doctrine of promissory estoppel "prevents a promisor who has induced substantial action or forebearance by another from denying that promise if 'injustice can be avoided only by enforcement.'" *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 926 (Tex. App.—Austin 2008, no pet.) (quoting *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005) (orig. proceeding)). Promissory estoppel is normally a defensive theory but "may be the basis of an affirmative claim." *Id.*; *see Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 655 (Tex. App.—Dallas 2015, no pet.). BFM characterized its promissory-estoppel theory as a "counterclaim" but employed it defensively at trial. The jury excused three of BFM's breaches. Moreover, BFM did not plead for or seek any damages for its reliance. *See Bechtel Corp.*, 271 S.W.3d at 926

(stating that promissory-estoppel claim may be used affirmatively "to recover no more than reliance damages measured by the detriment sustained" (quoting *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965)). We overrule BFM's first issue.

Suit for Accounting

BFM argues in its seventh issue that the trial court reversibly erred by failing to order an accounting. Botrie replies that BFM made no showing that an accounting was appropriate.

"'A suit for accounting is generally founded in equity,' and whether to grant 'an accounting is within the discretion of the trial court.'" *Williams v. Wells Fargo Bank, N.A.*, 560 Fed. App'x 233, 243 (5th Cir. 2014) (quoting *Southwestern Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 809 (Tex. App.—San Antonio 1994, writ denied)). A party seeking an equitable accounting has the burden to demonstrate that the facts and accounts presented are so complex that it cannot obtain the necessary information through normal discovery procedures. *Grant v. Pivot Tech. Sols., Ltd.*, ___ S.W.3d ___, ___, No. 03-17-00289-CV, 2018 WL 3677634, at *12 (Tex. App.—Austin Aug. 3, 2018, no pet. h.); *T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n*, 79 S.W.3d 712, 717-18 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). BFM alleged that Botrie deliberately overcharged BFM for electricity and maintenance beginning in 2011 but made no showing that BFM could not obtain the information that it needed through ordinary discovery procedures. We conclude the trial court did not abuse its discretion by not ordering an accounting. *See Williams*, 560 Fed. App'x at 243 ("The Williamses have alleged no facts suggesting the information they seek is complex such that the district court abused its discretion in denying their request for accounting."). We overrule BFM's seventh issue.

Attorney's Fees

BFM challenges the award of attorney's fees in its second through fifth issues. The relevant portions of the final judgment provide:

> 2. [Botrie] is entitled to recover $131,146.93 in reasonable attorney's fees under Lease section 23.7, as that is the amount of reasonable attorney's fees [Botrie] incurred to enforce and defend her rights and remedies under the Lease.
>
> 3. To the extent necessary, the Court also found that Botrie is entitled to recover the same amount in attorney's fees under Texas Civil Practice and Remedies Code section 37.009.

In its second issue, BFM argues that the trial court's fee award is not supported by the pleadings. *See* Tex. R. Civ. P. 301. Botrie expressly pleaded for a fee award under article 23.7 of the Lease or section 37.009 of the UDJA, and the judgment awards her fees under the Lease and alternatively under the UDJA. BFM points out that Botrie's counsel cited to cases addressing awards under a different fee provision during the hearing but does not explain the significance of that fact. We conclude that the judgment conforms to the pleadings and overrule BFM's second issue.

BFM argues in its third and fourth issues that the fee award must be reversed because Botrie failed to segregate her fees. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006) (holding that prevailing party must "segregate fees between claims for which they are recoverable and claims for which they are not"). When the issue of attorney's fees is tried to the bench, as it was here, "if no one objects to the fact that the attorney's fees are not segregated as to specific claims, then the objection is waived." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). BFM made this argument in its motion for new trial but "[r]aising the segregation issue for the first time in a motion for new trial does not preserve error." *Lawson v. Keene*, No.

03-13-00498-CV, 2016 WL 767772, at *5 (Tex. App.—Austin Feb. 23, 2016, pet. denied) (mem. op.) (citing *Horvath v. Hagey*, No. 03-09-00056-CV, 2011 WL 1744969, at *6 (Tex. App.—Austin May 6, 2011, no pet.) (mem. op.)). We overrule BFM's third and fourth issues.

BFM argues in its fifth issue that the trial court abused its discretion by failing to award BFM its attorney's fees and costs. "In any proceeding" under the UDJA, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. We review a fee award for an abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The trial court's discretion to award fees under the UDJA is "subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Id.* The determination of whether an award of fees is equitable and just is not susceptible to direct proof but rather "is a matter of fairness in light of all the circumstances." *Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 494 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *Ridge Oil Co., v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162-63 (Tex. 2004)). The award is not dependent on whether a party substantially prevailed, and the trial court has the discretion to decline to award fees entirely. *See Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Anglo-Dutch Petrol.*, 522 S.W.3d at 494.

BFM argues that the trial court's refusal to award fees is not equitable and just since the trial court made declarations that some of BFM's defaults were excused. However, those declarations in BFM's favor did not
22 afford it any relief. The Lease provides that a single "event of *22 default" entitles Botrie to possession of the premises and a variety of other remedies. The trial court did not abuse its discretion by refusing to award fees and costs to BFM when it did not prevail. *See Ochoa v. Craig*, 262 S.W.3d 29, 33 (Tex. App.—Dallas 2008, pet. denied) (finding no abuse of discretion in refusal to award fees to nonprevailing party); *Brazoria Cty. v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 728, 744 (Tex. App.—Austin 2004, no pet.) (same). We overrule BFM's fifth issue.

CONCLUSION

Having overruled all of BFM's issues, we affirm the trial court's judgment.

/s/_____

Cindy Olson Bourland, Justice Before Justices Puryear, Goodwin, and Bourland Affirmed Filed: October 25, 2018

NO. 14-17-00859-CV
State of Texas in the Fourteenth Court of Appeals

Curtis v. Baker

Decided Dec 20, 2018

NO. 14-17-00859-CV

12-20-2018

SHANNON CURTIS, Appellant v. CHAD SEAN BAKER, Appellee

J. Brett Busby Justice

On Appeal from the 164th District Court Harris County, Texas
Trial Court Cause No. 2015-47231

MEMORANDUM OPINION

Appellant Shannon Curtis appeals a summary judgment granted in favor of appellee Chad Sean Baker on Baker's suit to quiet title, request for declaratory judgment, and request for attorneys' fees. Curtis and Baker dispute the ownership of a condominium. Curtis contends the condo was a gift to him from Baker's father. Baker contends the condo belongs to him because he executed a quitclaim deed at his father's request that transferred the condo to Curtis on the condition that Curtis *2 would pay Baker $33,000, which Curtis failed to do. The trial court agreed with Baker, quieting title in his name, declaring the quitclaim deed void, and awarding attorneys' fees and costs.

2

We conclude the trial court erred in granting summary judgment because fact issues exist. To establish his right to quiet title, Baker had to establish conclusively his right of ownership and the existence of a cloud on the title that equity would remove. *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). In his sole ground for summary judgment, Baker argued that the quitclaim deed should be declared void for failure of consideration. He did not conclusively establish his right of ownership in the subject property, and failure of consideration is insufficient to void a deed where evidence of fraud or undue influence is absent. We therefore reverse the trial court's judgment and remand the case for further proceedings.

BACKGROUND

Curtis's summary-judgment evidence shows that in 2013, Curtis rented the condo from Baker's father. Baker's father owned several rental properties and put title to them in Baker's name, purportedly for reasons relating to social security benefits.[1] Curtis executed the rental agreement with Baker's father and paid monthly rental payments to him. Baker was not listed in the rental agreement and Curtis had no communication with Baker regarding the rental of the condo. Baker's father paid the condo's dues, fees, insurance, and maintenance.

[1] In his motion for summary judgment, Baker states that he originally received the property from his father.

Baker's father also lived in the same condominium complex. Curtis befriended Baker's father, who became terminally ill with cancer. Curtis ran errands *3 for Baker's father, took him to medical appointments, helped him clean, did his grocery shopping, and paid his bills, among other things. Curtis helped Baker's father in this manner, without payment, for a little over two years.

Curtis offered evidence of the following version of events, which Baker disputes in part. According to Curtis, Baker's father said he wanted to give the condo Curtis was renting to Curtis in exchange for Curtis's efforts in caring for him. Baker's father called Baker to the condo and asked Baker to sign a quitclaim deed transferring the condo from Baker to Curtis. Though Baker seemed upset about the transaction, Baker's father insisted on the transfer. Baker signed the deed, as witnessed by Baker's father and another witness, and a notary then notarized the signature. The quitclaim deed had a blank for consideration and the notary refused to notarize the document without the blank filled in. To satisfy the notary, Baker's father listed the approximate value of the condo—$33,000—as the consideration. Curtis maintains there was no expectation he would make any payments or provide any consideration to either Baker or Baker's father for the ownership of the condo, other than continued caretaking services. Curtis also maintains he was given the original deed and later recorded it in the real property records of Harris County.

Approximately eight months after executing the quitclaim deed, Baker brought this suit to invalidate the deed. Baker asserted claims: (1) to quiet title, (2) for a declaratory judgment that the deed is void for failure of consideration and Curtis lacks right, title, or ownership in the condo; and (3) for attorneys' fees under the Declaratory Judgments Act. Baker's father died a few months after Baker brought suit.

Baker moved for traditional summary judgment on his claims, asserting as his sole ground for judgment Curtis's failure to pay consideration. Baker cited no legal authority and made no arguments regarding the effect of failure to pay consideration *4 on the validity of a deed. Baker filed an affidavit stating he had not received the $33,000 recited in the deed for the condo, never authorized Curtis to file the deed, never gave the deed to Curtis, never authorized the transfer of the property to Curtis, and was never informed of the transfer by Curtis. Baker's motion included a request for attorneys' fees, and he attached an affidavit from his attorney setting forth the amount of fees and costs incurred.

Curtis filed a response to the motion, attaching his own affidavit describing how he received the condo and that Baker's father gave him the condo without expectation of payment. Curtis also challenged the request for attorneys' fees as well as the affidavit of Baker's attorney regarding fees.

The trial court granted Baker's motion for summary judgment, declared the quitclaim deed void, and awarded Baker $7,125.00 in attorneys' fees and $299.72 in costs. This appeal followed.

ANALYSIS

Curtis raises two issues on appeal: (1) whether the trial court erred in granting summary judgment in favor of Baker; and (2) whether the trial court erred in awarding attorneys' fees under the Texas Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2015). Baker raises an alternative argument in his brief that Curtis's appeal is not timely because a prior order granting summary judgment should have been treated as final. We first address the finality argument because it potentially affects our jurisdiction to decide Curtis's issues. *See Lee v. Lee*, 528 S.W.3d 201, 208 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Thus, before we can reach the merits of the trial court's challenged rulings, we first must determine whether we have jurisdiction to do so."). *5

I. The prior order granting summary judgment was not final because it did not dispose of the request for attorneys' fees.

In his live petition, Baker included a claim to quiet title, a claim for declaratory judgment, and a request for attorneys' fees under section 37.009 of the Texas Civil Practice and Remedies Code. On April 15, 2016, Baker filed a motion for summary judgment asking the trial court to declare the quitclaim deed void for failure of consideration and to award him attorneys' fees under section 37.009. On May 13, 2016, the trial court signed the first of two orders granting summary judgment in favor of Baker. In that order, originally entitled "Final Order & Declaratory Judgement," the trial court purported to grant Baker's motion for summary judgment in its entirety and declared the quitclaim deed void as a matter of law. The order contained a legal description of the condo at issue. The trial court crossed out the word "Final" from the title of the document, crossed out a statement that would have ordered Curtis to pay Baker attorneys' fees, and crossed out the sentence stating: "This Order is FINAL and disposes of all parties & claims in this matter." Comments at a later hearing reveal that the trial court considered the request for attorneys' fees outstanding.

Baker argues the May 13, 2016 order was nevertheless a final order because it disposed of all parties and claims. Because Curtis filed no motion that would have extended the appellate timetable from that May 13, 2016 order, Baker contends Curtis's appeal from the later order granting summary judgment on July 31, 2017, that is the subject of this appeal, is not timely. We disagree.

A judgment that does not dispose of all parties and claims is interlocutory and will not be considered final for purposes of appeal unless the intent to finally dispose of the case is unequivocally expressed in the words of the
6 order itself. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 830 (Tex. *6 2005) (orig. proceeding); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). By its express provisions, the May 13, 2016 order did not fully dispose of Baker's request for attorneys' fees. Although the order granted in its entirety Baker's motion for summary judgment in which he sought attorneys' fees, the trial court struck the word "final" from the order, deleted the blank left for a specific amount of attorneys' fees to be awarded, and struck language from the order stating that it disposed of all parties and all claims. The trial court advised Baker that the request for attorneys' fees remained pending.

The language of the order itself and the evidence in the record reflects that the May 13, 2016 order did not actually dispose of all claims in the case because the attorneys' fees claim remained pending. *See Farm Bureau Cnty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015) (per curiam) ("[t]he order at issue here did not dispose of all parties and claims, because neither the language taxing court costs nor the Mother Hubbard clause disposed of the parties' claims for attorney's fees."); *Garcia v. Comm'rs Court of Cameron Cnty.*, 101 S.W.3d 778, 785 (Tex. App.—Corpus Christi 2003, no pet.) (holding order was not final even though it granted request for attorneys' fees because it did not set the amount nor address another party's claim for fees). The evidence in the record expressly indicates the trial court did not intend to render a final judgment by the May 13, 2016 order. *See Rogers*, 455 S.W.3d at 164 (noting lack of record evidence of the trial court's intent with respect to the parties' claims for attorney's fees in determining finality).

Baker points out that he filed a notice of nonsuit of his request for attorneys' fees on June 14, 2016. But that notice of nonsuit did not make the prior order final because the trial court did not sign an order of nonsuit. *See Iacono v. Lyons*, 6 S.W.3d 715, 716-17 (Tex. App.—Houston [1st Dist.] 1999, no pet.). In *Iacono*, the court
7 explained: *7

> A party has an absolute right to a nonsuit at the moment the party files a nonsuit. However, when a nonsuit is filed after a partial judgment has been signed, the judgment does not become final until the trial court signs either an order granting the nonsuit or a final judgment explicitly memorializing the nonsuit.

6 S.W.3d at 716. As in *Iacono*, the notice of nonsuit filed by Baker did not make the May 13, 2016 order final because he did not obtain an order memorializing the nonsuit.

In sum, the May 13, 2016 order was not a final order because it did not fully dispose of the request for attorneys' fees and the trial court indicated its intent not to render a final judgment.[2] The trial court thus retained jurisdiction and Curtis's appeal from the court's subsequent "Final Order & Declaratory Judgment" was timely.

> [2] On January 13, 2017, the trial court vacated the May 13, 2016 order in response to a motion filed by Curtis. Baker then filed another motion for summary judgment, again asking the trial court to declare the quitclaim deed void for failure of consideration and to award him attorneys' fees under section 37.009. The trial court granted that motion for summary judgment, awarding the attorneys' fees and costs at issue in this appeal.

II. Baker did not conclusively establish his title to the condo.

In his first issue, Curtis contends the trial court erred in granting summary judgment declaring the quitclaim deed void because Baker did not establish the required elements to quiet title in his name for the condo. After reviewing the record, we agree that Baker failed to conclusively establish his right to summary judgment because the sole ground offered by Baker—failure of consideration—is insufficient standing alone to void a
8 deed. Baker failed to meet his burden of conclusively establishing his right to the relief sought. *8

A. Standard of review and applicable law

We review the trial court's order granting summary judgment de novo. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

To prevail on a traditional motion for summary judgment, the movant must establish there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). The non-movant bears no burden to respond to a motion for summary judgment unless the movant conclusively establishes its claim or defense. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). Evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all the summary-judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam); *Transcontinental Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 692 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

A plaintiff moving for summary judgment must conclusively establish all essential elements of his claim as a matter of law. *Univ. MRI & Diagnostics, Inc. v. Med. Lien Mgmt., Inc.*, 497 S.W.3d 653, 658 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex.2005).

A suit to quiet title relies on the invalidity of the opposing party's claim to the property. *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). It exists "to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the *9 appearance of better right." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *Bell v. Ott*, 606 S.W.2d 942, 952 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.)). A plaintiff seeking summary judgment on his suit to quiet title must prove conclusively that: (1) he has a right of ownership; and (2) the adverse claim is a cloud on the title that equity will remove. *Carter*, 371 S.W.3d at 388; *Hahn*, 321 S.W.3d at 531; *see also Vernon v. Perrien*, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied). A cloud on title that equity will remove exists when a claim or encumbrance, if valid, would affect or impair the title of the property owner. *See Carter*, 371 S.W.3d at 388. "[T]he plaintiff has the burden of supplying the proof necessary to establish his superior equity and right to relief." *Hahn*, 321 S.W.3d at 531.

B. Baker failed to establish his superior title or the existence of a cloud on his title that equity would remove.

In his motion, Baker asserted only one ground for summary judgment on the suit to quiet title and for declaratory judgment: that the quitclaim deed was void for failure of consideration. In support, Baker stated that he is the proper owner of the condo, that he never agreed to transfer the property to Curtis prior to receiving the $33,000, and that the $33,000 was never paid. He also stated that the quitclaim deed was fraudulently created and filed with the clerk, though he offered no facts or evidence to support the allegation of fraud. Baker cited no legal authority for his argument that the failure to pay consideration rendered the deed void.

A party seeking relief in a suit to quiet title must establish that he has a right of ownership in the property. *See Vernon*, 390 S.W.3d at 61; *Hahn*, 321 S.W.3d at 531. There are two facets of ownership of property: legal title and equitable title. *See Estate of Wright*, 482 S.W.3d 650, 658 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Baker, as the plaintiff, bore the burden of supplying the proof necessary *10 to establish his ownership. *See Hahn*, 321 S.W.3d at 531. But Baker failed to prove conclusively that he owned the property at the time he executed the quitclaim deed to Curtis.

Baker does not state anywhere in his affidavit that he is the owner of the condo. Baker did attach to his motion the quitclaim deed to Curtis, which Baker executed. This deed can be considered some evidence of possible legal title in Baker at the time he executed the deed, but it is not conclusive because a quitclaim deed is not a warranty of title. *See Jackson v. Wildflower Prod. Co., Inc.*, 505 S.W.3d 80, 89 (Tex. App.—Amarillo 2016, pet. denied) ("[A] quitclaim deed is only a release and assignment of the grantor's claims to the property because it contains no covenant of seisin or representation of title in the grantor.").

There is evidence in the record, however, raising a fact issue as to whether Baker held legal title to the condo while Baker's father retained equitable title to the condo. According to Curtis's affidavit, Baker's father told Curtis that he put his rental properties in his son's name for purposes relating to social security benefits, but that Baker's father remained the owner.[3] Curtis executed a rental agreement with Baker's father, not Baker, and Baker's father paid all of the dues, fees, insurance, and maintenance on the condo. Thus, fact issues exist as to the extent of Baker's ownership interest in the condo. *See Estate of Wright*, 482 S.W.3d at 658 *11 ("Ownership of the equitable estate is the real ownership; the legal estate is no more than the shadow following the equitable estate.") (internal quotation marks omitted); *see also Transcontinental Ins. Co.*, 321 S.W.3d at 696 (reversing summary judgment because conflicting evidence created fact issue).

3 On appeal, Baker claims there is no evidence his father was the one to put the condo in his name because the Harris County Appraisal District records do not show Baker's father as the prior owner of the property. We note that this is inconsistent with Baker's own statement in his motion for summary judgment that he received the condo from his father. In any event, the records referenced by Baker are not in the summary judgment record, so we do not consider them on appeal. *See Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, ___ S.W.3d ___, 2018 WL 4781526, at *6-7 (Tex. App.—Houston [14th Dist.] Oct. 4, 2018, no pet. h.); *Brookshire v. Longhorn Chevrolet Co.*, 788 S.W.2d 209, 213 (Tex. App.—Fort Worth 1990, no writ) (appellate court can consider only material on file with trial court at time summary judgment was granted). For the same reason, we do not consider Baker's reference to a letter sent by Curtis to the district clerk that was not included or even referenced in the summary judgment record.

Even if Baker had proven his ownership, he failed to establish conclusively that the quitclaim deed was void. "When a grantor transfers property, title to the property vests in the grantee upon execution and delivery of the deed conveying the property." *Watson v. Tipton*, 274 S.W.3d 791, 799 (Tex. App.—Fort Worth 2008, pet. denied) (citing *Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261-62 (Tex. 1974)). A deed will not be rendered void by mere failure of consideration. *See id.* at 801; *see also Silvio v. Boggan*, No. 01-10-00081-CV, 2012 WL 524420, at *3 (Tex. App.—Houston [1st Dist.] Feb. 16, 2012, pet. denied) (mem. op.); *Uriarte v. Prieto*, 606 S.W.2d 22, 24 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). Instead, there also must be evidence of "fraud or undue influence in obtaining the deed." *Silvio*, 2012 WL 524420, at *3.

Baker stated in his affidavit in support of his motion that Curtis filed a "fraudulent quitclaim deed" in exchange for $33,000 that Curtis never paid. But Baker never presented any evidence of fraud or undue influence by Curtis in obtaining the deed. On appeal, Baker argues the following facts from his affidavit show fraud: (1) he signed the deed because Curtis was to tender $33,000; (2) Baker was unaware that Curtis took the deed; (3) Baker never gave the deed to Curtis; and (4) Baker did not authorize Curtis to file the deed.[4] The facts cited are
12 either disputed *12 or otherwise fail to show the invalidity of the deed conclusively.

4 Baker also makes statements in his brief on appeal suggesting that Curtis obtained the deed by wrongfully taking it from Baker's father's condo. But Baker presented no evidence to support these statements, and they are contradicted by Curtis's statement in his affidavit that he was given the deed. To the extent Baker contends he can rely on statements in his motion that were not contained in an affidavit because he verified his motion for summary judgment, we disagree. Pleadings, even if verified, are not competent summary-judgment evidence. *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660-61 (Tex.1995); *Nguyen v. Citibank N.A.*, 403 S.W.3d 927, 932 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

With regard to Baker's statement that he signed the deed because Curtis was to tender $33,000, Curtis's affidavit directly contradicts this statement. Curtis states that Baker's father insisted Baker sign the deed because that is what the father wanted done and that Curtis was never expected, nor did he promise, to pay $33,000. As to Baker's statement that he was unaware Curtis took the deed, Curtis's affidavit states that he was given the original deed after the signing before the notary.

Regarding Baker's statement that he did not give the deed to Curtis, Curtis states he was given the deed without specifying who gave it to him. But under the standard of review, a reasonable inference from the summary judgment evidence — including other proof of Curtis's version of events—is that Baker's father gave Curtis the deed, as Baker's father was present at the signing and requested that Baker execute the deed for Curtis. Turning to Baker's statement that he did not authorize Curtis to file the deed, that evidence, at most, creates a fact issue on whether the condo was conveyed to Curtis. The evidence that the deed was executed and recorded created a rebuttable presumption of delivery and intent by Baker to convey the condo to Curtis. *See Watson*, 274 S.W.3d

at 799. Whether Baker did or did not authorize filing the deed is an issue to be resolved by the finder of fact in light of Curtis's testimony that he was given the deed and duly recorded it. *Cf. id.* (evidence did not create fact issue because presumption created by execution and proof of filing in deed records was not rebutted).

Although Baker contends on appeal that he did "in fact show some proof of fraud," Baker had the burden as the movant to establish the elements of his claims conclusively. We agree with Curtis that he did not do so. At a
13 minimum, fact issues *13 exist regarding whether the deed is valid. Therefore, the trial court's summary judgment for Baker on his claims to quiet title and for a declaratory judgment must be reversed. We sustain Curtis's first issue.[5]

[5] Curtis also argues that the trial court erred in granting summary judgment because he raised a fact issue regarding whether Baker's father completed an oral gift of the condo to Curtis. We express no opinion regarding whether an oral gift of the condo was established because it is not necessary to our disposition of the appeal and we are remanding the case for further proceedings. *See* Tex. R. App. P. 47.1.

III. Having reversed the declaratory judgment, we remand for reconsideration of the attorneys' fee award.

In his second issue, Curtis argues the trial court's award of attorneys' fees under section 37.009 should not stand if the summary judgment is reversed. In addition, he contends Baker failed to establish that his fees were reasonable and necessary, were adequately segregated, or were equitable and just.

Section 37.009 of the Texas Civil Practice and Remedies Code authorizes an award of "reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009; *Morath v. The Tex. Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 885 (Tex. 2016). Whether to award fees under section 37.009 is within the discretion of the trial court, but whether the fees are equitable and just is a question of law. *Morath*, 490 S.W.3d at 885; *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). An award of fees under the Declaratory Judgments Act is not dependent upon a finding that a party prevailed on its claims. *Morath*, 490 S.W.3d at 885.

When we change on appeal the extent to which a party obtained declaratory relief from the trial court, we reverse an accompanying award of attorneys' fees and remand for reconsideration in light of the disposition on appeal. *See Morath*, 490 S.W.3d at 885 (noting practice is to remand for reconsideration of what is equitable
14 *14 and just); *Bank of New York Mellon v. Soniavou Books, LLC*, 403 S.W.3d 900, 907 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("Because our disposition on appeal substantially affects the trial court's judgment, reversal of the attorney's fees award . . . is warranted so that on remand the trial court can address what costs and attorney's fees, if any, should be awarded against the Mortgage Servicer under the Declaratory Judgments Act."). We therefore sustain Curtis's second issue challenging the fee award.

CONCLUSION

Having rejected Baker's jurisdictional challenge and having sustained Curtis's two issues on appeal, we reverse the trial court's Final Order and Declaratory Judgment signed July 31, 2017, and remand the case to the trial court for further proceedings.

/s/ J. Brett Busby

Justice Panel consists of Chief Justice Frost and Justices Boyce and Busby.

NO. 14-16-00040-CV
Court of Appeals of Texas, Houston (14th Dist.).

Estate Land Co. v. Wiese

546 S.W.3d 322 (Tex. App. 2017)
Decided Dec 21, 2017

NO. 14–16–00040–CV

12-21-2017

ESTATE LAND COMPANY, Aaron Wiese and Kamal Banani (Bannan), Appellants v. Anthony WIESE, Appellee

Hugh L. McKenney, Houston, for Appellants. McDonald Scott Worley, Katherine Gonyea, J. W. Beverly, Sanford L. Dow, Houston, for Appellee.

John Donovan, Justice

Hugh L. McKenney, Houston, for Appellants.

McDonald Scott Worley, Katherine Gonyea, J. W. Beverly, Sanford L. Dow, Houston, for Appellee.

Panel consists of Chief Justice Frost and Justices Donovan and Wise

OPINION

John Donovan, Justice

After signing an amended final judgment and ordering the partition by sale of the real property at issue, the trial court signed two additional orders which are the subject of this appeal by appellants Estate Land Company, Aaron Wiese, and Kamal Banani (Bannan). We dismiss this appeal as moot.

I. Background

In 1999, Aaron Wiese ("Aaron") and his brother, Anthony ("Tony") Wiese, jointly purchased three properties in Houston, Texas: 812 Main Street; 110–114 Main Street; and I–10 McKee–Chapman ("McKee–Chapman"). In 2001, along with Kamal Bannan, they purchased a fourth property, 3302 Polk Street. The parties secured financing, and the record reflects that both Aaron and Tony were equally responsible for the entire amounts of the loans. After disagreements between the brothers arose, Tony sued appellants in 2009, seeking partition of the properties and reimbursement for contributions he had made to the properties. He also sought injunctive relief regarding a lease on the property at 812 Main Street ("Pearl Lease").

In February 2013, the case proceeded to a bench trial. Thereafter, in May 2013, the trial court signed a first amended final judgment and order of sale. Because the trial court found the properties were incapable of partition in kind, the trial court appointed a receiver, Donald Worley, and ordered partition by sale of the
324 properties pursuant to Rule 770 of the Texas Rules of Civil Procedure.[1] *324 Aaron did not agree with the

judgment of the trial court partitioning two of the properties (812 Main and 110–114 Main) and appealed the final judgment. This Court affirmed the final judgment and issued a Memorandum Opinion dated March 10, 2015. The Texas Supreme Court denied review in July 2016.

[1] If property is determined to be incapable of partition in kind, then the trial court must order partition by sale and determine the respective interests or shares of the persons entitled thereto. *See* Tex. R. Civ. P. 770.

In connection with the sale of one property,[2] 110–114 Main, the trial court issued two post-judgment orders: On December 18 and 23, 2015, respectively, over appellants' objections, the trial court signed a First Amended Decree Confirming Sale of 110–114 Main Street ("Decree Confirming Sale") and an Order Granting Motion to Turnover Net Sales Proceeds of 110–114 Main to Donald Worley, Receiver ("Turnover Order"). This appeal concerns only these two post-judgment orders.[3]

[2] With respect to the three other properties, Tony and Aaron have either agreed to a sale or the properties have not yet been sold.

[3] On May 23, 2016, the trial court signed an Order Denying Defendant's Amended Motion to Compel Post–Judgment Deposition of Receiver. That order is the subject of a separate appeal in this Court under appellate cause number 14–16–00496–CV.

Decree Confirming Sale

After the judgment was final, the court-appointed receiver, Worley, began marketing the properties for sale. In August 2015, Worley obtained two earnest money contracts for the sale of the 110–114 Main property and presented to the trial court a contract from Zimmerman Interests, Inc. On August 31, 2015, the trial court approved the contract from Zimmerman Interests, Inc., and authorized Worley to "take all reasonable step[s] to finalize the sale of the 110–114 Main property...."

In December 2015, Worley finalized the terms of the sale to Zimmerman Interests, Inc., and filed a report of sale with the trial court. On December 18, 2015, the trial court signed the First Amended Decree Confirming Sale of 110–114 Main Street, ordering the fees for the receiver and broker be calculated from the reduced sales price, approving and confirming the sale to Zimmerman Interests, Inc., and ordering that "the net sales proceeds, after payments of all fees of indebtedness, including payment to extinguish all valid mortgages, liens, other valid encumbrances, and reasonable and necessary receiver, legal and brokerage fees, if any, shall be distributed" among Tony, Aaron, and Kamal.

Turnover Order

To close the sale and insure title to 110–114 Main, Stewart Title requested a court order directing it to release the net sales proceeds from the sale to the receiver, Worley, who then would make the distributions in accordance with the final judgment. On December 23, 2015, the trial court issued the Turnover Order, wherein it ordered Stewart Title to turn over the net sales proceeds of 110–114 Main to Worley. The trial court further ordered Worley to deposit the net sales proceeds in an interest on lawyers trust account and then make the distributions in accordance with the trial court's final judgment. The sale of the property proceeded. It is undisputed that 110–114 Main was sold on December 30, 2015. Appellants filed this appeal on January 18, 2016.[4]
325 *325 **II. Issues on Appeal**

[4] In their original appeal appellants contested the judgment of the trial court partitioning two properties located on Main Street in Houston (812 Main and 110–114 Main). This court affirmed the final judgment and the Texas Supreme Court denied review. *See Estate Land Co. v. Wiese* , No. 14-13-00524-CV, 2015 WL 1061553 (Tex. App.—Houston [14th

Dist.] 2015, pet. denied) (mem. op.). While appellants' petition for review was pending, on January 19, 2016, appellants filed a petition for a writ of mandamus with the Texas Supreme Court. In their mandamus petition, appellants complained of the exact same post-judgment orders that are at issue in this appeal, arguing that the trial court lacked jurisdiction to order payment of Aaron's indebtedness and sale of the property should be "subject to" such indebtedness. On July 1, 2016, the Supreme Court of Texas denied appellants' mandamus petition, which was the same date appellants' petition for review was denied.

Additionally, on June 22, 2016, appellants filed another appeal from a post-judgment order in which the trial court denied Aaron's motion to take the deposition of the court-appointed receiver, Worley. This appeal remains pending before this court. *See Estate Land Co. v. Wiese* , appellate cause number 14–16–00496–CV.

On appeal, appellants' complain in several issues about two of the trial court's post-judgment orders related to the property at 110–114 Main Street: the trial court's First Amended Decree Confirming Sale of 110–114 Main Street and the trial court's Turnover Order. Appellants essentially argue that the trial court's judgment, which included language ordering net proceeds from the sale to be paid to the parties after payment of certain matters, including payment of all "indebtedness" as well as "mortgages, liens, [and] other valid encumbrances," did not allow as part of the sale transaction for Worley and/or Stewart Title to distribute funds to a bank in order to pay Aaron's promissory note obligation in full. Appellants argue that there are no specific findings in the amended final judgment determining or addressing encumbrances on the property. Thus, appellants maintain the post-judgment orders materially and substantially modified the final judgment, depriving the court of jurisdiction. Appellants argue the post-judgment orders are an "impermissible attempt to enforce the final judgment," and appellants request that this court reverse or set aside the post-judgment orders, and remand the matter to the trial court.

Appellee contends that appellants' issues appeal are moot because appeal was not made before the property was sold. Thus, appellee urges this court to dismiss the appeal. Alternatively, appellee argues that the trial court did not commit reversible error by issuing the post-judgment orders.

III. Analysis

As a threshold matter we address whether we have jurisdiction to review the trial court's receiver-related orders or whether appellants' issues are moot.

Unlike other proceedings, a partition case has two final judgments and both are appealable as a final judgment. *Griffin v. Wolfe* , 610 S.W.2d 466 (Tex. 1981). "This is because a partition proceeding is—at least—a two-step process." *Long v. Spencer* , 137 S.W.3d 923, 925 (Tex. App.—Dallas 2004, no pet.) (citing *Carr v. Langford* , 144 S.W.2d 612, 613 (Tex. Civ. App.—Dallas 1940), *aff'd* 138 Tex. 330, 159 S.W.2d 107, 108 (1942)); *see also* Tex. R. Civ. P. 760 (court shall determine share or interest of each claimant and all questions affecting title to property); Tex. R. Civ. P. 761 (court shall determine whether property is subject to partition in kind); Tex. R. Civ. P. 770 (if property not subject to equitable division, court shall order sale or property and partition proceeds). Thus, issues determined by the partition order must be challenged following issuance of the partition order; they cannot be attacked collaterally after the court issues a later order or judgment. *Long* , 137 S.W.3d at
326 925–26 (citing *Estate of Mitchell* , 20 S.W.3d 160, 162 (Tex. App.—Texarkana 2000, no pet.)); *see* *326 *Ellis v. First City Nat'l Bank* , 864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, no writ) (providing that matters decided in the first order cannot be reviewed in an appeal from the second order). The same rule applies for an order approving the terms of a proposed sale of real property in a partition suit: the terms of that order must be appealed—if at all—after its issuance, before the property is sold. *Long* , 137 S.W.3d 923, 926 (Tex. App.—

Dallas 2004, no pet.)"The reasoning behind the rule is clear: in the partition process, decisions must be made upon which other decisions will be based. An appeal at each stage provides a practical way to review controlling, intermediate decisions before the consequences of any error do irreparable injury." *Id.* at 926.

In the second step of a partition suit, the court issues an order either approving the receiver's report and giving the parties their share or rejecting the report and appointing other commissioners to partition the land. *Ellis* , 864 S.W.2d at 557. If the court approves the sale, this second order is a separate and distinct, yet final judgment. *See id.*

In their original appeal appellants challenged the trial court's first-step order (*i.e.* , the trial court's amended final judgment). In this appeal appellants purport to challenge the second-step post-judgment orders; however, the substance of appellants' complaints is about whether the trial court's final judgment could order payment of Aaron's indebtedness from the net proceeds. Matters related to the final judgment (including the portion ordering net proceeds from the sale of the property follow the payment of indebtedness, including the payment to extinguish all valid mortgages, liens, and other valid encumbrances) have been fully litigated and cannot be reviewed in this appeal purportedly involving second-step orders.

Further, it is undisputed that the property at issue, 110–114 Main, was sold on December 30, 2015. "A case becomes moot if a controversy ceases to exist at any stage of the proceedings, including the appeal." *In re Kellogg Brown & Root, Inc.* , 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding); *Aaron v. Aaron* , No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31 2012, no pet.) (mem. op.). Appellate courts lack jurisdiction to decide moot controversies and render advisory opinions. *See Nat'l Collegiate Athletic Assoc. v. Jones* , 1 S.W.3d 83, 86 (Tex. 1999) ; *In re H & R Block Fin. Advisors, Inc.* , 262 S.W.3d 896, 900 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). The mootness doctrine implicates a court's subject matter jurisdiction, which "is essential to a court's power to decide a case." *See State v. Naylor* , 466 S.W.3d 783, 791–92 (Tex. 2015). Because appellants did not seek an emergency stay, supersedeas bond, or otherwise suspend the enforcement of the trial court's post-judgment orders, the sale of the property at issue was completed and, as such, the issues in this case must be dismissed as moot. *See, e.g., Bass v. Bass* , No. 05-15-01362-CV, 2016 WL 1703007, at *1 (Tex. App.—Dallas Apr. 27, 2016) (mem. op.) ("Because the property that was the subject of the appealed interlocutory order appointing a receiver has been sold, the appeal from that order is now moot."); *Aaron* , 2012 WL 273766, at *5 (parties sold property while appeal pending rendering issues moot); *Taylor v. Hill* , 249 S.W.3d 618, 624 (Tex. App.—Austin 2008, pet. denied) (in a partition suit the terms of an order confirming sale must be appealed—if at all—after its issuance, before the property is sold) (citing *Long* , 137 S.W.3d at 926); *Shaw v. Allied Fin. Co.* , 319 S.W.2d 820, 821–22 (Tex. Civ. App.—Fort Worth 1958, no writ history) (dismissed appeal as moot where receiver sold property and no
327 supersedeas bond filed or *327 "stay" order sought); *State v. Jackson* , 101 S.W.2d 346, 347 (Tex. Civ. App.—Austin 1937, no writ history) (appeal dismissed when property already sold).

IV. Conclusion

Because our decision cannot have a practical effect on an existing controversy, the case is moot. Accordingly, without reference to the merits, we overrule appellants' issues and dismiss the appeal as moot. *See Jones* , 1 S.W.3d at 86.

(Frost, C.J., dissenting).

DISSENTING OPINION

Kem Thompson Frost, Chief Justice, dissenting.

The appellants challenge two post-judgment orders, asserting that (1) the trial court erroneously ordered the net proceeds from the sale of the property at 110–114 Main Street to be turned over to the receiver rather than to the trial court and (2) the trial court erroneously approved the deduction of certain items from the gross sale proceeds. The majority concludes that these complaints are moot because the sale of the property already has occurred, and therefore, the majority reasons, this court's judgment on appeal can have no practical effect on any existing controversy. An actual controversy between the parties as to the appellants' complaints continues to exist, and the sale of the property does not prevent this court from rendering a judgment that would have a practical effect on this controversy. So, the appellants' claims are not moot, and this court should not dismiss them on mootness grounds.

Law on Mootness

Appellate courts are not to decide moot controversies,[1] a rule rooted in constitutional prohibitions against rendering advisory opinions.[2] A case becomes moot if there ceases to be an actual controversy between the parties at any stage of the litigation.[3] If a judgment can have no practical effect on an existing controversy, the case becomes moot and any opinion issued on the merits in the appeal would constitute an impermissible advisory opinion.[4] A case becomes moot if, during the appeal, either of the opposing sides of the litigation ceases to have a legally cognizable interest in the appeal's outcome.[5]

1 *Nat'l Collegiate Athletic Ass'n v. Jones* , 1 S.W.3d 83, 86 (Tex. 1999).

2 *See id.* ;*see also Valley Baptist Med. Ctr. v. Gonzalez* , 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

3 *Jones* , 1 S.W.3d at 86 ; *see Robinson v. Alief I.S.D.* , 298 S.W.3d 321, 324 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

4 *Thompson v. Ricardo* , 269 S.W.3d 100, 103 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

5 *See Jones* , 1 S.W.3d at 87.

The Existence of an Actual Controversy

Appellants Estate Land Company, Aaron Wiese, and Kamal Bannan (a/k/a Kamal Banani) (collectively the "Estate Land Parties") challenge the trial court's order confirming the sale of the property at 110–114 Main Street (the "Confirmation Order") and its order requiring the title company from the sale to turn over net sale proceeds to the receiver (the "Turnover Order"). The Estate Land Parties assert that the trial court erred in issuing these orders and that these orders conflict with and materially change a part of the trial court's prior
328 final judgment because (1) the trial court ordered the receiver's distribution *328 of the sale proceeds without any requirement that the proceeds be "returned into court" for distribution by the trial court, as allegedly required by the trial court's final judgment; (2) the trial court approved certain deductions from the gross proceeds of the sale without determining whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment; (3) in the Turnover Order, the trial court asserted personal jurisdiction over the title company from the sale even though the title company has not been served with process, waived service of process, or voluntarily appeared; and (4) in the Turnover Order, the trial court ordered the title company from the sale to turn over net sale proceeds to the receiver rather than ordering that the proceeds be "returned into court," as allegedly required by the trial court's final judgment. Though appellee Anthony Wiese asserts that the sale of the property moots the Estate Land Parties' appellate

complaints, to the extent these issues are not moot, Anthony asserts that the Confirmation Order and the Turnover Order do not conflict with or materially change any part of the trial court's final judgment and that the trial court did not err as the Estate Land Parties allege. An actual controversy still exists between the Estate Land Parties and Anthony as to the Estate Land Parties' appellate complaints.[6]

6 *See In re C.C.E.* , 530 S.W.3d 314, 318–19 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Satisfaction of the Practical Effect Requirement

The majority concludes that, because the property at 110–114 Main Street has been sold to a third-party who is not a party to this litigation, this court cannot render an appellate judgment that would have a practical effect.[7] If the Estate Land Parties were complaining on appeal that the trial court erred in allowing this sale to proceed and were urging this court to render judgment ordering that the sale not take place, then the majority's conclusion would be correct.[8] But, the Estate Land Parties do not lodge this complaint or make this request on appeal; instead, they complain that the trial court erred in certain respects in ordering what should be done with the sale proceeds. They do not challenge the sale.

7 *See ante* at 326–27.

8 *See Lee v. Lee* , 528 S.W.3d 201, 209–10 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

To the extent that one of the post-judgment orders materially changed the relief awarded in the prior final judgment, the trial court lacked jurisdiction to make the change, and this part of the order is void.[9]

9 *See Partners In Bldg. v. Eure* , No. 14-12-00123-CV, 2013 WL 1279407, at *2 (Tex. App.—Houston [14th Dist.] Mar. 28, 2013, no pet.) (mem. op.).

If this court has appellate jurisdiction over the two orders and if this court were to find that the Estate Land Parties' appellate complaints have merit, this court could conclude that the challenged parts of the orders are void, and this court could remand to the trial court for further proceedings. Though the sale has occurred, the receiver is still operating, and the Estate Land Parties and Anthony are still parties to this case.[10] The trial court
329 could *329 order Anthony and Kamal to repay funds to the receiver or could offset amounts against any future distributions in this case as to other properties. Despite the sale of the property, this court still could render an appellate judgment that would have a practical effect.[11]

10 *See Lee* , 528 S.W.3d at 209–10 (concluding that challenges to approval of settlement agreement between the receiver and one party were not moot despite closing of the agreement because the complained-of action could still be reversed and because there still was a live controversy); *Taylor v. Hill* , 249 S.W.3d 618, 622, 624–25 (Tex. App.—Austin 2008, pet. denied) (necessarily rejecting argument that appeal in partition case was moot because the property already had been sold and the net proceeds delivered to the parties whom the trial court found to have an interest in the property).

11 *See Lee* , 528 S.W.3d at 209–10 ; *Taylor* , 249 S.W.3d at 622, 624–25.

The Majority's Description of the Estate Land Parties' Complaints

According to the majority, though the Estate Land Parties purport to challenge the two post-judgment orders, the substance of their appellate complaints is a challenge to the prior final judgment in which they assert that the trial court should not have ordered payment of Aaron's indebtedness from the net sale proceeds.[12] Neither the form nor the substance of the Estate Land Parties' appellate complaints challenges the prior final judgment.[13] In the challenge as to the deductions from the gross sale proceeds, the Estate Land Parties assert that the trial court erroneously approved certain deductions from the gross sale proceeds without determining

whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment. Though the majority asserts that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, a review of the Estate Land Parties' appellate complaints shows that they are not challenging any matter determined in the prior judgment.[14]

12 *See ante* at 325–26.

13 *See supra* at 324.

14 *See ante* at 325–26.

The Majority's Addressing of the Merits in Determining Jurisdiction

Even presuming for the sake of argument that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, those challenges would be barred by law of the case, claim preclusion, or issue preclusion. None of these doctrines (or facts supporting them) would deprive this court of jurisdiction or make any appellate complaint moot.[15] If, as the majority concludes, all of the Estate Land Parties' appellate complaints contradict the trial court's prior final judgment, the proper appellate disposition would be to affirm
330 the post-judgment orders rather than to dismiss this appeal as moot.[16] In determining whether *330 this court lacks jurisdiction over this appeal based on mootness of the appellate complaints, this court may not address the merits of those complaints.[17] The merits of the Estate Land Parties' appellate complaints are not relevant to whether this court can render an appellate judgment that would have a practical effect, and this court should not address whether the prior judgment bars any of these complaints.[18]

15 *See Philips v. McNease* , 467 S.W.3d 688, 697–99 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming, rather than dismissing appeal as moot, when the claim-preclusion doctrine barred the appellate complaints); *Jacobs v. Jacobs* , 448 S.W.3d 626, 630–31 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (affirming post-judgment orders, rather than dismissing appeal as moot, when the law-of-the-case doctrine barred the appellate complaints); *Simulis, LLC v. Gen. Elec. Capital Corp.* , 392 S.W.3d 729, 735 n.7 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (noting that the proper recourse if a plaintiff asserts claims barred by law of the case, claim preclusion, or issue preclusion is for the defendant to seek judgment on the merits by filing a summary-judgment motion).

16 *See Philips* , 467 S.W.3d at 697–99 ; *Jacobs* , 448 S.W.3d at 630–31 ; *Simulis, LLC* , 392 S.W.3d at 735 n.7.

17 *See Schwartzott v. Etheridge Prop. Mgmt.* , 403 S.W.3d 488, 502 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (concluding that, in determining this court's jurisdiction, the court does not address the merits of any of the claims); *Smith v. City of League City* , 338 S.W.3d 114, 129 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding that the merits of a claim are not at issue in determining whether courts have subject-matter jurisdiction over the claims and presuming for the sake of argument that the claim had merit in determining whether courts had jurisdiction over the claim).

18 *See Schwartzott* , 403 S.W.3d at 502 ; *Smith* , 338 S.W.3d at 129.

For the foregoing reasons, the Estate Land Parties' complaints are not moot.[19] Because the majority reaches the opposite conclusion and dismisses this appeal on mootness grounds, I respectfully dissent.

19 *See In re C.C.E.* , 530 S.W.3d at 318–19 ; *Lee* , 528 S.W.3d at 209–10 ; *Taylor* , 249 S.W.3d at 622, 624–25.

NO. 14-16-00040-CV
State of Texas in the Fourteenth Court of Appeals

Estate Land Co. v. Wiese

Decided Dec 21, 2017

NO. 14-16-00040-CV

12-21-2017

ESTATE LAND COMPANY, AARON WIESE AND KAMAL BANNAN (A/K/A KAMAL BANANI), Appellants v. ANTHONY WIESE, Appellee

Kem Thompson Frost Chief Justice

On Appeal from the 151st District Court Harris County, Texas
Trial Court Cause No. 2009-00136

DISSENTING OPINION

The appellants challenge two post-judgment orders, asserting that (1) the trial court erroneously ordered the net proceeds from the sale of the property at 110-114 Main Street to be turned over to the receiver rather than to the trial court and (2) the trial court erroneously approved the deduction of certain items from the gross sale proceeds. The majority concludes that these complaints are moot because the sale of the property already has occurred, and therefore, the majority *2 reasons, this court's judgment on appeal can have no practical effect on any existing controversy. An actual controversy between the parties as to the appellants' complaints continues to exist, and the sale of the property does not prevent this court from rendering a judgment that would have a practical effect on this controversy. So, the appellants' claims are not moot, and this court should not dismiss them on mootness grounds.

2

Law on Mootness

Appellate courts are not to decide moot controversies,[1] a rule rooted in constitutional prohibitions against rendering advisory opinions.[2] A case becomes moot if there ceases to be an actual controversy between the parties at any stage of the litigation.[3] If a judgment can have no practical effect on an existing controversy, the case becomes moot and any opinion issued on the merits in the appeal would constitute an impermissible advisory opinion.[4] A case becomes moot if, during the appeal, either of the opposing sides of the litigation ceases to have a legally cognizable interest in the appeal's outcome.[5]

1 *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999).

2 *See id*; *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

3 *Jones*, 1 S.W.3d at 86; *see Robinson v. Alief I.S.D.*, 298 S.W.3d 321, 324 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

[4] *Thompson v. Ricardo*, 269 S.W.3d 100, 103 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[5] *See Jones*, 1 S.W.3d at 87.

The Existence of an Actual Controversy

Appellants Estate Land Company, Aaron Wiese, and Kamal Bannan (a/k/a Kamal Banani) (collectively the "Estate Land Parties") challenge the trial court's order confirming the sale of the property at 110-114 Main
3 Street (the *3 "Confirmation Order") and its order requiring the title company from the sale to turn over net sale proceeds to the receiver (the "Turnover Order"). The Estate Land Parties assert that the trial court erred in issuing these orders and that these orders conflict with and materially change a part of the trial court's prior final judgment because (1) the trial court ordered the receiver's distribution of the sale proceeds without any requirement that the proceeds be "returned into court" for distribution by the trial court, as allegedly required by the trial court's final judgment; (2) the trial court approved certain deductions from the gross proceeds of the sale without determining whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment; (3) in the Turnover Order, the trial court asserted personal jurisdiction over the title company from the sale even though the title company has not been served with process, waived service of process, or voluntarily appeared; and (4) in the Turnover Order, the trial court ordered the title company from the sale to turn over net sale proceeds to the receiver rather than ordering that the proceeds be "returned into court," as allegedly required by the trial court's final judgment. Though appellee Anthony Wiese asserts that the sale of the property moots the Estate Land Parties' appellate complaints, to the extent these issues are not moot, Anthony asserts that the Confirmation Order and the Turnover Order do not conflict with or materially change any part of the trial court's final judgment and that the trial court did not err as the Estate Land Parties allege. An actual controversy still exists between the Estate Land Parties and
4 Anthony as to the Estate Land Parties' appellate complaints.[6] *4

[6] *See In re C.C.E.*, 530 S.W.3d 314, 318-19 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Satisfaction of the Practical Effect Requirement

The majority concludes that, because the property at 110-114 Main Street has been sold to a third-party who is not a party to this litigation, this court cannot render an appellate judgment that would have a practical effect.[7] If the Estate Land Parties were complaining on appeal that the trial court erred in allowing this sale to proceed and were urging this court to render judgment ordering that the sale not take place, then the majority's conclusion would be correct.[8] But, the Estate Land Parties do not lodge this complaint or make this request on appeal; instead, they complain that the trial court erred in certain respects in ordering what should be done with the sale proceeds. They do not challenge the sale.

[7] *See ante* at 7-8.

[8] *See Lee v. Lee*, 528 S.W.3d 201, 209-10 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

To the extent that one of the post-judgment orders materially changed the relief awarded in the prior final judgment, the trial court lacked jurisdiction to make the change, and this part of the order is void.[9]

[9] *See Partners In Bldg. v. Eure*, No. 14-12-00123-CV, 2013 WL 1279407, at *2 (Tex. App.—Houston [14th Dist.] Mar. 28, 2013, no pet.) (mem. op.).

If this court has appellate jurisdiction over the two orders and if this court were to find that the Estate Land Parties' appellate complaints have merit, this court could conclude that the challenged parts of the orders are void, and this court could remand to the trial court for further proceedings. Though the sale has occurred, the receiver is still operating, and the Estate Land Parties and Anthony are still parties to this case.[10] The trial court could order Anthony and Kamal to *5 repay funds to the receiver or could offset amounts against any future distributions in this case as to other properties. Despite the sale of the property, this court still could render an appellate judgment that would have a practical effect.[11]

10 *See Lee*, 528 S.W.3d at 209-10 (concluding that challenges to approval of settlement agreement between the receiver and one party were not moot despite closing of the agreement because the complained-of action could still be reversed and because there still was a live controversy); *Taylor v. Hill*, 249 S.W.3d 618, 622, 624-25 (Tex. App.—Austin 2008, pet. denied) (necessarily rejecting argument that appeal in partition case was moot because the property already had been sold and the net proceeds delivered to the parties whom the trial court found to have an interest in the property).

11 *See Lee*, 528 S.W.3d at 209-10; *Taylor*, 249 S.W.3d at 622, 624-25.

The Majority's Description of the Estate Land Parties' Complaints

According to the majority, though the Estate Land Parties purport to challenge the two post-judgment orders, the substance of their appellate complaints is a challenge to the prior final judgment in which they assert that the trial court should not have ordered payment of Aaron's indebtedness from the net sale proceeds.[12] Neither the form nor the substance of the Estate Land Parties' appellate complaints challenges the prior final judgment.[13] In the challenge as to the deductions from the gross sale proceeds, the Estate Land Parties assert that the trial court erroneously approved certain deductions from the gross sale proceeds without determining whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment. Though the majority asserts that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, a review of the Estate Land Parties' appellate complaints shows that they are not challenging any matter determined in the prior judgment.[14] *6

12 *See ante* at 6-7.

13 *See supra* at 3.

14 *See ante* at 6-7.

The Majority's Addressing of the Merits in Determining Jurisdiction

Even presuming for the sake of argument that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, those challenges would be barred by law of the case, claim preclusion, or issue preclusion. None of these doctrines (or facts supporting them) would deprive this court of jurisdiction or make any appellate complaint moot.[15] If, as the majority concludes, all of the Estate Land Parties' appellate complaints contradict the trial court's prior final judgment, the proper appellate disposition would be to affirm the post-judgment orders rather than to dismiss this appeal as moot.[16] In determining whether this court lacks jurisdiction over this appeal based on mootness of the appellate complaints, this court may not address the merits of those complaints.[17] The merits of the Estate Land Parties' appellate complaints are not relevant to whether this court can render an appellate judgment that would have a practical effect, and this court should not address whether the prior judgment bars any of *7 these complaints.[18]

15 *See Philips v. McNease*, 467 S.W.3d 688, 697-99 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming, rather than dismissing appeal as moot, when the claim-preclusion doctrine barred the appellate complaints); *Jacobs v. Jacobs*, 448 S.W.3d 626, 630-31 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (affirming post-judgment orders, rather than dismissing appeal as moot, when the law-of-the-case doctrine barred the appellate complaints); *Simulis, LLC v. Gen. Elec. Capital Corp.*, 392 S.W.3d 729, 735 n.7 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (noting that the proper recourse if a plaintiff asserts claims barred by law of the case, claim preclusion, or issue preclusion is for the defendant to seek judgment on the merits by filing a summary-judgment motion).

16 *See Philips*, 467 S.W.3d at 697-99; *Jacobs*, 448 S.W.3d at 630-31; *Simulis, LLC*, 392 S.W.3d at 735 n.7.

17 *See Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488, 502 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (concluding that, in determining this court's jurisdiction, the court does not address the merits of any of the claims); *Smith v. City of League City*, 338 S.W.3d 114, 129 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding that the merits of a claim are not at issue in determining whether courts have subject-matter jurisdiction over the claims and presuming for the sake of argument that the claim had merit in determining whether courts had jurisdiction over the claim).

18 *See Schwartzott*, 403 S.W.3d at 502; *Smith*, 338 S.W.3d at 129.

For the foregoing reasons, the Estate Land Parties' complaints are not moot.[19] Because the majority reaches the opposite conclusion and dismisses this appeal on mootness grounds, I respectfully dissent.

19 *See In re C.C.E.*, 530 S.W.3d at 318-19; *Lee*, 528 S.W.3d at 209-10; *Taylor*, 249 S.W.3d at 622, 624-25.

/s/ Kem Thompson Frost

Chief Justice Panel consists of Chief Justice Frost and Justices Donovan and Wise. (Donovan, J., majority).

No. 03-19-00485-CV
Court of Appeals of Texas, Third District, Austin

Goepp v. Comerica Bank & Trust, N.A.

Decided Jul 9, 2021

03-19-00485-CV

07-09-2021

Robert Goepp, Heidi M. Goepp-Schurman Appellant//Cross-Appellant, v. Comerica Bank & Trust, N.A.; Heidi M. Goepp-Schurman; and Myra J. Goepp, Comerica Bank & Trust, N.A.; Robert Goepp; and Myra J. Goepp Appellees//Cross-Appellees,

---

Melissa Goodwin, Justice

FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY NO. C-1-PB-18-001903, THE HONORABLE GUY S. HERMAN, JUDGE PRESIDING

Before Justices Goodwin, Kelly, and Smith

MEMORANDUM OPINION

Melissa Goodwin, Justice

Robert C. Goepp (Bob) and Heidi Goepp-Schurman each appeal from the probate court's order denying Heidi's plea to the jurisdiction and motion to abate or dismiss the case; overruling Bob's reimbursement request; and granting Comerica's petition for settlement of trustee's final account and for an order of no liability. For the following reasons, we affirm.

BACKGROUND

Bob, Heidi, and Myra Goepp are the children of Robert A. and Iraida P. Goepp.[1] During their lifetimes, Robert and Iraida established the Robert A. Goepp Marital Trust and the Iraida P. Goepp Living Trust with their children as the ultimate beneficiaries. After Robert *1 passed away, a Travis County guardianship proceeding for Iraida was initiated in 2011, and a guardian was appointed. The children also began serving as co-trustees of the Goepp Trusts. After conflicts arose, however, the children entered into a family settlement agreement (the FSA) in 2014 that provided for a corporate successor trustee, and Comerica filled that role. The FSA also provided that Bob would receive a parcel of real property (the Kilbourn Property); that Heidi and Myra would receive preferential cash distributions based on a Kilbourn Property appraisal; and that Myra or Bob "may pay incidental expenses relating to Iraida Goepp's care" and "submit those payments for reimbursements" to the "the Successor Trustee." Iraida passed away in 2015, and the next year the probate court signed an order admitting a copy of Iraida's will and appointing Comerica as dependent administrator. In April 2018, Comerica filed its final account and application to close Iraida's estate and to discharge the administrator.

1

[1] Because the parties share similar last names, we will refer to them by their first names and, consistent with the parties' appellation, refer to the father Robert A. Goepp as "Robert" and the son Robert C. Goepp as "Bob."

In October 2018, Comerica, as trustee of the Goepp Trusts, filed a First Amended Petition for Settlement of Trustee's Final Account and Order of No Liability (the Trustee's Petition). Bob "object[ed]" to the Trustee's Petition, complaining about the timing of certain preferential distribution payments, about the calculations of interest on the distributions, and that he "has yet to be reimbursed the monies owed to him for out of pocket expenses of durable medical equipment purchased on behalf of Iraida." Heidi, initially acting pro se, filed an answer in December raising various complaints. Later that month, Heidi's lawyer filed an amended answer entering a general denial. In January 2019, Myra filed a general denial.

The probate court conducted a bench trial on the Trustee's Petition in June 2019. In its opening remarks, the probate court stated "that there is a plea to the jurisdiction and some other pleading" that "is being filed as we speak over with the clerk" and that "we're not going to proceed until the filer of that document, which I
2 understand is maybe Heidi Goepp, is back with *2 her pleading and then we can get our announcements." At that time, Heidi, acting pro se at the trial, was filing a "Plea to the Jurisdiction, Motion to Vacate All Orders and Abate or Dismiss Case" (the Plea). When Heidi returned, the probate court stated, "You should have filed that with the clerk before today," and, "We'll take another recess." After the recess, Heidi testified as to the Plea on voir dire. Following Heidi's testimony, the probate court orally denied the Plea. The trial then proceeded with Heidi, Myra, and Bob testifying along with Comerica's witness.

Following the trial, the probate court entered an order denying Heidi's Plea and granting the Trustee's Petition. In the order, the probate court concluded that it had jurisdiction and that venue was proper; that Comerica administered the Goepp Trusts in accordance with the terms of the instruments and with Texas law; that Comerica is entitled to court settlement and release of liability as to the Goepp Trusts; that Heidi and Myra were each entitled to preferential distributions of $128,865.29 pursuant to the FSA; and that Bob's reimbursement requests are denied as "either barred by the Statute of Limitations" or "controlled by the FSA."

In this appeal, Bob challenges both the legal and factual sufficiency of the evidence supporting the amount for preferential distributions and the denial of his request for reimbursement. Heidi also appeals, challenging the probate court's denial of her Plea and the no liability ruling.

DISCUSSION

Jurisdiction

As a threshold matter, Heidi challenges the probate court's jurisdiction over the case, raising three arguments: the probate court lacked subject matter jurisdiction over the case because "a statutory probate court cannot take
3 jurisdiction of an inter vivos trust" and "exclusive *3 jurisdiction is in District Court under Tex. Prop. Code Section 115 and Tex. Est. Code Chapter 32"; an Illinois court has exclusive jurisdiction by the express language of the Living Trust; and an Illinois court acquired dominant jurisdiction over the case thereby depriving the Texas probate court of jurisdiction.[2] We consider each argument in turn.

> [2] These arguments were raised in four issues: whether the probate court committed reversible error by denying Heidi's Plea; whether the court erred by assuming subject matter jurisdiction over the Goepp Trusts; whether the court erred by applying Texas law in violation of the Goepp Trusts; and whether the trust lawsuit was ancillary to or related to any pending estate matter when filed.

Heidi did not raise her first argument regarding the probate court's subject matter jurisdiction in her Plea. Nevertheless, "[s]ubject matter jurisdiction is an issue that may be raised for the first time on appeal." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Although subsection 115.001(a) of the Texas Property Code grants a district court "original and exclusive jurisdiction over all proceedings by or

against a trustee and all proceedings concerning trusts," that subsection is prefaced with "[e]xcept as provided by Subsection (d) of this section." Tex. Prop. Code § 115.001(a). Subsection (d)(1) states, "The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on: (1) a statutory probate court[.]" *Id.* § 115.001(d)(1). And jurisdiction is conferred by law on a statutory probate court by section 32.006 of the Texas Estates Code: "In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of" both "an action by or against a trustee" and "an action involving an intervivos trust, testamentary trust, or charitable trust." Tex. Est. Code § 32.006(1), (2); *see Johnson v. Johnson*, No. 04-19-00500-CV, 2020 WL 214762, at *3 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) (mem. op.) (noting jurisdiction of "statutory probate courts is broad"). It is undisputed that the Goepp Trusts are intervivos trusts
4 and that Comerica, as trustee, brought the underlying suit in a statutory probate *4 court in Travis County. *See* Tex. Gov't Code § 25.2291(c) ("Travis County has one statutory probate court, the Probate Court No. 1 of Travis County."). Thus, in light of section 32.006 of the Texas Estates Code, section 115.001 of the Texas Property Code did not deprive the probate court of subject matter jurisdiction over the underlying case.[3]

[3] In her fourth issue, Heidi asserts that the "trust matter is not 'incident to or ancillary to' any pending estate matter in probate court." Heidi argues that section 115.001(d) of the Texas Property Code "is limited to matters '*incident to an estate*' and apply only when a probate proceeding relating to such estate is actually '*pending*' in the probate court," citing *Baker v. Baker*, No. 02-18-00051-CV, 2018 WL 4224843, at *1-2 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.), and that "[t]o trigger a statutory probate court's exclusive subject-matter jurisdiction over a cause 'related to the probate proceeding,' a probate proceeding must be pending." But *Baker* concerned a statutory probate court's jurisdiction under section 32.005 of the Texas Estates Code, not section 32.006, and is therefore not applicable here. *See id.* (citing Tex. Est. Code § 32.005(a) (providing statutory probate court with "exclusive jurisdiction of all probate proceedings" and related causes of action unless its jurisdiction "is concurrent with the jurisdiction" of "any other court")). Section 32.006 concerns a statutory probate court's independent jurisdiction, not its jurisdiction over causes related to the probate proceeding. *See Lee v. Lee*, 528 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Our conclusion that a statutory probate court has jurisdiction over 'an action involving an inter vivos trust, testamentary trust, or charitable trust' as unambiguously stated in Texas Estates Code section 32.006, is unaffected by the authorities Susan cites concerning proceedings 'appertaining to or incident to an estate.' The authorities on which Susan relies deal with conditions in which a court exercising original probate jurisdiction can exercise jurisdiction over related or ancillary matters; they do not address a statutory probate court's independent jurisdiction over trust actions.").

In Heidi's next argument, she argues that an Illinois court has exclusive jurisdiction under section 10.16 of the Living Trust:

> 10.16 Controlling Law. The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

Contrary to Heidi's position in her appellate briefing, however, section 10.16 does not implicate the probate
5 court's subject matter jurisdiction. As to section 10.16's first sentence, a "foreign *5 choice-of-law provision" does not prevent Texas courts from exercising jurisdiction over the case. *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 598 (Tex. 2007); *see Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (noting "longstanding principle that subject-matter jurisdiction is a power that 'exists by operation of law only, and cannot be conferred upon any court by consent or waiver'" (quoting *Federal Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943))). Regarding section 10.16's second sentence, Heidi asserts, without citing any authority, that "[t]he Texas Estates Code makes the situs of administration of the trust during the preceding four years the

location for subject matter jurisdiction." Presumably, Heidi is referring to section 115.002(c) of the Texas Property Code, which provides that "the venue of an action under Section 115.001" when there is a corporate trustee shall be the county in which either "the situs of an administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed" or "any corporate trustee maintains its principal office in this state." Tex. Prop. Code § 115.002(c). But "[v]enue pertains solely to where a suit may be brought and is a different question from whether the court has 'jurisdiction of the property or thing in controversy, '" and "unlike subject-matter jurisdiction . . . venue may be waived if not challenged in due order and on a timely basis." *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (first quoting *National Life Co. v. Rice*, 167 S.W.2d 1021, 1024 (Tex. [Comm'n Op.] 1943); then citing Tex.R.Civ.P. 86(1); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 700 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)). Because it is undisputed that Heidi filed an answer and that her attorney filed a general denial approximately six months before filing the Plea, Heidi waived any objections to the alleged improper venue. *See In re OSG Ship Mgmt., Inc.*, 514 S.W.3d 331, 337 (Tex. App.— Houston [14th Dist.] 2016, orig.
6 proceeding) ("[U]nless venue is challenged by a motion to *6 transfer venue filed before or concurrently with the defendant's answer, any objection to venue is waived." (citing *Lui v. Cici Enters. L.P.*, No. 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.))); *see also* Tex.R.App.P. 33.1(a) (requiring as prerequisite to presenting complaint for appellate review that complaint was made to trial court by timely request, objection, or motion); Tex.R.Civ.P. 86(1) ("An objection to improper venue is waived if not made by a written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.").

Turning to Heidi's dominant jurisdiction argument—the primary argument raised in her Plea—"[t]he general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (orig. proceeding) (quoting *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974)); *see In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (per curiam) (noting that "filing a dilatory plea in abatement is the proper method for drawing a court's attention to another court's possible dominant jurisdiction"). Heidi argues that dominant jurisdiction applies because "[t]he Cook County [Illinois] Circuit Court has reopened its prior filed 2014 case involving the same parties and trusts." However, dominant jurisdiction applies to suits filed in different counties within Texas; the doctrine "does not apply to suits filed in other states because 'every state is entirely sovereign and unrestricted in its powers.'" *In re Old Am. Cty. Mut. Fire Ins.*, No. 03-12-00588-CV, 2012 WL 6699052, at *1 (Tex. App.—Austin Dec. 20, 2012, orig. proceeding) (mem. op.) (quoting *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 794 (Tex. App.—Dallas 2012, no pet.)). Instead, states apply a "general rule" based on "state-to-state comity, which, while not a constitutional obligation, is 'a
7 principle of mutual convenience whereby one state or jurisdiction will give *7 effect to the laws and judicial decisions of another'"; namely, "[w]hen a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit." *In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) (orig. proceeding) (quoting *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986)). In this situation, "the proper course of action is for the first-filing party to seek a stay, rather than seeking relief through a plea in abatement," and "we should consider whether the later-filed case should be stayed under the doctrine of comity." *Old Am.*, 2012 WL 6699052, at *1-2. However, "the mere pendency of a previously filed action in one state does not, in itself, mandate abatement or dismissal in another state," *AutoNation*, 228 S.W.3d at 670, and "[b]eing voluntary and not obligatory, the application of comity vests in the sound discretion of the trial court," *Ashton Grove*, 366 S.W.3d at 794. We therefore "examine the pleadings filed in the cases and ask whether the trial court abused its discretion in refusing to grant the stay [in] the later-filed action" by making a

decision "so arbitrary and unreasonable that it amount to a 'clear and prejudicial error of law'" or by "misappl[ying] the law to the facts." *Old Am.*, 2012 WL 6699052, at *2 (quoting *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding)).

Assuming Heidi's Plea requesting abatement based on dominant jurisdiction could be construed as a motion to stay based on comity, we conclude that the probate court did not abuse its discretion in denying the request for a stay. "To show its entitlement to a stay, the party must generally show 'that the two suits involve the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief.'" *Id.* (quoting *Griffith v. Griffith*, 341 S.W.3d 43, 54 (Tex. App.—San Antonio 2011, no pet.)). Heidi's Plea referenced the following order as reopening the Cook County suit: "June 5, 2019 Order of Cook County, Illinois Court re-opening this case for dominant jurisdiction of the Goepp family trusts." But *8 Heidi did not attach the Cook County order to her Plea and admitted in her testimony that "it wasn't included in [the Plea]."[4] At trial, counsel for the parties disputed whether there was pending litigation in Cook County, Illinois, and when Bob's counsel stated that there had been a filing in Cook County the day before, Comerica's counsel argued that Comerica had not received any notice of any filing in Cook County. The probate court expressed confusion and asked whether Comerica's counsel would like to take Heidi on voir dire. On voir dire, Comerica's counsel asked whether Heidi had the document from the Illinois court. When Heidi tried to show a document on her telephone, Comerica's counsel responded that he needed to "see the document." And when Heidi requested to print the document, Comerica's counsel responded, "I don't think there is any way to print it" and "even if you printed it, it wouldn't be a certified document. It would be a copy of a purported certified copy." Heidi also testified that she and Bob had filed suit against Comerica with "Judge Brennan in Chicago" and that Judge Brennan "left [the case] open." But Comerica's counsel objected "to any testimony about what Judge Brennan did without seeing the certified document," and the probate court sustained the objection. Finally, when asked if she filed something in Cook County in the last six months, Heidi said "No" but "I know that something was filed. The contents of the filing, I do not know." On this record, we conclude that the probate court's denial of Heidi's request for a stay—to the extent her Plea could be construed as such—was not an abuse of discretion. *See id.*; *Ashton Grove*, 366 S.W.3d at 794. *9

[4] Although Heidi was acting pro se at trial, pro se litigants "are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties." *Stewart v. Texas Health & Hum. Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *1 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978)).

Accordingly, we overrule Heidi's first four issues addressing the probate court's jurisdiction.

No Liability Order

In her fifth and final issue, Heidi argues that the probate court "abus[ed] [its] discretion in issuing an order of 'no liability' . . . to extinguish [Heidi's] claims for breach of trust and breach of fiduciary duty in violation of the law." Heidi does not challenge the sufficiency of the evidence supporting the order; rather, she argues that the probate court "cannot rule that Comerica . . . has no liability or attempt to adjudicate this claim, which would have a preclusive effect on further litigation elsewhere." Heidi's argument is not exactly clear. To the extent Heidi is challenging the order on the jurisdictional grounds raised in her first four issues, we have overruled those issues. And if Heidi is raising a nonjurisdictional ground to challenge the issuance of the "no liability" order, she did not preserve error as to this issue by making this complaint to the probate court and obtaining a ruling on the complaint. *See* Tex.R.App.P. 33.1(a). We therefore overrule Heidi's fifth and final issue.[5] *10

5 In her appellate reply brief, Heidi raises for the first time arguments related to the Uniform Enforcement of Foreign Judgments Act, the Full Faith and Credit Clause of the United States Constitution, and the doctrine of res judicata, and she attaches various documents to her reply brief that were not included in the record. Because these arguments were not raised in her opening brief, we do not consider them. *See* Tex.R.App.P. 38.3 ("The appellant may file a reply brief addressing any matter in the appellee's brief."); *McFadden v. Olesky*, 517 S.W.3d 287, 293 n.3 (Tex. App.—Austin 2017, pet. denied) ("Ordinarily, an argument asserted for the first time in a reply brief is waived and need not be considered by an appellate court."). Nor do we consider the documents that were not properly presented to the probate court and included in the record on appeal. *See* Tex.R.App.P. 34.1, 38.1(g); *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied) ("We are limited to the appellate record provided."); *Burke v. Insurance Auto Auctions Corp.*, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, pet. denied) (explaining that documents that are cited in brief and attached as appendices may not be considered by appellate courts if they are not formally included in record on appeal).

Interest Calculations

Having overruled Heidi's issues, we now turn to Bob's two appellate issues. In his first issue, Bob claims that the trial court "erred in ordering a distribution in the amount of $128,865.29 be made, each, to Heidi and Myra" because "[t]he only evidence to support any distribution was that such amount should be $126,572.88."

The FSA provides that "Heidi and Myra shall be entitled to preferential distributions upon Iraida's death from the Iraida Goepp Trust equivalent to the value of the Kilbourn [Property] appraisal" and that "[t]he preferential distributions shall also accrue simple interest of 3.5% from the date that the deed transferring the Kilbourn [Property] to [Bob] is executed until the date the preferential distributions are completed." It is undisputed on appeal that the principal amount for the preferential distributions was $560,000; that the interest rate was 3.5%; that the relevant time frame for interest accrual was February 10, 2015, through May 31, 2019; that on May 25, 2018, the balance of principal and interest had accrued to $624,438.36 ($64,438.36 in accrued interest and $560,000 as principal); and that on May 25, 2018, Comerica made a $500,000 payment from the estate trust to Myra and to Heidi as a partial payment.

11 *11 At trial, Comerica submitted exhibit 5, which calculated a $126,572.88 total balance due as of May 31, 2019. Exhibit 5 applied the $500,000 partial payment made on May 25, 2018, to the principal alone and calculated interest going forward on the remaining $60,000 outstanding principal amount.[6] However, Myra's attorney cross examined Comerica's representative as to the calculations on exhibit 5, asking, "Isn't the normal procedure on a loan to charge a payment against interest first?" Comerica's representative said she did not know if that is true. The probate court stated, "I can tell you from paying a mortgage that some of that is princip[al], some of that is interest." Myra's attorney continued, "So if you charge that $500,000 first to the earned interest at that point, would . . . it increase the amount that is due to Heidi and Myra?" Comerica's representative said that she believed so, that the calculation could be easily made, and that her estimate is that it would amount to "a few thousand" more for Myra and Heidi. At the close of trial, the probate court asked Comerica's attorney: "I would like one last exhibit .... And that is an exhibit from your client. Because they answered some questions to [Myra's attorney] that the[re] may be a different calculation as to what is owed if you take the payment made to interest first, princip[al] second." Comerica submitted exhibit 12; the exhibit is included in the reporter's record on appeal, and the appellate record does not indicate any objection to the exhibit. In exhibit 12, Comerica applied the $500,000 partial payment to pay off first the interest that had accrued as of May 25, 2018, and then the principal amount. Thus, the remaining principal amount for exhibit 12 is higher than on exhibit 5. Exhibit 12 then shows the calculated interest on the remaining principal amount from May 26, 2018, through May 31, 2019, and a total balance due on May 31, 2019, of $128,865.30.

6 Specifically, the exhibit calculated interest on the $60,000 principal amount from May 26, 2018, through May 31, 2019, for an additional $2,134.52, which equaled $66,572.88 in total interest due when combined with the outstanding interest of $64,438.36 as of May 26, 2018. Adding the total interest due to the remaining $60,000 principal balance created a $126,572.88 total balance due on May 31, 2019.

After the probate court made the request for exhibit 12, Bob's attorney asked to address that point, stating, "That's not what the [FSA] says. It's not structured as a loan." The probate court asked, "Which way should it come?" Bob's attorney said, "The cheapest way to my client[.]" On appeal, however, Bob challenges only the legal and factual sufficiency of the evidence; he does not address how the FSA structures how a partial payment would apply to the preferential distribution. In its order, the probate court concluded that the FSA
12 "required preferential distributions with interest to Heidi [] and Myra [] related to Kilbourn Property and *12 the remaining amount of unpaid preferential distributions (including accrued interest) as of May 31, 2019 are $128,865.29 to Heidi [] and $128,865.29 to Myra[.]" When, as here, no findings of fact or conclusions of law are filed or requested following a bench trial, it is implied that the trial court made all the necessary findings to support the judgment. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Because the appellate record includes the reporter's record and clerk's record, these implied findings are not conclusive and may be challenged on appeal for legal and factual sufficiency. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). We review sufficiency challenges under well-established standards of review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) (describing standard for reviewing legal sufficiency challenges); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (describing standard for reviewing factual sufficiency challenges).

On appeal, Bob argues that "Comerica's Exhibit 12 reflects nothing more than a document with numbers" and that "[t]here is no testimony to support its accuracy." But exhibit 12 is not merely "a document with numbers"; it expressly lists the principal amount, the interest rate, the number of days for monthly time frames, and the interest due for each monthly time frame. And on appeal Bob does not identify any inaccuracies on exhibit 12. Additionally, exhibit 12 is consistent with the testimony of Comerica's representative that her estimate would be that the balance due to Myra and Heidi would be "a few thousand" more than the amount listed in exhibit 5. Accordingly, we conclude that exhibit 12 and the testimony of Comerica's representative constitute legally and factually sufficient evidence to support the probate court's judgment as to this issue and overrule Bob's first
13 issue. *13

Reimbursement Claim

In his second issue, Bob challenges the legal and factual sufficiency of the evidence to support the denial of his "request for reimbursement of amounts that he expended on behalf of his mother and which were clearly reimbursable under the terms of the [FSA]." Section 11 of the FSA provides:

> 11. *Payment of Iraida's Care Expenses*. . . . Nothing in this Agreement changes the fact that John Crane, as guardian of Iraida Goepp's Estate, or Debbie Pearson, as guardian of Iraida Goepp's person, has the proper authority to make health-care decisions for Iraida Goepp, including changes to her care that may result in greater expenses. Any of Myra or Robert may pay incidental expenses relating to Iraida Goepp's care and submit those payments for reimbursements to the Guardian of the Estate or the Successors Trustee.

At trial, Bob submitted an exhibit requesting $31,272.32 for reimbursement and attaching various agreements, invoices, and copies of checks related to that reimbursement request. Comerica's representative testified that she saw this reimbursement request for the first time the day before trial and that she was never presented with

any of the bills before the day of the hearing. She also testified that many of those charges were made before the FSA was executed in February 2014 and that most of the expenses concerned hyperbaric chamber treatment. When Comerica's counsel asked Bob whether Iraida received any of the hyperbaric chamber treatments, Bob responded, "I don't know." And Heidi asked Bob on cross examination, "Why didn't our mother receive the hyperbaric treatments?" Bob responded that the court made a ruling that "while I was still validly medical power of attorney that there could be no changes to her care." In its final order, the probate court ordered, "All other claims for reimbursement made by [Bob] at the hearing on June 6th, 2019, are either barred by the Statute of Limitations or are controlled by the [FSA] and are therefore DENIED." *14

As the party requesting affirmative relief, Bob bore the burden of proof as to his entitlement to reimbursement. *See TRO-X, L.P. v. Anadarko Petrol. Corp.*, 548 S.W.3d 458, 465-66 (Tex. 2018) (noting "well accepted postulate of the common law" that civil litigant asserting affirmative claim for relief has burden of proof (quoting *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984))). When, as here, the appellant is attacking the sufficiency of the evidence supporting an adverse implied finding on an issue for which it had the burden of proof, we sustain a legal sufficiency challenge if the appellant "demonstrate[s] on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue" and a factual sufficiency challenge if the appellant "demonstrate[s] on appeal that the adverse finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

We conclude that Bob did not meet his appellate burden. First, section 11 of the FSA provides that Bob "*may pay* incidental expenses" and "submit *those* payments for reimbursements." (Emphases added.) The FSA therefore authorizes future payments and reimbursement for those payments; it does not authorize reimbursement for payments already made at the time the FSA was signed.[7] Thus, there was sufficient evidence supporting the trial court's conclusion that Bob was not entitled to reimbursement for expenses paid prior to the FSA. Second, the payments must be "incidental expenses relating to Iraida Goepp's care." The remaining expenses were related to the hyperbaric chamber treatments. But there was sufficient evidence of a court ruling in place that prevented changes to Iraida's care to provide such *15 treatment and that Iraida did not receive any such care; thus, those payments were not "relat[ed] to Iraida Goepp's care." Accordingly, we overrule Bob's second issue.

[7] Section 7 of the FSA provided for reimbursement of already paid "Trust expense[s]": "7. *Expense Reimbursement*. Bob, Myra and Heidi shall each receive $650,000 in Trust expense reimbursement and pre-death estate planning distributions from the Iraida Goepp Trust."

CONCLUSION

Having overruled Heidi's and Bob's issues on appeal, we affirm the probate court's final order.

Affirmed *16

Goepp v. Comerica Bank

Decided Jul 9, 2021

NO. 03-19-00485-CV

07-09-2021

Appellant, Robert Goepp // Cross-Appellant, Heidi M. Goepp-Schurman v. Appellees, Comerica Bank & Trust, N.A.; Heidi M. Goepp-Schurman; and Myra J. Goepp // Cross-Appellees, Comerica Bank & Trust, N.A.; Robert Goepp; and Myra J. Goepp

---

Melissa Goodwin, Justice

**FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY
NO. C-1-PB-18-001903, THE HONORABLE GUY S. HERMAN, JUDGE
PRESIDING**MEMORANDUM OPINION

Robert C. Goepp (Bob) and Heidi Goepp-Schurman each appeal from the probate court's order denying Heidi's plea to the jurisdiction and motion to abate or dismiss the case; overruling Bob's reimbursement request; and granting Comerica's petition for settlement of trustee's final account and for an order of no liability. For the following reasons, we affirm.

BACKGROUND

Bob, Heidi, and Myra Goepp are the children of Robert A. and Iraida P. Goepp.[1] During their lifetimes, Robert and Iraida established the Robert A. Goepp Marital Trust and the Iraida P. Goepp Living Trust with their children as the ultimate beneficiaries. After Robert *2 passed away, a Travis County guardianship proceeding for Iraida was initiated in 2011, and a guardian was appointed. The children also began serving as co-trustees of the Goepp Trusts. After conflicts arose, however, the children entered into a family settlement agreement (the FSA) in 2014 that provided for a corporate successor trustee, and Comerica filled that role. The FSA also provided that Bob would receive a parcel of real property (the Kilbourn Property); that Heidi and Myra would receive preferential cash distributions based on a Kilbourn Property appraisal; and that Myra or Bob "may pay incidental expenses relating to Iraida Goepp's care" and "submit those payments for reimbursements" to the "the Successor Trustee." Iraida passed away in 2015, and the next year the probate court signed an order admitting a copy of Iraida's will and appointing Comerica as dependent administrator. In April 2018, Comerica filed its final account and application to close Iraida's estate and to discharge the administrator.

2

[1] Because the parties share similar last names, we will refer to them by their first names and, consistent with the parties' appellation, refer to the father Robert A. Goepp as "Robert" and the son Robert C. Goepp as "Bob."

In October 2018, Comerica, as trustee of the Goepp Trusts, filed a First Amended Petition for Settlement of Trustee's Final Account and Order of No Liability (the Trustee's Petition). Bob "object[ed]" to the Trustee's Petition, complaining about the timing of certain preferential distribution payments, about the calculations of

interest on the distributions, and that he "has yet to be reimbursed the monies owed to him for out of pocket expenses of durable medical equipment purchased on behalf of Iraida." Heidi, initially acting pro se, filed an answer in December raising various complaints. Later that month, Heidi's lawyer filed an amended answer entering a general denial. In January 2019, Myra filed a general denial.

The probate court conducted a bench trial on the Trustee's Petition in June 2019. In its opening remarks, the probate court stated "that there is a plea to the jurisdiction and some other pleading" that "is being filed as we speak over with the clerk" and that "we're not going to proceed until the filer of that document, which I understand is maybe Heidi Goepp, is back with *3 her pleading and then we can get our announcements." At that time, Heidi, acting pro se at the trial, was filing a "Plea to the Jurisdiction, Motion to Vacate All Orders and Abate or Dismiss Case" (the Plea). When Heidi returned, the probate court stated, "You should have filed that with the clerk before today," and, "We'll take another recess." After the recess, Heidi testified as to the Plea on voir dire. Following Heidi's testimony, the probate court orally denied the Plea. The trial then proceeded with Heidi, Myra, and Bob testifying along with Comerica's witness.

Following the trial, the probate court entered an order denying Heidi's Plea and granting the Trustee's Petition. In the order, the probate court concluded that it had jurisdiction and that venue was proper; that Comerica administered the Goepp Trusts in accordance with the terms of the instruments and with Texas law; that Comerica is entitled to court settlement and release of liability as to the Goepp Trusts; that Heidi and Myra were each entitled to preferential distributions of $128,865.29 pursuant to the FSA; and that Bob's reimbursement requests are denied as "either barred by the Statute of Limitations" or "controlled by the FSA."

In this appeal, Bob challenges both the legal and factual sufficiency of the evidence supporting the amount for preferential distributions and the denial of his request for reimbursement. Heidi also appeals, challenging the probate court's denial of her Plea and the no liability ruling.

DISCUSSION

Jurisdiction

As a threshold matter, Heidi challenges the probate court's jurisdiction over the case, raising three arguments: the probate court lacked subject matter jurisdiction over the case because "a statutory probate court cannot take jurisdiction of an inter vivos trust" and "exclusive *4 jurisdiction is in District Court under Tex. Prop. Code Section 115 and Tex. Est. Code Chapter 32"; an Illinois court has exclusive jurisdiction by the express language of the Living Trust; and an Illinois court acquired dominant jurisdiction over the case thereby depriving the Texas probate court of jurisdiction.[2] We consider each argument in turn.

[2] These arguments were raised in four issues: whether the probate court committed reversible error by denying Heidi's Plea; whether the court erred by assuming subject matter jurisdiction over the Goepp Trusts; whether the court erred by applying Texas law in violation of the Goepp Trusts; and whether the trust lawsuit was ancillary to or related to any pending estate matter when filed.

Heidi did not raise her first argument regarding the probate court's subject matter jurisdiction in her Plea. Nevertheless, "[s]ubject matter jurisdiction is an issue that may be raised for the first time on appeal." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Although subsection 115.001(a) of the Texas Property Code grants a district court "original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts," that subsection is prefaced with "[e]xcept as provided by Subsection (d) of this section." Tex. Prop. Code § 115.001(a). Subsection (d)(1) states, "The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on: (1) a statutory probate court[.]" *Id.* §

115.001(d)(1). And jurisdiction is conferred by law on a statutory probate court by section 32.006 of the Texas Estates Code: "In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of" both "an action by or against a trustee" and "an action involving an intervivos trust, testamentary trust, or charitable trust." Tex. Est. Code § 32.006(1), (2); *see Johnson v. Johnson*, No. 04-19-00500-CV, 2020 WL 214762, at *3 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) (mem. op.) (noting jurisdiction of "statutory probate courts is broad"). It is undisputed that the Goepp Trusts are intervivos trusts and that Comerica, as trustee, brought the underlying suit in a statutory probate *5 court in Travis County. *See* Tex. Gov't Code § 25.2291(c) ("Travis County has one statutory probate court, the Probate Court No. 1 of Travis County."). Thus, in light of section 32.006 of the Texas Estates Code, section 115.001 of the Texas Property Code did not deprive the probate court of subject matter jurisdiction over the underlying case.[3]

[3] In her fourth issue, Heidi asserts that the "trust matter is not 'incident to or ancillary to' any pending estate matter in probate court." Heidi argues that section 115.001(d) of the Texas Property Code "is limited to matters '*incident to an estate*' and apply only when a probate proceeding relating to such estate is actually '*pending*' in the probate court," citing *Baker v. Baker*, No. 02-18-00051-CV, 2018 WL 4224843, at *1-2 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.), and that "[t]o trigger a statutory probate court's exclusive subject-matter jurisdiction over a cause 'related to the probate proceeding,' a probate proceeding must be pending." But *Baker* concerned a statutory probate court's jurisdiction under section 32.005 of the Texas Estates Code, not section 32.006, and is therefore not applicable here. *See id*. (citing Tex. Est. Code § 32.005(a) (providing statutory probate court with "exclusive jurisdiction of all probate proceedings" and related causes of action unless its jurisdiction "is concurrent with the jurisdiction" of "any other court")). Section 32.006 concerns a statutory probate court's independent jurisdiction, not its jurisdiction over causes related to the probate proceeding. *See Lee v. Lee*, 528 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Our conclusion that a statutory probate court has jurisdiction over 'an action involving an inter vivos trust, testamentary trust, or charitable trust' as unambiguously stated in Texas Estates Code section 32.006, is unaffected by the authorities Susan cites concerning proceedings 'appertaining to or incident to an estate.' The authorities on which Susan relies deal with conditions in which a court exercising original probate jurisdiction can exercise jurisdiction over related or ancillary matters; they do not address a statutory probate court's independent jurisdiction over trust actions.").

In Heidi's next argument, she argues that an Illinois court has exclusive jurisdiction under section 10.16 of the Living Trust:

> 10.16 **Controlling Law.** The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

Contrary to Heidi's position in her appellate briefing, however, section 10.16 does not implicate the probate court's subject matter jurisdiction. As to section 10.16's first sentence, a "foreign *6 choice-of-law provision" does not prevent Texas courts from exercising jurisdiction over the case. *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 598 (Tex. 2007); *see Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (noting "longstanding principle that subject-matter jurisdiction is a power that 'exists by operation of law only, and cannot be conferred upon any court by consent or waiver'" (quoting *Federal Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943))). Regarding section 10.16's second sentence, Heidi asserts, without citing any authority, that "[t]he Texas Estates Code makes the situs of administration of the trust during the preceding four years the location for subject matter jurisdiction." Presumably, Heidi is referring to section 115.002(c) of the Texas Property Code, which provides that "the venue of an action under Section 115.001" when there is a corporate trustee shall be the county in which either "the situs of an administration of the trust is maintained or has been

maintained at any time during the four-year period preceding the date the action is filed" or "any corporate trustee maintains its principal office in this state." Tex. Prop. Code § 115.002(c). But "[v]enue pertains solely to where a suit may be brought and is a different question from whether the court has 'jurisdiction of the property or thing in controversy,'" and "unlike subject-matter jurisdiction . . . venue may be waived if not challenged in due order and on a timely basis." *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (first quoting *National Life Co. v. Rice*, 167 S.W.2d 1021, 1024 (Tex. [Comm'n Op.] 1943); then citing Tex. R. Civ. P. 86(1); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 700 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)). Because it is undisputed that Heidi filed an answer and that her attorney filed a general denial approximately six months before filing the Plea, Heidi waived any objections to the alleged improper venue. *See In re OSG Ship Mgmt., Inc.*, 514 S.W.3d 331, 337 (Tex. App.—Houston [14th Dist.] 2016, orig.
7 proceeding) ("[U]nless venue is challenged by a motion to *7 transfer venue filed before or concurrently with the defendant's answer, any objection to venue is waived." (citing *Lui v. Cici Enters. L.P.*, No. 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.))); *see also* Tex. R. App. P. 33.1(a) (requiring as prerequisite to presenting complaint for appellate review that complaint was made to trial court by timely request, objection, or motion); Tex. R. Civ. P. 86(1) ("An objection to improper venue is waived if not made by a written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.").

Turning to Heidi's dominant jurisdiction argument—the primary argument raised in her Plea—"[t]he general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (orig. proceeding) (quoting *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974)); *see In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (per curiam) (noting that "filing a dilatory plea in abatement is the proper method for drawing a court's attention to another court's possible dominant jurisdiction"). Heidi argues that dominant jurisdiction applies because "[t]he Cook County [Illinois] Circuit Court has re-opened its prior filed 2014 case involving the same parties and trusts." However, dominant jurisdiction applies to suits filed in different counties within Texas; the doctrine "does not apply to suits filed in other states because 'every state is entirely sovereign and unrestricted in its powers.'" *In re Old Am. Cty. Mut. Fire Ins.*, No. 03-12-00588-CV, 2012 WL 6699052, at *1 (Tex. App.—Austin Dec. 20, 2012, orig. proceeding) (mem. op.) (quoting *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 794 (Tex. App.—Dallas 2012, no pet.)). Instead, states apply a "general rule" based on "state-to-state comity, which, while not a constitutional obligation, is 'a
8 principle of mutual convenience whereby one state or jurisdiction will give *8 effect to the laws and judicial decisions of another'"; namely, "[w]hen a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit." *In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) (orig. proceeding) (quoting *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986)). In this situation, "the proper course of action is for the first-filing party to seek a stay, rather than seeking relief through a plea in abatement," and "we should consider whether the later-filed case should be stayed under the doctrine of comity." *Old Am.*, 2012 WL 6699052, at *1-2. However, "the mere pendency of a previously filed action in one state does not, in itself, mandate abatement or dismissal in another state," *AutoNation*, 228 S.W.3d at 670, and "[b]eing voluntary and not obligatory, the application of comity vests in the sound discretion of the trial court," *Ashton Grove*, 366 S.W.3d at 794. We therefore "examine the pleadings filed in the cases and ask whether the trial court abused its discretion in refusing to grant the stay [in] the later-filed action" by making a decision "so arbitrary and unreasonable that it amount to a 'clear and prejudicial error of law'" or by "misappl[ying] the law to the facts." *Old Am.*, 2012 WL 6699052, at *2 (quoting *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding)).

Assuming Heidi's Plea requesting abatement based on dominant jurisdiction could be construed as a motion to stay based on comity, we conclude that the probate court did not abuse its discretion in denying the request for a stay. "To show its entitlement to a stay, the party must generally show 'that the two suits involve the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief.'" *Id*. (quoting *Griffith v. Griffith*, 341 S.W.3d 43, 54 (Tex. App.—San Antonio 2011, no pet.)). Heidi's Plea referenced the following order as reopening the Cook County suit: "June 5, 2019 Order of Cook County, Illinois Court re-opening this case for dominant jurisdiction of the Goepp family trusts." But *9 Heidi did not attach the Cook County order to her Plea and admitted in her testimony that "it wasn't included in [the Plea]."[4] At trial, counsel for the parties disputed whether there was pending litigation in Cook County, Illinois, and when Bob's counsel stated that there had been a filing in Cook County the day before, Comerica's counsel argued that Comerica had not received any notice of any filing in Cook County. The probate court expressed confusion and asked whether Comerica's counsel would like to take Heidi on voir dire. On voir dire, Comerica's counsel asked whether Heidi had the document from the Illinois court. When Heidi tried to show a document on her telephone, Comerica's counsel responded that he needed to "see the document." And when Heidi requested to print the document, Comerica's counsel responded, "I don't think there is any way to print it" and "even if you printed it, it wouldn't be a certified document. It would be a copy of a purported certified copy." Heidi also testified that she and Bob had filed suit against Comerica with "Judge Brennan in Chicago" and that Judge Brennan "left [the case] open." But Comerica's counsel objected "to any testimony about what Judge Brennan did without seeing the certified document," and the probate court sustained the objection. Finally, when asked if she filed something in Cook County in the last six months, Heidi said "No" but "I know that something was filed. The contents of the filing, I do not know." On this record, we conclude that the probate court's denial of Heidi's request for a stay—to the extent her Plea could be construed as such—was not an abuse of discretion. *See id*.; *Ashton Grove*, 366 S.W.3d at 794. *10

[4] Although Heidi was acting pro se at trial, pro se litigants "are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties." *Stewart v. Texas Health & Hum. Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *1 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978)).

Accordingly, we overrule Heidi's first four issues addressing the probate court's jurisdiction.

No Liability Order

In her fifth and final issue, Heidi argues that the probate court "abus[ed] [its] discretion in issuing an order of 'no liability' . . . to extinguish [Heidi's] claims for breach of trust and breach of fiduciary duty in violation of the law." Heidi does not challenge the sufficiency of the evidence supporting the order; rather, she argues that the probate court "cannot rule that Comerica . . . has no liability or attempt to adjudicate this claim, which would have a preclusive effect on further litigation elsewhere." Heidi's argument is not exactly clear. To the extent Heidi is challenging the order on the jurisdictional grounds raised in her first four issues, we have overruled those issues. And if Heidi is raising a nonjurisdictional ground to challenge the issuance of the "no liability" order, she did not preserve error as to this issue by making this complaint to the probate court and obtaining a ruling on the complaint. *See* Tex. R. App. P. 33.1(a). We therefore overrule Heidi's fifth and final issue.[5] *11

[5] In her appellate reply brief, Heidi raises for the first time arguments related to the Uniform Enforcement of Foreign Judgments Act, the Full Faith and Credit Clause of the United States Constitution, and the doctrine of res judicata, and she attaches various documents to her reply brief that were not included in the record. Because these arguments were not raised in her opening brief, we do not consider them. *See* Tex. R. App. P. 38.3 ("The appellant may file a reply brief addressing any matter in the appellee's brief."); *McFadden v. Olesky*, 517 S.W.3d 287, 293 n.3 (Tex. App.—Austin

2017, pet. denied) ("Ordinarily, an argument asserted for the first time in a reply brief is waived and need not be considered by an appellate court."). Nor do we consider the documents that were not properly presented to the probate court and included in the record on appeal. *See* Tex. R. App. P. 34.1, 38.1(g); *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied) ("We are limited to the appellate record provided."); *Burke v. Insurance Auto Auctions Corp.*, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, pet. denied) (explaining that documents that are cited in brief and attached as appendices may not be considered by appellate courts if they are not formally included in record on appeal).

Interest Calculations

Having overruled Heidi's issues, we now turn to Bob's two appellate issues. In his first issue, Bob claims that the trial court "erred in ordering a distribution in the amount of $128,865.29 be made, each, to Heidi and Myra" because "[t]he only evidence to support any distribution was that such amount should be $126,572.88."

The FSA provides that "Heidi and Myra shall be entitled to preferential distributions upon Iraida's death from the Iraida Goepp Trust equivalent to the value of the Kilbourn [Property] appraisal" and that "[t]he preferential distributions shall also accrue simple interest of 3.5% from the date that the deed transferring the Kilbourn [Property] to [Bob] is executed until the date the preferential distributions are completed." It is undisputed on appeal that the principal amount for the preferential distributions was $560,000; that the interest rate was 3.5%; that the relevant time frame for interest accrual was February 10, 2015, through May 31, 2019; that on May 25, 2018, the balance of principal and interest had accrued to $624,438.36 ($64,438.36 in accrued interest and $560,000 as principal); and that on May 25, 2018, Comerica made a $500,000 payment from the estate trust to Myra and to Heidi as a partial payment.

At trial, Comerica submitted exhibit 5, which calculated a $126,572.88 total balance due as of May 31, 2019. Exhibit 5 applied the $500,000 partial payment made on May 25, 2018, to the principal alone and calculated interest going forward on the remaining $60,000 outstanding principal amount.[6] However, Myra's attorney cross examined Comerica's representative as to the calculations on exhibit 5, asking, "Isn't the normal
12 procedure on a loan to *12 charge a payment against interest first?" Comerica's representative said she did not know if that is true. The probate court stated, "I can tell you from paying a mortgage that some of that is princip[al], some of that is interest." Myra's attorney continued, "So if you charge that $500,000 first to the earned interest at that point, would . . . it increase the amount that is due to Heidi and Myra?" Comerica's representative said that she believed so, that the calculation could be easily made, and that her estimate is that it would amount to "a few thousand" more for Myra and Heidi. At the close of trial, the probate court asked Comerica's attorney: "I would like one last exhibit . . . . And that is an exhibit from your client. Because they answered some questions to [Myra's attorney] that the[re] may be a different calculation as to what is owed if you take the payment made to interest first, princip[al] second." Comerica submitted exhibit 12; the exhibit is included in the reporter's record on appeal, and the appellate record does not indicate any objection to the exhibit. In exhibit 12, Comerica applied the $500,000 partial payment to pay off first the interest that had accrued as of May 25, 2018, and then the principal amount. Thus, the remaining principal amount for exhibit 12 is higher than on exhibit 5. Exhibit 12 then shows the calculated interest on the remaining principal amount from May 26, 2018, through May 31, 2019, and a total balance due on May 31, 2019, of $128,865.30.

6 Specifically, the exhibit calculated interest on the $60,000 principal amount from May 26, 2018, through May 31, 2019, for an additional $2,134.52, which equaled $66,572.88 in total interest due when combined with the outstanding interest of $64,438.36 as of May 26, 2018. Adding the total interest due to the remaining $60,000 principal balance created a $126,572.88 total balance due on May 31, 2019.

After the probate court made the request for exhibit 12, Bob's attorney asked to address that point, stating, "That's not what the [FSA] says. It's not structured as a loan." The probate court asked, "Which way should it come?" Bob's attorney said, "The cheapest way to my client[.]" On appeal, however, Bob challenges only the legal and factual sufficiency of the evidence; he does not address how the FSA structures how a partial payment would apply to the preferential distribution. In its order, the probate court concluded that the FSA
13 "required preferential distributions with interest to Heidi [] and Myra [] related to Kilbourn Property and *13 the remaining amount of unpaid preferential distributions (including accrued interest) as of May 31, 2019 are $128,865.29 to Heidi [] and $128,865.29 to Myra[.]" When, as here, no findings of fact or conclusions of law are filed or requested following a bench trial, it is implied that the trial court made all the necessary findings to support the judgment. *Holt Atherton Indus*., *Inc*. *v*. *Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Because the appellate record includes the reporter's record and clerk's record, these implied findings are not conclusive and may be challenged on appeal for legal and factual sufficiency. *See BMC Software Belg*., *N.V*. *v*. *Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). We review sufficiency challenges under well-established standards of review. *See City of Keller v*. *Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) (describing standard for reviewing legal sufficiency challenges); *Cain v*. *Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (describing standard for reviewing factual sufficiency challenges).

On appeal, Bob argues that "Comerica's Exhibit 12 reflects nothing more than a document with numbers" and that "[t]here is no testimony to support its accuracy." But exhibit 12 is not merely "a document with numbers"; it expressly lists the principal amount, the interest rate, the number of days for monthly time frames, and the interest due for each monthly time frame. And on appeal Bob does not identify any inaccuracies on exhibit 12. Additionally, exhibit 12 is consistent with the testimony of Comerica's representative that her estimate would be that the balance due to Myra and Heidi would be "a few thousand" more than the amount listed in exhibit 5. Accordingly, we conclude that exhibit 12 and the testimony of Comerica's representative constitute legally and factually sufficient evidence to support the probate court's judgment as to this issue and overrule Bob's first
14 issue. *14

Reimbursement Claim

In his second issue, Bob challenges the legal and factual sufficiency of the evidence to support the denial of his "request for reimbursement of amounts that he expended on behalf of his mother and which were clearly reimbursable under the terms of the [FSA]." Section 11 of the FSA provides:

> 11. Payment of Iraida's Care Expenses. . . . Nothing in this Agreement changes the fact that John Crane, as guardian of Iraida Goepp's Estate, or Debbie Pearson, as guardian of Iraida Goepp's person, has the proper authority to make health-care decisions for Iraida Goepp, including changes to her care that may result in greater expenses. Any of Myra or Robert may pay incidental expenses relating to Iraida Goepp's care and submit those payments for reimbursements to the Guardian of the Estate or the Successors Trustee.

At trial, Bob submitted an exhibit requesting $31,272.32 for reimbursement and attaching various agreements, invoices, and copies of checks related to that reimbursement request. Comerica's representative testified that she saw this reimbursement request for the first time the day before trial and that she was never presented with any of the bills before the day of the hearing. She also testified that many of those charges were made before the FSA was executed in February 2014 and that most of the expenses concerned hyperbaric chamber treatment. When Comerica's counsel asked Bob whether Iraida received any of the hyperbaric chamber treatments, Bob responded, "I don't know." And Heidi asked Bob on cross examination, "Why didn't our mother receive the hyperbaric treatments?" Bob responded that the court made a ruling that "while I was still

validly medical power of attorney that there could be no changes to her care." In its final order, the probate court ordered, "All other claims for reimbursement made by [Bob] at the hearing on June 6th, 2019, are either barred by the Statute of Limitations or are controlled by the [FSA] and are therefore DENIED." *15

As the party requesting affirmative relief, Bob bore the burden of proof as to his entitlement to reimbursement. *See TRO-X, L.P. v. Anadarko Petrol. Corp.*, 548 S.W.3d 458, 465-66 (Tex. 2018) (noting "well accepted postulate of the common law" that civil litigant asserting affirmative claim for relief has burden of proof (quoting *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984))). When, as here, the appellant is attacking the sufficiency of the evidence supporting an adverse implied finding on an issue for which it had the burden of proof, we sustain a legal sufficiency challenge if the appellant "demonstrate[s] on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue" and a factual sufficiency challenge if the appellant "demonstrate[s] on appeal that the adverse finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

We conclude that Bob did not meet his appellate burden. First, section 11 of the FSA provides that Bob "*may pay* incidental expenses" and "submit *those* payments for reimbursements." (Emphases added.) The FSA therefore authorizes future payments and reimbursement for those payments; it does not authorize reimbursement for payments already made at the time the FSA was signed.[7] Thus, there was sufficient evidence supporting the trial court's conclusion that Bob was not entitled to reimbursement for expenses paid prior to the FSA. Second, the payments must be "incidental expenses relating to Iraida Goepp's care." The remaining expenses were related to the hyperbaric chamber treatments. But there was sufficient evidence of a court ruling in place that prevented changes to Iraida's care to provide such *16 treatment and that Iraida did not receive any such care; thus, those payments were not "relat[ed] to Iraida Goepp's care." Accordingly, we overrule Bob's second issue.

[7] Section 7 of the FSA provided for reimbursement of already paid "Trust expense[s]": "7. Expense Reimbursement. Bob, Myra and Heidi shall each receive $650,000 in Trust expense reimbursement and pre-death estate planning distributions from the Iraida Goepp Trust."

CONCLUSION

Having overruled Heidi's and Bob's issues on appeal, we affirm the probate court's final order.

/s/_____

Melissa Goodwin, Justice Before Justices Goodwin, Kelly, and Smith Affirmed Filed: July 9, 2021

Gordon v. Nickerson

Decided May 17, 2019

NO. 03-18-00228-CV

05-17-2019

Jeremie Gordon and Amber Arnold-Gordon, Appellants v. James B. Nickerson and Julia A. Nickerson, Trustees of the Nickerson Revocable Living Trust, Appellees

---

Edward Smith, Justice

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-17-002819 , THE HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING
MEMORANDUM OPINION

Jeremie Gordon and Amber Arnold-Gordon appeal the district court's order confirming an arbitration award in favor of James B. Nickerson and Julia A. Nickerson, Trustees of the Nickerson Revocable Living Trust.[1] We will modify the district court's order and affirm as modified.

[1] The Gordons represent themselves on appeal. We read the briefs liberally, *see* Tex. R. App. P. 38.9, but we hold pro se litigants to the same standards as we do litigants represented by counsel to avoid giving pro se litigants an unfair advantage. *Veigel v. Texas Boll Weevil Eradication Found., Inc.*, 549 S.W.3d 193, 195 n.1 (Tex. App.—Austin 2018, no pet.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978)).

This is the second appeal arising out of the parties' dispute. To give context to the Gordons' issues, we repeat the background facts set out in our previous opinion:

> The Nickersons, who own and live on the property adjacent to the Gordons, obtain their water from the Gordon-owned water well under a "Well Use Easement Agreement" entered into in 1995 by the previous owners of the Gordon and Nickerson properties. In January 2015, shortly after purchasing the property
>
> 2 *2
>
> with the water well, the Gordons told the Nickersons that the easement agreement did not allow the Nickerson property access to the water and that, unless the Nickersons started paying an annual fee, the Gordons would disconnect the well piping to cut off the Nickersons' water supply. In response to the Gordons' notice, the Nickersons filed suit for breach of the well-use agreement and trespass and sought injunctive relief.

Gordon v. Nickerson, No. 03-16-00071-CV, 2017 WL 1549150, at *1 (Tex. App.—Austin Apr. 27, 2017, no pet.) (mem. op.) [*Gordon I*]. The parties mediated and reached a settlement agreement (the MSA) calling for

the Gordons to sell a portion of their property with the water well to the Nickersons in exchange for $32,500. *Id*. They further agreed to resolve all disputes arising out of the MSA through binding arbitration. *Id*.

A dispute soon arose over whether the property had to be replatted before it was conveyed to the Nickersons. *Id*. The arbitrator issued an award ordering the sale to go forward without replatting. *Id*. The Gordons refused to comply, and the Nickersons sued to confirm the award. A Travis County district court rendered judgment confirming the award and specifically directing the Gordons to convey the property. *Id*. While the Gordons' appeal was pending in this Court, the Travis County clerk created an abstract of judgment incorrectly reflecting that the Nickersons obtained a money judgment against the Gordons. The Nickersons' counsel filed the abstract in the real property records of Travis County.[2] In April of 2017, this Court modified the district court's judgment to remove attorney's fees not awarded by the arbitrator and affirmed as modified. *Id*. at *5.

[2] We take our description of the abstract and the other events not mentioned in *Gordon I* from the parties' briefs and the factual recitations in the arbitrator's second award.

Two months later, the Gordons agreed to sell an unrelated Travis County property to Richeon and Steven
3 Eledge. The Eledges subsequently canceled the contract, allegedly due to *3 the abstract of judgment. The Gordons then sued the Nickersons under a different cause number alleging causes of action for filing a fraudulent lien, slander of title, abuse of process, and tortious interference with a contract. They sought relief in the form of a declaration nullifying the abstract and an award of at least $15,000 in attorney's fees.

The Nickersons moved to compel arbitration of the Gordons' claims under the MSA. The district court granted the motion and referred the case to the same arbitrator who conducted the arbitration in *Gordon I*. The Nickersons submitted a written counterclaim for breach of contract and requested attorney's fees and costs as sanctions. The arbitrator issued a second award concluding both sides failed to prove their claims but stating he expected the conveyance "on or before January 15, 2018." If that did not occur, the arbitrator "specifically reserve[d] the right to award to a non-breaching party additional attorney's fees incurred as a result of an unreasonable failure of a party to close on or before January 15, 2018." The arbitrator also conditionally awarded the Nickersons $4,500 in attorney's fees "if the Gordons again seek review in the trial court."

The Gordons conveyed 0.172 acres of land containing the disputed well to the Nickersons shortly before the arbitrator's deadline. The Nickersons then filed a motion to confirm the arbitrator's award, and the Gordons filed a cross-motion to vacate. The district court signed an order confirming the award and ordering the Gordons to pay $4,500 in attorney's fees plus post-judgment interest. This appeal followed.

ANALYSIS

The Gordons argue on appeal that the district court erred by confirming the award because the MSA is void for
4 illegality, the arbitrator committed a "gross error of fact," and the *4 arbitrator exceeded his powers. If we conclude the award is valid, the Gordons contend the district court improperly added post-judgment interest to the award of attorney's fees.

Standard of Review

We review a trial court's decision to confirm or vacate an arbitration award de novo. *Southwinds Express Constr*., *LLC v*. *D.H*. *Griffin of Tex*., *Inc*., 513 S.W.3d 66, 70 (Tex. App.—Houston [14th Dist.] 2016, no pet.). However, "[b]ecause Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow." *East Tex*. *Salt Water Disposal Co*., *v*. *Werline*, 307 S.W.3d 267, 271 (Tex. 2010). We give arbitration awards "the same effect as the judgment of a court of last resort" and presume their validity. *Id*. at 271 n.11

(quoting *CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)). The party seeking to vacate the award "bears the burden of presenting a complete record that establishes grounds for vacatur." *Kreit v. Brewer & Pritchard, P.C.*, 530 S.W.3d 231, 243 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (quoting *Amoco D.T. Co. v. Occidental Petrol. Corp.*, 343 S.W.3d 837, 841 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)).

The Texas Arbitration Act (TAA) requires trial courts to confirm an arbitration award "[u]nless grounds are offered for vacating, modifying, or correcting [the] award under Section 171.088 or 171.091." Tex. Civ. Prac. & Rem. Code § 171.087; *see generally id.* §§ 171.001-.098. The TAA "leaves no room for courts to expand on those grounds" in vacating an arbitration award. *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016). Thus, a
5 party may *5 avoid confirmation of an arbitration award under the TAA "only by demonstrating a ground expressly listed in section 171.088." *Id.* at 495.[3]

[3] The MSA does not fall within any exclusion from the scope of the TAA. *See* Tex. Civ. Prac. & Rem. Code § 171.002. Moreover, neither party has suggested that the Federal Arbitration Act applies.

Illegality

The Gordons argue in their first two issues that the MSA is void because it requires the Gordons to violate state law and municipal ordinances. And this voids the arbitrator's award, they reason, because it is based on an illegal contract. The Nickersons respond that the issue is moot or, in the alternative, that res judicata bars the Gordons from raising this issue.

We address the Nickersons' mootness argument first because it implicates our jurisdiction. *See State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018) (stating courts lose subject matter jurisdiction when case becomes moot). A case becomes moot when there ceases to be a live controversy between the parties or when the parties no longer have "a legally cognizable interest in the outcome." *Id.* (quoting *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)). "Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012). The Nickersons argue the illegality issue has become moot because the Gordons would not regain the property they conveyed even if we conclude the MSA is void and unenforceable. But if the Gordons succeed in proving the MSA is void, the conveyance could be reversed. *See Lee v. Lee*, 528 S.W.3d 201, 210 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (holding several transfers of real property pursuant to settlement agreement did not moot party's
6 appeal of *6 agreement because "if [appellant] should prevail, these transactions can be reversed"). The illegality issue is thus not moot.

However, we agree with the Nickersons that res judicata bars the issue.[4] "[R]es judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments." *Barr v. Resolution Tr. Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Relevant here is claim preclusion—also called res judicata—which "bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action." *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017) (quoting *Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008)).

[4] We construe the Gordons' brief as asserting that the award should be vacated under the TAA because "there was no agreement to arbitrate" because the MSA was illegal. *See id.* § 171.088(a)(4).

The Gordons initially argue that the Nickersons waived res judicata by failing to plead the issue. *See Whallon v. City of Houston*, 462 S.W.3d 146, 155 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) ("[R]es judicata is an affirmative defense that must be pleaded."). We agree the Nickersons did not raise the issue in their pleadings,

but "[t]rial by consent can cure lack of pleading." *Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018). To determine whether an issue was tried by consent, "[w]e must examine the record not for evidence of the issue, but rather for evidence of trial of the issue." *Id*. at 307 (quoting *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 446 (Tex. 1993)). Jeremie Gordon argued during the hearing on the parties' cross-motions that "[the Nickersons' counsel] has also raised res judicata of the illegality issue" and then explained why the court should reject it. The record does not contain the arguments of the Nickersons' counsel or his response because the
7 record before us consists *7 only of Jeremie Gordon's arguments, the Gordons' exhibits, and the presiding judge's ruling. Nevertheless, the record before us is sufficient to demonstrate the issue was tried by consent.[5]

[5] The Gordons failed to file "a statement of the points or issues to be presented on appeal" as required by the rules governing appeals on partial records. *See* Tex. R. App. P. 34.6(c)(1). If an appellant entirely fails to comply with this requirement the reviewing court "must presume that the omitted portions of the record are relevant to the disposition of the appeal and that they support the trial court's judgment." *Nelson v. Gulf Coast Cancer & Diagnostic Ctr.*, 529 S.W.3d 545, 548 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002) (per curiam)). Accordingly, we presume the omitted portions of the record support that the parties tried the issue of res judicata by consent and that res judicata bars the Gordons' illegality claim.

To establish res judicata as a bar to the Gordons' illegality claim, the Nickersons had the burden to establish that there is a prior final judgment on the merits by a court of competent jurisdiction, the parties in this case are the same or in privity with those in *Gordon I*, and the illegality claim was or or could have been raised in *Gordon I*. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). All three elements are met here. This Court has issued its mandate in *Gordon I*, making the judgment final and enforceable, and there is no dispute the parties in the two cases are the same. The Gordons primarily contest the third element. "Texas courts apply the transactional approach to res judicata, which requires that claims arising out of the same subject matter be litigated in a single lawsuit." *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 500 S.W.3d 26, 40 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (citing *Hallco Tex., Inc. v. McMullen County.*, 221 S.W.3d 50, 58 (Tex. 2006)). Cases arise from the same transaction if they share the same set of operative facts. *Id*. The Gordons analogize this case to *Lawlor v. National Screen Service Corp.*, where the United States Supreme Court held res judicata did not bar a second lawsuit based on the same course of conduct as a previous suit if the new claims "could not possibly have been sued upon in the previous case." 349 U.S. 322, 327-28
8 (1955). Applying that holding here, the Gordons contend *8 their challenge to the arbitrator's award of attorney's fees (and his reservation of the right to award additional fees to compel the transfer) were new acts that could not have been sued upon in *Gordon I*. But the Gordons challenge the arbitrator's acts based on the alleged illegality of the MSA. This is the same claim the Gordons asserted in *Gordon I*, 2017 WL 1549150 at *2, and res judicata bars the Gordons from raising it again here. *See John Moore Servs.*, 500 S.W.3d at 40. We overrule the Gordons' first two issues.

Gross Mistake of Fact

The Gordons' third ground for vacating the award is that the arbitrator allegedly committed a gross mistake of fact. Gross mistake "is a common law ground for setting aside an arbitration award" but not a ground for vacatur set out in the TAA. *Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002); *see* Tex. Civ. Prac. & Rem. Code § 171.088 (listing grounds for vacatur). Thus, the Gordons may not rely on gross mistake of fact to overturn the award. *See Hoskins*, 497 S.W.3d at 494-95; *see also Patel v. Moin*, No. 14-15-00851-CV, 2016 WL 4254016, at *6 (Tex. App.—Houston [14th Dist.] Aug. 11, 2016, pet. denied) (mem. op.) (holding gross mistake is not permissible basis under TAA to vacate arbitrator's award). We overrule the Gordons' third issue.

Arbitrator's Powers

The Gordons' fourth argument is that the arbitrator exceeded his powers by conditionally awarding attorney's fees. *See* Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(A). Arbitrators derive their authority "over disputes from parties' consent and the law of contract." *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 122 (Tex. 2018). As a result, an arbitrator "exceeds his authority only 'when he disregards the contract and dispenses his
9 own idea of *9 justice.'" *Denbury Onshore, LLC v. Texcal Energy S. Tex., L.P.*, 513 S.W.3d 511, 520 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (quoting *D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). Thus, the relevant question when determining whether an arbitrator exceeded his authority "is not whether the arbitrator decided an issue correctly, but rather, whether he had the authority to decide the issue at all." *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 431 (Tex. 2017).

The MSA's arbitration clause does not address attorney's fees, but paragraph 2 of the MSA states: "[e]ach party shall otherwise bear his her its [sic] attorney[']s fees and mediation fees." Even if we assume that paragraph 2 applies to fees incurred in arbitration proceedings rather than the original lawsuit, an arbitrator "may expand the scope of its review based on the issues the parties submit or the arguments they advance in the proceedings." *Miller v. Walker*, ___ S.W.3d ___, ___, No. 02-17-00035-CV, 2018 WL 895602, at *3 (Tex. App.—Fort Worth Feb. 15, 2018, no pet.) (quoting *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 711 (8th Cir. 2011)); *see New Med. Horizons II, Ltd. v. Jacobson*, 317 S.W.3d 421, 429 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("An arbitrator's jurisdiction is defined by the contract containing the arbitration clause and by the issues actually submitted to arbitration."). The Gordons requested in their amended petition that the district court award them "at least $15,000" in attorney's fees, and the Nickersons moved to submit the "entire controversy" to arbitration, including "attorney's fees." The district court referred all "issues raised by [the Gordons'] petition" to the arbitrator. The Nickersons then requested that the arbitrator award them "attorney's fees and costs" as sanctions. The Gordons have not presented us with a complete record of the arbitration hearing, but the arbitrator's award does not reflect the parties questioned the arbitrator's power to award fees.
10 The issue of attorney's fees was *10 obviously submitted to the arbitrator, and paragraph 2 of the MSA does not expressly prohibit the arbitrator from awarding fees. *See D.R. Horton*, 423 S.W.3d at 535 (reasoning provision with similar wording did not prohibit arbitrator from awarding fees when requested by parties). Under these circumstances, we cannot say the district court exceeded its authority by awarding attorney's fees to the Nickersons. *See Miller*, 2018 WL 895602 at *5-6 (upholding arbitration panel's award of attorney's fees when both sides requested fees and arbitrator considered fee award without objection); *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847, 851 (Tex. App.—Austin 1996, no writ) ("We conclude that both parties' claims for attorney fees reflect their unified intention to authorize the panel's award of attorney fees."). We overrule the Gordons' fourth issue.

Modification

The Gordons argue in their final issue that the district court improperly added post-judgment interest to the award of attorney's fees. The TAA authorizes trial courts to modify an arbitration award on application of a party if: the award contains an evident miscalculation of numbers or an evident mistake in the description of a relevant person, thing, or property; the award addresses a matter not submitted to the arbitrators; or "the form of the award is imperfect in a manner not affecting the merits of the controversy." Tex. Civ. Prac. & Rem. Code § 171.091. These are the exclusive grounds for modifying an award under the TAA. *See Callahan & Assocs.*, 92 S.W.3d at 844; *White v. Siemens*, 369 S.W.3d 911, 916 (Tex. App.—Dallas 2012, no pet.). Because modifying an award so that it accrues interest is not permitted by the TAA, the district court erred by adding

5% interest to the arbitrator's award of attorney's fees. *See Barnes v. Old Am. Mut. Fire Ins. Co.*, No. 03-07-00404-CV, 2010 WL 668913, at *8 *11 (Tex. App.—Austin Feb. 26, 2010, no pet.) (mem. op.) (concluding trial court erred by adding post-judgment interest to arbitration award). We sustain the Gordons' fifth issue.

CONCLUSION

We modify the district court's order to delete the award of post-judgment interest and affirm as modified.[6]

[6] The Nickersons have filed a motion asking this Court to sanction the Gordons for filing a frivolous appeal. *See* Tex. R. App. P. 45 (authorizing court of appeals to award prevailing party "just damages" if appeal is frivolous). We exercise our discretion and decline to do so. *See R. Hassell Builders, Inc. v. Texan Floor Serv., Ltd.*, 546 S.W.3d 816, 833 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (awarding damages under Rule 45 is discretionary).

/s/_____

Edward Smith, Justice Before Chief Justice Rose, Justices Kelly and Smith Modified and, as Modified, Affirmed Filed: May 17, 2019

No. 14-21-00499-CV
Court of Appeals of Texas, Fourteenth District

In re Amegy Bank

650 S.W.3d 842 (Tex. App. 2022)
Decided May 10, 2022

NO. 14-21-00499-CV

05-10-2022

IN RE AMEGY BANK NATIONAL ASSOCIATION, Relator

James E. Cuellar, Houston, for Relator. C. Thomas Schmidt, for Real party in interest.

Randy Wilson, Justice

James E. Cuellar, Houston, for Relator.

C. Thomas Schmidt, for Real party in interest.

Panel consists of Chief Justice Christopher and Justices Hassan and Wilson.

Randy Wilson, Justice

On September 3, 2021, relator Amegy Bank National Association filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 ; *see also* Tex. R. App. P. 52. The underlying case involves a receivership in which the master-in-chancery issued two reports. The first master report concerns the non-exempt status of property belonging to real party in interest Emmanuel Megrelis, and the second master report found Megrelis in contempt for violating the turnover order. The trial court approved both reports in two orders, and Megrelis did not appeal either order. The trial court set the reports for trial. Amegy contends that the trial court lost its plenary power to conduct a trial on the master's reports after Megrelis did not appeal the orders approving the reports.

Amegy asks this court to prohibit the Honorable Dedra Davis, presiding judge of the 270th District Court of Harris County, from conducting a trial on the issues presented in the master's reports and disturbing the orders approving the master's reports. We deny the petition.

BACKGROUND

On October 1, 2010, the trial court signed an agreed final judgment against Megrelis and GB Foods, Inc. in favor of Amegy for actual damages, prejudgment interest, post-judgment interest, and attorney's fees. The trial court ordered that Amegy satisfy the judgment by seizing and selling property specifically identified in the judgment and "all other non-exempt property" of GB Foods and Megrelis. On April 1, 2011, the trial court signed a judgment nunc pro tunc to correct the spellings of Megrelis's name. The trial court also signed an order appointing Riecke Baumann receiver to take possession of and sell real and personal non-exempt

property of GB Foods and Megrelis pursuant to the Texas Turnover Statute. Additionally, the trial court
845 appointed Baumann master-in-chancery *845 with the power to order the production of evidence, schedule hearings, and direct parties and witnesses to give testimony.

On April 20, 2012, Baumann filed his first master's report, finding that Megrelis had abandoned property located at 4701 Inker Street (the "Inker Street property") in Houston and had not claimed the property as being exempt from judgment enforcement.

On August 9, 2012, Megrelis objected to a proposed supplement to the April 1, 2011 order appointing the receiver and master. Megrelis objected that Baumann's authority as receiver was too broad and to Baumann's continuing to serve as master in chancery in the absence of a showing of the exceptional nature of this case. Asserting that Baumann, as receiver, had acted beyond the scope of the trial court's orders, Megrelis further asked the trial court to supplement the turnover order to provide for the application of the Texas Rules of Civil Procedure to post-judgment discovery and to Baumann. Megrelis also filed a designation of exempt property, which included the Inker Street property.

After a status conference on June 12, 2013, the trial court found that Megrelis did not file an objection to the first master's report and signed the order approving the report. Megrelis did not file any post-judgment motions or appeal the order approving the first master's report

On July 25, 2016, Baumann filed his second master's report, which addressed events that took place after the approval of the first master's report. Baumann found that Megrelis had made no effort to pay the judgment despite having the ability to do so and was in contempt of the turnover order and should be attached until he purged himself of contempt. Megrelis filed an answer to the second master's report on December 19, 2017, asserting that the Inker Street property is his homestead and he did not hide money from the receiver.

On August 29, 2019, the trial court signed the order approving the second master's report and adopting the report's facts and conclusions as those of the court. Megrelis did not file any post-judgment motions or appeal the August 29, 2019 order.

On November 26, 2019, Baumann filed an application to sell the Inker Street property, stating that the first master's report had conclusively found that the Inker Street property is non-exempt property. The trial court, on June 22, 2020, signed an order prohibiting Megrelis from arguing or mentioning that the Inker Street property is exempt property. On July 6, 2020, Baumann filed an amended application to sell the receivership property, adding that the trial court had ordered Megrelis, on June 22, 2020, not to argue that the Inker Street property was his homestead "because the first Master's report found that it is not an exempt homestead and the fact issue is conclusive an [sic] all appellate time periods expired years ago." The next day, Megrelis filed a motion for reconsideration of the trial court's June 12, 2013 and August 29, 2019 orders approving the master's reports because, among other arguments, the reports were not final and Megrelis was entitled to a jury trial.

On August 2, 2021, the trial court held a status conference and scheduled a bench trial on the master's reports for September 8, 2021. On August 10, 2021, Amegy filed a motion for affirmation that the trial court did not have jurisdiction to reconsider its prior orders approving the master's reports because its plenary power expired 30 days after the orders were signed. At an August 24, 2021 hearing, the trial court confirmed that the
846 September 8, 2021 *846 bench trial would be a trial on the two master's reports and denied Amegy's motion for affirmation.

STANDARD OF REVIEW

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Dawson* , 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam) ; *In re Prudential Ins. Co. of Am.* , 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re H.E.B. Grocery Co., L.P.* , 492 S.W.3d 300, 302–03 (Tex. 2016) (orig. proceeding) (per curiam) ; *In re Cerberus Capital Mgmt. L.P.* , 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam).

Courts are to assess the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P.* , 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Because this balancing depends in large measure on the circumstances presented, courts look to principles rather than simple rules that treat cases as categories. *In re McAllen Med. Ctr., Inc.* , 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). Whether an appeal amounts to an adequate remedy depends heavily on the circumstances. *In re Garza* , 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). Mandamus is available to correct a void order, *i.e.* , an order the trial court had no power render. *Urbish v. 127th Judicial Dist. Court* , 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding) ; *see also In re Sw. Bell Tel. Co.* , 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam) (stating relator need not show that it does not have adequate remedy by appeal when complained-of order is void).

ANALYSIS

Amegy contends that the orders approving the master's reports were final orders, the trial court's plenary power had expired thirty days after approving the orders, and the trial court lacks jurisdiction to reconsider the orders. Megrelis, on the other hand, argues that the orders master's reports are not final orders because they do not dispose of all pending parties and claims.

A trial court generally has plenary power to modify its judgment for thirty days after the judgment is signed and, in some cases, that power may be extended up to an additional seventy-five days. Tex. R. Civ. P. 329b(c), (d), (e), (g). Even after its plenary power has expired, however, a trial court retains the power to enforce its judgments. *Arndt v. Farris* , 633 S.W.2d 497, 499 (Tex. 1982) (orig. proceeding) ; *see also Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.* , 540 S.W.3d 577, 581 (Tex. 2018) ("Generally, every court with jurisdiction to render a judgment also has the inherent authority to enforce its judgments."). This power extends to enforcement of the judgment by execution or other appropriate process when necessary, *Mitchell v. Turbine Res. Unlimited, Inc.* , 523 S.W.3d 189, 197 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing Tex. R. Civ. P. 621), and can last until the judgment is satisfied. *Alexander Dubose Jefferson & Townsend LLP* , 540 S.W.3d at 581.

A court can appoint a receiver to assist with enforcement and will retain continuing jurisdiction and control
847 over the receiver and receivership property until the proceeding is concluded. *847 *Gutman v. De Giulio* , No. 05-20-00735-CV, 2022 WL 574968, at *3 (Tex. App.—Dallas Feb. 25, 2022, no pet.) (mem. op.). The trial court's authority also includes modifying its previous orders to respond to new circumstances. *Id.* Even after discharging a receiver, the trial court has the power to continue the receivership if circumstances require. *Hill v. Hill* , 460 S.W.3d 751, 764 (Tex. App.—Dallas 2015, pet. denied).

Generally, a judgment must dispose of all legal issues between or among all parties to a final judgment. *Lee v. Lee* , 528 S.W.3d 201, 208 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). There are exceptions to the general rule that a final, appealable judgment must dispose of all issues and all parties. *Id.* "[C]ertain

postjudgment orders, such as turnover orders and orders that resolve certain discrete matters in receivership proceedings, may be final for purposes of appeal, even if these orders do not dispose of all pending parties and claims." *Fischer v. Ramsey* , No. 01-14-00743-CV, 2016 WL 93512, at *2 (Tex. App.—Houston [1st Dist.] Jan. 7, 2016, no pet.) (mem. op.) ; *see also Huston v. Fed. Deposit Ins. Corp.* , 800 S.W.2d 845, 847 (Tex. 1990) ("A trial court's order that resolves a discrete issue in connection with any receivership has the same force and effect as any other final adjudication of a court, and thus, is appealable.").

First Master's Report

Baumann found in the first masters report that the Inker Street property was non-exempt. The trial court approved the first master's report. The first master's report resolved a discrete issue when it determined that the Inker Street property was not Megrelis's homestead. *See Lee* , 528 S.W.3d at 208 (holding trial court's order approving receiver's sale resolved a discrete issue and, therefore, was a final, appealable judgment); *Fischer* , 2016 WL 93512, at *3 (holding trial court's order, which adjudicated property as homestead, non-exempt property, granted receiver possession and control, authorized its sale, with only final closing of specific sale subject to approval, was final, appealable order). Therefore, the order was final and appealable.

While we agree with Amegy that the first master's report resolved a discrete issue and was final and appealable, we do not agree that the trial court lost its plenary power over the order approving the first master's report after Megrelis did not appeal the order.

The right to appeal the order of receivership must be exercised within twenty days after the order is entered, otherwise an untimely appeal will be dismissed. *See Fortenberry v. Cavanaugh* , No. 03-07-00310-CV, 2008 WL 4997568, at *23 (Tex. App.—Austin Nov. 26, 2008, pet. denied) (mem op.) ("Given the nature of a receivership, a party's ability to seek termination or modification, and the policy reasons behind the twenty-day time limit to appeal, we conclude that the Fortenberrys were required to appeal the appointment of the receiver within twenty days from the October 27, 2006, order."); *Long v. Spencer* , 137 S.W.3d 923, 926 (Tex. App.—Dallas 2004, no pet.). The First Court of Appeals set forth the reasons an order of receivership must be appealed 20 days after its entry:

> A contrary holding would mean that a party could rightfully attempt to set aside an order of receivership in an appeal regardless of how long ago the receivership order was entered. The setting aside of an order of receivership has the effect of nullifying all intervening acts of the receiver .... or, at least, of raising serious questions concerning the

848 *848

> validity of such intervening acts. Furthermore, an unlimited time to appeal would mean that the order of receivership would *never* be beyond challenge, and thus never attain the finality upon which the parties, the receiver, and those who have transacted with the receiver, are entitled to depend. Allowing the vacation of a receivership at any time after its creation would work undue hardship on third parties who have dealt in good faith with the receiver.

Sclafani v. Sclafani , 870 S.W.2d 608, 611 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (internal quotation marks and citation omitted). The requirement that a receivership order be appealed immediately is based on the notion of estoppel, *i.e.* , the reliance of third parties who dealt with the receiver in good faith. *Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders, LLC* , 603 S.W.3d 385, 395 (Tex. 2020).

The same reasoning applies to appeals of orders confirming the sale of receivership property. *See Gibson v. Cuellar* , 440 S.W.3d 150, 155 (Tex. App.—Houston [14th Dist.] 2013, no pet). In this case, however, the Inker Street property has not been sold, but has merely been found to be non-exempt. The order approving the master's report's finding that the Inker Street property is non-exempt does not raise the same concerns as an order appointing a receiver or an order confirming the sale of receivership property. Here, there has not yet been any reliance by a purchaser of the Inker Street property on the finding that that the property was non-exempt and could be properly sold by the receiver.

In essence, Amegy's argument is that whenever an order is appealable, it can never be reconsidered by the trial judge even if the trial judge continues to have jurisdiction over the parties. That is not necessarily the case, however. An analogous situation involves appealable pre-trial orders. Section 51.014 of the Civil Practice and Remedies Code lists numerous pre-trial orders can be appealed. Merely because they can be appealed does not mean that they must be appealed. For example, an interlocutory order denying a special appearance can be appealed. Civ. Prac. & Rem. Code § 51.014(a)(7). If the trial judge denies a special appearance and the defendant does not appeal, the trial judge has not lost the ability or jurisdiction to reconsider that motion at a later date and grant the special appearance. *See GJP, Inc. v. Ghosh* , 251 S.W.3d 854, 866 n.15 (Tex. App.—Austin 2008, no pet.) ("The legislature did not state that section 51.014(a)(7) is the exclusive or mandatory means for appealing the types of orders within its scope, nor did it say anything about limiting our general appellate jurisdiction to consider such orders after they are merged into final judgments.... [W]e cannot conclude that by its limited grant of jurisdiction to us to consider certain types of otherwise-unappealable interlocutory orders, the legislature intended correspondingly to limit our subject-matter jurisdiction over appeals from final judgments.").

We hold that, although the June 12, 2013 order was final and appealable, the trial court retains plenary power over the order and the trial court did not abuse its discretion by setting the first master's report for trial. *See Alexander Dubose Jefferson & Townsend LLP* , 540 S.W.3d at 581 ; *Gutman* , 2022 WL 574968, at *3 ; *Hill* , 460 S.W.3d at 764.

Second Master's Report

Baumann found in the second master's report that Megrelis had made no effort to pay the judgment despite having the ability to do so, was in contempt of the trial court's turnover order by hiding funds and should be
849 attached until he purged *849 himself of contempt. The second master's report did not resolve a discrete issue because there is no order of contempt. Without the trial court actually rendering a proper order of contempt, there are issues still left to be resolved and the order approving the second master's report is not a final, appealable order. *Cf. Mitchell* , 523 S.W.3d at 196 (holding that appellants had no right to appeal order of sale because it did not resolve discrete issues regarding their ownership in property where order of sale stated it was subject to third parties' rights); *Art Inst. of Chicago v. Integral Hedging, L.P.* , 129 S.W.3d 564, 572 (Tex. App.—Dallas 2003, no pet.) (holding order at issue in receivership was not final because record showed that trial court made clear that court was not finished with application for attorney's fees and issues were left open for further discussion). We conclude that it was not an abuse of discretion for the trial court to set the second master's report for trial.

CONCLUSION

Having determined that the trial court did not abuse its discretion by setting the master's reports for trial, we deny Amegy's petition for writ of mandamus. We also lift our stay of September 7, 2021.

(Hassan, J., concurring in result only).

NO. 14-16-00587-CV
State of Texas in the Fourteenth Court of Appeals

In re Estate of Larson

541 S.W.3d 368 (Tex. App. 2017)
Decided Dec 7, 2017

NO. 14-16-00587-CV

12-07-2017

IN the ESTATE OF Mary E. LARSON, Deceased

Andrew Lewis, William T. Powell, Catherine N. Wylie, Houston, TX, for Appellee. Rudolph Michael Culp, Linda C. Goehrs, Houston, TX, for Appellant.

Martha Hill Jamison, Justice

Andrew Lewis, William T. Powell, Catherine N. Wylie, Houston, TX, for Appellee.

Rudolph Michael Culp, Linda C. Goehrs, Houston, TX, for Appellant.

Panel consists of Justices Boyce, Jamison, and Brown.

Martha Hill Jamison, Justice

Debbie Ratz, Gwen Patterson, and Wendy Bruney (the "Daughters"), are beneficiaries under the will of their mother, Mary E. Larson. In this appeal from probate proceedings, they challenge the trial court's orders approving the payment out of Mary's probate estate of certain expenses and attorney's fees. The expenses at issue were requested by appellee Robert Larson, as Independent Executor of the Estate of George N. Larson, Jr. (Mary's now-deceased husband) (we will refer to both Robert and George as the "Executor"). The attorney's fees were requested by two lawyers—appellees Catherine N. Wylie and William T. Powell (collectively, the "Lawyers")—who represented the Executor in a prior guardianship proceeding concerning Mary. Mary died about two months after the guardianship was established. George died during the pendency of this case.

Among their arguments on appeal, the Daughters contend that the Executor failed to timely contest the
370 rejection of the expenses claim by Mary's probate administrator *370 and that the Probate Court lacked authority to order Mary's probate estate to pay the Lawyers' fees incurred in the earlier guardianship proceeding. Because the trial court erred in ordering payment of these expenses and fees from the probate estate, we reverse the trial court's orders and render a take nothing judgment on these claims.

Background

In 2013, Mary Larson was 86 years old, in deteriorating physical and cognitive health, and living with one of her daughters, Debbie Ratz.[1] Mary's husband, who also was elderly, was then physically unable to care for Mary.

1 Mary and George were married for over twenty years and did not have any children together, but both had children from prior marriages.

On November 12, 2013, the Daughters filed an Application for Guardianship, identifying Mary as the proposed ward and seeking to have Ratz appointed as guardian. The application was assigned to Harris County Probate Court No. 3 (hereinafter, the "Guardianship Court"). The Executor filed an objection to the Daughters' application as well as a cross-application requesting to be named Mary's guardian or, in the alternative, for a neutral third party to be named guardian. The parties reached a mediated settlement agreement, which the Guardianship Court approved on October 14, 2014. Pursuant to the agreement, the parties filed an agreed order to appoint Howard Reiner as Mary's permanent guardian. The parties further agreed, among other things, that all marital property (with certain exceptions not relevant here) was community property and the parties' counsel were to "file their applications for attorney fees with the Court for auditing and approval without objection from the opposing counsel."[2] The parties also agreed to mutual releases of all claims between them related to the guardianship.

2 This provision specifically listed "The Wylie Law Firm" but did not list appellee William T. Powell or his law firm.

Mary died on December 11, 2014, while living in Galveston County,[3] and the Guardianship Court closed the guardianship estate on February 20, 2015.[4] Prior to closure, Reiner, Mary's attorney-ad-litem, and the Daughters' attorney submitted applications for fees that were approved by the Guardianship Court.[5] The Lawyers, who had represented George in the guardianship proceedings, did not file applications for fees with the Guardianship Court, and no fees were approved on their behalf.

3 At that time, George and Mary were apparently living in the same assisted care facility, although not together due to the level of care Mary required.

4 A guardianship of the estate of a ward must be settled when the ward dies. *See* Tex. Est. Code § 1204.001.

5 Costs and expenses in a guardianship are governed by chapter 1155 of the Estates Code. Tex. Est. Code §§ 1155.001 -.202. Subchapter A generally covers compensation for guardians, although a guardian may be entitled to additional expenses under other provisions. *See id.* §§ 1155.001 -.008. Compensation for attorneys-ad-litem is governed by section 1155.151. The attorney representing appellants sought fees pursuant to section 1155.054, entitled "Payment of Attorney's Fees to Certain Attorneys," which permits the court creating the guardianship to authorize the payment of reasonable and necessary attorney's fees to an attorney who represents a party who files an application to be appointed guardian if the applicant acted in good faith and for just cause in filing and prosecuting the application. *Id.* § 1155.054.

Mary's will was submitted to probate in the Galveston County Probate Court (the "Probate Court"), which
371 appointed Andrew Lewis as the dependent administrator. *371 Reiner, Mary's attorney-ad-litem in the guardianship case, and the attorney representing the Daughters in the guardianship case submitted claims to Lewis. As mentioned, these claims previously had been approved by the Guardianship Court, and Lewis therefore approved payment of the claims from Mary's probate estate.[6] The Lawyers also submitted claims to Lewis, requesting payment of their fees, even though their fees had neither been submitted to nor approved by the Guardianship Court. An additional claim was submitted to Lewis on behalf of the Executor, requesting payment of other expenses, as will be explained below. Each of these claims indicates that it was filed pursuant to chapter 355 of the Texas Estates Code, which governs the Presentment and Payment of Claims made against probate estates. Tex. Est. Code §§ 355.001 -.203.

6 The Daughters assert that the Guardianship Court audited and reduced these claims but do not cite any evidence to support this assertion, and we do not have the record from the guardianship case before us.

In the claim for Wylie's fees, she explains that she represented the Executor in the guardianship case and requested payment of $14,989.40 for legal fees and expenses out of Mary's probate estate. Powell's claim, seeking payment of $30,123.33 from Mary's probate estate, also states that it is for services rendered to the Executor in the guardianship case. Both of these claims are supported by billing statements from the respective attorneys.

In his claim, the Executor requests payment of $17,704.62 for "Attorney, Mediation, and Guardian's fees" that he states were "paid from George's personal estate on behalf of Mary ... while she was under Guardianship." The attached "detail" of the requested fees lists eleven separate items. Nine of the items are described as fees paid to an "Attorney for Mary's Children." All nine of these entries are for dates prior to the appointment of a temporary guardian for Mary and most were prior to the Daughters' filing their application for guardianship. The tenth entry states that it was for mediation fees (apparently the mediation that resulted in the settlement agreement in the guardianship proceedings), and the eleventh entry states that it was for guardian fees (apparently, given the dates listed, this was for temporary guardian fees). The Executor's claim was supported by cancelled checks, a receipt, and a bank account statement.

The three claims were submitted to Lewis as the administrator of Mary's probate estate. Although Lewis initially approved Wylie's claim for payment, he subsequently denied all three claims. None of the three claimants filed suit with the Probate Court to contest the administrator's decision, *see* Texas Estates Code section 355.064, but all three claims were subsequently brought to the Probate Court's attention for approval. During a hearing on the claims, Lewis and the Daughters urged that the claims could not be paid because (1) the Lawyers and the Executor failed to file suit timely to contest Lewis's decision and (2) the Lawyers and the Executor failed to submit their claims to and have them approved by the Guardianship Court. The probate judge, however, found the requests were requests for fees or reimbursement of expenses and not claims against the probate estate, and on that basis, the judge approved payment of the requests out of Mary's probate estate.

In the three orders that are the subject of this appeal, each entitled "Order Approving Request for Attorney's
372 Fees," the Probate Court references its own Standards for Court Approval of Attorney Fee *372 Petitions,[7] which mandate that "fee requests should be filed as applications for payment of fees or for reimbursement and not as claims against the estate." The court then states that considering each request as an application for fees and expenses, such fees and expenses were necessary and should be paid by the estate. The court further noted that Lewis had paid the claims of Reiner, the attorney-ad-litem in the guardianship case, and the Daughters' attorney.[8]

7 www.galvestoncountytx.gov/ja/pb/Documents/Probate% 20Information/Standards% 20for% 20Court% 20Atty% 20Fees% 20-% 20Galveston% 202014.pdf (last visited November 8, 2017).

8 In the Wylie order, the Probate Court added that refusing payment to Wylie was "in direct conflict" with paying the other attorneys.

Issues on Appeal

In three issues, the Daughters contend that the Probate Court erred in ordering the three claims paid because (1) the Lawyers and the Executor failed to timely file suit contesting the administrator's rejection of the claims as required by Estates Code section 355.064, (2) the Probate Court lacked authority to order Mary's probate estate to pay attorney's fees incurred in the earlier guardianship proceeding, and (3) the claims were not valid debts of the probate estate. We first will consider the Daughters' second issue as applied to the Lawyers' claims; then, we will consider the Daughters' first issue as applied to the Executor's claim. We address the claims in this

manner because, as will become clear, the Lawyers' claims are fundamentally different than the Executor's claim. The Lawyers seek payment for services rendered to a different person in another proceeding. The Executor seeks reimbursement for funds that he contends he expended on Mary's behalf prior to the probate proceeding.

The Lawyers' Claims

As stated, the Daughters contend in their second issue that the Probate Court lacked authority to order Mary's probate estate to pay the Lawyers' fees in the guardianship proceeding. It is well established that Texas does not allow recovery of attorney's fees unless authorized by statute or contract. *See, e.g., Gulf States Utils. Co. v. Low* , 79 S.W.3d 561, 567 (Tex. 2002) ; *In re Guardianship of Vavra* , 365 S.W.3d 476, 484 (Tex. App.—Eastland 2012, no pet.). No one alleges that either Mary or her probate or guardianship estates had any contract requiring payment of the Lawyers' fees.

The claims were filed pursuant to Estates Code chapter 355, but this chapter simply allows claims to be presented for payment to a probate estate; it does not provide for payment of attorney's fees in the absence of a contract or statute authorizing them. *See* Tex. Est. Code §§ 355.001 -.203. The Probate Court treated the fee requests as requests for fees or reimbursement under the court's own standards, i.e., Galveston County Standards for Court Approval of Attorney Fee Petitions, but these standards are not statutory, do not purport to create a basis for awarding fees, and govern the payment of fees to attorneys representing personal representatives, not claims for payment of a third-party's attorney in a prior proceeding. *See supra* n.7.

During the hearing on the Lawyers' claims, the parties disputed whether the Probate Court could authorize the
373 fees pursuant to Estates Code § 1155.054. We review matters of statutory construction de novo. *373 *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.* , 513 S.W.3d 487, 493 (Tex. 2017). In construing a statute, our objective is to determine and give effect to the legislature's intent. *Nat'l Liab. & Fire Ins. Co. v. Allen* , 15 S.W.3d 525, 527 (Tex. 2000). In doing so, we ascertain that intent from the language the legislature used in the statute, if possible, and do not look to extraneous sources for an intent the statute does not state. *Id.* If the meaning of the statutory language is unambiguous, we are to adopt the interpretation supported by the plain meaning of the provision's words. *St. Luke's Episcopal Hosp. v. Agbor* , 952 S.W.2d 503, 505 (Tex. 1997). Each word, phrase, and clause the legislature selected should be interpreted in a way that gives meaning to them all. *PlainsCapital Bank v. Martin* , 459 S.W.3d 550, 556 (Tex. 2015). Accordingly, we read statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning. *Id.*

Section 1155.054 provides in relevant part as follows:

> (a) A court that creates a guardianship ... on request of a person who filed an application to be appointed guardian of the proposed ward [or] an application for the appointment of another suitable person as guardian of the proposed ward ... may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just, to an attorney who represents the person who filed the application ... regardless of whether the person is appointed the ward's guardian ... from available funds of the ward's estate....
>
> (c) The court may not authorize attorney's fees under this section unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.

It is undisputed that the Lawyers represented the Executor in the guardianship case and that the Executor filed an application seeking to be Mary's guardian or, in the alternative, to have a neutral third party named guardian.

The question here is whether section 1155.054 authorizes an award of fees by a court other than the court that created the guardianship. The Daughters argue that the intent of section 1155.054—as expressed by its plain language—is that only the court that created a guardianship can award attorney's fees to an applicant. The Lawyers argue to the contrary that in the absence of exclusivity language, specifically referencing the words "only" and "exclusively," section 1155.054 should not be interpreted as limiting the authority of courts to award fees to guardianship applicants. We agree with the Daughters.

We have considered the construction of this statute, or its substantially similar predecessor, in two recent cases, although neither settles the question raised here. In *In re Guardianship of Whitt* , we determined that the unambiguous language of the provision did not permit the trial court to authorize the payment of attorney's fees unless a guardianship was actually created. 407 S.W.3d 495, 499-500 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (construing former Tex. Prob. Code § 665B, redesignated as Tex. Est. Code Ann. § 1155.054). In coming to this conclusion, we noted that the legislature could have, but did not, provide for the payment of attorney's fees from a "proposed" ward's estate. *Id.* In *In Guardianship of Burley* , we concluded that the unambiguous wording of the statute did not limit the recoverable attorney's fees to those incurred in the filing and prosecution of the application. 499 S.W.3d 196, 200 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). In both cases, we found the statutory language to be clear and specifically noted the words the legislature used as well as language *374 and directives the legislature left out.

374

The provision has a very precise answer to the question presented here: the "court that creates [the] guardianship ... may authorize the payment." Contrary to the Lawyers' contention, no additional words of exclusivity are necessary. The Lawyers cite no language in the provision, and we discern none, suggesting an intent to permit any other court to authorize payment of fees except the court that created the guardianship. This limitation makes sense because the court that creates a guardianship is in the best position to make the determinations required under section 1155.054, including whether an applicant acted in good faith and with just cause in the filing and prosecution of the application and what amount would be equitable and just for such fees. *Cf. Russell v. Moeling* , 526 S.W.2d 533, 536 (Tex. 1975) (explaining, in will probate context, that questions of good faith and just cause are best determined by the court in which the proceedings at issue occurred).

We acknowledge that the present case is somewhat unusual, as Mary died within months of the guardianship's creation. However, these circumstances do not alter the language of the statute. The Estates Code provides specific guidance for the circumstance of a ward's death. *See* Tex. Est. Code §§ 1204.001 -.202. *See generally Valdez v. Robertson* , No. 14-10-00323-CV, 2011 WL 2566277, at *3–4 (Tex. App.—Houston [14th Dist.] June 30, 2011, no pet.) (discussing the question of a guardianship court's continuing jurisdiction upon the death of a ward). We note that the Daughters' attorney, the guardian, and the attorney-ad-litem in the guardianship proceeding were able to present their fee requests and have them authorized by the Guardianship Court before the guardianship estate was closed.[9]

[9] As mentioned above, in its order approving payment of Wylie's claim, the Probate Court stated that administrator Lewis's denial of that claim was "in direct conflict" with his approval of the claims by the Daughters' attorney, the guardian, and the attorney-ad-litem. However, the clear distinction between the two sets of claims is that the claims by the Daughters' attorney, the guardian, and the attorney-ad-litem were authorized by the Guardianship Court, whereas the Lawyers' claims were not. The Estates Code provides a mechanism for the relief the Lawyers seek, but that mechanism was not utilized.

In the Probate Court and their briefing to this court, the Lawyers complain that appellants breached the settlement agreement in which the parties agreed not to object to each other's attorney's fees requests.[10] The Lawyers, however, have not pleaded or otherwise raised a breach of contract claim in this case, and none was tried by consent. Moreover, the Lawyers do not explain how the parties' agreement to not object could confer authority on the Probate Court to award fees it otherwise could not award.

10 As noted above, *see supra* n.2, this provision of the agreement expressly referenced Wylie but not Powell.

The Lawyers further argue that the Probate Court could properly authorize the payment of their fees because the Estates Code grants the court exclusive jurisdiction over probate proceedings, as well as pendant and ancillary jurisdiction as necessary for judicial efficiency. *See* Tex. Est. Code §§ 31.001 -.002, 32.001-.002; *see also Lee v. Lee* , 528 S.W.3d 201, 212 (Tex. App.—Houston [14th Dist.] 2017, pet. filed) (discussing jurisdiction of statutory probate courts). However, nothing in these sections authorizes a probate court in a
375 subsequent probate proceeding to award fees to the attorneys of a different party in *375 a previously concluded guardianship proceeding from a different court.

The Probate Court lacked authority to authorize payment from Mary's probate estate to the Lawyers for services they rendered to the Executor in the guardianship proceeding. Accordingly, the Probate Court erred in ordering such payment. We sustain the Daughters' second issue to the extent that it challenges the orders requiring payment of the Lawyers' fees from Mary's probate estate.

The Executor's Claim

In their first issue, the Daughters contend, among other things, that the Probate Court erred in ordering the Executor's claim paid from Mary's probate estate because the Executor failed to timely file suit contesting administrator Lewis's rejection of his claim as required by Estates Code section 355.064. We agree.

When a person seeks payment on a claim for money against an estate, such as the Executor's claim in the present case, the Estates Code sets out the procedure to follow. Under section 355.065, the claimant must first present the claim to the representative of the estate. Tex. Est. Code § 355.065 ; *see also In re Estate of Gaines* , 262 S.W.3d 50, 61–62 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (discussing steps under predecessor code); *Walton v. First Nat'l Bank of Trenton, Trenton, Tex.* , 956 S.W.2d 647, 651 & n.1 (Tex. App.—Texarkana 1997, pet. denied) (discussing definition of "claims for money" under predecessor code). The representative has 30 days after the claim is presented to accept or reject it. Tex. Est. Code § 355.051. If the representative fails to timely accept or reject the claim, the claim is considered rejected. *Id.* § 355.052. When a claim is rejected, the claimant must file suit in the court of original probate jurisdiction within ninety days of the rejection, or the claim is barred. *Id.* § 355.064.[11] To file suit on a claim, the claimant must file a pleading alleging the presentation and rejection of the claim and demonstrate that the suit was filed within 90 days of rejection. *Gaines* , 262 S.W.3d at 62 n.12 (citing *Jaye v. Wheat* , 130 S.W.2d 1081, 1084 (Tex. Civ. App.—Eastland 1939, no writ)).

11 Section 355.064(a) specifically provides that: "[a] claim or part of a claim that has been rejected by the personal representative is barred unless not later than the 90th day after the date of rejection the claimant commences suit on the claim in the court of original probate jurisdiction in which the estate is pending."

It is undisputed that the Executor filed his claim for money with Lewis and Lewis expressly denied the claim. The Executor did not file suit in the Probate Court contesting the rejection within 90 days.[12] He asserts, however, that the Probate Court's consideration of his request as an application for payment of fees or for reimbursement, and not as a claim against the estate, rendered section 355.064 inapplicable to the request.

12 The record does not contain any pleading by the Executor contesting the rejection, and the Executor does not argue on appeal that he filed any such pleading even in light of the Daughters' statement that he did not. Lewis rejected the claim on December 29, 2015. The Executor's claim was discussed at a hearing on July 5, 2016, over six months later. At the hearing, Lewis urged the Probate Court to reject the claim due to the Executor's failure to comply with section 355.064.

As discussed above, the Executor requested payment of "Attorney, Mediation, and Guardian's fees" that he paid
376 "on behalf of Mary ... while she was under Guardianship."[13] The detailed list of the *376 requested fees attached to the claim shows that nine of the eleven items dated from before the appointment of Reiner as Mary's temporary guardian and the remaining two occurred before Reiner's appointment as permanent guardian. Accordingly, these expenses were clearly not incurred during the pendency of the probate proceedings and, in fact, predate even the creation of the permanent guardianship.[14]

13 The settlement agreement states that all property owned by George and Mary was community property, except for a couple of items that were to be categorized by the guardian. A guardianship estate consists of the ward's property. *See* Tex. Est. Code § 1002.010.

14 The Executor offers no explanation for why the Probate Court treated his request as an application for the payment of fees or for reimbursement in the probate proceedings. The Executor references the Probate Court's own Standards for Court Approval of Attorney Fee Petitions, but nothing in these standards suggest that they apply to claims such as the Executor's that predate the probate proceedings. *See supra* n.7.

The Executor failed to file suit contesting Lewis's rejection of his claim for money within 90 days of such rejection; accordingly, his claim was barred by operation of section 355.064. *See Gaines* , 262 S.W.3d at 62. We therefore sustain the Daughters' first issue to the extent it challenges the Probate Court's order requiring payment of the Executor's claim from Mary's probate estate.[15]

15 We need not address the Daughters' third issue or their remaining arguments under issues one and two.

Conclusion

We reverse the Probate Court's three orders approving payment by Mary's probate estate of the Lawyers' and the Executor's claims and render judgment that these parties take nothing on these claims.

No. 05-19-00909-CV
Court of Appeals Fifth District of Texas at Dallas

In re O.M.

Decided Aug 17, 2020

No. 05-19-00909-CV

08-17-2020

IN THE INTEREST OF O.M. AND M.M., CHILDREN

Opinion by Chief Justice Burns

On Appeal from the 429th Judicial District Court Collin County, Texas
Trial Court Cause No. 429-53875-2018

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Pedersen, III, and Justice Evans
Opinion by Chief Justice Burns[1]

[1] The Honorable David L. Bridges, Justice, participated in the submission of this case; however, he did not participate in the issuance of this opinion due to his death on July 25, 2020. Chief Justice Robert Burns has substituted for Justice Bridges after reviewing the briefs and the record before the Court.

The trial court finalized appellee Husband's and appellant Wife's divorce on March 18, 2019. Husband moved for appointment of receiver under Chapter 9 of the Texas Family Code after Wife failed to comply with certain terms of the decree, including her refusal to list a McKinney rental property and the marital residence for a fair
2 market value. The trial court signed an order appointing receiver on July 19, 2019. *2

On August 1, 2019, Wife filed this interlocutory appeal raising five issues: (1) the trial court denied her Due Process by issuing the order without a hearing; (2) the court acted arbitrarily and unreasonably in appointing a receiver; (3) the appointment of a receiver modified the decree; (4) the powers granted to the receiver exceeded those that could be exercised in the absence of a receivership; and (5) the receiver failed to exercise ordinary care and prudence and should be terminated. We dismiss the appeal as moot.

Wife's opening brief indicated the properties at issue in this appeal were sold on July 26, 2019 and August 23, 2019, respectively. Generally, when a party appeals an order appointing a receiver and the property has been sold, the appeal of the order becomes moot. *See*, *e.g.*, *Bass v. Bass*, No. 05-15-01362-CV, 2016 WL 1703007 at *1 (Tex. App.—Dallas April 27, 2016, pet. denied). The Court sent a letter on May 7, 2020, requesting supplemental briefing addressing whether the appeal is moot.[2]

[2] Husband did not file an appellee brief; however, he responded to the Court's request for supplemental briefing from Wife.

After requesting one extension, Wife filed supplemental briefing. She spent the majority of her supplemental briefing rearguing the issues raised in her initial brief. She dedicated only the last three pages, with citation to two cases, arguing her appeal is not moot.

To the extent she cites the dissenting opinion in *Estate Land Co. v. Wiese*, 546 S.W.3d 322 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), we are not bound [3] by a dissenting opinion. *See Canadian River Mun. Water Auth. v. Hayhook, Ltd.*, 469 S.W.3d 301, 303 (Tex. App.—Amarillo 2015, pet. denied). Rather, the *Wiese* majority followed well-established law that a case "becomes moot if a controversy ceases to exist at any stage of the proceedings, including the appeal." *Id.* at 326 (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (original proceeding)). The property at issue in that case was sold; therefore, the appellate court dismissed the appeal as moot without addressing the issues raised. *Id.*

We reach the same conclusion under these facts. The conveyance of the properties moots this appeal. *See, e.g., Mitchell v. Turbine Res. Unlimited, Inc.*, 523 S.W.3d 189, 195-96 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (order authorizing receiver to sell vehicle became moot when vehicle sold); *see also Bass*, 2016 WL 1703007 at *1.

We likewise reject Wife's reliance on *Lee v. Lee*, 528 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) in which the appellate court concluded live controversies existed after the closing of a settlement agreement because attainable relief such as refunds or recession of a promissory note were still available. *Id.* at 209-10. In that case, because the settlement resulted in conveyance of property from the husband to Legacy Trust Company, N.A., in its capacity as the trust's receiver, the court determined these transactions could be reversed if the wife prevailed on appeal. *Id.* at 210. [4]

Here, the record contains no information regarding the buyers of the properties; therefore, unlike *Lee*, nothing indicates the property transactions can be reversed. Thus, we cannot say "the evidence before us does not indicate that anything has been done that cannot be undone." *Id.* at 210.

Wife contends her arguments on appeal are "more than just the sale of the house" because she challenges whether the receiver "violated a duty of care, duty of loyalty or any other oath he/she took in selling the property pursuant to the Order in question." We disagree these issues can be addressed. Any opinion issued on the propriety of the underlying proceeding or the receiver's actions would constitute an impermissible advisory opinion. *See Thompson v. Ricardo*, 269 S.W.3d 100, 103 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

We recognize Wife filed a motion for order for interlocutory appeal on controlling question of law on July 24, 2019 (file stamped July 29, 2019) as to whether the trial court violated Texas Family Code section 9.007(b) and asked the trial court to stay any further proceedings pending disposition of the appeal. *See* TEX. FAM. CODE ANN. § 9.007(b) (order amending, modifying, or altering a final divorce decree is beyond the power of the court and unenforceable). However, after filing the motion, she sat idle and did nothing further, such as demand a hearing or ruling from the trial court or file a motion for emergency stay in this Court, to stop the sale of the rental property two days later on July 26, 2019. Rather, per the decree, she participated in the closing and signed the necessary documents. Although she [5] filed a notice of appeal in this Court on August 1, 2019, she again did nothing to stay the sale of the marital property on August 23, 2019.

Because Wife did not seek an emergency stay or otherwise suspend enforcement of the trial court's order, the sale of the properties were completed, and, as such, the appeal from the order appointing a receiver is moot. *See Wiese*, 546 S.W.3d at 326; *Bass*, 2016 WL 1703007, at *1. Accordingly, we dismiss Wife's appeal. *See* TEX. R. APP. P. 42.3(a).

/Robert D. Burns, III/

ROBERT D. BURNS, III

6 CHIEF JUSTICE 190909F.P05 *6

JUDGMENT

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-53875-2018.
Opinion delivered by Chief Justice Burns. Justices Pedersen, III and Evans participating.

In accordance with this Court's opinion of this date, the appeal is **DISMISSED** as moot.

It is **ORDERED** that appellee Oscar Millan recover his costs of this appeal from appellant Magdalena Millan.
Judgment entered August 17, 2020

NO. 14-17-00431-CV
State of Texas in the Fourteenth Court of Appeals

Izen v. Ryals

Decided Apr 18, 2019

NO. 14-17-00431-CV

04-18-2019

JOE ALFRED IZEN, JR.; RAY EDWARDS; AND BONNIE EDWARDS, Appellants v. KENNETH E. RYALS, TRUSTEE OF THE EAST TEXAS INVESTMENTS TRUST, Appellee

Charles A. Spain Justice

On Appeal from the 55th District Court Harris County, Texas
Trial Court Cause No. 2014-43610A

MEMORANDUM OPINION

This is a dispute over real estate. The trial court granted summary judgment in favor of appellee Kenneth E. Ryals, Trustee of the East Texas Investments Trust (the "Trust"), and declared that as between the Trust and
2 appellant Joe Alfred Izen, Jr., the Trust owned the property. The trial court later severed the Trust's title and *2 declaratory-judgment claims against Izen and made the summary judgment final and appealable. Izen's primary issue on appeal is whether the trial court erred by granting summary judgment in favor of the Trust.

Because there is no final, appealable judgment for our review as to appellants Ray Edwards and Bonnie Edwards, we dismiss their interlocutory appeal. We overrule Izen's issues[1] and affirm the trial court's judgment.

[1] We lack jurisdiction to review Izen's issue relating to the trial court's granting of the Trust's motion to expunge notice of lis pendens and for temporary injunction.

I. BACKGROUND

This case involves an approximately 3.4-acre tract of land along the Eastex Freeway in Houston (the "property"). The Trust acquired title to the property by general warranty deed in 2002. This property was at issue in two prior suits, one in 2004 in Harris County Civil Court of Law No. 1 and one in 2007 in the 55th District Court of Harris County. Both cases resulted in final judgments in which the Trust was adjudicated to be the title owner of the property. In both cases, Izen was the attorney who represented the Trust. The 2007 case was captioned: "No. 2007-63116, Lisa Ogden, Steven Gayle, and Wayne Westbrook, Plaintiffs and Counter-Defendants vs. Kenneth Ryals as Managing Trustee of East Texas Investment[s] Trust, Defendant and Counter-Plaintiff." In pertinent part, the final judgment in the 2007 case, signed July 29, 2010, ordered that:

• Ryals, as trustee for the Trust, have and recover title in fee simple to the real estate against and from Ogden, W. Westbrook, and Gayle who take nothing on their claim for trespass to try title;

• Ryals, as trustee for the Trust, recover reimbursement of $160,000 from the Trust for attorney's fees owed to Izen for various legal services performed for the Trust;

• Ryals, as trustee for the Trust, recover reimbursement of $8,000

3 *3

from the Trust for ad valorem taxes he paid and advanced for the benefit of the Trust;

• Ryals, as trustee for the Trust, have and recover against Ogden, W. Westbrook, and Gayle attorney's fees owed to Izen for services performed for the Trust in this case in the amount of $60,000;

• the real estate awarded to the Trust by this judgment be sold at public auction;

• Ryals pay Izen $160,000 and reimburse Ryals $8,000 out of the first proceeds of such sale after payment of the sale costs; and

• Ryals, as trustee for the Trust, have all writs, including writs of execution and possession, necessary for the enforcement of the judgment.

In 2012, this court affirmed the July 2010 final judgment. *Ogden v. Ryals*, No. 14-10-01052-CV, 2012 WL 3016856, at *1, *6 (Tex. App.—Houston [14th Dist.] July 24, 2012, no pet.) (mem. op.). Izen also represented the Trust in that appeal.

In April 2013, Izen filed for the issuance of a writ of execution. On June 4, 2013, the Harris County Precinct One constable held a sale of the property under the writ of execution. Izen was the successful bidder and received a constable's deed dated October 28, 2013, and filed November 21, 2013. The constable's deed states in pertinent part:

> On . . . the 4th day of June, 2013 . . . , I sold said hereinafter described land and premises at public venue . . . , and the premises hereinafter described were sold to JOE ALFRED IZEN for the bid of Two Hundred Forth Thousand and No/100($240,000.00), Dollars . . . .
>
> . . . I . . . have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said JOE ALFRED IZEN all of the estate, right, title and interest which the said LISA OGDEN, WAYNE WESTBROOK, AND STEVEN GAYLE had of, in and to the following land . . . .

4 In 2014, CIG DT Holding, LLC, a cell phone tower company (the "Cell *4 Tower"), brought an interpleader suit against Izen and the Trust, alleging that the Cell Tower was leasing a portion of the property and that both Izen and the Trust had demanded the Cell Tower make the 2014 annual rent payment to them. The Cell Tower requested that the trial court allow the rent to be paid into the court's registry.

The Trust asserted counterclaims against the Cell Tower for recovery of rent, possession of the tract, declaratory relief canceling the lease or determining rights and obligations under the lease, and attorney's fees. The Trust alleged that Izen represented to the Cell Tower and Ray Edwards and Bonnie Edwards[2] that he is the owner of the property, collected rent from the Edwardses, and attempted to collect rent from the Cell Tower.

The Trust asserted cross-claims against Izen for an accounting of rent collected, recovery of rent, declaratory relief canceling any lease, and attorney's fees. The Trust also asserted cross-claims against Izen for trespass to try title, breach of fiduciary duty, cancellation of the constable's deed, disgorgement of fees, and slander of title. The Trust alleged that the Edwardses were using and occupying the land without paying rent to the Trust. The Trust brought third-party claims against the Edwardses for recovery of rent, possession of the tract, declaratory relief canceling any lease, and attorney's fees.

[2] The record consistently refers to the Edwardses as "d/b/a Big Man Diesel."

Izen asserted cross-claims against the Trust and third-party claims against Ryals individually for breach of contract, malicious prosecution, declaratory relief regarding the invalidity of a $25,000 lien asserted by Ryals on the property, defamation, and confirmation of the constable's sale and deed.

The Edwardses asserted a third-party claim against the Trust for filing frivolous claims and sought attorney's fees as sanctions.

5 The case initially proceeded in the 80th District Court of Harris County and *5 was transferred to the 55th District Court by agreed order signed February 25, 2016.

In April 2016, the Trust filed a traditional motion for partial summary judgment on "its trespass to try title and to quiet title claims"[3] against Izen. The Trust argued that it was entitled to summary judgment as a matter of law because it could conclusively prove there were no genuine issues of material fact as to all the elements of its claims. The Trust further requested that the trial court declare the Trust the owner of the property and declare Izen's constable's deed invalid.

[3] A suit to quiet title and a trespass-to-try-title claim are both actions to recover possession of land unlawfully withheld; a quiet-title suit is an equitable remedy and a trespass-to-try-title suit is a legal remedy afforded by statute. *See Lance v. Robinson*, 543 S.W.3d 723, 738-39 (Tex. 2018) (citing *Cameron Cty. v. Tompkins*, 422 S.W.3d 789, 797 (Tex. App.—Corpus Christi 2013, pet. denied)).

Izen and the Edwardses filed a response, a traditional cross-motion for partial summary judgment, and a no-evidence motion for summary judgment. Izen and the Edwardses also filed a plea to the jurisdiction.

The trial court initially signed an order granting the Trust's traditional motion for partial summary judgment on June 6, 2016.[4] On June 6, 2016, the trial court signed an order denying Izen's and the Edwardses' traditional cross-motion for partial summary judgment and no-evidence motion for summary judgment.[5] The Trust filed a motion to modify to correct two typographical errors in the June 6 order granting its traditional motion for partial summary judgment. The trial court granted the motion to modify, set aside the summary judgment signed on June 6, and entered an amended order. In its amended order signed July 25, 2016, the trial court stated that the Trust asked the court to grant summary judgment on its trespass-to-try-title and quiet-title claims
6 against Izen. The trial court granted the Trust's traditional *6 motion for partial summary judgment. In doing so, the trial court expressly stated that "[a]s between [the Trust] and Izen, [the Trust] is the owner of the Property" and "[t]he Constable's Deed is set aside." That same day, the trial court signed an order denying Izen's and the Edwardses' plea to the jurisdiction.

[4] This order is not in the record. The record also does not contain a transcript from the summary-judgment hearing held on June 6, 2016.

[5] This order also is not in the record.

The Trust filed a motion for severance of the partial summary judgment, which the trial court granted by order signed March 1, 2017. Specifically, the trial court severed out "[the Trust]'s causes of action for declaratory judgment and in trespass to try title brought against . . . Izen" into cause no. 2014-43610-A, and styled, "East Texas Investments Trust v. Joe Alfred Izen, Jr." The trial court did not sever out any other parties or claims. The trial court specifically ordered that the amended summary judgment signed on July 25, 2016, was now a final judgment and was appealable.[6]

[6] Also, on March 1, 2017, the trial court signed a severance order granting a motion for severance filed by CIG Comp Tower, LLC. The trial court ordered that the clerk create a new lawsuit with cause no. 2014-43610B, and styled, "CIG Comp Tower, LLC vs. Joe Alfred Izen, Jr., and Kenneth Ryals, as Trustee of the East Texas Investment[s] Trust." The appeal Izen filed in that case has been abated pending the disposition in this appeal.

Izen and the Edwardses filed their original motion for new trial on March 31, 2017, which motion was overruled by operation of law as of May 15, 2017. *See* Tex. R. Civ. P. 306a(1), 329b(a), (c). Izen and the Edwardses filed their notice of appeal on May 30, 2017. *See* Tex. R. App. P. 26.1(a)(1). In their notice of appeal from cause no. 2014-43610-A, Izen and the Edwardses stated they:

> desire to appeal the Order for Severance[7] and the Final Judgment of this Court entered on the 1st day of March, 2017, against the Defendants, Joe Alfred Izen, Jr., and Ray Edwards and Bonnie Edwards d/b/a Big Man Diesel, and in favor of Cross-Plaintiff, Kenneth Ryals, Trustee of the [the Trust], severing Cause No. 2014-43610 severing [sic] certain cause of action into Cause No. 2014-43160A and entering

7 *7

[7] Izen and the Edwardses do not raise any issue on appeal challenging the trial court's granting of the Trust's motion to sever.

Final Judgment to the Court of Appeals.

II. THE EDWARDSES' APPEAL

The record reflects that claims involving the Edwardses were still pending at the time of the severance order. Nothing in the amended summary judgment or the severance order (1) unequivocally expresses an intent to finally dispose of the entire case or (2) effects an actual disposition of all parties and claims remaining in the case at the time the order was signed. *See Lentino v. Frost Nat'l Bank*, 159 S.W.3d 651, 653 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The severance order only severs the Trust's declaratory-judgment and title claims against Izen and specifically makes only the amended summary judgment a final judgment.

On March 27, 2019, notification was transmitted to all parties of the court's intent to dismiss the Edwardses' appeal for want of jurisdiction. *See* Tex. R. App. P. 42.3(a). Izen's and the Edwardses' response has not shown that this court has jurisdiction to hear the Edwardses' appeal. Because there is no final judgment from which Ray Edwards and Bonnie Edwards may take an appeal, *see Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001), we dismiss the Edwardses' appeal for lack of jurisdiction.

III. ANALYSIS IN IZEN'S APPEAL

Izen brings five issues. First, he challenges the trial court's grant of the Trust's traditional motion for partial summary judgment and the denial of Izen's traditional cross-motion for partial summary judgment and no-evidence summary-judgment motion. Second, Izen challenges the trial court's denial of his plea to the

jurisdiction. Third, Izen attacks the trial court's denial of his motion for new trial. Fourth, he challenges the trial court's actions in expunging notices of lis pendens filed by Izen and entering an injunction against him without requiring the Trust to post a bond. And fifth, Izen contends that a May 2018 federal-court jury verdict and final
8 *8 judgment established Izen's rights as a mortgagee in possession based on res judicata and collateral estoppel.

A. Subject-matter jurisdiction over the Trust's claims

We initially address issue two, as it challenges subject-matter jurisdiction, which is never presumed and cannot be waived. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44, 445 (Tex. 1993). "Whether the trial court has subject matter jurisdiction is a question of law that we review de novo." *Appraisal Review Bd. of Harris Cty. Appraisal Dist. v. Spencer Square Ltd*, 252 S.W.3d 842, 844 (Tex. App.—Houston [14th Dist.] 2008, no pet.). We conclude that the trial court had subject-matter jurisdiction over the Trust's claims.

Izen does not dispute, and Texas law supports, that the trial court, as a district court, properly would have subject-matter jurisdiction over the Trust's title and declaratory-judgment claims.[8] However, Izen contends the Trust's claims were "crooked maneuverings" that constituted "an impermissible collateral attack on the mandatory terms of the [July 2010] Final Judgment." The Trust responds that it filed its claims to settle "the
9 question of whether [the Trust] or Izen had title," not to attack *9 the July 2010 final judgment, and that its claims were based on events occurring after the July 2010 final judgment.

> 8 *See* Tex. Const. art. V, § 8 (district court has exclusive, original jurisdiction of "all actions, proceedings, and remedies," except when constitution or other law confers jurisdiction on some other court); Tex. Gov't Code Ann. § 24.007 ("The district court has the jurisdiction provided by Article V, Section 8 of the Texas Constitution."); Tex. Prop. Code Ann. §§ 22.001-.045 (governing trespass-to-try-title actions); *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 918-19 (Tex. 2013) (party may sue in district court to obtain adjudication of its title); *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 389 (Tex. 2011) ("Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property."); *Meekins v. Wisnoski*, 404 S.W.3d 690, 694-97 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (substance of plaintiff's claim was trespass-to-try-title action rather than declaratory-judgment action when claim required determination of who, after sale by receiver of estate property, had title to portion of property); *Inman v. Orndorff*, 596 S.W.2d 236, 238-39 (Tex. App.—Houston [1st Dist.] 1980, no writ) ("The trial court had jurisdiction of the cause of action seeking to set aside the constable's deed as a cloud on [plaintiff's] title."); *see generally Lance*, 543 S.W.3d at 738 ("We have never addressed the nuanced differences between quiet-title claims, trespass-to-try-title claims, and modern declaratory-judgment claims in any real depth.").

Our review of the Trust's live pleading (second amended cross-action against Izen) does not reveal that the Trust sought to "avoid the binding force" of any portion of the July 2010 final judgment. *See Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (defining collateral attack as "an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief which the judgment currently stands as a bar against"). Regarding the July 2010 final judgment, the Trust alleged: "By final judgment in that suit, Ryals, as trustee, was, again, adjudicated the fee simple title owner of the tract. That judgment is valid, subsisting." Therefore, the Trust did not seek to collaterally attack the July 2010 final judgment.[9]

> 9 Izen cites cases for the proposition that one who accepts the fruits of a judgment is estopped from asserting its invalidity. *See Marshall v. Lockhead*, 245 S.W.2d 307, 308 (Tex. App.—Waco 1952, writ ref'd n.r.e.); *Mueller v. Banks*, 332 S.W.2d 783, 786 (Tex. App.—San Antonio 1960, no writ). Such cases are distinguishable; the Trust did not allege that the July 2010 final judgment was invalid, but instead was "valid" and "subsisting."

Izen also argues that the trial court was not "free to enter a modified summary judgment which rewrote the terms" of the July 2010 final judgment. He contends that the terms were binding on the trial court and the court's "refusal to enforce those terms was a gross abuse of discretion." Izen does not otherwise describe or explain what terms the trial court allegedly rewrote and refused to enforce. Our review of the amended summary judgment does not reveal that the trial court rewrote or refused to enforce the July 2010 final judgment.[10]

[10] The case on which Izen relies does not persuade us otherwise. *See Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 406 (Tex. 1971) (orig. proceeding) (determining judgment nunc pro tunc corrected judicial errors in prior judgment and therefore was void).

10 We overrule Izen's second issue. *10

B. Summary judgment in favor of the Trust

In his first issue, Izen argues that the trial court erred "when it denied [his] cross-motion(s) for traditional and no evidence motion for summary judgment and granted [the Trust's] motion for summary judgment." The trial court's severance order did not sever Izen's cross-claims against the Trust and Ryals into the separate cause or finally dispose of such claims. The amended summary judgment made final and appealable by the severance order does not state that the trial court considered Izen's traditional cross-motion for partial summary judgment and no-evidence motion for summary judgment; rather, it states that the trial court considered the Trust's traditional motion for partial summary judgment filed on April 26, 2016, "together with the response, summary judgment evidence and oral argument." Nor does the severance order state that any order by the trial court denying Izen's summary-judgment motions was now made a final judgment and appealable. On this record, we cannot conclude that the trial court ruled on competing motions for summary judgment. *See Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980) (interlocutory denial of summary-judgment motion is not appealable unless parties file competing summary judgments). Therefore, we may not review the denial of Izen's motions, and we limit our review to the arguments Izen raised in response to the Trust's summary-judgment motion.

1. The Trust conclusively established its claims.

In its traditional motion for partial summary judgment, the Trust argued that it had sufficient evidence to conclusively prove each element of its claims for trespass to try title and quiet title. According to the Trust, it was entitled to summary judgment on its "claim to title to the real property and to declare Izen's Constable's deed invalid." We first consider whether the Trust conclusively proved all essential elements of its claims to
11 establish its right to judgment as a matter of law. *See* Tex. *11 R. Civ. P. 166a(c).

To prove a trespass-to-try-title claim, a plaintiff must establish one of the following: (1) a regular chain of conveyances from the sovereign; (2) a superior title from a common source; (3) title by limitations; or (4) title by prior possession that was not abandoned. *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004); *see generally* Tex. Prop. Code Ann. § 22.001. The plaintiff need only establish one of the four accepted methods to recover. *See Kennedy Con., Inc. v. Forman*, 316 S.W.3d 129, 138 (Tex. App.—Houston [14th Dist.] 2010, no pet.). To prevail in a trespass-to-try-title action, the plaintiff must prove the strength of his own title and not the weakness of the defendant's title. *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994). In its summary-judgment motion, the Trust argued that it conclusively proved both (1) a regular chain of conveyances from the sovereign and (2) superior title from a common source. We conclude that the Trust established its right to title by proving superior title from a common source.

A plaintiff seeking summary judgment on his suit to quiet title must prove: (1) he has a right of ownership and (2) the adverse claim is a cloud on the title that equity will remove. *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Such a claim relies on the invalidity of the opposing party's claim to the property. *Id.* A cloud on title that equity will remove exists when a claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the property owner. *Id.* The effect of a suit to quiet title is to declare invalid or ineffective the defendant's claim to title. *Id.*

Superior title from a common source. To prevail on a claim of superior title out of a common source, the plaintiff must show a complete chain of title for its claim from the common source, connect the defendant's title
12 to the same source, and, in the process, show the superiority of its claim to the defendant's. *Dames v.* *12 *Strong*, 659 S.W.2d 127, 131 (Tex. App.—Houston [14th Dist.] 1983, no writ). Generally, the holder of older title from a common source holds superior title, unless a holder of later title shows that he acquired title as a bona fide purchaser for value and without notice of an earlier existing interest. *Wells v. Kan. Univ. Endowment Ass'n*, 825 S.W.2d 483, 486 (Tex. App.—Houston [1st Dist.] 1992, writ denied). The Trust asserted that it had superior title based on the July 2010 final judgment. The Trust argued that any possible claim or cloud of title to the property held by defendants Ogden, W. Westbrook, and Gayle was judicially removed by the July 2010 final judgment, which decreed that Ryals, as trustee for the Trust, have and recover "title in fee simple" to the property against and from Ogden, W. Westbrook, and Gayle, and that Ogden, W. Westbrook, and Gayle take nothing on their trespass-to-try-title claims.

The Trust contended that based on the July 2010 final judgment at the time of the constable's sale in June 2013, Ogden, W. Westbrook, and Gayle did not own any interest in the property. Because the July 2010 final judgment vested title in fee simple in the Trust and predated the constable's sale, the Trust argued that its title was superior to Izen's purported title. *See Diversified, Inc. v. Hall*, 23 S.W.3d 403, 406 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("Generally, the earlier title emanating from a common source is better title and superior to others."); *see also Longoria v. Lasater*, 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied) (op. on reh'g) ("'Perfect title' means fee simple title, or 'a title that does not disclose a patent defect that may require a lawsuit to defend it . . . title that is good both at law and in equity.'"); *Fee Simple*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs").

13 The Trust asserted that the constable's deed relied on by Izen amounted to a *13 quitclaim deed. *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005) ("In deciding whether an instrument is a quitclaim deed, courts look to whether the language of the instrument, taken as a whole, conveyed property itself or merely the grantor's rights."); *Hall*, 23 S.W.3d at 407 ("A quitclaim deed conveys any title, interest, or claim of the grantor, but it does not profess that the title is valid nor does it contain any warrant or covenants of title."). We agree. The language of the constable's deed conveyed "all of the estate, right, title and interest which the said LISA OGDEN, WAYNE WESTBROOK, AND STEVEN GAYLE had of, in and to the following land premises, viz: . . ." and did not warrant that title was valid. *See Hall*, 23 S.W.3d at 407 (constable's deed conveying "all of the estate, right, title and interest which the said [judgment debtor] had" and that did not contain any covenant of warranty found to be quitclaim deed).

Because the constable's deed was a quitclaim deed, the Trust argued that Izen was not a bona fide purchaser and could not show superior title. *See Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (per curiam) ("Status as a bona fide purchaser is an affirmative defense to a title dispute."); *Hall*, 23 S.W.3d at 407 ("As the purchaser of a quitclaim deed, Diversified cannot enjoy the protections afforded a bona fide purchaser, because a grantee in a quitclaim deed is not an innocent purchaser without notice."). We again agree. Izen in the

constable's deed received only what interests Ogden, W. Westbrook, and Gayle had in the property, which were no interests. And as the purchaser of a quitclaim deed who had notice of the Trust's earlier interest based on the July 2010 final judgment, Izen could not enjoy the protections of a bona fide purchaser. Even considered in the light most favorable to Izen, the summary-judgment record shows that the Trust conclusively established the
14 strength of its title based on a superior title from a common source. *14

On appeal, Izen challenges the Trust's reliance on *Hall*,[11] arguing that in this case there was no common source of title because "Izen derived his title from the Constable's Sale out of Ryals, not some earlier predecessor in title."[12] We reject this argument. The Trust linked both its title and Izen's purported title based on the constable's deed to the "common source" of the July 2010 final judgment. The evidence shows that, as of the time of the constable's sale, the Trust—not Ogden, W. Westbrook, and Gayle—held title in fee simple to the property based on the July 2010 final judgment. Ogden, W. Westbrook, and Gayle took nothing on their title claims in the July 2010 final judgment. Next, Izen argues that even if the constable's deed was treated as a quitclaim deed, "a quit claim deed out of Ryals/[the Trust] . . . was more than enough to pass title" and "Izen's alleged lack of status as a bona fide purchaser for value is irrelevant." Again, we disagree. The constable's deed did not convey any interest of the Trust, but instead that of Ogden, W. Westbrook, and Gayle, who had no interest. As in *Hall*, Izen "received nothing more than a chance at title" and as the purchaser of a quitclaim deed did not enjoy the protections of a bona fide purchaser. *See* 23 S.W.3d at 407.

11 Izen did not address the applicability of *Hall* in the trial court. We construe this argument as an attack on the legal sufficiency of the Trust's common-source ground expressly relied on its summary-judgment motion, which Izen may raise for the first time on appeal. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam) (citing *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999), and *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)).

12 In addition, the case relied on by Izen does not apply because the Trust was not the grantor in the constable's deed to Izen. *See Am. Sav. & Loan Ass'n of Houston v. Musick*, 517 S.W.2d 627, 630 (Tex. App.—Houston [14th Dist.] 1974), *rev'd on other grounds*, 531 S.W.2d 581 (Tex. 1975).

Declaration setting aside constable's deed. When the Trust conclusively proved its superior right of ownership to the property and when the recorded constable's deed presented a cloud on the Trust's title to the property that
15 it was *15 entitled to have removed, the trial court properly could declare in the amended summary judgment: "The Constable's Deed is set aside. As between [the Trust] and Izen, [the Trust] is the owner of the Property." *See I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 476-77 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (concluding that trial court was able to make "declarations" regarding title in judgment); *Inman v. Orndorff*, 596 S.W.2d 236, 238-39 (Tex. App.—Houston [1st Dist.] 1980, no writ) (modifying judgment to "decree that the cloud cast on the title of [plaintiff] to the subject property by the deed issued by the constable to [defendant] be removed").

Because the Trust's traditional motion and summary-judgment evidence facially established its right to judgment as a matter of law, *see* Tex. R. Civ. P. 166a(c), we now consider whether Izen raised a genuine, material fact issue sufficient to defeat summary judgment, *see M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam).

2. Izen failed to raise a fact issue to avoid the Trust's summary judgment.

Confirmation of the constable's sale. Izen argues he can avoid summary judgment because he raised genuine issues of material fact that the constable's sale should be affirmed. According to Izen, the sale should be affirmed because (1) the price received was fair and (2) the constable's listing and sale of Ogden's, W. Westbrook's, and Gayle's equitable title to the property "was not an irregularity." Izen does not point us to, and we have not located, any authority providing the requisite elements of what is required to affirm a constable's sale, as opposed to set it aside, either as a cause of action or as an affirmative defense. *Cf. Beneficial Mortg. Corp.-B01 v. Lopez*, No. 04-03-00215-CV, 2005 WL 1224613, at *2 (Tex. App.—San Antonio May 25, 2005, no pet.) (mem. op.) ("A sheriff's sale of real property will be set aside only on proof of (1) an irregularity
16 calculated to affect the sale, (2) a *16 grossly inadequate sales price, and (3) a causal connection between the irregularity and the selling price."). In any event, we assume without deciding that Izen could assert confirmation of the constable's sale as a defense to avoid summary judgment. We disagree, however, that Izen raised sufficient fact issues.

(1) Price received at sale. Regarding the adequacy of the sales price, Izen stated: "Izen's Declaration testimony establishe[d] that the Constable received a fair price for the property at the June 4, 2013, sale." Izen referenced a paragraph of his summary-judgment declaration, which stated "his opinion as current owner of record title of the disputed property" that "the price Joe Alfred Izen, Jr. paid for the property in question—$240,000.00 plus $113,199.87 plus $3,170.00 in the total amount of $356,369.87 was a fair consideration for a June 4, 2013 purchase of the disputed property at a public sale that was not grossly inadequate or inadequate sales price." In his brief, Izen points to a paragraph from Izen's declaration dated October 3, 2016, which referenced a tax-judgment exhibit that purportedly "contained a finding of the fair market value of the property as of the date the tax judgment was signed, October 22, 2013, in the amount of $401,407.00." We do not consider evidence that was not before the trial court when it ruled on the Trust's summary-judgment motion.[13] Even assuming that Izen properly was able to testify as to the value of the property for purposes of the property-owner rule,[14] and even considering the same evidence of the October 2013 tax judgment in Izen's declaration dated May 23, 2016
17 (which we *17 have located on our own in the summary-judgment record), Izen has not shown that the price received at the earlier constable's sale in June 2013 was fair. *See Preston Reserve, L.L.C. v. Compass Bank*, 373 S.W.3d 652, 663, 668 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (trial court could not consider price at subsequent sale as evidence of fair market value at time of foreclosure sale without showing of comparable market conditions).[15]

13 *See Saad v. Valdez*, No. 14-15-00845-CV, 2017 WL 1181241, at *7-*8 & n.3 (Tex. App.—Houston [14th Dist.] Mar. 30, 2017, no pet.) (mem. op.) ("We consider only evidence that was before the trial court at the time it ruled on the particular summary judgment motions being challenged."); *McMahan v. Greenwood*, 108 S.W.3d 467, 485 n.5 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g).

14 A property owner is qualified to testify to the value of his property, but his testimony must be substantiated by facts and may not be based solely on the owner's word. *See* Tex. R. Evid. 701; *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156-59 (Tex. 2012); *DZM, Inc. v. Garren*, 467 S.W.3d 700, 703-05 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

15 In his response, Izen recognized: "The fairness of the price received, whether the consideration paid was 'inadequate' or even 'grossly inadequate,' must be determined as of the date of sale and the condition of the property and title being sold."

(2) Lack of irregularity of sale; conveyance of equitable title. To support the lack of irregularity of the constable's sale and that Izen's title based on the constable's sale and deed was superior, Izen argued that the equitable interests and title of Ogden, W. Westbrook, and Gayle as trust beneficiaries were subject to sale by writ of execution. Izen also argued that such equitable title may prevail over bare legal title in a trespass-to-try-title suit. Even assuming without deciding that Izen presented sufficient legal grounds,[16] he did not present sufficient evidence to establish Ogden, W. Westbrook, and Gayle were beneficiaries of the Trust owning equitable title to the property. Izen relied on his declaration, which simply states: "Lisa Ogden, Wayne Westbrook, and Steven Gayle, were the beneficiaries of the East Texas Investments Trust." Such a broad, conclusory statement without underlying factual support does not constitute competent summary-judgment evidence. *See Arkoma Basin Expl. Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 & n.32 (Tex. 2008); *Doherty v. Old Place, Inc.*, 316 S.W.3d 840, *18 845 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (op. on reh'g) ("Appellant's statements that he claims 'fee simple title' to the property based on his prior possession of the land without abandonment or, alternatively, his occupation of the land in peaceable and adverse possession are merely conclusory and unsupported by factual evidence."). Izen also relied on our opinion affirming the July 2010 final judgment. However, there, we did not address or determine any status or equitable title of Ogden, W. Westbrook, and Gayle as beneficiaries of the Trust; our only reference was to these parties as "purported beneficiaries." *See Ogden*, 2012 WL 3016856, at *1.

18

16 *See Longoria*, 292 S.W.3d at 165 ("An owner of a superior equitable title may recover in a trespass to try title action if the record shows the equitable title is superior to the defendant's bare legal title."); *Brelsford v. Scheltz*, 564 S.W.2d 404, 406 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); *Jensen v. Wilkinson*, 133 S.W.2d 982, 986-87 (Tex. App.—Galveston 1939, writ dism'd judgm't cor.) (op. on reh'g).

Izen as party to judgment or judgment creditor. Also, Izen sought to support the validity of the constable's sale and show the superiority of Izen's constable's deed on the ground that "a judgment awarding attorney's fees directly to a party's attorney is valid and enforceable." In other words, "Izen was entitled to collect the attorney's fees awarded him by the July 29, 2010 Final Judgment." Similarly, on appeal, Izen argues that he was a party to and a creditor under the July 2010 final judgment entitled to a writ of execution and to collect his attorney's fees. We disagree. Our review of the July 2010 final judgment does not indicate that Izen was himself a party in the 2007 case or that the trial court made any award of attorney's fees directly to Izen. Accordingly,

19 the authorities cited by Izen do not apply.[17] *19 Rather, the July 2010 final judgment expressly decreed that Ryals as trustee of the Trust recover reimbursement from the Trust for $160,000 in Izen's legal services for Trust. The July 2010 final judgment ordered that Ryals as trustee of the Trust have all writs of execution and possession necessary for the enforcement of the judgment. While the July 2010 final judgment provided that Ryals pay Izen his $160,000 attorney's fees from the proceeds of a public sale of the property, it was Ryals as trustee of the Trust, *not Izen*, who was awarded reimbursement and all writs.

17 *See, e.g., Gulf, C. & S.F. Ry. Co. v. Cooper*, 77 S.W. 263, 266 (Tex. App.—Galveston 1903, no writ) (because judgment rendered in favor of plaintiff's attorney for half of amount recovered as contingent fee "in no wise affect[ed]" defendant, its complaint regarding same was not allowed); *Rampy v. Rampy*, 432 S.W.2d 175, 176-77 (Tex. App.—Houston [14th Dist.] 1968, no writ) (discussing cases in which divorce judgment ordered defendant to directly pay attorney's fees to plaintiff's attorney). In his brief, Izen also relies on *Sommers v. Concepcion*, 20 S.W.3d 27, 32 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). However, the cited portion of the case pertains to a nonprecedential, unpublished appeal in which a trial court order recognized that an attorney could enforce his contract for attorney's fees. *See Velasquez v. Lunsford*, No. 14-95-00172-CV, 1996 WL 544429, at *1 (Tex. App.—Houston [14th Dist.] Sept. 26, 1996, no writ) (not designated for publication). Izen has not cited, and we have not located in the record, any trial court order recognizing that Izen had any claim based on a contract with the Trust for his attorney's fees. Izen also cites

Nicholson v. Mills, 227 S.W.2d 354 (Tex. App.—Galveston 1950, writ ref'd). In *Nicholson*, the face of the judgment stated that "said cause is dismissed at costs of plaintiffs, for which let execution issue; fee of auditor heretofore appointed being heretofore taxed as costs." *Id.* at 357; *see* Tex. R. Civ. P. 172 ("The court shall award reasonable compensation to such auditor to be taxed as costs of suit."). Izen's attorney's fees were not awarded to him or "taxed as costs" in the July 2010 final judgment.

Quasi- and judicial estoppel. In his response, Izen argued that by claiming title under the July 2010 final judgment the Trust was judicially estopped from collaterally attacking the enforcement of that judgment's provisions requiring sale of the property and payment of attorney's fees. Likewise, on appeal, Izen argues that "judicial estoppel barred Ryals from attempting to prevent a constable's sale and payment of Izen's attorney's fees out of the sales proceeds." Izen also asserted quasi-estoppel as an affirmative defense. Both in the trial court and on appeal, Izen describes the Trust's conduct as acceptance of the benefits. *See supra* note 9; *see also Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) ("[A]cceptance of the benefits, is a species of quasi-estoppel.").

Judicial estoppel precludes a party from adopting a position inconsistent with one that it successfully maintained in an earlier proceeding. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008). The doctrine of judicial estoppel applies if these elements are present: (1) a sworn, prior inconsistent statement
20 made in a judicial proceeding; (2) the party now sought to be estopped *20 successfully maintained the prior position; (3) the prior inconsistent statement was not made inadvertently or because of mistake, fraud, or duress; and (4) the statement was deliberate, clear, and unequivocal. *In re Marriage of Butts*, 444 S.W.3d 147, 151 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The doctrine of quasi-estoppel precludes a person from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Lopez*, 22 S.W.3d at 864. Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced. *Id.*

We reject Izen's attempts to invoke these related defensive doctrines. Below and on appeal, Izen generally points to trial testimony by Ryals in the 2007 case where Ryals stated he was asking the trial court to "[p]ay all of the due debts [sic] to it and all of the attorney fees that's been accumulated what we had to defend and try the cases" out of "the proceeds of the [property] sale" and stated he thought all court-ordered moneys "ought to be paid." Izen also points to the Trust's response to a request for admission in which the Trust admitted that it was "dissatisfied with the jury award to Ryals of Eight Thousand ($8,000.00) Dollars instead of the amounts Ryals claimed for reimbursement which the jury rejected." However, statements in support of the payment of the Trust's debts out of the sale of the property and disappointment with a portion of the July 2010 final judgment are not necessarily inconsistent with the Trust's title challenge under circumstances where Izen obtained a writ of execution on a judgment to which he was not a party or creditor, purchased at a constable's sale nonexistent interest on property, and received a quitclaim constable's deed. Nor does Izen explain how it would be unconscionable to allow the Trust to maintain its title challenge.

Ryals's authorization; Izen's implied authority. On appeal, Izen asserts that "Ryals authorized Izen to sell the
21 Highway 59 property at constable's sale in order *21 to pay [the Trust]'s attorney's fees, costs, and debts." We have not located where in his response Izen raised Ryals's authorization as a ground to avoid summary judgment. However, in its amended summary-judgment order, the trial court stated: "Izen claims he conducted the constable's sale with authority from his client, but he admitted at the hearing that he has no summary judgment evidence which supports that position." The trial court also stated: "Izen had no authority to conduct the constable's sale which resulted in the Constable's Deed." Therefore, we will consider this subissue.

Izen argues that the "trial court cannot try summary judgment fact issues by oral testimony at a summary judgment hearing." Izen claims that he never made any statement admitting "that he had no summary judgment evidence proving that Ryals authorized the execution sale." Izen does not cite any portion of the record in support. *See* Tex. R. App. P. 38.1(g), (i). Nor does the record contain a transcript of the June 6, 2016 summary-judgment hearing. In any event, contrary to his contention, Izen did not "produce[] evidence that Ryals authorized the issuance of the writ of execution and the Constable's Sale." Izen again points to Ryals's testimony in the 2007 case trial where Ryals stated that he was asking the trial court to "[p]ay all of the due debts [sic] to it and all of the attorney fees that's been accumulated what we had to defend and try the cases" out of "the proceeds of the [property] sale" and stated he thought all court-ordered moneys "ought to be paid." Izen also points to Ryals's State Bar grievance complaint form against Izen, in which Ryals stated:

> At this point, unbeknownst, nor the way I would have handled the sell [sic]. I was told to meet Izen by Izen at this auction. The property should have been sold so the max amount of money that the property is worth could have been recovered for the beneficiaries and myself.
>
> Izen then bought this property and with two constables stole the
>
> 22 *22
>
> proceeds of the sale. This sale was a secret sale.[18]

Finally, Izen points to his summary-judgment affidavit and declaration in support. In Izen's affidavit, he referenced Ryals's trial testimony in the 2007 case. In Izen's declaration,[19] he stated: "There was no 'secret sale.' I fully informed Ryals of the details of the sale including the date and time and location and that Ryals was free to bid." Izen also stated:

> Prior to the date of the June 4, 2016 [sic] sale, I instructed Kenneth Ryals, as Managing Trustee for [the Trust], to attend the sale and to meet me at the sale and specifically informed him of the place, date and time, June 4, 2013. I instructed Ryals to arrive on that date at the Family Law Building where the sale was to be held. Ryals arrived at the Family Law Building where the sale was to take place [sic] until the sale began. Ryals remained at the Family Law Building where the sale took place and was present when the sale was called, bids were received on the property, the successful bidder was declared, and the sale ended.

18 This last sentence was handwritten.

19 Izen again relies on his declaration dated October 3, 2016, which was not before the trial court when it ruled on the Trust's traditional motion for partial summary judgment. *See supra* note 13. We consider instead similar paragraphs included in Izen's declaration dated May 23, 2016.

None of this evidence shows that Ryals as trustee of the Trust authorized Izen with regard to issuance of the writ of execution and constable's sale in favor of Izen. *See Authorization*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Official permission to do something; sanction or warrant."); *see also Authority*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The official right or permission to act, esp. to act legally on another's behalf; esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent; the power delegated by a principal to an agent."). Izen declared that he "ordered the Writ of Execution" without any mention of doing so on behalf of the Trust or Ryals as trustee of
23 the Trust. The constable's deed does not state that the writ of execution *23 was issued in favor of the Trust or Ryals as trustee of the Trust, but rather in favor of Izen as a "plaintiff" who "recovered a judgment against"

Ogden, W. Westbrook, and Gayle. *See* Tex. R. Civ. P. 629 (writ of execution "shall describe the judgment, stating . . . the names of the parties in whose favor and against whom the judgment was rendered"). That Ryals approved of funds from a sale of the property being used to pay for the Trust's debts is not evidence that Ryals authorized Izen as a nonparty to the July 2010 final judgment to obtain a writ of execution in Izen's name for a constable's sale. That Izen informed Ryals of the date, time, and place of the constable's sale and that Ryals attended is not evidence that Ryals authorized Izen to order a writ of execution in Izen's favor to conduct such constable's sale.[20]

[20] Izen contends that any complaint by the Trust concerning the constable's sale or the provisions of the July 2010 final judgment amounts to "invited error." Izen does not explain how the doctrine of invited error would apply under circumstances in which Izen did not present evidence of Ryals's authorization for the sale and the Trust did not challenge the July 2010 final judgment.

Izen also contends that "Izen's authority to order the writ of execution and to obtain a constable's sale of the property as ordered in the July 29, 2010 final judgment was implied." That is, as part of his "representation of Ryals/[the Trust]," Izen was taking action "necessary to enforce the client's case." Izen fails to include any citations to the record in this section of his argument and therefore did not adequately brief this subissue. *See* Tex. R. App. P. 38.1(i). In any event, Izen does not explain, and we fail to see, how obtaining a writ of execution and constable's sale *in Izen's own favor as a nonparty*, as opposed to in favor of the Trust, which was to have all writs of execution and possession as the successful party under the July 2010 final judgment, would fall within the scope of any continued representation of the Trust. *See* Tex. R. Civ. P. 629; *Gavenda v. Strata*
24 *Energy*, *Inc.*, 705 S.W.2d 690, 693 (Tex. 1986) ("[A]cts and omissions within the scope of [an *24 attorney's] employment are regarded as the client's acts."); *see also Implied Authority*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Authority intentionally given by the principal to the agent as a result of the principal's conduct, such as the principal's earlier acquiescence to the agent's actions.").[21]

[21] The case Izen cites does not support his position. *See Clint Indep. Sch. Dist. v. Cash Inv., Inc.*, 970 S.W.2d 535, 537 (Tex. 1998) ("A valid judgment, execution, and sale are required to pass title to property at an execution sale.").

Ability of attorney to bid at sale;"misrecital" in the constable's deed; inequitable conduct; and public policy. On appeal, Izen argues that when Ryals for the Trust authorized the issuance of the writ of execution and the constable's sale, Izen was not "out of line" when he successfully bid at the sale of his client's property to collect his attorney's fees. We already have determined that Izen did not present evidence of authority or implied authority.

Izen also contends that the constable's deed merely contained a "misrecital" or "technicality" "that the right, title, and interest, of the [Trust] beneficiaries (equitable title) was being sold and conveyed to Izen instead of the legal title of Ryals/Trustee." Izen contends that such misrecital "did not effect [sic] the title passed to Izen" or the sales price of the property. In addition, Izen argues that "Ryals/[the Trust]" cannot invoke equity to force another constable's sale without showing that another sale would bring a higher price and without "payment of the just debt which [the Trust] owed Izen" for his legal work. Finally, Izen asserts that Texas public policy upholds constable's sales wherever possible. Because Izen did not raise any of these arguments in his response, we do not consider these grounds on appeal to avoid summary judgment. *See* Tex. R. Civ. P. 166a(c); Tex. R.
25 App. P. 33.1(a); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). *25

Validity of lease; possession; reimbursement. Also, within his first issue, Izen attempts to challenge "another summary judgment issued in favor of Ryals purporting to hold the month-to-month [lease] between Izen and [the Edwardses] which paid the advalorem [sic] taxes on the Highway 59 property invalid." In September 2016,

the Trust filed a traditional motion for partial summary judgment against the Edwardses on the Trust's claim that no lease agreement exists between the Trust and the Edwardses and for issuance of a writ of possession of the property.

Izen further contends that "Ryals failed to tender prompt payment of the attorney's fees and reimbursement of advalorem [sic] taxes and costs, with interest, and lost any right to redeem the property after the constable's sale." In October 2016, Izen and the Edwardses filed a traditional motion for partial summary judgment "to enforce their rights to remain in possession of the property sold by the Constable's Deed until Ryals pays reimbursement."

Izen fails to include any citations to the record in these sections of his argument and therefore did not adequately brief these subissues. *See* Tex. R. App. P. 38.1(i). In any event, the trial court did not address or finally dispose of any lease or possession claims by the Trust against the Edwardses or any reimbursement or possession claims by Izen or the Edwardses against the Trust or Ryals in the July 2016 amended summary-judgment order. Nor did the severance order include or finally dispose of such claims or specify that rulings relating to such claims, if any, were now final and appealable. Therefore, we lack jurisdiction to review these subissues. *See Lehmann*, 39 S.W.3d at 195; *Lentino*, 159 S.W.3d at 653.

Having reviewed the summary-judgment evidence under well-established standards, *see* Tex. R. Civ. P. 166a(c); *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam); *City of Keller*
26 *v. Wilson*, 168 S.W.3d 802, 822-24 (Tex. 2005), we conclude that the trial court did not err in granting the *26
Trust's traditional motion for partial summary judgment.

We overrule Izen's first issue.

3. Izen's motion for new trial

In Izen's related third issue, he challenges the trial court's denial of his motion for new trial.[22] We will reverse a trial court's ruling on a motion for new trial only for an abuse of discretion. *See Director, State Employees Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

22 Izen refers to a motion for new trial denied "by a separate order dated May 30, 2018 [sic]." However, the only timely motion Izen filed in relation to the July 2016 amended summary judgment made final and appealable by the trial court's March 2017 severance order was the motion for new trial filed on March 31, 2017, which was overruled by operation of law as of May 15, 2017.

Izen contends:

> The trial court ignored all of the points raised by Izen . . . in the Motion for New Trial and refused to modify its ruling that Izen had no right to receive payment of the attorney's fees awarded directly to him under the July 29, 2010 Final Judgment and that Izen . . . had failed to produce any summary judgment evidence that Ryals approved the issuance of a writ of execution and Constable's Sale.

Izen argues the trial court's ruling was "manifest error" and his motion should have been granted. However, he fails to cite to any portion of the record or any legal authority. *See* Tex. R. App. P. 38.1(i). Izen also fails to provide any substantive analysis of "the points" raised in his new-trial motion or explain how the trial court abused its discretion. Because Izen inadequately briefed this issue, we do not consider it. *See Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931-32 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

27 We overrule Izen's third issue. *27

C. Lis-pendens expunction and temporary-injunction order

In his fourth issue, Izen challenges the trial court's actions in expunging the lis pendens filed by Izen and in entering an injunction against him without requiring the Trust to post a bond. We lack jurisdiction over this issue.

The final judgment in this case was signed on March 1, 2017, when the trial court granted the Trust a severance of its title and declaratory-judgment claims and made the July 2016 amended summary judgment a final, appealable judgment. *See Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001) (per curiam) ("As a rule, the severance of an interlocutory judgment into a separate cause makes it final."). Izen expressly noted in his notice of appeal that he was appealing from the judgment "signed on the 1st day of March, 2017." Izen stated that he filed his motion for new trial on March 31, 2017, which was overruled by operation of law on May 15, 2017. *See* Tex. R. Civ. P. 306a(1), 329b(a), (c). Izen's notice of appeal, filed on May 30, 2017, was timely. *See* Tex. R. App. P. 26.1(a).

The trial court signed its order granting the Trust's motion to expunge Izen's notice of lis pendens on May 22, 2017. In this order, the trial court ordered two notices of lis pendens filed by Izen on March 13, 2017 and April 21, 2017 expunged. The trial court also ordered Izen to cease and desist from filing additional notices of lis pendens involving the property.

The trial court signed its severance order over two-and-a-half months before the court signed its expunction order. *See Lee v. Lee*, 528 S.W.3d 201, 210-11 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (interlocutory order only becomes appealable when merged into subsequent, final, appealable order). In addition, Izen did not state in his notice of appeal that he was appealing from an order signed May 22, 2017.
28 *See* Tex. R. App. P. 25.1(d)(2) (notice of appeal must "state the date of the *28 judgment or order appealed from"). Therefore, Izen did not preserve any available appeal[23] from the trial court's May 22, 2017 order.

[23] *Compare Marks v. Starratt*, No. 14-09-00269-CV, 2009 WL 1312180, at *1 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.) (mem. op.) (per curiam) (no statute provides for appeal from interlocutory order that cancels lis pendens) *with id.* (indicating orders enjoining filing of lis pendens are appealable interlocutory orders for temporary injunction (citing Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4))).

Consequently, we do not consider Izen's fourth issue.

D. Res judicata and collateral estoppel

In his fifth issue, Izen argues that a federal-court jury verdict and an amended final judgment entered in May 2018 "required reversal and rendition of this cause on appeal" in his favor. We reject Izen's attempts to rely on principles of res judicata and collateral estoppel.

First, we do not consider documents an appellant appends to his brief that are not contained in the record. *See Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 210-11 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In any event, Izen asserts that such jury verdict and amended final judgment present the "last final judgment" upholding "Izen's claim to rights as a mortgagee in possession." However, as Izen acknowledges in his brief, "[t]he trial court below did not adjudicate that claim." And, as discussed above, the trial court did not sever or issue any final judgment on Izen's claims. Moreover, Izen did not raise the doctrines of res judicata and collateral estoppel based on any federal-court litigation in his summary-judgment response.

See Tex. R. Civ. P. 166a(c); Tex. R. App. P. 33.1(a); *Clear Creek Basin Auth.*, 589 S.W.2d at 678. Finally, Izen does not explain, and we fail to see, how any verdict and final judgment entered more than a year after the final
29 summary judgment in this case, would support res judicata or collateral *29 estoppel.[24]

24 *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 521 (Tex. 1998) (doctrine of collateral estoppel applies when issue was fully and fairly litigated in prior action and was essential to judgment in prior action); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (res judicata precludes relitigation of claims that have been finally adjudicated or arise out of same subject matter and could have been litigated in prior action). We express no opinion regarding the applicability of collateral estoppel or res judicata based on any May 2018 federal-court verdict and judgment to any claims remaining among the parties.

We overrule Izen's fifth issue.

IV. CONCLUSION

The Edwardses' interlocutory appeal is dismissed for lack of jurisdiction. We affirm the trial court's judgment as to all Izen's issues over which we have jurisdiction.

/s/ Charles A. Spain

Justice Panel consists of Justices Christopher, Bourliot, and Spain.

NO. 14-18-00383-CV
State of Texas in the Fourteenth Court of Appeals

Mahon v. Spaulding

Decided Mar 21, 2019

NO. 14-18-00383-CV

03-21-2019

DARREL MAHON, Appellant v. ALBERT TRAVIS SPAULDING, Appellee

PER CURIAM

On Appeal from the County Court at Law Burnet County, Texas
Trial Court Cause No. C5127

MEMORANDUM OPINION

Appellant Darrel Eugene Mahon sued appellee Albert Travis Spaulding in the Justice Court for Precinct 3 of Burnet County, Texas, Cause No. 316-021SC. On July 10, 2017, the Honorable Peggy L. Simon rendered a post-answer default judgment in Mahon's favor in the amount of $5,000.00 plus court costs of $341.00. Spaulding filed a Motion for New Trial and Motion to Set Aside Post-Answer Default Judgment, which the justice court denied on July 27, 2017. *2

2

On October 17, 2017, Spaulding filed a document styled as "Appeal Bond" in the justice court. Thereafter, the county court at law heard the appeal of the case by trial de novo. *See* TEX. R. CIV. P. 506.3. On April 5, 2018, the county court at law rendered judgment that Mahon take nothing by his claims.

In the proceeding before us, Mahon attempts to appeal from the April 5, 2018, judgment of the county court at law; however, as Mahon points out in his appellate brief, an appeal from a justice court in a small-claims case such as this must be perfected "within 21 days after the judgment is signed or the motion to reinstate, motion to set aside, or motion for new trial, if any, is denied." TEX. R. CIV. P. 506.1(a). An appeal from the judgment of a justice court is perfected by (a) filing an appeal bond supported by a surety or sureties approved by the judge, (b) filing a cash deposit in lieu of bond, or (c) filing a statement of inability to afford payment of court costs. *See* TEX. R. CIV. P. 506.1(a), (g). If the justice court's judgment is not timely appealed, the county court at law is without jurisdiction to hear the appeal. *See Searcy v. Sagullo*, 915 S.W.2d 595, 597 (Tex. App.—Houston [14th Dist.] 1996, no writ).

The record shows that Spaulding's Motion for New Trial and Motion to Set Aside Post-Answer Default Judgment was denied on July 27, 2017, and he did not attempt to appeal the justice court's judgment until October 17, 2017, more than 80 days later. The county court at law therefore lacked jurisdiction over the attempted appeal.[1]

[1] Because the "Appeal Bond" was untimely filed, we do not consider whether it would have satisfied the requirements for perfecting a small-claims appeal from the justice court.

A judgment or order by a court without the power or jurisdiction to render it is void. *See Lee v. Lee*, 528 S.W.3d 201, 208 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing *Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 *3 (Tex. 1986) (orig. proceeding)). We lack jurisdiction to review the merits of a void order. *See Jefferson v. Unity Nat'l Bank*, No. 14-14-00197-CV, 2015 WL 1779254, at *2 (Tex. App.—Houston [14th Dist.] Apr. 16, 2015, no pet.) (mem. op.) (citing *Waite v. Waite*, 150 S.W.3d 797, 800 (Tex. App.-Houston [14th Dist.] 2004, pet. denied)).

We notified the parties on February 25, 2019, that we would declare void the April 5, 2018, judgment of the county court at law and dismiss this appeal for want of jurisdiction unless, within ten days of the date of this notice, a response was filed demonstrating grounds for continuing the appeal. *See* TEX. R. APP. P. 42.3(a). No response was filed.

We accordingly declare the county court at law's judgment of April 5, 2018, void for want of jurisdiction. Because the void judgment has no effect, the judgment signed by the justice court on July 10, 2017, in Mahon's favor remains in effect.

An appellate court's jurisdiction "as to the merits of a case extends no further than that of the court from which the appeal is taken." *Pearson v. State*, 159 Tex. 66, 71, 315 S.W.2d 935, 938 (1958). Because the county court at law lacked jurisdiction to consider the merits of the case, so too do we. Thus, we dismiss the appeal for want of jurisdiction.

PER CURIAM Panel consists of Justices Christopher, Hassan , and Poissant.

NO. 01-18-00779-CV
Court of Appeals For The First District of Texas

Nnaka v. Mejia

Decided Jan 28, 2020

NO. 01-18-00779-CV

01-28-2020

KENNETH NNAKA, Appellant v. BLANCA MEJIA INDIVIDUALLY AND A/N/F OF W.A., A MINOR CHILD, AND HALLMARK COUNTY INSURANCE CO., Appellees

---

Richard Hightower Justice

On Appeal from the 333rd District Court Harris County, Texas
Trial Court Case No. 2016-74062

MEMORANDUM OPINION

Appellant Kenneth Nnaka challenges the trial court's post-judgment imposition of sanctions against him in connection with litigation arising out of the personal injury case of appellee Blanca Mejia, individually and
2 a/n/f of W.A. In one of his appellate issues, Nnaka asserts that the trial court erred in imposing *2 sanctions because Nnaka did not engage in any sanctionable conduct. Nnaka also attempts to appeal from the trial court's final judgment, rendered prior to the sanctions order, to challenge the trial court's resolution of Nnaka's claim for attorney's fees in connection with Mejia's personal injury case and his separate claims against appellee Hallmark County Insurance Co., the insurance company that insured the defendant in Mejia's personal injury case.

Because we conclude that he failed to file a notice of appeal from the final judgment, Nnaka never invoked this Court's jurisdiction over that judgment and we cannot consider those complaints on appeal. We further conclude that the trial court did not abuse its discretion in imposing sanctions against Nnaka. Accordingly, we affirm the trial court's sanctions order.

Background

Mejia and her minor child were injured in a crash between their vehicle and a tractor trailer driven by Kenneth Washington and insured by Hallmark County Mutual Insurance Co.

Mejia retained Nnaka to represent her with regard to the crash, and she signed a contingency fee agreement for 33.3% of any eventual damages recovered. Mejia testified before the trial court that she attempted on numerous occasions to meet or speak with Nnaka, but she was unable to do so. She obtained a copy of the police report
3 and reported the claim to Hallmark herself. She also attempted to *3 obtain medical treatment for back injuries sustained in the crash, but the medical providers refused to treat her without authorization from Nnaka or his firm. Mejia requested the treatment authorizations, but she never received them.

Mejia then terminated her relationship with Nnaka and retained Jeffrey Stern from the Stern Law Group. She entered into another contingency fee agreement for 40% of any eventual recovery with Stern. Stern filed the lawsuit against Washington, conducted discovery and otherwise litigated the case, paid some medical costs for Mejia to receive treatment while the suit was pending, and ultimately obtained a settlement in favor of Mejia and her minor child that was paid by Hallmark.

Following the settlement of Mejia's personal injury claims, Nnaka sought a portion of the attorney's fees from Stern. Stern intervened in Mejia's personal injury case and named Nnaka as a party. Stern sought a declaratory judgment to resolve Nnaka's claim to a portion of the attorney's fees. Stern asserted that Mejia had terminated Nnaka for cause and that Nnaka had not provided any significant legal services during the six to eight weeks that he was Mejia's attorney.

Nnaka & Associates, PLLC, answered Stern's petition in intervention with a general denial, stating that the firm was "incorrectly named as 'Kenneth Aghadi Nnaka.'" Nnaka & Associates also filed a separate suit in a
4 different district court against Hallmark asserting causes of action for tortious interference with contract, *4
fraud, and quantum meruit in connection with Hallmark's paying the settlement to Stern on Mejia's behalf.

Hallmark filed an unopposed motion to consolidate Nnaka & Associate's separate claims against it with Mejia's personal injury suit, which the trial court granted. The parties waived a jury trial and stipulated that the trial court could resolve all the issues necessary to render final judgment on the settlement agreement, the related dispute over the attorney's fees, and Nnaka's separate claims against Hallmark based on a hearing held on July 12, 2018. At this hearing, both Mejia and Nnaka testified and the parties presented documents and other evidence to the trial court.

The evidence showed that Mejia first contacted Nnaka's office on or around June 21, 2016, a few days after the accident. Mejia testified about the services Nnaka performed on her behalf—testifying that she had been unable to meet with him, had called on several occasion and had been told that he was out of the country, and had been unable to receive medical treatment due to his office's failure to provide proper documentation to her providers. Mejia testified that she had obtained the police report herself and had reported the crash to Hallmark herself before she terminated Nnaka's representation on August 24, 2016, and retained Stern. Nnaka testified that he had provided services to Mejia, including dealing with medical care providers, obtaining medical records, and
5 drafting *5 pleadings. He provided a billing statement reflecting 54.5 hours of attorney work and 42 hours of paralegal work, including multiple contacts and meetings with or on behalf of Mejia, for a total of $29,462.50 in fees.

At the end of the July 12, 2018 hearing, the trial court made an oral pronouncement finding that Mejia had terminated Nnaka for cause and that the value of his legal services to her was $0. The trial court further pronounced that the evidence taken at the hearing had finally resolved all other pending claims, which included Nnaka's separate claims against Hallmark. The trial court indicated that it would incorporate these pronouncements into a final judgment as soon as the settlement with regard to the minor child could be finalized and approved.

Following this hearing, on July 16, 2018, based on its consideration of "Kenneth Nnaka's sworn testimony and his 'Statement for Professional Services Rendered [to Mejia]' introduced into evidence in this case," the trial court ordered Nnaka "together with his paralegal, Jessica Mandujano," to "appear and show cause why he should not be sanctioned by the Court, or held in contempt of court." The trial court further ordered Nnaka "to bring his entire 'Mejia' client file to the hearing, including any time records, time entries, billing records, and all other documents related to this case."

On July 19, 2018, the trial court held a hearing on the issue of sanctions. Both Nnaka and his paralegal Mandujano appeared and testified under oath *6 regarding the legal services rendered to Mejia and the billing statement that was filed with the court. Nnaka's entire file and the billing statement itself was admitted into evidence at the hearing. The trial court reminded the parties on the record that all of the other issues in the case had been resolved at the July 12, 2018 hearing. The trial court further expressed concern regarding the nature of Nnaka's billing practices and stated that it had not yet decided whether to sanction Nnaka, report him to the State Bar, or both.

On July 20, 2018, the trial court rendered a final judgment approving the final settlement of Mejia's and W.A.'s personal injury claims. The trial court further found that Mejia had terminated Nnaka's representation for cause and that the value of Nnaka's legal services to Mejia was $0. The trial court rendered a take-nothing judgment on Nnaka's additional claims against Hallmark.

On July 24, 2018, the trial court signed its order imposing sanctions on Nnaka. The order set out the background of the case, including the fee dispute between Nnaka and Stern and Nnaka's separate claims against Hallmark, and it expressly referenced the court's final judgment that Nnaka take nothing on his affirmative claims for relief, the findings that Mejia had terminated her fee agreement with Nnaka for "good and just cause" and that the value of the reasonable and necessary attorney's services Nnaka had performed on Mejia's behalf "was $0.00." The order then made findings of fact relevant to the sanctions *7 hearing that had been held on July 19, 2018. The trial court further found that "it is appropriate to assess sanctions against Kenneth Nnaka for his knowing violations of the Rules of Civil Procedure and for his interference with the Court's orderly and expeditious administration of justice." The trial court ordered Nnaka to

> 1. personally attend a continuing legal-education course (CLE) of at least 4.0 hours of ethics that addresses ethics in billing practices;
>
> 2. provide the Court with written proof of such attendance within 120 days of the signing of this Order, and not later than November 21, 2018; and
>
> 3. pay, as a sanction, $2,500.00 into the registry of the Court within 30 days of the signing of this Order, and not later than August 23, 2018.

Nnaka filed a notice of appeal stating that he wished to appeal this sanctions order, and this appeal followed.

Jurisdiction and Scope of Appeal

Appellee Hallmark first asserts that this Court lacks appellate jurisdiction to consider Nnaka's issues challenging the July 20, 2018 final judgment.

A. Jurisdictional Background

The trial court signed the final judgment on July 20, 2018, resolving all of the issues in the litigation, including the fee dispute between Nnaka and Stern and Nnaka's claims against Hallmark. The trial court signed the order sanctioning Nnaka on July 24, 2019. *8

Nnaka filed his notice of appeal on August 28, 2018, outside the thirty-day deadline but within the time for an implied extension of time to file his notice of appeal:[1]

> [1] *See* TEX. R. APP. P. 26.1 (setting time for perfecting appeal), 26.3 (permitting extension of time to file notice of appeal); *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).

> NOTICE is hereby given that KENNETH NNAKA, Intervenor and the former attorney for Plaintiff, desires to appeal all portions of the appealable Sanctions ordered by this court, against Kenneth Nnaka. . . . The Sanction Order appealed hereto was entered on July 24, 2018[.]

Nnaka subsequently filed a brief in this Court arguing that the trial court erred by disregarding his claims against Hallmark and rendering a take-nothing judgment, that the trial court erred in rendering judgment that Nnaka was not entitled to any portion of the attorney's fees in Mejia's case, and that he did not commit any sanctionable conduct. Hallmark responded in its appellate brief that Nnaka had appealed only the sanctions order, so this Court lacked appellate jurisdiction over Nnaka's appeal to the extent that he challenged the trial court's rulings on the merits of the case. Mejia and her counsel waived their right to file a brief and instead joined Hallmark's brief.

After the briefs were filed, Nnaka moved to amend his notice of appeal. The amended notice stated in relevant part, "KENNETH NNAKA, NNAKA & ASSOCIATES, PLLC, and LAW OFFICES OF NNAKA &
9 ASSOCIATES, *9 PLLC, hereby give notice of their intent to appeal all of the trial court's appealable order signed by the [trial court] on July 24, 2018." Hallmark objected to this motion to amend, asserting, among other grounds, that its interest in the case would be harmed by allowing Nnaka to amend his notice of appeal to include an entirely new appealable order than the one he initially filed. We carried this motion with the case and resolve it now.

B. Analysis

There were two appealable instruments in this case. The first is the final judgment, signed by the trial court on July 20, 2018. This judgment disposed of all of the claims and all of the parties, including Nnaka's claim that he was entitled to a portion of the attorney's fees from Mejia's personal injury settlement and Nnaka's separate claims against Hallmark for tortious interference with contract, fraud, and quantum meruit.[2] *See Lehmann v.*
10 *Har-Con Corp.*, 39 S.W.3d 191, 205- *10 06 (Tex. 2001) (holding that judgment or order is final for purposes of appeal when it disposes of all pending claims and parties). The fact that the issues of potential sanctions against Nnaka remained pending does not prevent the July 20, 2018 judgment from being final and appealable. *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 2000) ("[A] judgment does not have to resolve pending sanctions issues to be final."); *Mantri v. Bergman*, 153 S.W.3d 715, 717 (Tex. App.—Dallas 2005, pet. denied) ("Unlike a pending cause of action, a pending motion for sanction does not make
11 interlocutory an otherwise- *11 final judgment"; also holding that if motion for sanctions remains pending when final judgment is signed, trial court retains jurisdiction to rule on that motion until expiration of its plenary power).

> 2 Nnaka argues in his reply brief that "[t]he trial court never considered [his] suit against Hallmark" and that "[t]here is no order from the trial court stating that Nnaka should take nothing against [Hallmark]." Nnaka concludes that "[t]he order to take nothing is part of the sanctions against Nnaka." This is incorrect. At the hearing on July 12, 2018, all parties presented evidence regarding the attorney's fee dispute and other pending claims. For example, Hallmark's attorney questioned Mejia, who testified that, as far as she was aware, Nnaka did not complete any work on her case and that all of the work was done by Stern and his firm. Hallmark's attorney asked Nnaka if he knew why Hallmark had no record of his letter of representation of Mejia, and Nnaka replied that he had "confirmation that it was sent and delivered," so he did not know why it was not in the file. Hallmark's attorney also questioned why Nnaka continued to bill Mejia for legal work after she had terminated his representation. This evidence adduced at the hearing was relevant to determining whether Nnaka had a contract with which Hallmark could have interfered, whether Hallmark had committed any fraud against Nnaka, and whether Nnaka was entitled to any recovery from Hallmark on a quantum

meruit theory for legal services that he had rendered on Mejia's behalf.

Finally, the July 20, 2018 final judgment expressly ruled on Nnaka's claim for attorney's fees and his separate claims for affirmative relief against Hallmark:

> After hearing the evidence adduced [at the July 12, 2018 hearing], and the arguments of counsel, the Court rendered a take-nothing judgment on all of NNAKA's claims for affirmative relief, determined that MEJIA had just and good cause to terminate her fee agreement with NNAKA, and determined that the value of reasonable and necessary attorney's fees NNAKA performed on MEJIA's behalf are $0.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims for affirmative relief brought by KENNETH NNAKA are hereby denied in all respects. It is the judgment of this Court that NNAKA take nothing against any other party to this suit.

The July 24, 2018 sanctions order repeated the facts of the case and referred to the trial court's previously rendered final judgment, but the sanctions order itself did not address the merits of any of Nnaka's claims. Rather, the sanctions order addressed only the trial court's imposition of sanctions against Nnaka. Thus, the record does not support Nnaka's contention that he was denied due process and did not have an opportunity to be heard on his claims for attorney's fees and additional affirmative relief against Hallmark. Those claims were heard and resolved by the trial court in its July 20, 2018 final judgment.

The second appealable order is the July 24, 2018 order sanctioning Nnaka. This order reduced the sanctions against Nnaka to a judgment and was itself appealable. *See Bahar v. Lyon Fin. Servs., Inc.*, 330 S.W.3d 379, 388 (Tex. App.—Austin 2010, pet. denied) ("A post-judgment imposition of monetary sanctions, however, is a final, appealable judgment 'when the sanctions are reduced to a judgment and execution is authorized thereon.'") (quoting *Arndt v. Farris*, 633 S.W.2d 497, 500 n.5 (Tex. 1982)); *see also Cook v. Stallcup*, 170 S.W.3d 916, 920 (Tex. App.—Dallas 2005, no pet.) ("Post-judgment orders embodying awards to claimants or enforcing the court's judgment itself are appealable orders; they function like judgments.").

Nnaka's original notice of appeal expressly stated that he was appealing the July 24, 2018 sanctions order. This notice of appeal thus invoked this Court's jurisdiction over all parties to the sanctions order. *See* TEX. R. APP. P. 25.1(b) ("The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from."). Nnaka subsequently filed briefing asking, in part, that this Court address issues resolved in the July 20, 2018 final judgment. Because no notice of appeal from
12 that *12 judgment was ever filed, however, this Court's jurisdiction over the final judgment was never invoked. *See id.*

Nnaka argues that his notice of appeal of the July 24, 2018 sanctions order also invoked our jurisdiction over the July 20, 2018 final judgment. He appears to rely on cases holding that interlocutory orders are merged into the final judgment and that appellants need not list every interlocutory order that they intend to challenge as long as the notice of appeal identifies the final order or judgment. *See, e.g., Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam) (holding that appellants "were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions" but only "the date of the judgment or order appealed from—in this instance the order dismissing their suit"); *Wall v. State Farm Lloyds*, 573 S.W.3d 281, 289 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("Our jurisdiction over the appeal from the final judgment is unimpaired by the notice of appeal's identification of an interlocutory order that would not be appealable in the absence of a final appealable judgment."); *Lee v. Lee*, 528 S.W.3d 201, 211 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("[B]y stating in her notice of appeal her intent to appeal the trial court's final order signed on March 2, 2016, [appellant] invoked our jurisdiction not only to review that order

but also to address interlocutory rulings that were merged into it."). In this case, however, there is no
13 interlocutory order. The July 20 and July 24 *13 orders are separately appealable, and the July 24 sanctions order adjudicates a separate issue than those addressed in the final judgment.

Nnaka argues that, even if the notice of appeal was defective, it nevertheless invoked this Court's jurisdiction and that his notice of appeal conferred jurisdiction on this Court because it was filed in a bona fide attempt to invoke our appellate jurisdiction. *See Warwick Towers Council v. Park Warwick LP*, 244 S.W.3d 838, 839 (Tex. 2008) (per curiam) (holding that, in determining presence of jurisdiction, appellate courts do not look to form or substance of instrument filed but rather consider whether it reflected a bona fide attempt to invoke appellate jurisdiction). But this is not a case in which there was an omission or defect in Nnaka's notice of appeal. Nnaka filed a notice of appeal from the sanctions order, but Nnaka has not filed any notice of appeal specifying the intent to appeal the July 20, 2018 final judgment. We conclude that filing a notice appeal from the July 24, 2018 sanctions order is not a "bona fide attempt to invoke appellate court jurisdiction" over the July 20 final judgment. *See id.*; *see also Jones v. Port Arthur Indep. Sch. Dist.*, No. 09-16-00374-CV, 2018 WL 3149162, at *1 n.2 (Tex. App.—Beaumont June 28, 2018, no pet.) (mem. op.) (declining to address issue related to order
14 that was not identified in notice of appeal). *14

Finally, Nnaka moved to amend the notice of appeal to include his related business entities Nnaka & Associates, PLLC, and Law Offices of Nnaka & Associates, PLLC. The rules permit amendment of the notice of appeal:

> An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.

TEX. R. APP. P. 25.1(g). Because Nnaka waited to seek leave to amend his notice of appeal until after both his and Hallmark's briefs had been filed, and after Mejia waived her right to file a brief and instead joined Hallmark's brief, he must obtain the leave of this Court to make any amendment. *See id.* We decline to grant leave to amend here.

This is not a case in which there has been a defect or omission that can be corrected by amendment *See*, *e.g.*, *Sweed v. Nye*, 323 S.W.3d 873, 874-75 (Tex. 2010) (per curiam) (holding that notice of appeal that did not contain all information necessary for notice of restricted appeal nevertheless invoked appellate court's jurisdiction); *City of San Antonio v. Rodriguez*, 828 S.W.2d 417, 418 (Tex. 1992) (seeking to correct typographical errors); *Taylor v. Margo*, 511 S.W.3d 117, 120 (Tex. App.—El Paso 2014, order) (allowing party
15 to amend notice of appeal to include amended version of originally identified order). Nnaka failed to file a *15 notice of appeal from the July 20, 2018 final judgment, and the time to do so has passed. *See* TEX. R. APP. P. 26.1 (setting out deadlines for perfecting appeal); *see also Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 764-65 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that when notice of appeal failed to challenge "the operative order," appellant had failed to perfect appeal as to that appealable order; further holding that because time for perfecting appeal from operative order had "long since expired," appellant failed to invoke appellate court's jurisdiction as to that appealable order).

Finally, the amended notice continues to identify only the July 24, 2018 sanctions order as the order being appealed from, so it would not correct the jurisdictional defect identified by Hallmark's briefing. And even if we were to construe Nnaka's amended notice as attempting to add a challenge to the July 20, 2018 final

judgment, such an amendment would be improper. Multiple Texas courts have held that a party may not amend its notice of appeal to challenge an entirely different order than the one named in the original notice of appeal. *See*, *e.g.*, *Fain v. Georgen*, No. 03-17-00313-CV, 2017 WL 4766654, at *3 (Tex. App.—Austin Oct. 19, 2017, no pet.) (mem. op.); *Oak Creek Homes*, *LP v. Moore*, No. 11-15-00291-CV, 2016 WL 6998949, at *2 (Tex. App.—Eastland Nov. 30, 2016, no pet.) (mem. op.); *Perez v. Perez*, No. 09-06-521-CV, 2007 WL 5187895, at *6-7 (Tex. App.—Beaumont May 22, 2008, pet. denied) (mem. op.); *Wright v.* *16 *Estate of Wright*, No. 03-07-00618-CV, 2008 WL 1753616, at *2 (Tex. App.—Austin Apr. 18, 2008, no pet.) (mem. op.); *Rainbow Grp.*, *Ltd. v. Wagoner*, 219 S.W.3d 485, 492-93 (Tex. App.—Austin 2007, no pet.); *Thomas v. Thomas*, No. 14-02-01286-CV, 2003 WL 1088220, *1-2 (Tex. App.—Houston [14th Dist.] Mar. 13, 2003, no pet.) (mem. op.) (per curiam). Accordingly, we deny Nnaka's motion to amend his notice of appeal.

We conclude that Nnaka failed to invoke this Court's jurisdiction over the July 20, 2018 final judgment, and, thus, any complaints on appeal relating to that judgment fall outside the scope of this appeal. We can, however, address Nnaka's challenge to the trial court's July 24, 2018 sanctions order.

Sanctions

Nnaka argues that the trial court erred (1) in ordering him to attend an additional continuing legal education course and to pay a $2,500 fine and (2) in reporting Nnaka to the State Bar of Texas because he did not commit any sanctionable conduct.

A. Standard of Review

In reviewing the trial court's sanction orders, we "must independently review the entire record to determine whether the trial court abused its discretion." *Am. Flood Research*, *Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006); *Sims v. Fitzpatrick*, 288 S.W.3d 93, 105 (Tex. App.—Houston [1st Dist.] 2009, no pet.). *17

The trial court here found that Nnaka violated Rule of Civil Procedure 13, and it referenced its inherent authority to sanction attorneys. Rule 13 authorizes sanctions for "groundless" and bad-faith pleadings, motions, and other papers. *See* TEX. R. CIV. P. 13; *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 362-63 (Tex. 2014). Rule 13 contains a presumption that documents are filed in good faith, and it "does not permit sanctions on the issue of groundlessness alone. Rather, the filing in question must be groundless and also either brought in bad faith, brought for the purpose of harassment, or false when made." *Nath*, 446 S.W.3d at 362-63.

Furthermore, "Texas courts "have the inherent power to sanction for an abuse of the judicial process that may not be covered by any specific rule or statute." *See Houtex Ready Mix Concrete & Materials v. Eagle Constr. & Envtl. Servs., L.P.*, 226 S.W.3d 514, 524 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Kings Park Apartments*, *Ltd. v. Nat'l Union Fire Ins. Co.*, 101 S.W.3d 525, 540-41 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). The inherent power to sanction "exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process." *Houtex Ready Mix Concrete & Materials*, 226 S.W.3d at 524. "In applying its inherent power to impose sanctions, a trial court must make findings to support its conclusion that the conduct complained of significantly interfered with the court's legitimate exercise of its core functions." *Id.* *18

A trial court does not abuse its discretion in imposing sanctions if some evidence supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009).

B. Analysis

The trial court here gave notice to Nnaka of its intention to impose sanctions, and it allowed him an opportunity to be heard. Following the sanctions hearing, the trial court found that Nnaka:

> 1. billed for services he did not perform, on dates he could not have performed services, and by overstating the time he allegedly spent performing services;
>
> 2. charged an unconscionable fee for work he did not perform and for overstating the work he did perform;
>
> 3. knowingly made false statements of material fact to the Court;
>
> 4. offered testimony and documentary evidence (the Fee Statement) he knew to be false;
>
> 5. offered evidence (the Fee Statement) without making a reasonably diligent inquiry to determine whether it was accurate;
>
> 6. violated the Texas Rules of Civil Procedure by filing pleadings/papers not in good faith. *See* Tex. R. Civ. P. 13; and
>
> 7. interfered with this Court's orderly and expeditious administration of justice by advancing claims he knew to be false.

The trial court thus imposed sanctions on Nnaka, requiring him to pay $2,500 into the registry of the court and ordering him to attend continuing education in ethics relating to billing practices. *19

The evidence supported these determinations. The Fee Statement introduced into evidence at the sanctions hearing—the same statement that Nnaka had relied on in seeking attorney's fees in the July 12 hearing—indicated that Nnaka sought approximately $29,462.50 in fees for legal services he allegedly performed during the nine-week period he represented Mejia. At the sanctions hearing, the trial court also compared the Fee Statement and case file submitted by Nnaka to the testimony of both Nnaka and his paralegal and the trial court's own knowledge of the case to identify discrepancies and inconsistencies.

For example, the Fee Statement showed that Nnaka billed Mejia for eleven hours of work over several separate days after she had terminated his representation. The statement further reflected that Nnaka spent three hours at his rate of $425 per hour creating the Fee Statement, but Nnaka testified at one point that his secretary created it, and he did not "vet it very, very well," and then later testified that he thought it was right to include the three hours because "we have to go back to the file to look at everything we did." The Fee Statement included entries for services that were not supported by any other evidence such as Nnaka's activity log or calendar, but they were instead based solely on Nnaka's attempts to recall the services he had completed for Mejia and Nnaka himself acknowledged that at least some of the dates "may be wrong." The trial court also noted that Nnaka had billed Mejia for a hearing on a day that no hearing had been held. *20

At one point in the sanctions hearing, the trial court asked, "Do you think it's an okay practice to not keep any time records and then if you need a bill or you have a quantum meruit claim, then you create a bill and you just choose dates with no supporting documentation?" And Nnaka replied, "Your Honor, that was my fault, because it was a contingency fee case. To be quite honest with you, Your Honor, this is the first time I'm having to do this. Most of my cases are contingency fee or a flat rate." Nnaka testified that these and other discrepancies

were errors "but there was no intention from [his] part to deceive." Nnaka explained to the trial court that some of the billings reflected the incorrect dates or periods of time. However, the trial court, as the fact finder, was entitled to disbelieve all or any portion of Nnaka's testimony on these matters. *See Rich v. Olah*, 274 S.W.3d 878, 884 (Tex. App.—Dallas 2008, no pet.) ("In a bench trial, the trial court is the sole judge of the credibility of the witnesses, assigns the weight to be given to their testimony, may accept or reject all or any part of their testimony, and resolves any conflicts or inconsistencies in the testimony.").

Accordingly, we conclude that the trial court did not abuse its discretion in determining that Nnaka engaged in sanctionable conduct because there was at least some evidence to support the trial court's imposition of
21 sanctions. *See Villa*, 299 S.W.3d at 97. We overrule Nnaka's complaint on appeal. *21

Rule 45 Sanctions

Finally, Hallmark asks this Court to provide sanctions against Nnaka pursuant to Rule of Appellate Procedure 45 because Nnaka's appeal was frivolous.

Rule 45 provides that if a court of appeals determines an appeal is frivolous, it may award a prevailing party just damages. *In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d 358, 369 (Tex. App.—San Antonio 2014, no pet.). "Whether to grant sanctions for a frivolous appeal is a matter of discretion that this court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances." *Id.*; *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Notably, Rule 45 does not require the Court to award just damages in every case in which an appeal is frivolous. *Woods v. Kenner*, 501 S.W.3d 185, 198 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

After a review of the record, briefing, and other papers filed in this Court, including the trial court's order imposing sanctions on Nnaka, we deny Hallmark's request that we impose sanctions against Nnaka pursuant to
22 Rule 45. *22

Conclusion

We hold that we have no jurisdiction over the trial court's July 20, 2018 final judgment. We affirm the trial court's July 24, 2018 sanctions order.

Richard Hightower

Justice Panel consists of Chief Justice Radack and Justices Landau and Hightower.

NO. 14-16-00630-CV
Court of Appeals of Texas, Houston (14th Dist.).

Rice v. Rice

533 S.W.3d 58 (Tex. App. 2017)
Decided Sep 26, 2017

NO. 14-16-00630-CV

09-26-2017

Emily and Olivia RICE, Appellants v. Peggy Evelyn RICE, Appellee

Christopher Burt, Michael Trevino, Orjanel Lewis, Jorge Borunda, Houston, TX, for Appellants. Robert S. MacIntyre, Jr., Houston, TX, Arno Schwamkrug, Sugar Land, TX, for Appellee.

Tracy Christopher, Justice

Christopher Burt, Michael Trevino, Orjanel Lewis, Jorge Borunda, Houston, TX, for Appellants.

Robert S. MacIntyre, Jr., Houston, TX, Arno Schwamkrug, Sugar Land, TX, for Appellee.

Panel consists of Justices Christopher, Brown, and Wise.

Tracy Christopher, Justice

In this probate proceeding, sisters Emily and Olivia Rice alleged that their stepmother Peggy Evelyn Rice tortiously interfered with their rights to inherit property from their father Raymond Rice. After sustaining Peggy's special exception that tortious interference with inheritance is not a recognized cause of action in Texas, the trial court dismissed the claim.[1] Emily and Olivia appealed, and after the parties' briefs were filed, the Texas Supreme Court issued an opinion that validates Peggy's position. *See Kinsel v. Lindsey*, No. 15-0403, 526 S.W.3d 411, 423–24, 2017 WL 2324392, at *9 (Tex. May 26, 2017). Peggy then moved to dismiss the appeal on the ground that *Kinsel* renders the appeal moot, and we took the motion with the case.

[1] Because all of the individuals identified in this opinion share the same surname, we refer to them by their respective first names.

We now deny Peggy's motion to dismiss the appeal, and because this case does not warrant the recognition of a new cause of action, we affirm the trial court's judgment.

I. BACKGROUND

60 Peggy applied to probate the will of her late husband Raymond in the statutory *60 probate court of Galveston County; Raymond's daughters Emily and Olivia contested the will. Peggy specially excepted to Emily's and Olivia's "First Amended Contest to Probate of Will and Application for Declaratory Relief." Although that pleading is not in the record, Emily and Olivia presumably alleged that Peggy tortiously interfered with their inheritance rights, because Peggy specially excepted on the ground that "the Texas Supreme Court and the Texas Legislature have not accepted that tortious interference with inheritance rights is a viable cause of action

under Texas law." Emily and Olivia responded to Peggy's special exceptions and amended their pleading, but continued to plead that "Contestants sue Peggy for tortious interference with their inheritance rights." The trial court sustained Peggy's special exceptions and dismissed the claim.

Emily and Olivia proceeded to trial on their will contest, and the jury found that Raymond lacked testamentary capacity when the will was executed and had signed the document as a result of undue influence. The trial court rendered final judgment incorporating the jury's findings. Because Raymond's purported will is invalid, he is considered to have died intestate.

In a single issue, Emily and Olivia argue that the trial court erred in sustaining Peggy's special exceptions and dismissing their interference-with-inheritance claim. They contend that, contrary to Peggy's arguments, interference with inheritance is a recognized cause of action in Texas.

II. ANALYSIS

Whether state law recognizes a tort is itself a question of law, which we review de novo. *See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996) (explaining that tort liability requires a legally cognizable duty, the existence of which is a question of law); *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016) (stating that questions of law are reviewed de novo).

This court first recognized a claim of tortious interference with inheritance in our 1998 decision in *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146–47, 149–50 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). In taking this view, we followed our sister court's decision in *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ), noting that the *King* court cited the Restatement (Second) of Torts 774B (1977) which provided that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." As the Texas Supreme Court recently explained in *Kinsel v. Lindsey*, the *King* court's conclusion was based on a misreading of the Texas Supreme Court's decision in *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559 (1948). *See Kinsel*, 526 S.W.3d at 422–24, 2017 WL 2324392, at *8–9. In *Pope*, a woman died intestate because two of her heirs-at-law prevented her from executing a will leaving her property to a third party. *See id.* at 423–24, 2017 WL 2324392, at *9 (citing *Pope*, 211 S.W.2d at 559–60). The Texas Supreme Court upheld the imposition of a constructive trust in favor of the third party, who was equitably entitled to the property. *See id.*(citing *Pope*, 211 S.W.2d at 560). Although the *King* court read *Pope* as implying a cause of action for tortious interference with inheritance, the Texas Supreme Court explained in *Kinsel* that " *Pope* did nothing to create a stand-alone tort. It simply concluded the facts gave rise to one of the 'numberless' instances in which a court, acting in equity, might impose a constructive trust on
61 property obtained 'through bad faith and unconscientious *61 acts.' " *Id.* (quoting *Pope*, 211 S.W.2d at 560). The Texas Supreme Court further clarified that "[n]either our precedent nor the Legislature has blessed tortious interference with an inheritance as a cause of action in Texas. Its viability is an open question." *Id.* at 423, 2017 WL 2324392, at *8.

The court then went on to consider whether to recognize such a claim. It stated that in determining whether to recognize a new cause of action, "a host of factors" must be considered, including "the existence and adequacy of other protections." *Kinsel*, 526 S.W.3d at 424, 2017 WL 2324392, at *9 & n.6. The court explained that in the case before it, the trial court imposed a constructive trust, and "[u]nder the circumstances, the constructive trust was an adequate remedy." *Id.* at 424, 2017 WL 2324392, at *10. The court emphasized that "the question as we see it is not whether we can increase the Kinsels' recovery, but whether the facts of *this* case warrant an enlargement of our body of tort law." *Id.* (emphasis in original). The court concluded that the facts presented in

Kinsel did not warrant recognition of a new cause of action for tortious interference with inheritance. Thus, as of this writing, the Texas Supreme Court has not recognized such a cause of action, but has instead stated that "[i]ts viability is an open question." *Id.* at 423, 2017 WL 2324392, at*8.[2]

[2] The same issue is presented in another case currently pending as Cause No. 16-0256 before the Texas Supreme Court. *See Anderson v. Archer*, 490 S.W.3d 175, 176 (Tex. App.—Austin 2016, pet. granted) (concluding that Texas does not recognize a cause of action for tortious interference with inheritance).

A. Peggy's Motion to Dismiss the Appeal as Moot

Peggy contends that because the Texas Supreme Court declined to recognize a claim for tortious interference with inheritance in *Kinsel*, we must dismiss this appeal as moot. *See Kessling v. Friendswood Indep. Sch. Dist.*, 302 S.W.3d 373, 384 n.9 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (explaining that courts lack subject-matter jurisdiction over a moot claim). But, even if the Texas Supreme Court had held that tortious interference with inheritance is an invalid cause of action in Texas—and it did not so hold—this appeal would not be moot.

An appeal is moot when there is no longer a live controversy between the parties and appellate relief would be futile. *See Lee v. Lee*, No. 14-16-00258-CV, 528 S.W.3d 201, 2017 WL 3270963, *4 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, no pet. h.) (citing *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006)). Stated differently, "a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012).

In this case, there continues to be a live controversy between the parties about whether tortious interference with inheritance is a viable cause of action in Texas. The parties' rights can be affected by an appellate ruling on the issue: if this Court, or the Texas Supreme Court, were to hold that tortious interference with inheritance is a legally cognizable cause of action, then Emily and Olivia would be entitled to litigate the merits of their claim against Peggy. Thus, this appeal is not moot. We accordingly deny Peggy's motion to dismiss.

B. Emily's and Olivia's Appeal of the Trial Court's Dismissal of their Claim

62 Emily and Olivia argue that the trial court erred in dismissing their claim *62 for tortious interference with inheritance, because under principles of vertical stare decisis, the trial court is bound by the decisions of the First and Fourteenth Courts of Appeals, both of which had recognized such a cause of action.[3] We agree that no trial court "has a right to decide cases contrary to an opinion of the appellate court for its jurisdiction on the same question." *Perez v. State*, 495 S.W.3d 374, 392 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Nevertheless, "[t]he doctrine of *stare decisis* must yield when a prior decision of [an intermediate appellate court] is plainly contrary to a holding of our Supreme Court." *Zimmerman v. Glacier Guides, Inc.*, 151 S.W.3d 700, 703 (Tex. App.—Waco 2004, no pet.). This is such an instance.

[3] The First and Fourteenth Courts of Appeal have shared jurisdiction over appeals in the district composed of the counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington. *See* Tex. Gov't Code Ann. § 22.201(a), (b), (o) (West Supp. 2016).

Under principles of vertical stare decisis, Texas intermediate appellate courts and trial courts are bound by the decisions of the Texas Supreme Court. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts are obligated to follow higher Texas courts and the United States Supreme Court). The Texas Supreme Court's pronouncement in *Kinsel* that the viability of a Texas tortious-interference-with-inheritance claim is "an open question" contradicts the earlier conclusion of the First and Fourteenth Courts of Appeals "that a cause of action for tortious interference with inheritance rights exists in

Texas." *Brandes*, 966 S.W.2d at 146 (quoting *King*, 725 S.W.2d at 754). We therefore conclude that stare decisis no longer applies to our holdings in *Brandes* and its progeny. The question then becomes whether we should recognize a new cause of action for tortious interference with inheritance.

When deciding whether to recognize a new cause of action, courts "must perform something akin to a cost-benefit analysis to assure that this expansion of liability is justified." *Kinsel*, 526 S.W.3d at 423 n.6, 2017 WL 2324392, at 9 n.6 (quoting *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003)). The non-dispositive factors we must consider include

> 1. the foreseeability, likelihood, and magnitude of the risk of injury;
>
> 2. the existence and adequacy of other protections against the risk;
>
> 3. the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question; and
>
> 4. the consequences of imposing the new duty, including
>
> (a) whether Texas's public policies are served or disserved;
>
> (b) whether the new duty may upset legislative balancing-of-interests; and
>
> (c) the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms.

See id.(citing *Ritchie v. Rupe*, 443 S.W.3d 856, 878 (Tex. 2014)).

Emily and Olivia briefed none of these factors, even after Peggy drew their attention to the *Kinsel* decision in her motion to dismiss the appeal. Emily and Olivia instead have continued to insist that interference with
63 inheritance already is a recognized cause of action. In their response *63 to Peggy's motion to dismiss the appeal as moot, Emily and Olivia point out that less than three weeks after *Kinsel* was decided, the First Court of Appeals decided *Yost v. Fails*, in which tortious interference with inheritance was treated as an established cause of action. *See Yost v. Fails*, No. 01-15-00773-CV, 534 S.W.3d 517, 2017 WL 2545088, at *9 (Tex. App.—Houston [1st Dist.] June 13, 2017, no pet. h.). Citing *King v. Acker*, the *Yost* court stated, "Texas courts of appeals are split on the question, but this court has recognized a cause of action for tortious interference with inheritance." *Id.* Because our sister court neither mentioned *Kinsel* and its abrogation of *King* nor considered whether interference with inheritance should be recognized as a new cause of action, we do not find it persuasive, and we decline to follow it.

We instead conclude that this case does not warrant an extension of existing law. We reach this conclusion based not only on the parties' failure to brief the issue, but for the reason stated in *Kinsel*, that is, the parties who are asking us to recognize a new cause of action already have an adequate remedy. *See Kinsel*, 526 S.W.3d at 414–15, 2017 WL 2324392, at *1. When Peggy applied to probate Raymond's will, Emily and Olivia could and did contest it on the grounds that their father lacked testamentary capacity to execute the will and that he signed it as a result of undue influence. The jury agreed with both of these contentions, and Emily and Olivia received their requested declaration that the will is invalid. Their only apparent reason for seeking recognition of a tortious-interference-with-inheritance claim is found in their pleading that "Contestants are entitled to

recover exemplary damages from Peggy arising from their claim for tortious interference with inheritance rights." Exemplary damages, however, are intended to punish the offender rather than to compensate the claimant. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (West Supp. 2016). Emily and Olivia already can be made whole by their existing causes of action, and we decline to create a new cause of action solely as a vehicle for an award of exemplary damages that are not otherwise available.

In sum, we agree with Emily and Olivia that the Galveston County probate court was bound by the principle of vertical stare decisis to follow binding precedent recognizing a cause of action for tortious interference with inheritance, and that the trial court erred in failing to do so; however, in light of the Texas Supreme Court's decision in *Kinsel* and our own refusal to recognize such a cause of action on the record and the briefs before us, the trial court's error was harmless. *See* TEX. R. APP. P. 44.1(a) (providing that a trial court's error of law is not reversible unless the error probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case on appeal).

III. CONCLUSION

Having concluded that the trial court did not reversibly err in sustaining Peggy's special exceptions and in dismissing Emily's and Olivia's claim for tortious interference with inheritance, we overrule the sole issue presented, and we affirm the trial court's judgment.

NO. 14-17-00079-CV
State of Texas in the Fourteenth Court of Appeals

Said v. Sugar Creek Country Club, Inc.

Decided Aug 31, 2018

NO. 14-17-00079-CV

08-31-2018

ASMA SAID, Appellant v. SUGAR CREEK COUNTRY CLUB, INC., Appellee

J. Brett Busby Justice

On Appeal from the 61st District Court Harris County, Texas
Trial Court Cause No. 2015-71133

MEMORANDUM OPINION

Appellant Asma Said appeals the summary judgment granted in favor of appellee Sugar Creek Country Club, Inc. on her negligence claim based on a premises-liability theory. Said sustained injuries when stepping off a curb while leaving Sugar Creek following a wedding. Sugar Creek moved for traditional summary judgment, arguing that the curb was not an unreasonably dangerous condition as a matter of law, and that the condition was open and obvious. The trial *2 court granted Sugar Creek's motion without specifying the grounds for its ruling. The trial court also denied a motion for continuance filed by Said in which she sought additional time for further discovery.

On appeal, Said challenges both grounds for summary judgment. She first argues that the curb was unreasonably high at the point at which she stepped off. We conclude that the evidence establishes the step did not pose an unreasonably dangerous condition as a matter of law because there was nothing unusual about the step and it was clearly marked and visible to pedestrians. We therefore need not address whether the condition was open and obvious. Finally, we conclude that the trial court acted within its discretion in denying a continuance. We affirm the trial court's summary judgment.

BACKGROUND

Said testified in her deposition that she and her husband attended a wedding at Sugar Creek on the evening of June 20, 2014. They chose not to valet park their car and instead self-parked in an adjacent parking lot. To enter the Sugar Creek clubhouse from that parking lot, Said and her husband walked up a sloping driveway next to other cars waiting to valet park, approached the front entrance of the clubhouse, and entered through the front door. In doing so, Said did not pass by or step up onto the curb at the location where she later fell.

Said and her husband left the reception at approximately 11:00 p.m. Said exited the front door of the clubhouse and turned immediately left down a tiled patio heading toward the parking lot where her car was parked. Her husband remained at the entrance to the club talking with friends. After walking several steps along the tiled patio, Said decided to step off the patio onto the sloping driveway leading towards the parking lot. She testified

that at the point where she stepped off the patio, the curb dividing the patio from the driveway was painted red and she was *3 aware there was a step down. She explained the step was higher than she anticipated. As she stepped off, her foot "kept going" and she fell.

Said filed this suit against Sugar Creek seeking to recover actual damages under a negligence claim based on premises liability and exemplary damages based on an allegation of gross negligence. She alleged that the curb represented an unreasonably dangerous condition because the curb is "at least twelve (12) inches high, which is twice the height of the average curb, without any warning to invitees." Sugar Creek moved for traditional and no-evidence summary judgment. In its traditional motion, Sugar Creek asserted two independent grounds: (1) the curb did not pose an unreasonable risk of harm; and (2) the condition of the curb was open and obvious. In support, Sugar Creek relied upon Said's testimony that she saw the step off of the curb but simply did not appreciate the height of the step.

Sugar Creek also attached the affidavit of a professional civil engineer, who explained that the clubhouse sits at the top of a small hill with a circular driveway in front that declines in both directions going away from the clubhouse toward the street. As the driveway declines, the patio attached to the front of the clubhouse remains relatively level, resulting in a gradual increase of the curb height towards the northwest corner of the patio where Said stepped off of the curb. According to the expert "[v]arying curb heights is consistent with common construction practices." The curb is painted red along the entire length of the club's front elevation and all the way down the driveway. The curb is visible to both a pedestrian standing in the driveway and a pedestrian standing on the patio who attempts to step down. Further, because the driveway and tiled patio are made from different construction materials, there is clear contrast between the patio and driveway, and the edge of the patio is clearly visible. The expert stated that the curb does not violate any applicable building or construction codes or any Sugar Land city codes or *4 municipal ordinances.

Sugar Creek also relied on an affidavit from its general manager. The manager stated that the club was completed in 1975 and there had been no material alterations to the structure or appearance of the curb or the front of the club since he began his employment in 2009. The manager further averred that, in his role as general manager, he is notified of all reported injuries, accidents, falls or other incidents concerning the premises, as well as complaints made to staff by members or guests related to any condition of the premises. With the exception of Said's fall, there had been no reported falls or other similar incidents related to the curb during the entirety of his employment, and he had never been notified of any complaints concerning the curb. At his deposition, the manager stated that the club had not added any written warning at the place where Said stepped off the curb because it had "never had any incident of any kind relating to somebody's inability to manage the curb."

In response to the motion for summary judgment, Said pointed to other deposition testimony in which the manager agreed that at the entrance of the club, the curb is about six inches high and the height gradually increases as one walks along the patio. When shown a picture of the view while looking down from the patio to the driveway around the point where Said stepped off, the manager stated that it was difficult to determine the change in the curb height from the photograph. The manager also agreed it was possible other people may have fallen off the curb because it was too high, and he just did not know about it. Said stated in her own affidavit that the height of the curb where she stepped off the patio is eleven inches, that the curb height and driveway slope were neither open nor obvious when looking down, and she had "no idea that the curb was nearly twice as high as a curb of normal height or that the driveway sloped downward." *5

Seven days before the hearing on the motions for summary judgment, Said filed a motion for continuance contemporaneously with her response. As grounds for continuance, Said cited her need for responses to her second request for production (due after the hearing on the motion for summary judgment), which she propounded after taking the deposition of Sugar Creek's general manager and learning of an "incident reports" file. She also cited her desire to take the deposition of Sugar Creek's expert witness regarding the opinions he expressed in his affidavit. The trial court denied the motion for continuance and instead granted the traditional motion for summary judgment in favor of Sugar Creek. Said filed a motion for new trial, which the trial court denied. This appeal followed.

ANALYSIS

Said raises four issues on appeal: (1) whether the trial court erred in granting summary judgment in favor of Sugar Creek; (2) whether summary judgment should have been denied because Sugar Creek failed to establish as a matter of law that the curb was not unreasonably dangerous and the condition of the curb was open and obvious; (3) whether the trial court abused its discretion in denying Said's motion for continuance; and (4) whether the trial court erred by granting more relief than requested by dismissing the part of her claim in which she sought to recover exemplary damages based on an allegation of gross negligence. We first address whether the trial court properly granted summary judgment on the grounds asserted by Sugar Creek in its traditional motion for summary judgment and whether the trial court granted more relief than requested. We then address
6 whether the trial court abused its discretion in denying the motion for continuance. *6

I. The trial court properly granted summary judgment on Said's negligence claim.

A. Standards of review and applicable law

We review the trial court's grant of summary judgment de novo. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

To prevail on a traditional motion for summary judgment, the movant must establish there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). The non-movant bears no burden to respond to a motion for summary judgment unless the movant conclusively establishes its cause of action or defense. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). Evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When the movant is a defendant, a trial court should grant summary judgment if the defendant negates at least one element of each of the plaintiff's causes of action. *Clark v. ConocoPhillips Co.*, 465 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

A negligence claim based on a theory of premises liability requires proof that (1) the defendant owed a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Del Lago Partners, Inc. v. Smith*, 307
7 S.W.3d 762, 767 (Tex. 2010). The scope of the premises owner's duty depends on the plaintiff's status. *Id.* *7 Where, as here, the plaintiff is an invitee, the property owner must exercise ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known. *Id.*; *see Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 162 (Tex. 2007) (per curiam).

B. The curb does not pose an unreasonable risk of harm.

To prove her claim, Said must establish that Sugar Creek breached a duty to reduce or eliminate an unreasonable risk of harm posed by a condition on the premises. *Brinson Ford*, 228 S.W.3d at 162. Said characterizes the curb where she stepped down onto the driveway as an unreasonably dangerous condition, maintaining that it is twice the height of a normal curb. Thus, the question on summary judgment is whether Sugar Creek proved as a matter of law that the curb did not pose an unreasonable risk of harm.

A condition posing an unreasonable risk of harm "is defined as one in which there is a sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970). A condition will not be deemed unreasonably dangerous simply because it is not foolproof. *Brinson Ford*, 228 S.W.3d at 163. Although whether a condition is unreasonably dangerous generally presents a fact issue, courts have held as a matter of law that a condition did not pose an unreasonable risk of harm. *See*, *e.g.*, *Brinson Ford*, 228 S.W.3d at 163; *Seideneck*, 451 S.W.2d at 755; *Martin v. Chick-fil-a*, No. 14-13-00025-CV, 2014 WL 465851, at *3 (Tex. App.—Houston [14th Dist.] Feb. 4, 2014, no pet.) (mem. op.). In *Brinson Ford*, the court held as a matter of law that a pedestrian ramp did not pose an unreasonable risk of harm where it was clearly marked, no other injuries had occurred in the past, no other invitees had complained of the condition, and the ramp met
8 applicable safety standards. 228 S.W.3d at 163; *8 *see also Seideneck*, 451 S.W.2d at 754 (no evidence of an unreasonably dangerous condition where plaintiff did not establish offending rug was defective or "unusual").

Sugar Creek presented evidence that the curb has existed in its current state for many years and its manager was aware of no other complaints or reports of persons having trouble stepping from the curb to the driveway. Further, its expert averred that curbs of varying height are common in the construction industry.[1] The curb is clearly marked with red paint and the patio is a different material from the driveway, making the curb visible to pedestrians stepping off the curb.[2] The expert testified that the curb does not violate any applicable building codes or ordinances. Although the lack of other similar incidents, by itself, may not be conclusive, *see*, *e.g.*, *Hall v. Sonic Drive-In of Angleton*, *Inc.*, 177 S.W.3d 636, 646 (Tex. App.—Houston [1st Dist.] 2005, pet. denied), nothing in the record suggests the condition of this curb was unusual. *See*, *e.g.*, *Brinson Ford*, 228 S.W.3d at 163; *Seideneck*, 451 S.W.2d at 754; *cf. Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006) (per curiam) (holding employer not liable as matter of law where injury resulted from performing same character of
9 work that employees in that position have always *9 performed and no evidence indicated work was unusually precarious). We therefore conclude that Sugar Creek met its initial burden of establishing that the curb did not pose an unreasonable risk of harm as a matter of law.

[1] In her brief on appeal, Said contends that Sugar Creek's expert affidavit should not have been considered because the testimony is not helpful. According to Said, the testimony goes to "whether the curb is too high, and curb height is an issue dealt with by everyone who walks or has walked." We disagree that standard curb height, or whether varying curb heights are common in the construction industry, are matters within the general knowledge of jurors. *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) (expert testimony assists trier-of-fact when knowledge on relevant issue is beyond that of average juror).

[2] Said argues that the red paint does not support the trial court's summary judgment, relying on the statement in *Brinson Ford* that yellow stripping on the ramp was "a common method used to indicate a change in elevation." *Brinson Ford*, 228 S.W.3d at 163. Whether the curb was painted red or yellow is immaterial in this case for two reasons. First, there is no testimony that only yellow paint signifies a change in elevation. Sugar Creek's expert stated that the red paint is visible to a pedestrian who is standing on the patio and attempts to step down on to the driveway, and that the edge of

the patio is clearly visible with differing materials used on the patio and driveway. Second, Said stated that she was in fact aware of a change in elevation: she saw the step and knew that she was stepping down from the patio to the driveway.

Said argues the curb poses an unreasonably dangerous condition because it is "twice as high as a normal curb." She further argues that the "gradual, yet substantial, change in the height of the curb, without a warning of the same, posed an unreasonably dangerous condition when stepping down from the curb." But Sugar Creek presented evidence that varying curb heights are common and Said presented no contrary evidence. Although she did attach photographs of the curb showing the sloping driveway and gradual change in height from approximately six inches to approximately eleven inches, the photographs do not show an unusually large curb or step-off. *See Seideneck*, 451 S.W.2d at 754 (plaintiff presented no evidence that rug with decorative fringe and tassels was "unusual" or would have suggested to defendant that it presented the prohibited degree of danger). Said presented no expert or factually supported testimony regarding normal curb height.[3]

[3] Said does state in her affidavit "I had no idea that the curb was nearly twice as high as a curb of normal height or that the driveway sloped downward." She does not include any facts supporting her statement regarding a curb of normal height, rendering her statement conclusory and insufficient to avoid summary judgment. *See Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex. 1997) (holding conclusory statements unsupported by facts insufficient to raise fact issue).

In *Christus Health Southeast Texas v. Wilson*, the Eleventh Court of Appeals addressed whether sufficient evidence supported a jury's finding of an unreasonably dangerous condition where the plaintiff failed to see a curb in a parking garage. 305 S.W.3d 392, 395 (Tex. App.—Eastland 2010, no pet.). When the plaintiff walked off the unseen curb, she fell and injured herself. *Id*. The curb was unpainted and made of similar material as the ground on which the plaintiff fell. *Id*. at 398. The expert in *Wilson* testified that the curb should have been
10 painted or made of a *10 different material so that pedestrians would have a warning of an elevation change. *Id*. Importantly, the premises owner in *Wilson* had notice of several prior incidents of people falling off of unpainted curbs in the garage. *Id*. As a result, the court concluded the evidence supported the jury's finding of an unreasonably dangerous condition. *Id*.

In this case, the only evidence Said presented to rebut Sugar Creek's proof that the curb was not an unreasonably dangerous condition is the fact of her own accident. As a matter of law, that fact alone is insufficient to avoid summary judgment. *See Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968) ("It is clear . . . that the fact an accident happens is no evidence that there was an unreasonable risk of such an occurrence; because almost an[y] activity involves some risk of harm."); *Martin*, 2014 WL 465851, at *6; *Dietz v. Hill Country Rests., Inc.*, 398 S.W.3d 761, 767 (Tex. App.—San Antonio 2011, no pet.) ("Standing alone, Dietz's testimony [regarding the circumstances of her fall] does no more than create a mere surmise or suspicion of an unreasonable risk of harm.").

Sugar Creek's general manager did acknowledge under questioning at his deposition that he was not saying other falls had never happened just because no one had brought any to his attention. But this acknowledgment amounts to speculation as to a possibility; it does not amount to evidence that such falls actually have occurred or that Sugar Creek knew or should have known of some unusual condition of the curb. Such speculation is no more than a scintilla of evidence and is insufficient to defeat summary judgment. *See Seideneck*, 451 S.W.2d at 755.

We conclude Sugar Creek established as a matter of law that the curb did not pose an unreasonable risk of harm. Therefore, the trial court properly granted summary judgment on Said's negligence claim. We overrule
11 Said's first two issues. *11

II. Sugar Creek's motion was sufficiently broad to support summary judgment on Said's allegation of gross negligence.

In her fourth issue, Said argues the trial court erred in granting more relief than requested because Sugar Creek did not mention her allegation of gross negligence in its motion for summary judgment. A trial court errs when it grants summary judgment on grounds not expressly set out in the motion or response. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *Bridgestone Lakes Cmty. Improvement Ass'n, Inc. v. Bridgestone Lakes Dev. Co., Inc.*, 489 S.W.3d 118, 123 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

In her petition, Said pleaded a negligence claim based on a premises-liability theory. In addressing the damages portion of her negligence claim, Said alleged that Sugar Creek's "conduct was grossly negligent and/or malicious" and stated she therefore was suing for exemplary damages. Said did not purport to plead gross negligence as an independent claim; rather, Said alleged gross negligence as a potential basis for recovering exemplary damages in addition to actual damages based on her negligence claim. In this context, Said's allegation of gross negligence is not a claim separate from her negligence claim, and Said cannot recover exemplary damages unless she first proves negligence. *See Nowzaradan v. Ryans*, 347 S.W.3d 734, 739 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (concluding that negligence and gross negligence are not separate claims but are inextricably intertwined); *Wortham v. Dow Chemical Co.*, 179 S.W.3d 189, 201 n.16 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Thus, a summary-judgment ground that would support dismissal of Said's negligence claim is sufficiently broad to support the dismissal of the part of her negligence claim in which she seeks to recover exemplary damages based on an allegation of gross negligence. *See Wortham*, 179 S.W.3d at 201-02 & n.16. *12

12

As discussed above, Sugar Creek proved as a matter of law that the curb was not an unreasonably dangerous condition. Because there was no breach of any duty Sugar Creek owed Said with regard to her negligence claim, Said cannot recover exemplary damages based on her allegation of gross negligence. *See id.* at n.16 (stating "[a] plaintiff who cannot support a cause of action for negligence cannot succeed on gross negligence because a finding of ordinary negligence is a prerequisite to a finding of gross negligence."); *Dubose v. Worker's Med. P.A.*, 117 S.W.3d 916, 922 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (negligence claim was barred by lack of physician-patient relationship between plaintiff and defendant; thus, summary judgment was also proper on unaddressed negligent misrepresentation and fraud claims that were dependent on the negligence claim). This summary-judgment ground is sufficiently broad to support the dismissal of the part of Said's negligence claim in which she seeks to recover exemplary damages based on an allegation of gross negligence. *See Nowzaradan*, 347 S.W.3d at 739; *Wortham*, 179 S.W.3d at 201-02 & n.16. Accordingly, the trial court did not grant more relief than Sugar Creek requested. We overrule Said's fourth issue.

III. The trial court did not abuse its discretion by denying a continuance.

In her third issue, Said challenges the trial court's order denying her motion for continuance of the summary judgment hearing. Texas Rule of Civil Procedure 166a(g) allows a trial court to order a continuance of a summary judgment hearing if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Tex. R. Civ. P. 166a(g). In her motion, Said gave two reasons for seeking a continuance: (1) to receive Sugar Creek's response to her second request for production (due one week after the hearing), in which she sought an incident report file, agendas and minutes of Sugar Creek's safety committee, and records from Sugar Creek's valet *13 service; and (2) to take the deposition of Sugar Creek's expert in response to his affidavit attached to the motion for summary judgment.

13

We review a trial court's decision to deny a motion for continuance for a clear abuse of discretion and on a case-by-case basis. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004) (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002)). A clear abuse of discretion is shown when a trial court reaches a decision "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* Courts consider the following non-exclusive factors in determining whether a trial court has abused its discretion in denying a motion for continuance for additional discovery: (1) the length of time the case has been on file; (2) the materiality and purpose of the discovery sought; and (3) whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Id.*; *Muller v. Stewart Title Guar. Co.*, 525 S.W.3d 859, 867 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

A. Length of time the case has been on file

Said filed her case as level 2 under Rule 190.3 of the Texas Rules of Civil Procedure. At the time Said sought a continuance, the case had been on file for approximately eleven months and discovery had been open for approximately nine months. The discovery period was set to end almost six weeks later. Said argues that she had only a short time to conduct discovery after the answer was filed, citing our decision in *Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) as support. But that case was in a different procedural posture: the trial court denied any discovery at all following a remand from the Supreme Court of Texas on a specific issue, which we held was an abuse of discretion. *Id.* at 465, 469. Here, in contrast, the trial court did not deny all discovery, and Said had over nine months to conduct
14 discovery before the summary- *14 judgment hearing. *See Perotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (trial court acted within its discretion in denying continuance; seven months was sufficient to effect discovery before motion for summary judgment filed). This factor weighs in favor of finding no abuse of discretion in the trial court's denial of a continuance.

B. Materiality of the information sought

Said contends the information sought—incident reports, minutes of the safety committee identified in a deposition, and the club's valet services records—was material to her negligence claim because this information may have revealed other witnesses or other falls on the curb. She also argues the deposition of Sugar Creek's expert was needed to further explicate his opinions about the safety of the curb.

According to Sugar Creek, the documents sought were encompassed by Said's earlier requests for production and all responsive documents already had been produced. Sugar Creek contends Said failed to show how the additional discovery requests would have elicited any additional material information related to the curb or incident at issue.

We conclude that at least some of the information sought—including the incident reports and minutes—could be material, though it is unclear whether Said's requests would have revealed any information not previously
15 produced.[4] In addition, the deposition of Sugar Creek's expert would be material to the opinions *15 he expressed regarding the curb in his affidavit. This factor weighs in favor of finding an abuse of discretion in the trial court's denial of a continuance.

[4] In her appellate brief, Said expresses concern about whether Sugar Creek was complying with its discovery obligations, noting that the general manager said at his deposition that he had not been shown the First Request for Production of Documents. Sugar Creek responds that the parties had limited their discovery requests to the curb at issue, and the failure to show the general manager the actual document titled First Request for Production of Documents does not establish that the general manager was not asked to gather and produce responsive documents. We express no opinion on this dispute because it is not necessary to our disposition of Said's issue on appeal. *See* Tex. R. App. P. 47.1.

C. Due diligence in obtaining the discovery sought

A party seeking a continuance also must establish that it acted diligently to obtain the discovery sought. *See Duerr v. Brown*, 262 S.W.3d 63, 79 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Schmidt v. Bell*, No. 01-06-00161-CV, 2008 WL 921702, at *1 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (verified motion for continuance must state with particularity the diligence used to obtain the evidence). Said stated in her motion that she was unaware of the documents' existence until the general manager's deposition, and that within two weeks of the deposition she sent the second set of discovery requests. Said argues on appeal that the documents were (1) responsive to her first request for production and should have been produced earlier; and (2) she only learned of them at the deposition of the general manager. If the documents were responsive to the first request for production, Said could have filed a motion to compel production of the documents after the deposition and before the hearing on the motion for summary judgment. She did not. Said's failure to utilize the rules of civil procedure to file a motion to compel does not support a continuance. *See Duerr*, 262 S.W.3d at 79.

Even assuming the documents were not responsive to the first request and Said only learned of the additional documents at the deposition of the general manager, Said does not explain why she did not ask for the documents until after the motion for summary judgment had been filed. Though Said did not wait that long after the deposition to request the documents, the case already was near the end of the discovery period and Said offered no explanation for her nearly two-week delay. A party that does not seek discovery diligently runs
16 the risk of not being able to obtain the needed discovery before the hearing. *See Duerr*, 262 S.W.3d at 79. *16

With regard to the deposition of Sugar Creek's expert, Said states that she did not seek the deposition immediately after receiving the motion for summary judgment because she wished to have the responses to her second request for production before doing so. But that is a strategy decision Said made; nothing prevented her from seeking the deposition earlier if she believed it necessary to respond to the motion for summary judgment. "When a party is prevented from deposing opponents because it failed to act timely, that is a predicament of its own making and a risk the party takes by not diligently pursuing discovery." *Duerr*, 262 S.W.3d at 79 (internal quotations omitted); *see Carter v. MacFadyen*, 93 S.W.3d 307, 311 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). This factor weighs in favor of finding no abuse of discretion in the trial court's denial of a continuance.

D. Noncompliance with Texas Rule of Civil Procedure 252

We also note that Said's motion did not comply strictly with the procedures for a continuance set forth in Rule 252 of the Texas Rules of Civil Procedure. To establish an abuse of discretion, the record must show that the complainant complied with the rules governing a motion for continuance. *See Lee v. Lee*, 528 S.W.3d 201, 221 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Rule 252 expressly states that a motion for continuance must state, among other things, "that the continuance is not sought for delay only, but that justice may be done. . .." Tex. R. Civ. P. 252. Although Said did file a declaration attesting to the statements contained in the motion for continuance, a statement that the motion was not sought for delay only, but that justice may be done, is not contained in either the motion or the declaration attached to the motion. This factor weighs in favor of finding no abuse of discretion in the trial court's denial of the continuance.

In sum, although the materiality of the discovery sought weighs in favor of granting a continuance, the length
17 of time the case has been on file and the due *17 diligence factors weigh in favor of the trial court's decision to deny the motion for continuance. In addition, the motion for continuance did not comply strictly with Rule 252. Having reviewed the record and motion for continuance filed by Said, we cannot say the trial court clearly abused its discretion in denying her motion. We overrule Said's third issue.

CONCLUSION

Having overruled Said's four issues on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby

Justice Panel consists of Chief Justice Frost and Justices Busby and Wise.

NO. 09-18-00390-CV
Court of Appeals Ninth District of Texas at Beaumont

Samson Expl., LLC v. Hooks

Decided Sep 17, 2020

NO. 09-18-00390-CV

09-17-2020

SAMSON EXPLORATION, LLC, Appellant v. CHARLES G. HOOKS III, ET AL, Appellees

CHARLES KREGER Justice

On Appeal from the 60th District Court Jefferson County, Texas
Trial Cause No. B-173,008-B

MEMORANDUM OPINION

We are asked to determine, among other issues, what constitutes an unconditional tender of payment sufficient to stop the accrual of post-judgment interest. Samson Exploration, LLC, previously known as Samson Lone Star, LP, (Samson) appeals the trial court's denial of its motion for satisfaction of judgment concerning post-judgment interest owed by Samson and granting of the Hooks's motion to maintain Samson's supersedeas bond until full payment of final judgment. Samson argues that the trial court erred when it denied Samson's motion
2 for *2 satisfaction of judgment and ordered Samson to pay an additional $3,434,279.00 in post-judgment interest because the trial court did not properly apply the Finance Code in calculating the accrual of post-judgment interest as it relates to appellate extensions, and erred in failing to consider partial payments by Samson as unconditional tenders, thereby arresting the accrual of post-judgment interest on the judgment amount after crediting each partial payment at the time they are tendered against the remaining balance owed. For the reasons explained below, we affirm the trial court's judgment in part and reverse and remand in part.

Procedural History [1]

[1] It is not necessary for our resolution of the appeal to recite the extensive background of this case. Therefore, we will only explain the procedural history necessary for our review.

Appellees, Charles E. Hooks III, et al, (Hooks) sued Samson for violations, including breach of contract and fraud, of a mineral lease of land owned by Hooks and leased by Samson. A jury found that Samson violated the terms of the lease, among other issues, and awarded Hooks a judgment that "exceeded $22 million dollars."
3 The judgment of the trial court contained the following provision: *3

> IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that, in addition to the foregoing, Plaintiffs shall have and recover from Samson post-judgment interest on the total amount of this judgment, including damages, attorneys' fees, expert witness fees, and costs of court, at the rate of 18%, compounded annually.

Samson appealed the jury's verdict, and the First Court of Appeals affirmed in part and reversed and rendered in part the trial court's judgment. *Samson Lone Star, Ltd. P'ship v. Hooks*, 389 S.W.3d 409, 440 (Tex. App.—Houston [1st Dist.] 2012), *aff'd in part, rev'd in part* 457 S.W.3d 52 (Tex. 2015). The appellate court affirmed only the trial court's judgment award of $52,257.22 to Hooks related to Samson's failure to pay ad valorem taxes and modified the post-judgment interest to 5%. *Id.* The court reversed "the remaining portions of the final judgment." *Id.* Samson paid to Hooks the $52,257.22 plus accrued interest at 5%, totaling $62,025.47. Hooks refused the payment. According to Samson, this amount was "stipulated by the parties." The payment reflected the following language:

> Samson has previously tendered this payment directly to Plaintiffs and Plaintiffs' counsel, but Samson's tenders have been refused. Samson will cooperate with a motion by Plaintiffs to withdraw, for Plaintiffs, this sum from the Court's Registry, and with any motion Plaintiffs may make to have this sum placed in an interest-bearing account.

Samson deposited the money into the registry of the trial court.

Hooks then appealed to the Texas Supreme Court. *See Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52 (Tex. 2015). The Supreme Court reversed the court of appeals on the issues of limitations for fraud, the most-
4 favored-nations clause, *4 limitations for breach of offset provisions, and attorneys' fees. *See id.* at 70. It also affirmed in part and reversed in part post-judgment interest, holding that "to the extent Hooks recovers for past due royalties, he is entitled to an 18% interest rate[,]" and a 5% post-judgment interest rate on all other recoveries. *Id.* at 69-70. On remand, the First Court of Appeals modified the trial court's judgment regarding unpooling damages, fraud damages representing the formation-production damages, the most-favored-nations damages and post-judgment interest rate, stating the post-judgment interest rate will accrue at "an 18% rate for past-due royalties . . . and a 5% interest rate for other recoveries." *Samson Lone Star Ltd. P'ship v. Hooks*, 497 S.W.3d 1, 34-35 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (Supp. Op.).

Samson thereafter paid the sum of $1,793,314.89 to Hooks based on its calculation of "final portions of the judgment plus post-judgment interest[,]" that Samson believed the Texas Supreme Court mandate made final. When Hooks refused the payment, Samson filed a motion with the trial court requesting the payment amount be deposited into the registry of the court. The following language accompanied Samson's payment:

> Samson has previously tendered this payment directly to Plaintiffs and Plaintiffs' counsel, but Samson's tenders have been refused. Samson will cooperate with a motion by Plaintiffs to withdraw . . . this sum from the Court's Registry, and with any motion Plaintiffs may make to have this sum placed in an interest-bearing account.

5 *5 The trial court granted Samson's motion in part and ordered the amount deposited with the district clerk be applied toward "satisfaction of those claims made final by the January 30, 2015 Opinion and May 1, 2015 Mandate of the Texas Supreme Court[.]"

Simultaneously with its partial payment to Hooks, Samson appealed to the Texas Supreme Court. The Supreme Court denied Samson's petition for review. *Samson Lone Star, Ltd. P'ship v. Hooks*, 16-0776, 2018 Tex. LEXIS 80, *1 (Tex. Jan. 26, 2018). Samson then attempted to make a final payment to Hooks reflecting the "total unpaid portion of the judgment of $25,416,097.73." Samson offered this amount to Hooks as payment for the full judgment and represented to Hooks it would "forego" a petition for rehearing to the Texas Supreme Court if Hooks accepted the amount as payment in full for the judgment. Samson argues that this was not a

"voluntary payment" to Hooks because, Samson included language tracking the Texas Supreme Court in *Miga I* and *Miga II*. *See Miga v. Jensen*, 96 S.W.3d 207 (Tex. 2002) (*Miga I*); *see also Miga v. Jensen*, 299 S.W.3d 98 (Tex. 2009) (*Miga II*).

> Samson explicitly reserves, and does not waive, its rights to (a) challenge the judgment giving rise to the Remaining Final Judgment Amount, both in the Texas Supreme Court and in any other courts to which the case might be remanded; and (b) if the challenge is successful, recover the Remaining Final Judgment Amount plus interest from Plaintiffs and their attorneys representing them. Accordingly, any overpayment is not a "voluntary" payment but rather
>
> 6 *6
>
> should be returned to Samson or applied to any amounts owed for any claims under this case. (citations omitted.)

Hooks refused the attempted payment but did not object to the amount being deposited into the registry of the court. Samson again included the following language with its deposit into the court's registry.

> Samson has previously tendered this payment directly to Plaintiffs and Plaintiffs' counsel by the letter dated February 12, 2018, . . . but Plaintiffs have not accepted that tender. Samson will cooperate with a motion by Plaintiffs to withdraw, for Plaintiffs, this sum from the Court's registry, and with any motion Plaintiffs may make to have this sum placed in an interest-bearing account.

The Texas Supreme Court denied Samson's motion for rehearing. *Samson Lone Star, Ltd. P'ship v. Hooks*, 16-0776, 2018 Tex. LEXIS 460, *1 (Tex. June 1, 2018). Thereafter, Hooks and Samson submitted an agreed order requesting that the trial court release to Hooks all sums deposited by Samson from the registry of the court. The money was released to Hooks.

Subsequently, Samson filed a Motion for Entry of Satisfaction of Judgment. Hooks opposed Samson's motion and requested the court maintain Samson's supersedeas bond until Samson paid the judgment in full. Hooks asserted that Samson still owed Hooks money on the judgment, and Samson sought a court order "acknowledging that Samson has paid all amounts due and owing by virtue of the judgment of this case." The
7 trial court denied Samson's motion and ordered that *7 Samson pay an additional $3,434,279.00 to Hooks, "plus subsequent post-judgment interest[.]" Samson timely filed this appeal.

Accrual of Post-judgment Interest

In its first issue, Samson argues that the trial court erred by failing to properly apply the Finance Code when calculating post-judgment interest. *See* Tex. Fin. Code Ann. § 304.005. According to Samson, the post-judgment interest should not have accrued during times of Hooks' appellate extensions and therefore, the trial court's judgment is in direct violation of section 304.005(b) of the Finance Code. *See id*. Samson contends that "post-judgment interest statutes operate on judgments even when the judgments do not reference those statutes."

The assessment of when post-judgment interest begins to accrue is a matter of statutory interpretation, subject to *de novo* review. *Long v. Castle Tex. Prod. LP.*, 426 S.W.3d 73, 78 (Tex. 2014). "Our fundamental goal when reading statutes 'is to ascertain and give effect to the Legislature's intent.'" *Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017) (quoting *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)). "To do this, we look to and rely on the plain meaning of a statute's words as expressing

legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results." *Id*. (citation omitted). Section 304.005 states the following
8 regarding post-judgment interest accrual: *8

> a) Except as provided by Subsection (b), post-judgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment is rendered and ending on the date the judgment is satisfied.
> (b) If a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension.

Tex. Fin. Code Ann. § 304.005. The 2008 judgment of the trial court reflects the following language:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in addition to the foregoing, Plaintiffs shall have and recover from Samson post-judgment interest on the total amount of this judgment, including damages, attorneys' fees, expert witness fees, and costs of court, at the rate of 18% compounded annually.

The 2008 judgment is silent as to when post-judgment interest begins to accrue or if it ceases to accrue during periods when Hooks, as the claimants in the trial court, obtained appellate briefing extensions. The Supreme Court has applied the Finance Code to fill in gaps in contracts. *See Hooks*, 457 S.W.3d at 69-70 (explaining that where a contract does not specify an interest rate, the rate is to be determined pursuant to the Finance Code); *see also Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 189 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (discussing Finance Code section 304.00l's applicability to silent judgments and holding that "[the Appellee] is statutorily entitled to post-judgment interest despite the trial court's failure to award such
9 interest in the judgment"). *9

Hooks challenges section 304.005's applicability to the 2008 judgment by arguing that the judgment is not silent and "[u]nlike cases where the judgment simply does not address interest at all, the judgment here says exactly what the interest rate shall be and exactly how frequently the interest shall compound." According to Hooks, the judgment is clear on the rate of post-judgment interest and how the interest should be calculated. Any deviation would go against the direct language of the judgment signed by the trial court. Notably, Hooks does not argue that subsection 304.005(a) is inapplicable to the 2008 judgment despite its silence regarding the start date of post-judgment interest accrual. Hooks only states that "[t]here is no silence."

We are unpersuaded by Hooks's argument. Without the application of section 304.005, the judgment would be silent as to the start date for accrual of post-judgment interest. Hooks cannot rely on one aspect of the statute without applying the entire statute.

> When interpreting statutes[,] we try to give effect to legislative intent. "Legislative intent remains the polestar of statutory construction." However, it is cardinal law in Texas that a court construes a statute, "first, by looking to the plain and common meaning of the statute's words." If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms. Further, if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity. As our Court said long ago: When the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the
>
> 10 *10
>
> courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law.

Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865-66 (Tex. 1999) (citations omitted). We review the language of the statute as a whole to determine the legislature's intent.

> [W]ords and phrases are not to be considered in isolation, but rather in the context of the statute as a whole. Put differently, our objective is not to take definitions and mechanically tack them together—as [Appellant] claims the court of appeals did—rather, we consider the context and framework of the entire statute and meld its words into a cohesive reflection of legislative intent.

Cadena Comercial USA Corp., 518 S.W.3d at 326 (internal citations omitted). Section 304.005(b) requires that any appellate briefing delays obtained by the claimant abate the accrual of post-judgment interest. *See* Tex. Fin. Code Ann. § 304.005(b). We are not to fragment the statute to support one version of an interpretation of 304.005. *See Cadena Comercial USA Corp.*, 518 S.W.3d at 326.

Given the judgment's silence regarding the commencement date for accrual of post-judgment interest and the cessation of interest accrual during periods of a trial court claimant's appellate briefing extensions, the plain language of the statute requires this Court to apply not only section 304.005(a), but also 304.005(b). *See* Tex. Fin. Code Ann. § 304.005. Subsection (a) expressly references Subsection (b)'s exception to the accrual of post-judgment interest between "the date the judgment is rendered and ending on the date the judgment is
11 satisfied." *See id.* To make sure we *11 properly apply Subsection (a), we must also look to the exception provided in Subsection (b). *See id.*

Accordingly, Samson is entitled to a recalculation of post-judgment interest by the trial court which does not include accrual of post-judgment interest for periods of appellate briefing extensions obtained by Hooks, the trial court claimants. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 162 (Tex. 2014) (explaining that in section 304.005(b), "[a]nother important factor comes into play and asks whether, on appeal . . . [post]judgment interest does not accrue for the period of any extension" moved for by the claimant and granted); *see also Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2014 WL 6705741, at *3 (Tex. App.—Austin Nov. 14, 2014, no pet.) (mem. op.) (stating on remand that any calculation of post-judgment interest must subtract appellate briefing extensions granted the claimant in the trial court by either the court of appeals or the supreme court).[2] Hooks has failed to show as a
12 matter of law that *12 subsection 304.005(b) is inapplicable to the judgment. Therefore, the trial court erred when it refused to apply section 304.005(b) in the post-judgment interest calculation. We sustain Samson's first issue.

> 2 We note that Hooks argues that any appellate extensions moved for and granted on behalf of Hooks was in large part to respond to Samson's extensions or a "mirror-image motion" although they may not have needed an extension. Hook describes this as common practice used to "promote orderly prosecution of the appeal by preventing the briefing schedule from becoming staggered." The Austin Court of Appeals dismissed a similar argument as "facially appealing" but concluding that the Finance Code "forecloses it." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2014 WL 6705741, at *3 (Tex. App.—Austin Nov. 14, 2014, no pet.) (mem. op.); *see also* Tex. Fin. Code Ann. 304.005(b). It concluded that the plain meaning of the statute "simply and plainly . . . defines the period for which interest does not accrue solely in terms of the extension that was *granted for* a claimant at trial [and i]t does not address, or suggest that we may consider, the effect of such an extension on the appellate process of the claimant's reasons for seeking such an extension." *Waste Mgmt. of Tex. Inv.*, 2014 WL 6705741, at *3 (citations omitted).

Samson's Partial Payments to Hooks

In its second issue, Samson argues that its partial payments to Hooks throughout the appellate process were effective unconditional tenders and served to arrest accrual of post-judgment interest on the amounts paid. According to Samson, Hooks's opposition to the tender of the partial payments is in violation of Texas law and serves only to punish Samson. While we disagree that Samson's payments operated as valid tenders such that they stopped the accrual of post-judgment interest in its entirety, Samson's partial payments should have been considered to reduce the post-judgment interest amounts owed. *See Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 490 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Hand & Wrist Ctr. of Hous., P.A. v. Republic Servs., Inc.*, 401 S.W.3d 712, 721 (Tex. App.—Houston [14th Dist.] 2013, no pet.). *13

The Payments

"Post-judgment interest is not a punishment inflicted on a judgment debtor for exercising the right to appeal. Instead, like pre-judgment interest, post-judgment interest is simply compensation for a judgment creditor's lost opportunity to invest the money awarded as damages at trial." *Miga I*, 96 S.W.3d at 212 (citation omitted). "The party asserting a valid tender has the burden of proving it." *Church v. Rodriguez*, 767 S.W.2d 898, 901 (Tex. App.—Corpus Christi 1989, no writ) (citing *Arguelles v. Kaplan*, 736 S.W.2d 782, 784 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *C.F. Bean Corp. v. Rodriguez*, 583 S.W.2d 900, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ)). "A tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt or obligation." *Saravia v. Benson*, 433 S.W.3d 658, 663 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Baucum v. Great Am. Ins. Co. of New York*, 370 S.W.2d 863, 866 (Tex. 1963)). "[A] tender of payment must include everything to which the creditor is entitled, and a tender of any less sum is ineffective." *See Note Inv. Group, Inc. v. Assocs. First Capital Corp.*, 476 S.W.3d 463, 493 (Tex. App.—Beaumont 2015, no pet.) (citation omitted). A partial tender will not serve to stop the accrual of interest. *Id.* The elements required to establish a valid tender are: (1) an unconditional offer; and (2) production of funds in the entire amount due. *See Baucum*, 370 S.W.2d at 866; *Anglo Dutch*, 522 S.W.3d at 489. As the party asserting valid tender to stop the *14 accrual of post-judgment interest, Samson bears the burden of proving these elements. *See Anglo-Dutch*, 522 S.W.3d at 489. Because each payment made by Samson to Hooks was not in the full amount due to Hooks, each payment was not a valid tender. *See id.*

Hooks argues Samson's attempted tenders of payments were not unconditional because Samson made partial payments conditioned on their right to appeal the judgment. With each of the tenders, Samson included the following language:

2011 Payment of $60,124.44

[O]n behalf of Samson, I am now forwarding you a check in the amount of $60,124.44, which is the amount stipulated at trial plus interest at the rate of 5%. This payment is in trust for your clients in the referenced action and is being paid pursuant to the Stipulation received into evidence as Court Exhibit A[.] *This amount is not a payment of the trial court's Judgment*, now reversed, and Samson is not acquiescing in any way in the trial court's Judgment.

2016 Payment of $1,793,314.89

Samson Exploration, LLC ("Samson") recognizes that the portion of the trial court's December 11, 2008 Judgment (the "Judgment") related to the favored nations damages and the portion of the Judgment related to the attorneys' fees award (collectively, the "Resolved Issues") are now final and are not subject to any appellate challenge. Accordingly, Samson is arranging *to pay the full amount of the Resolved Issues*, plus post-judgment interest thereon, in order to stop the running of additional post-judgment interest on the Resolved Issues *pending Samson's appeal of the other erroneous portions of the Judgment*. Samson calculates the full amount owed on the Resolved Issues plus post-judgment interest through November 7, 2016 to be $1,793,314.89 (the "Resolved Payment Amount").

15 *15

. . .

Samson hereby tenders the Resolved Payment Amount to plaintiffs *as full satisfaction of the Resolved Issues* and post-judgment interest thereon.

2018 Payment of $25,416,097.73

[T]he *total unpaid portion of the judgment* is $25,416,097.73 (the "Remaining Final Judgment Amount).

. . .

Samson hereby tenders the *Remaining Final Judgment Amount*, along with the First and Second Deposits, to Plaintiffs in full satisfaction of the Hooks Final Judgment.

. . .

Samson explicitly reserves, and does not waive, its rights to (a) challenge the judgment giving rise to the Remaining Final Judgment Amount, both in the Texas Supreme Court and in any other courts to which the case might be remanded; and (b) if the challenge is successful, recover the Remaining Final Judgment Amount plus interest from Plaintiffs and their attorneys representing them. In that situation, the payment of the Final Judgment Amount is not a "voluntary" payment pursuant to the Supreme Court's opinions in *Miga I* and *Miga II*.

(Internal citations omitted, emphasis added.)

None of these payments were for the full amount Samson owed the Hooks as evidenced by the very language it employed to accompany these payments. Samson used phrases like "as full satisfaction of the [r]esolved
16 [i]ssues," "total unpaid portion of the judgment," and "[r]emaining [f]inal [j]udgment [a]mount" which *16 indicate their intention to pay select portions of the judgment. To establish a valid tender, Samson bore the burden of proving that it made an unconditional offer *and* produced the full amount owed. *See Bray v. Cadle Co.*, 880 S.W.2d 813, 818 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (emphasis added). Samson failed to do so.[3] However, Samson did establish that it made partial payments on the judgment by depositing funds into the court's registry and offering to cooperate with the Hooks regarding any desired withdrawals they wanted to make, and those payments should be factored into a post-judgment interest calculation as discussed below.

3 The Texas Supreme Court discussed finality of judgments and post-judgment interest in *Long v. Castle Texas Production Ltd. Partnership*, explaining that "finality for the purpose of appeal bears the closest resemblance to finality for the purpose of accruing post-judgment interest." 426 S.W.3d 73, 78 (Tex. 2014). In *Long*, the Supreme Court held for a judgment to be final and subject to appellate review, it must "dispose[] of all pending parties and claims in the record," and the court analogized that the same must be done for the accrual of post-judgment interest. *Id.* at 78-79.

> A judgment that disposes of all parties and claims begins appellate deadlines and generally triggers the accrual of post-judgment interest. But if an appellate court reverses that final judgment and remands for further proceedings, the original, erroneous trial court judgment is no longer final because it no longer disposes of all parties and claims. Generally then, if a remand results in multiple trial court judgments, post-judgment interest accrues from the date of the *final* judgment (rather than the original, erroneous judgment).

Id. (citations omitted).

Partial Payments and Declining-Principal Interest

As we have previously discussed, "[a] tender generally must include everything the creditor is entitled to, and a
17 tender of any less sum is not effective." *17 *Anglo-Dutch*, 522 S.W.3d at 490 (citation omitted). "[T]he general rule [is] that paying part of a debt does not bar the further accrual of interest." *Id.* (citations omitted). "However, '[t]he [declining-principal] interest framework used in *Brainard* [*v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006)] and *Battaglia* [*v. Alexander*, 177 S.W.3d 893 (Tex. 2005)] applies not only to partial settlements, but also . . . to partial payments of obligations that are unconditionally tendered and accepted.'" *Id.* (quoting *Hand & Wrist Ctr. of Hous.*, 401 S.W.3d at 721); *see also Miga I*,96 S.W.3d at 212 (explaining that post-judgment interest should not accrue on "an unconditional tender of the money awarded," given to a judgment creditor that he "may invest it as he chooses").

Samson argues that although the deposit of partial payments to the registry of the court does not stop post-judgment interest in its totality, Samson is entitled to be credited for any payments in the calculation of post-judgment interest. We agree. The Supreme Court has been clear that partial payments toward prejudgment interest should be credited in calculating prejudgment interest. In both *Brainard* and *Battaglia*, the Supreme Court applied the declining-principal interest framework to prejudgment interest.

> When a defendant is not jointly and severally liable for the damages a claimant has sustained, this means the "principal" is only the specified percentage of the "damages found by the trier of fact." Interest would accrue only on that amount, and a settlement payment would be applied first to accrued interest on that amount as of the date of the settlement

18 *18

> payment, then to any remaining principal, and interest would accrue on any remaining principal from that date forward.

Battaglia, 177 S.W.3d at 908 (citations omitted).

> [C]ompensation other than for lost use of money is not interest but a windfall for the claimant and a penalty to the defendant. We concluded that, to satisfy the purpose of prejudgment interest, settlements must be credited periodically, according to the date they are received. This approach, known as the "declining principal" formula, is the proper way to apply credits in the calculation of prejudgment interest. In *Battaglia*, we concluded that "[a] settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward." . . . Under the "declining principal" formula, the trial court is to consider the date on which the insured received each payment.

Brainard, 216 S.W.3d at 816 (citations omitted). The Texas Supreme Court agreed in *Brainard* that the plaintiff should not continue to earn interest on $1,010,000 in damages despite having already received $1,005,000 in compensation. *See id*

This same method should be applied to post-judgment payments. Our sister courts have applied this method to post-judgment calculations. *See First State Bank of Rogers v. Wallace*, 788 S.W.2d 41, 43 (Tex. App.—Houston [1st Dist.] 1990, no writ) (noting that when "interest has accrued on the funds in the registry after the date of judgment and prior to the withdrawal of the funds by appellees[,] [s]uch interest shall be credited to the post-judgment interest assessed against First State Bank on the amount paid in to the trial court's registry"); *see*
19 *also Lee v. Lee*, 528 S.W.3d 201, 220 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (explaining *19 that a judgment should be credited with offsets in determining post-judgment interest, "then those amounts would further reduce the amount of post-judgment interest that continued to compound"); *Rosenthal v. Rosenthal*, Nos. 01-99-00058-CV, 01-00-00259-CV, 2001 WL 1383132, at *8 (Tex. App.—Houston [1st Dist.] Nov. 8, 2001, pet. denied) (holding that a wife should not have to pay post-judgment interest for the time period that the husband possessed the funds that he obtained by garnishment). While we agree with Hooks that Samson's partial payments do not suspend post-judgment interest in its entirety, the trial court erred when it did not give Samson credit for its partial payments under the declining-principal interest framework outlined in both *Brainard* and *Battaglia*, in calculating post-judgment interest.

Conclusion

In conclusion, we affirm the trial court's judgment that the 2011, 2016, 2018 were not valid tenders that would cease the accrual of post-judgment interest in its entirety. We reverse and remand to the trial court and order that the trial court calculate the appropriate days of Hooks' appellate briefing extensions as required under section 304.005(b) in determining the amount of post-judgment interest Samson owes. We further conclude Samson's partial payments should be factored into the recalculation of post-judgment interest under the
20 declining-principal interest *20 framework outlined in *Battaglia* and *Brainard*. Given our resolution of that issue, we need not reach Samson's remaining issue on appeal. *See* Tex. R. App. P. 47.1.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

/s/_____

CHARLES KREGER

Justice Submitted on June 6, 2019
Opinion Delivered September 17, 2020 Before Kreger, Horton and Johnson, JJ.

No. 11-20-00181-CV
Court of Appeals of Texas, Eleventh District

Schauble v. Schauble

Decided Jul 21, 2022

11-20-00181-CV

07-21-2022

JAY SCHAUBLE A/K/A JUAN SCHAUBLE, Appellant v. MATTHEW SCHAUBLE, IN HIS CAPACITY AS TRUSTEE OF THE EDWARD R. SCHAUBLE TRUST, Appellee

---

JOHN M. BAILEY CHIEF JUSTICE

On Appeal from the Probate Court No. 2 Harris County, Texas Trial Court Cause No. 470,780-401

Panel consists of: Bailey, C.J., Trotter, J., and Williams, J.

MEMORANDUM OPINION

JOHN M. BAILEY CHIEF JUSTICE

This is an appeal from a bench trial on a motion in limine to determine if Appellant, Jay Schauble a/k/a Juan Schauble, had standing to bring an action against the Edward R. Schauble Trust. The trial court determined that Appellant lacked standing because he was not a beneficiary of the Edward R. Schauble Trust. The trial court also ordered Appellant to pay $358,692 to Appellee, Matthew Schauble, in his capacity as trustee of the Edward R. Schauble Trust, for attorney's fees for the work in the trial court and $88,750 if Appellant unsuccessfully appealed the trial *2 court's judgment and lost on all points. Appellant challenges these determinations in four issues. We affirm.[1]

[1] By order of the Texas Supreme Court, this case was transferred to this court from the First Court of Appeals. As the transferee court, we "must decide the case in accordance with the precedent of the transferor court." *See* Tex. R. App. P. 41.3.

Background Facts

Edward R. Schauble (decedent) created the Edward R. Schauble Trust on January 12, 2000. Prior to the genesis of this litigation, decedent amended the terms of the trust once-on October 7, 2013. Under the terms of the trust, decedent was to serve as the trustee until he became incapacitated or died. Originally, decedent's children, Matthew Schauble and Claire Schauble, were the beneficiaries of the trust. Following decedent's incapacitation or death, Matthew Schauble would assume the role of successor trustee. The terms of the trust also provided that decedent possessed the authority to amend the trust in writing.

On February 20, 2018, decedent and Appellant married. Following their marriage, several e-mails were sent from decedent's personal e-mail account to his trust attorney, Joe Cioffi. These e-mails are discussed in more depth below. In these e-mails, decedent discussed conveying one of his residences to Appellant, possibly

amending the trust to include Appellant as a beneficiary, and substituting Northern Trust as the successor trustee. Decedent sent Cioffi several e-mails between February and June of 2018. In response to one of decedent's June e-mails, Cioffi cautioned decedent and said that it would be best to discuss his proposed changes at their next annual meeting. Additionally, during this same time period, decedent emailed Eileen Bourke, of Northern Trust, several times. In these e-mails, decedent informed Bourke that he had informed Cioffi of the changes that he had discussed with Northern Trust in their meeting. *3

During his marriage to Appellant, decedent also executed a durable power of attorney wherein he appointed Appellant as his attorney-in-fact. Appellant was to remain decedent's attorney-in-fact until decedent's death. As decedent's attorney-in-fact, Appellant had the authority to "act for [decedent] in all matters that affect a trust." Additionally, decedent appointed Appellant as his health care agent in a medical power of attorney. As decedent's health care agent, Appellant had the authority to make all health care decisions for decedent. Appellant's authority under both the durable power of attorney and the medical power of attorney terminated on August 19, 2018, when decedent passed away.

On March 15, 2019, Appellant sued Appellee seeking a declaratory judgment that Appellant was a beneficiary of the trust and the owner of specific assets of the trust.[2] Appellee responded to Appellant's claims with a general denial. Additionally, Appellee included a motion in limine in his response wherein Appellee asserted that Appellant lacked standing to sue because Appellant was not an interested person in the trust.

[2] Appellant also sued Matthew Schauble in his capacity as the independent executor of decedent's estate. However, Appellant's claims against the estate are not a subject of this appeal.

On November 26, 2019, Appellant filed his first motion to compel production of certain documents from Appellee. The basis for Appellant's first motion to compel was his contention that Appellee inadequately and untimely responded to his request for production. Specifically, Appellant asserted that Appellee never produced eight boxes that decedent's children allegedly took from decedent's residence. On January 7, 2020, the trial court held a hearing on Appellant's motion to compel. However, the trial court ultimately suggested that Appellant reset his motion to compel. *4

On March 2, 2020, Appellant filed a second motion to compel. On April 13, 2020, Appellee filed a traditional motion for summary judgment. A hearing on Appellee's motion in limine and motion for summary judgment was set for May 4, 2020. However, on April 29, 2020, Appellant filed a motion for continuance. Like his motion to compel, Appellant based his motion for continuance on the boxes that decedent's children allegedly removed from decedent's home.

On June 8, 2020, the trial court held a bench trial on Appellee's motion in limine. At the start of the hearing, the trial court also heard Appellant's motion to compel. The trial court denied Appellant's motion to compel. At the end of the bench trial, the trial court found that Appellant had no interest in the trust and granted Appellee's motion in limine.

Appellee filed a motion for attorney's fees and costs on July 15, 2020. On October 2, 2020, the trial court held a hearing on Appellee's motion for attorney's fees and costs. Prior to the trial court's ruling on the motion, Appellee filed a motion to supplement the record. The supplement included detailed invoices of the work Appellee's counsel performed on the case. On October 29, 2020, the trial court granted Appellee's motion and ordered Appellant to pay Appellee $358,692 as reasonable attorney's fees and costs. The trial court also ordered Appellant to pay Appellee an additional $88,750 if Appellant appealed the initial judgment and lost.

Analysis

Standing

This appeal concerns Appellant's standing to pursue a claim against the trust. Standing is a component of subject-matter jurisdiction and focuses on whether a party has a sufficient relationship with the lawsuit to have a justiciable interest in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). If a party lacks standing, the trial court lacks subject-matter jurisdiction to hear the *5 case.[3] *Id.* at 849. A party's standing to sue is implicit in the concept of subject-matter jurisdiction and will not be presumed-it must be proved. *Linegar v. DLA Piper LLP (US)*, 495 S.W.3d 276, 279 (Tex. 2016).

[3] We note that a statutory probate court has jurisdiction over "an action by or against a trustee" and "an action involving an inter vivos trust." *See* Tex. Est. Code Ann. § 32.006 (West 2020); *Lee v. Lee*, 528 S.W.3d 201, 212-13 (Tex. App.-Houston [14th Dist.] 2017, pet. denied).

By statute, an "interested person" may bring a claim concerning a trust. Tex. Prop. Code Ann. § 115.001 (West Supp. 2021), § 115.011(a) (West 2014). An "[i]nterested person" is defined as "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust." *Id.* § 111.004(7). A "beneficiary" is "a person for whose benefit property is held in trust, regardless of the nature of the interest." *Id.* § 111.004(2).

The parties litigated Appellant's status as a beneficiary of the trust in a motion in limine proceeding. In the probate context, a motion in limine to determine the claimant's standing is essentially a motion to dismiss for lack of standing. *See Estate of Burns*, 619 S.W.3d 747, 751 (Tex. App.-San Antonio 2020, pet. denied). We review a trial court's ruling that grants a motion in limine for lack of standing in the same manner as a plea to the jurisdiction. *See Estate of Lee*, 551 S.W.3d 802, 807 (Tex. App.-Texarkana 2018, no pet.) (citing *Estate of Forister*, 421 S.W.3d 175, 178 (Tex. App.-San Antonio 2013, pet. denied)). Ordinarily, "[i]f the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact[-]finder." *Id.* (second alteration in original) (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004)). Here, the parties litigated the issue of standing in a bench trial with the trial court acting as the factfinder. *6

In Appellant's first issue, he contends that the trial court erred in granting Appellee's motion in limine. Specifically, Appellant contends that there was "overwhelming evidence" that decedent manifested his intent, in compliance with the terms of the trust, to make Appellant a beneficiary of the trust. Thus, Appellant challenges the factual sufficiency of the evidence supporting the trial court's determination that decedent did not make Appellant a beneficiary under the trust.[4]

[4] Appellant does not assert that he established his status as a beneficiary as a matter of law, which would be required for a legal sufficiency challenge. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it "must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). "The court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* Because it acts as the factfinder in a bench trial, the trial court is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761

(Tex. 2003). Therefore, we will not substitute our judgment for that of the factfinder so long as the evidence at trial "would enable reasonable and fair-minded people to differ in their conclusions." *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

When no findings of fact or conclusions of law are properly requested or filed, we imply all facts necessary to support the judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam). However, when a reporter's record is filed, these implied findings are not conclusive, and the appellant may challenge the legal
7 and factual sufficiency of the evidence to support the findings. *Sixth RMA Partners, L.P. v. Sibley,* *7 111 S.W.3d 46, 52 (Tex. 2003). The trial court's decision must be affirmed if it can be upheld on any legal theory that finds support in the record. *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766 (Tex. 2011) (per curiam).

Appellant's factual sufficiency contention is directed at the ultimate issue in the case-whether decedent amended the terms of the trust to make Appellant a beneficiary. "Any attempt to amend a term of a trust that does not comply with the specific procedure set forth in the trust instrument is ineffective." *Emps.' Ret. Fund of City of Dallas v. City of Dallas*, 636 S.W.3d 692, 696 (Tex. App.-Dallas 2021, pet. filed) (citing *Jinkins v. Jinkins*, 522 S.W.3d 771, 782 (Tex. App.-Houston [1st Dist.] 2017, no pet.)). The applicable terms of decedent's trust are as follows:

> The Donor reserves the right to revoke or amend this agreement, in whole or in part, at any time and from time to time, by a memorandum in writing delivered to the Trustee (provided, that the duties, powers, and liabilities of the Trustee shall not be materially or substantially changed by any such amendment without the consent of the Trustee in writing) and to authorize and direct the Trustee to assign, transfer, pay over and deliver to Donor's order all or any part of the Trust Estate as it may then exist. Such direction to the Trustee, upon making of such assignment, transfer, payment or delivery, shall operate as a revocation of this agreement, and the trusts hereby created, as to the property so assigned, transferred, paid over and delivered by the Trustee.

Thus, the decedent was required to deliver a writing to the Trustee demonstrating his intent to change the beneficiaries of the trust.[5]

> [5] Under the terms of the trust, decedent was the original trustee. Therefore, decedent only needed to produce a writing to amend the terms of his trust.

Appellant relies on several e-mails, two Charles Schwab "Designated Beneficiary Plan Agreement" forms, handwritten notes from Decedent, and an affidavit from Sheryl James as evidence that Decedent modified the
8 terms of the trust and inserted Appellant as a beneficiary. Appellant first contends that the *8 numerous e-mails that decedent sent established decedent's intent to make Appellant a beneficiary of the trust. Appellant testified that he typed some of decedent's emails. Essentially, Appellant testified that decedent would tell him what to type and that Appellant would type whatever decedent said. Specifically, Appellant relies on e-mails decedent sent to his estate attorney, Joe Cioffi. Cioffi testified that he believed that the e-mails coming from decedent's Gmail account were not actually coming from decedent.

In relevant portion, decedent's e-mail conversations with Cioffi were as follows:

> [Decedent sent the following on February 15, 2018] I had a good meeting with Northern Trust and accomplished a lot of items that have been on my mind. Can you please draw up the paperwork for Power of Attorney. Please write up as the following: *Jay AKA Juan Salazar Jr. Durable Power of Attorney and also a Medical Power of Attorney Northern Trust as Executor of trust when I am gone*.[6]
>
> [Cioffi sent the following on February 16, 2018] . . . I can amend your Trust documents to modify the trustee language though. Do you have contact information for Jay so I can list it in the document?
>
> [Decedent sent the following on May 16, 2018] Hello Joe, I hope things are going well with you. I need your quick help because I am buying a new home and I need you to put together a very short one page amendment to my trust and a side document that stipulates my ownership of the home and no other parties including my spouse. The contract goes hard in five days so I need the trust and side document done and executed within five days. This shouldn't be more than one paragraph confirming that I have some ownership of the property without and claims from anyone. Can you help me out real quick to do this one paragraph admendment to my trust. The side document that needs to be signed by me and my spouse confirming my sole ownership of the property. Also, I would like for you to send me the signature page for the trust to reexecute because I can not find the original copy. *Later on after I finish this deal I want to revisit my whole trust document*

9 *9

> *because the children are grown up and on their own now. That makes things a lot different with the language and the payout schedule*.[7] Can you please get back to me today? . . . I would like to get this going very quickly because I got this really great deal on the home but the timeframes are compressed to go hard within five days and close by the end of this month. Can you please help me today. I appreciate your help.
>
> [Cioffi sent the following on May 16, 2018] Hi Ed, I am doing well. Hopefully things are going well for you in Houston. Unfortunately, I am out of town until Tuesday, May 22nd, so I will be unable to conduct any document modifications until I return to Chicago. However, you do not need to modify your trust due to a new home purchase. Since you are no longer married, your ex-spouse does not have any rights to newly acquired real estate. If you want to amend your payout schedule, we can make adjustments, but she would no longer be in a position to make a claim on your estate regarding property of any type. Additionally, you should avoid copying Jay on legal correspondence unless he is an attorney because you run the risk of losing lawyer-client privilege and such communications may be discoverable in a lawsuit. It is especially important if you believe she may be considering any type of legal action against you.
>
> [Cioffi sent the following on May 30, 2018] Hi Ed, If you are buying a new property and want it to be a trust asset, you should title it as follows: Edward R. Schauble, Trustee of the Edward R. Schauble Living Trust dated 1/12/2000[.]

> [Decedent sent the following on June 7, 2018] Hello Joe, The IRS has not contacted me on my tax return so I guess we are good there, thanks for your help for helping with my taxes. On another and very urgent matter, as you recall I bought a very nice new house here in Houston. I would like to amend my trust making Northern Trust, Eileen Bourke my SUCCESSOR TRUSTEE in place of my son Matthew Schauble. I also would like to leave my house, 302 Grandview Terrace in Houston to Juan (Jay) Salazar Jr. *I have also created a new pay schedule to be revised. But I will get that to you pretty soon, but we need to add Jay to the payout schedule.* [8] Since the kids are out of college and earning nice money and I don't have an obligation to help them like before.
>
> 10 *10
>
> Lastly, we got to figure out if we need to shift the whole trust to be administered in Texas for tax purposes or leave as is. Is this something we can get done quickly? What would be the cost of these amendments? I am cash short since I just bought the new house. I really appreciate your help.
>
> [Decedent sent the following on June 17, 2018] What is the status of these changes?
>
> [Cioffi responded on June 19, 2018] Hi Ed, As I mentioned in prior conversations, since the changes to your trust are significant, we need to discuss the modifications during our next annual meeting. Making such drastic changes will have serious impacts on your overall estate plan, which seem to run counter to all of our prior planning. Additionally, you still have an outstanding invoice with my firm. Please forward payment as soon as possible so our accounting department does not send the past due amount to collections.

Each of the above e-mails were sent from and to decedent's personal e-mail account.

[6] Emphasis added.

[7] Emphasis added.

[8] Emphasis added.

Decedent's e-mails to Cioffi fail to demonstrate his present intent to make Appellant a beneficiary under the trust. Decedent's February 15 e-mail fails to state that decedent wanted to amend his trust to include Appellant as a beneficiary. Rather, the e-mail only states that decedent wished Appellant to have a durable and medical power of attorney over decedent. The e-mail also seems to suggest that decedent wanted Northern Trust to serve as his successor trustee. However, the email makes no reference to decedent's possible desire to make Appellant a beneficiary of the trust. *See Matter of Estate of Kuyamjian*, No. 03-18-00257-CV, 2018 WL 3749834, at *5 (Tex. App.-Austin Aug. 8, 2018, pet. denied) (mem. op.) (holding that a will that purported to bequeath real property that was held in trust did not revoke or amend the trust because language used in the will did not mention the trust or any trust modification).

Decedent's May e-mail also fails to demonstrate decedent's present intent to make Appellant a beneficiary under the trust. The e-mail mentions decedent's desire to revisit the terms of his trust but fails to use any
11 language illustrating *11 decedent's present intent to immediately amend his trust to include Appellant as a beneficiary. Additionally, it fails to indicate how decedent would like to amend the payout schedule, further indicating a lack of present intent to amend the trust. *See Gordon v. Gordon*, No. 11-14-00086-CV, 2016 WL

1274076, at *1 (Tex. App.- Eastland Mar. 31, 2016, pet. denied) (mem. op.) (holding that a will clause that states "[i]t is our intention to dispose of all property . . . . This will shall override any prior allocations described in trust documents . . . ." was an insufficient manifestation of intent to revoke the trust).

Similarly, decedent's June 7 e-mail fails to establish that he had the present intent to amend the terms of the trust to include Appellant. Decedent's e-mail states that he has a new payout schedule, which presumably included Appellant, but fails to state that he wanted the new payout schedule to control over the old one immediately. Decedent's e-mail also fails to provide any details as to how decedent wanted the trust to be paid out. Additionally, the June 7 e-mail indicates that decedent did not attach the new payout schedule to the e-mail.

Likewise, decedent's June 17 e-mail also fails to demonstrate that decedent had the present intent to amend the trust. Decedent merely makes an inquiry as to the status of his proposed amendments to his trust. However, this inquiry does not demonstrate that decedent had the present intent to amend his trust because he did not request that the changes requested take effect immediately. *See Jameson v. Bain*, 693 S.W.2d 676, 681 (Tex. App.-San Antonio 1985, no writ) (holding that "decedent's will [bequeathing certain assets to charitable beneficiaries] [did] not contain a definitive manifestation to revoke the inter vivos trust"). Nor did he provide any details regarding his proposed amendments.

Additionally, Appellant contends that the e-mails decedent sent to Northern Trust establish that he intended to
12 amend his trust to include Appellant as a *12 beneficiary. In relevant portion, decedent's e-mail conversation with Northern Trust is as follows:

> [Decedent sent the following on February 15, 2018] Thank you for taking the time and meeting with Jay and I. The meeting set my mind at ease and I feel . . . confident that your firm is handling my affairs. Rest assured that I have sent Joe Cioffi an e-mail explaining what I wanted changed and implemented right away. I will keep you all in the loop as to the progress of the POA.
>
> [Northern Trust responded on February 16, 2018] Edward, it was very good to see you and meet Jay as well. I am glad you are feeling better and hope you continue to improve. We look forward to assisting in the completion of your estate plan.
>
> [Northern Trust followed up on February 23, 2018] Hello Edward, It was nice to see you last week! We had a productive meeting. I just wanted to follow up and see if you have been able to execute some of your changes to your POA and trust yet? If there is anything at all I can help with, please let me know.

As with decedent's e-mails to Cioffi, each of the e-mails decedent sent to Northern Trust was sent from his personal e-mail account.

Decedent's e-mail to Northern Trust fails to demonstrate that he had the present intent to amend the terms of his trust to include Appellant as a beneficiary. In the e-mail, decedent merely stated that he had e-mailed his attorney, Cioffi, and informed him of his discussion with Northern Trust. The February 15 e-mail to Northern Trust references the February 15 e-mail that decedent sent to Cioffi-an email that made no reference to making Appellant a beneficiary of the trust. Therefore, we conclude that neither Appellant's e-mails to Cioffi nor his e-mails to Northern Trust were sufficient to amend the terms of the trust.

A case that informs our determination that decedent's e-mails are insufficient to amend the terms of his trust is *Runyan v. Mullins*. In that case, the settlor executed the trust in 1978. 864 S.W.2d 785, 787 (Tex. App.-Fort Worth 1993, writ denied). In July of 1991, the trustee sent a letter to the attorney for the trust with a proposed
13 *13 amendment to the trust. *Id.* On August 9, 1991, the trustee sent the settlor a letter regarding a proposed amendment to the trust. *Id.* Additionally, the letter instructed the settlor to sign a copy of the August 9 letter and the July letter if he wished to adopt the proposed amendments. *Id.* However, the trustee failed to include the actual terms of the proposed amendment, a copy of the July letter, and a copy of the August 9 letter in the original August 9 letter. *Id.* Four days later, the Trustee sent another letter to the settlor that enclosed a copy of the August 9 letter. *Id.* The settler returned a signed copy of the August 9 letter. *Id.* However, the settlor passed away before he was able to sign the proposed amendment or the July letter. *Id.* The Fort Worth Court of Appeals held that, "[a]t best," the August 9 letter "expressed a possible intent to amend the trust, but did not contain or reflect the terms of any such intended amendment or provide the trustee with instructions regarding the same." *Id.* at 790. Accordingly, the court determined that the August 9 letter was not a clear manifestation of the settlor's intent to modify the trust. *Id.*

Here, decedent's e-mails to Cioffi and Northern Trust manifested a possible intent to amend the terms of his trust, but not a clear manifestation to do so. *See id.* First, much of the language decedent used in his e-mails did not indicate that he wished to immediately amend the terms of the trust. Rather, decedent manifested an intent to do so in the future. Second, decedent did not provide the exact terms of the modification that he wished to make. Therefore, we conclude that the e-mails were insufficient to amend the terms of decedent's trust.

Next, Appellant contends that the Designated Beneficiary Plan Agreement with Charles Schwab (the form) amended the trust to include Appellant as a beneficiary.[9] Appellee responds that this form did not make
14 Appellant a beneficiary of the trust for two reasons. First, because Appellant did not introduce the form into *14 evidence at trial, he cannot rely on it here on appeal. Second, Appellee contends the uncontroverted evidence established that the form was forged.

9 There are two different versions of this form included within the record.

We begin with Appellee's first contention. Generally, the scope of appellate review is limited to the materials that were before the trial court at the time the trial court issued its ruling. *In re Marriage of Skarda*, 345 S.W.3d 665, 670 (Tex. App.- Amarillo 2011, no pet.) (citing *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.-Fort Worth 2004, pet. denied)). Appellate courts will not consider matters that are outside the record. *See Barnard*, 133 S.W.3d at 789 (citing *Reyes v. Reyes*, 946 S.W.2d 627, 630 (Tex. App.-Waco 1997, no writ)).

Appellee relies on the following statement from Appellant's trial counsel to support the contention that the form should not be considered in our analysis:

> We have amended the pleading not to include that document or any mention of that document. So any moving forward on that, I have no problem with the Court entering an order saying [Appellant] is not entitled to any relief pursuant to that document.
>
> . . . .
>
> . . . [Appellant] is not relying on that document. We will stipulate that that is not a document that we are going to proceed on at the trial of the case.

When Appellant's trial counsel stated that Appellant was no longer relying on "the form," he was referring to the form found in Defendant's Exhibit No. 22. Another, separate version of this form can be found in the record as Defendant's Exhibit No. 23. Therefore, we will only consider Exhibit No. 23 in our analysis.

During the motion in limine trial, Appellee's expert testified that Exhibit No. 23 was an "electronic PDF, fill-in form." The signature date on Exhibit No. 23 indicates that decedent signed the form on June 25, 2018. However, the testimony from Appellee's expert established that Charles Schwab did not make this particular
15 form available to the public until July of 2018. Additionally, the expert testified that *15 the metadata associated with Exhibit No. 23 indicates that this form was not created until September 5, 2018, nearly a month after Decedent passed away.[10] Accordingly, there was strong evidence that it was impossible for Exhibit No. 23 to have amended decedent's trust because it was executed-allegedly by decedent-after decedent's death.

[10] Shortly after decedent's death, Appellant e-mailed the form contained in Exhibit No. 23 to Ray Hawkins. In relevant portion, Hawkins responded that "[j]oint [t]enants with [r]ight of [s]urvivorship is checked, but the [a]ccount [h]older is specified as 'Edward R. Schauble Trust.' Both of those cannot be true at the same time. A trust cannot be a joint tenant, based on what I know." Appellant responded by saying: "Well that's a roadblock I am not in the trust [] what do we do now?"

Even if we did consider Exhibit No. 22 in our analysis, it would still be insufficient to amend decedent's trust. Appellee's expert testified that Exhibit No. 22 is a "printer-to-paper scan back to PDF version" of the Charles Schwab form. Like Exhibit No. 23, Exhibit No. 22 suggests that decedent signed the form before Charles Schwab made the form available to the public. Appellee's expert testified that Exhibit No. 23 was the source document for Exhibit No. 22. Additionally, he testified that the purported handwritten entries on Exhibit No. 22 directly match those of Exhibit No. 23, indicating that there was no actual handwriting on Exhibit No. 22.

Appellant also cites to several of decedent's handwritten notes as evidence of decedent's intent to make Appellant a beneficiary under the trust. The notes, in relevant portion, are as follows:

> Find Joe Cioffi['s] cell phone number[.]
>
> Find Family Law Attorney ASAP to re-do Trust Document[.]
>
> Write Codicil to Ed's Will and do a Personal Contract Between Ed
>
> [and] Jay stipulating our Personal Agre[e]ment. Complete by Tuesday[.]

These handwritten notes suffer from many of the same flaws as decedent's e-mails. These notes fail to
16 demonstrate that decedent had the present intent to amend the *16 terms of the trust. Additionally, these notes provide no details regarding the nature of decedent's desired changes. At best, these notes reflect that Appellant had an interest in amending his trust, but no present intent to do so. Thus, we conclude that decedent's handwritten notes were insufficient to amend the trust.

On appeal, Appellant also relies on an affidavit from Sheryl James to show that decedent clearly manifested the intent to amend his trust to include Appellant as a beneficiary. However, James's affidavit was not offered into evidence at the trial on the motion in limine, and she did not testify. Accordingly, it has no bearing on our review of the sufficiency of the evidence offered at trial. *See Francis*, 46 S.W.3d at 242 (defining the scope of review for a factual sufficiency challenge). Moreover, in James's affidavit, she claims that decedent told her on multiple occasions that he wished to include Appellant as a beneficiary under the trust. However, the affidavit, and the oral conversations, are irrelevant to our analysis. As stated previously, in order to revoke or amend the terms of the trust, decedent must have manifested a clear intent to amend the trust in writing. Accordingly,

decedent's conversations with James expressing any intent to amend his trust were ineffective. *See Emps.' Ret. Fund of City of Dallas*, 636 S.W.3d at 696 (noting that a trust may only be amended in accordance with the terms of the trust).

The evidence supporting Appellant's claim that decedent sufficiently amended his trust to make Appellant a beneficiary of the trust was not so great as to make the trial court's contrary determination to be against the great weight and preponderance of the evidence. *See id.* Therefore, we overrule Appellant's first issue.

Motions to Compel and Motions for Continuance

In Appellant's second issue, he contends that the trial court abused its discretion when it denied his motions to compel and motions for continuance. We will first address Appellant's motions to compel. "We review a trial
17 court's order *17 denying a motion to compel under an abuse of discretion standard." *Cline v. Guaranty Bond Bank*, 404 S.W.3d 139, 142 (Tex. App.-Texarkana 2013, no pet.) (citing *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 661 (Tex. 2009)). Under an abuse of discretion standard, we cannot substitute our judgment on factual issues for that of the trial court unless it is clear from the record that the trial court could reach only one decision. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Additionally, "appellate court[s] defer[] to a trial court's resolution of underlying facts and to credibility determinations that may have affected its determinations, and will not substitute its judgment for that of the trial court." *Interest of K.A.M.S.*, 583 S.W.3d 335, 341 (Tex. App.-Houston [14th Dist.] 2019, no pet.) (citing *Walker*, 827 S.W.2d at 839-40).

At the root of the trial court's denial of Appellant's motions to compel production is a credibility determination. Specifically, the trial court was required to determine the credibility of Appellee's trial counsel when he stated that Appellee provided Appellant all the requested documents in Appellee's possession. Thus, to reverse the trial court's denial of Appellant's motions to compel, there would have to be clear evidence that Appellee withheld requested documents from Appellant.

Appellant alleges that Appellee withheld documents from Appellant, but there is no clear evidence that Appellee actually withheld any documents. In Appellant's first motion to compel, he essentially asserted that Appellee failed to produce all the documents from eight boxes that decedent's children removed from one of decedent's homes. However, Appellant's motion does not provide clear evidence to contradict Appellee's claim that he provided Appellant all the documents that Appellee possessed.

Appellant's second motion to compel made many of the same contentions as his first motion. However, in this motion, Appellant provided additional details as to what sort of documents were in the eight boxes that
18 Appellee allegedly did not *18 provide. Appellant's second motion contains allegations that Appellee did not supply all the documents he had in his possession, but it does not rise to the level necessary to disturb the trial court's credibility determination that Appellee had not withheld requested documents from production.

During the first hearing on Appellant's motion to compel, Appellant made many of the same contentions that were contained in both of his motions to compel. During the second hearing on Appellant's motion to compel, Appellant reiterated that he believed that Appellee did not produce all the documents contained in the eight boxes. As with the first hearing, Appellant merely made allegations that Appellee withheld documents during discovery. These allegations are insufficient to overturn the trial court's credibility determination that Appellee had not withheld requested documents from discovery. Furthermore, at the close of the second hearing on the motion to compel, the trial court noted that Appellant should have been more diligent in presenting his motions to compel to the trial court for action rather than waiting until the morning of trial. On this record, the trial court did not abuse its discretion by overruling Appellant's motions to compel.

Next, Appellant contends that the trial court erred by denying his motion for continuance. Specifically, Appellant contends that he needed more time to conduct discovery to obtain the documents from the eight boxes that Decedent's children purportedly removed from his residence. Thus, Appellant's appellate contentions about the motions for continuance are largely the same as those for his motions to compel.

We review a trial court's denial of motions for continuance under an abuse of discretion standard. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). When analyzing a trial court's denial of a motion for continuance, we will not substitute our judgment for that of the trial court. *Tobias v. SLP Brownwood LLC*,
19 No. 11-19-00247-CV, 2021 WL 2584505, at *1 (Tex. App.-Eastland June 24, 2021, no pet.) (mem. op.) *19 (citing *In re Nitla S.A. de C.V.*, 92 S.W.3d 419,422 (Tex. 2002) (orig. proceeding)). Rather, "we must determine whether the trial court's discretion was so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law." *Id.* (citing *Joe*, 145 S.W.3d at 161). An abuse of discretion occurs when the trial court acts "without reference to guiding rules or principles." *Id.* (citing *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004)).

Appellant filed this case on March 15, 2019. Appellee included a motion in limine with his original answer that he filed on April 3, 2019. Appellee filed his motion for traditional summary judgment on April 13, 2020. The hearing on Appellee's motion for summary judgment and the bench trial on Appellee's motion in limine were both set for May 4, 2020. Appellant subsequently filed two motions for continuance on April 29, 2020. The first motion for continuance addressed the hearing on Appellee's motion for summary judgment. The second motion addressed the trial on the motion in limine. In the second motion, Appellant asserted that he needed a continuance for the trial on the motion in limine on the sole basis that he had a disagreement with his attorneys. In that regard, Appellant's attorneys filed a motion to withdraw on the same date.

On May 18, 2020, the matters set for hearing and trial on May 4, 2020, were reset for June 8, 2020. One of Appellant's original attorneys represented him at the proceedings on June 8, 2020.[11] At the outset of the hearing, the trial court denied Appellee's motion for summary judgment. Accordingly, Appellant did not suffer harm based on the implicit denial[12] of his motion for continuance pertaining to the motion for summary
20 judgment because the trial court ultimately ruled in his favor *20 on the motion for summary judgment. Additionally, the sole basis for Appellant's second motion for continuance was rendered moot because he was represented by one of his original attorneys at the bench trial on the motion in limine.

11 The trial court entered an order on May 21, 2020, permitting Appellant's original attorneys to withdraw. However, one of the original attorneys filed a notice of appearance on June 4, 2020, and he represented Appellant at the proceedings on June 8, 2020.

12 The record does not reflect that the trial court explicitly ruled on either of Appellant's motions for continuance.

To the extent that Appellant sought a continuance on the basis that he needed more time to find documents to support his status as a trust beneficiary, the trial court essentially considered Appellant's contention with respect to its consideration of Appellant's motions to compel. As we have previously noted, the trial court determined that Appellee had not withheld documents in his possession from discovery. The trial court also noted that Appellant had ample time to obtain the necessary discovery in order to prepare for trial. Accordingly, the trial court did not abuse its discretion by overruling Appellant's motions for continuance. We overrule Appellant's second issue.

Evidence of Appellant's Criminal Acts

In Appellant's fourth issue, he contends that the trial court erred by admitting evidence of his criminal history. "Evidentiary rulings are committed to the trial court's sound discretion." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012) (citing *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam)). To obtain a reversal of a judgment based on the erroneous admission of evidence, an appellant must show that (1) the trial court's ruling was in error and (2) the error probably caused the rendition of an improper judgment. *Id.*

Appellee's attorney asked Appellant at trial if he "had been caught stealing from at least three different employers." Appellant lodged a relevancy objection to this question. Appellee responded that he sought to offer under Rule 609 evidence of Appellant's felony theft conviction in 2009 of an amount of over $200,000. *See* Tex. R. Evid. 609. The trial court initially excluded the evidence on the basis that its probative value did not outweigh its prejudicial effect. The trial court subsequently permitted Appellee to question Appellant about a
21 restitution order *21 wherein Appellant was ordered to pay $76,474 to a former employer. The trial court also permitted Appellee to question Appellant about the fact that he had been indicted for aggravated perjury. The trial court cited Rule 404(b)(2) as its basis for the admission of this testimony. *See* Tex. R. Evid. 404(b)(2).

Rule 609 of the Texas Rules of Evidence governs the admission of a criminal conviction in a civil case to attack a witness's character for truthfulness. Tex. R. Evid. 609(a); *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 260-61 (Tex. App.-Houston [14th Dist.] 2018, no pet.); *see also U.S.A. Precision Machining Co. v. Marshall*, 95 S.W.3d 407, 409 (Tex. App.-Houston [1st Dist.] 2002, pet. denied) ("[c]onvictions for crimes involving felonies may be admissible in civil cases to impeach a witness's credibility for truthfulness"). If more than ten years have elapsed since the witness's conviction or release from confinement, then evidence of the conviction "is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Tex. R. Evid. 609(b); *see Richard Nugent & CAO, Inc.*, 543 S.W.3d at 261. The impeachment value of crimes involving deception is greater than that for crimes involving violence. *Richard Nugent & CAO, Inc.*, 543 S.W.3d at 261 (citing *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992)). "[I]n a civil case, as the importance of a particular witness's testimony and credibility increases, so does the need to allow impeachment of that witness with evidence of a criminal conviction." *Id.* (quoting *Cortez v. Wyche*, No. 02-11-00364-CV, 2012 WL 1555909, at *4 (Tex. App.-Fort Worth May 3, 2012, no pet.) (mem. op.)). Applying these rules to the facts in this case, the trial court did not abuse its discretion by admitting evidence of Appellant's prior conviction for a crime involving deception.

"Evidence of other wrongs or acts is not admissible to prove character in order to show 'action in conformity
22 therewith.'" *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011) *22 (quoting former Tex. R. Evid. 404). Rule 404(b)(2) lists some exceptions to the general rule, including showing a "plan." Appellee asserted that the evidence of Appellant's indictment for aggravated perjury, as well as the three thefts that he had committed, was admissible to show "a common scheme or plan." But as noted in *Daggett v. State*, the "plan" exception in Rule 404(b)(2) is frequently misidentified as "common scheme or plan." 187 S.W.3d 444, 451 (Tex. Crim. App. 2005). Rule 404(b)(2) does not permit the admission of evidence to show the repeated commission of the same crimes that are similar to the charged offense. *Id.* Evidence of this type would be impermissible "bad" character evidence-to essentially show "once a thief, always a thief." *Id.* Instead, the "plan" exception only allows the admission of evidence to show steps taken by the defendant in preparation of the charged offense. Furthermore, evidence of specific instances of a witness's conduct that do not result in a criminal conviction are not admissible to attack the witness's character for truthfulness. *See* Tex. R. Evid. 608(b).

Assuming, without deciding, that the trial court erred by admitting evidence of Appellant's past criminal acts that did not result in a criminal conviction, we conclude that the error did not cause the rendition of an improper judgment. "In a bench trial, we presume that the trial court, in its role as factfinder, disregarded any improperly admitted evidence." *Richard Nugent & CAO, Inc.*, 543 S.W.3d at 260 (citing *Kenny v. Portfolio Recovery Assocs.*, 464 S.W.3d 29, 32 (Tex. App.- Houston [1st Dist.] 2015, no pet.)). Thus, we presume that the trial court disregarded any improperly admitted evidence of Appellant's prior criminal acts that did not result in a criminal conviction.

The primary consideration in this case is whether decedent made Appellant a beneficiary of the trust prior to decedent's death. At best, the evidence of Appellant's bad acts may have damaged Appellant's credibility. But
23 because a *23 writing was necessary to amend the terms of the trust, much of Appellant's testimony regarding decedent's intent to make Appellant a beneficiary was irrelevant. The relevant inquiry was whether the writings that Appellant produced demonstrated decedent's present intent to make Appellant a beneficiary under the trust. As we conclude below, they did not. Therefore, we overrule Appellant's fourth issue.

Award of Attorney's Fees

In Appellant's third issue, he contends that there was insufficient evidence to for the trial court to award Appellee his attorney's fees. Section 114.064 of the Texas Trust Code authorizes the recovery of attorney's fees in an action involving a trust. Tex. Prop. Code Ann. § 114.064 (West 2014) ("In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."). An award of attorney's fees under this section "is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles." *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.-San Antonio 2004, no pet.); *see Lee v. Lee*, 47 S.W.3d 767, 793-94 (Tex. App.-Houston [14th Dist.] 2001, pet. denied).

Essentially, Appellant contends that the trial court erred because Appellee's affidavits in support of his motion only provided generalities of the work that Appellee's counsel performed on the case. In support of this contention, Appellant asserts that Appellee did not provide sufficient evidence to recover attorney's fees under a lodestar calculation.

Texas uses the "lodestar method," which is essentially a "short hand version" of the *Arthur Andersen* factors, to determine reasonable and necessary attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019); *see Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex.
24 1997). *24 Under the lodestar method, the factfinder must first determine the reasonable hours spent by counsel and the reasonable hourly rate for counsel's work. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). The factfinder then multiplies the number of hours that counsel worked on the case by the applicable rate to determine the base fee or lodestar. *Id.* The base fee is presumed to reflect the reasonable and necessary attorney's fees. *Rohrmoos Venture*, 578 S.W.3d at 499. The factfinder may adjust the lodestar up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.* at 500-501.

It is the fee claimant's burden to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Id.* at 498. "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.*

"General, conclusory testimony devoid of any real substance will not support a fee award." *Id.* at 501. Generalities about tasks performed provide insufficient information for the factfinder to meaningfully review whether the tasks and hours were reasonable and necessary. *El Apple I*, 370 S.W.3d at 764. While contemporaneous billing records are not required, there must be some evidence to inform the trial court of the time spent on specific tasks to enable the factfinder to meaningfully review the requested fees. *Rohrmoos Venture*, 578 S.W.3d at 502; *Long v. Griffin*, 442 S.W.3d 253, 253, 255 (Tex. 2014) (per curiam); *City of Laredo v. Montano*, 414 S.W.3d 731, 736-37 (Tex. 2013) (per curiam) (reversing and remanding to determine attorney's fees when attorney testified to the time expended and the hourly rate but failed to provide evidence of the time
25 devoted to specific tasks). *25

We begin our analysis of Appellant's third issue by noting that his brief failed to discuss the invoices included within Appellee's motion to supplement the record, which Appellee had filed in the trial court. Initially, Appellee supported his motion for attorney's fees and costs with an affidavit from Appellee's attorney, Joseph R. Marrs, and testimony from Marrs. Prior to the trial court entering its judgment, Appellee supplemented the record with a detailed invoice describing the work Appellee's counsel performed on the case.

As stated previously, the trial court granted Appellee's motion for costs and fees. In reaching this conclusion, the trial court stated it considered "the pleadings, filings and all evidence before it" in reaching its conclusion. In general, when a trial court states that "it considered the 'evidence and arguments of counsel,' without any limitation, [that] is an 'affirmative indication' that the trial court considered" all the evidence before it prior to entering its judgment. *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 261 (Tex. 2020). Thus, we cannot conclude that the trial court disregarded the invoices that Appellee included with his motion to supplement the record.

Appellee's evidence was sufficient to support the trial court's award of attorney's fees and costs. The attorney invoices that Appellee supplied the trial court in his motion to supplement the record provided evidence of the date on which the task was completed, who completed the task, the hours it took to complete the task, the hourly rate for such task, and a description of the work completed. Additionally, the invoices provided that the total amount of attorney's fees was $361,137.50. Moreover, each description sufficiently describes each task that was performed. Thus, the invoices satisfied the first three requirements of *Rohrmoos Venture*. *See*
26 *Rohrmoos Venture*, 578 S.W.3d at 498. *26

Marrs's affidavit sufficiently satisfies the other two requirements of *Rohrmoos Venture*. Marrs averred as follows:

> 1. *The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly*-The time and labor required in this matter are reflected in the attached billing records. The novelty and difficulty of the questions involved have been considerable, given Plaintiff's shifting rationales and forged documentation (requiring forensic-expert consultation to rebut). For the same reasons, it has required considerable skill and expertise to properly perform the legal services involved in this case.
>
> . . . .
>
> 3. *The fees customarily charged in the area for similar legal services*- I am personally familiar with the fees customarily charged by Houston attorneys for similar legal services. My firm's fees are in line with them.
>
> . . . .

> 5. *The time limitations imposed by the client or by the circumstances*- My firm was the third to represent this client. [Appellant] filed multiple pleadings and motions shortly before hearings were set to occur, which required my firm to turn out responsive work product within very tight timeframes.

(Emphasis in original). Marrs's affidavit provided specific details as to the conditions under which much of the work on this case was performed. Marrs noted that many of the tasks completed in this case were done under serious time constraints. Marrs also detailed how he was familiar with the hourly rates in the Houston area and how the rates in his firm were in line with those rates. Additionally, Marrs detailed his experience level and the experience level of each attorney in his office that worked on this case. Thus, we conclude that the final two
27 requirements under *Rohrmoos Ventures* are satisfied. *27

A case that informs our analysis of this issue is *Jurgens v. Martin*. In that case, the only evidence to support the award of attorney's fees was five affidavits from attorneys involved in the case. 631 S.W.3d 385, 418-19 (Tex. App.-Eastland 2021, no pet.). We held that the evidence was insufficient because the "affidavits did not discuss the particular services performed, who performed the services, the reasonable amount of time required to perform the services, or the reasonable hourly rate for each attorney performing the services." *Id.* Here, the combined forces of Appellee's invoice summary and Marrs's affidavit provided the details that the affidavits in *Jurgens* failed to provide. Accordingly, we affirm the trial court's award of $358,692.

Appellant also argues that the evidence was insufficient to support the trial court's award of $88,750 in the event that Appellant lost on all points on appeal. Generally, "[a]n award of [contingent] appellate attorney's fees to a party is essentially an award of fees that have not yet been incurred." *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 355 (Tex. 2020) (quoting *Ventling v. Johnson*, 466 S.W.3d 143, 156 (Tex. 2015)). In order for a party to recover contingent appellate fees, the party must "provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Id.*

Marrs's affidavit provides the following testimony regarding the conditional services Appellee's attorneys would have to perform in the event of an appeal:

> The plaintiff has filed a notice of appeal. My firm and I have substantial experience representing clients in appeals, including briefing, drafting, and arguing appellate issues and advising clients in appellate and other post-judgment matters. In my experience, I would anticipate the following reasonable and necessary attorneys' fees to handle this appeal:
>
> First or Fourteenth Court of Appeals: Zev Kusin: 100 hours ($425/hour); Joseph Marrs 50 hours ($475/hour); Vaibhavi Parmar 75
>
> 28 *28
>
> hours ($250/hour); Maria Mandujano 30 hours ($75/hour), for a total of $87,250, plus $1,500 in costs, for a total of $88,750.

Due to the speculative nature of conditional awards for attorney's fees and costs, we conclude that Marrs's affidavit meets the requirements of the standard set forth in *Yowell*. *See id.* In his affidavit, Marrs establishes that his firm has significant experience handling all aspects of an appeal. Additionally, drawing from that experience, Marrs sets forth the time he anticipated it will take for his firm to handle this appeal. Accordingly, we overrule Appellant's third issue.

Appellee's Motion for Rule 45 Damages

Appellee has filed a motion seeking damages under Rule 45 of the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 45. In support of the motion, Appellee asserts that Rule 45 damages are warranted "because Appellant and his attorney are trying to deceive the Court." He points to the use on appeal of "forged documents" that Appellant "disavowed" in the trial court. Appellee also asserts that Appellant and his attorney "are trying to deceive the Court by concealing crucial parts of the record." Appellee references the detailed attorney's fee invoices that Appellant did not reference in the presentation of his third issue. Appellee seeks damages under Rule 45 in an amount that this court deems just. Appellee contends that an award of damages under Rule 45 should be assessed jointly and severally against Appellant and his attorney. As recently noted by the First Court of Appeals:

> Rule 45 of the Texas Rules of Appellate Procedure permits an appellate court to award a prevailing party "just damages" for "frivolous" appeals. Tex.R.App.P. 45; *Smith v. Brown*, 51 S.W.3d 376, 380 (Tex. App.-Houston [1st Dist.] 2001, pet. denied). In determining whether an appeal is frivolous, we apply an objective test. *Smith*, 51 S.W.3d at 381. We review the record from the advocate's viewpoint and ask whether the advocate had reasonable grounds to believe the judgment could be reversed. *Id.* We exercise prudence and caution and deliberate most carefully before awarding appellate

29 *29

> sanctions. *Id.* Rule 45 does not mandate that this Court award damages in every case in which an appeal is frivolous. *R. Hassell Builders, Inc. v. Texan Floor Serv., Ltd.*, 546 S.W.3d 816, 833 (Tex. App.-Houston [1st Dist.] 2018, pet. dism'd). Instead, the decision to award damages falls within our discretion, and we will impose such damages only under egregious circumstances. *Id.* (citing *Durham v. Zarcades*, 270 S.W.3d 708, 720 (Tex. App.-Fort Worth 2008, no pet.)).

Kennard Law, P.C. v. Patton, No. 01-20-00560-CV, 2022 WL 1547783, at *1 (Tex. App.-Houston [1st Dist.] May 17, 2022, no pet. h.) (mem. op.).

Applying the factors outlined in *Patton* to the facts in this case, we decline to award Rule 45 damages to Appellee. While we share many of the same concerns raised by Appellee concerning the presentation of Appellant's case on appeal, Rule 45 does not mandate an award of damages in every appeal that is frivolous. Further, Rule 45 provides for an award of "just damages." As set out above, Appellee has already obtained a judgment against Appellant for Appellee's trial and appellate attorney's fees. We decline Appellee's request to make Appellant's attorney jointly and severally liable for damages or fees assessed against Appellant. Accordingly, we deny Appellee's motion for Rule 45 damages.

This Court's Ruling

We affirm the judgment of the trial court.

No. 05-18-00730-CV
Court of Appeals Fifth District of Texas at Dallas

Sims v. Thomas

584 S.W.3d 880 (Tex. App. 2019)
Decided Aug 20, 2019

No. 05-18-00730-CV

08-20-2019

Sandra L. SIMS, Appellant v. Tina THOMAS, Appellee

Simone Johnson, Cedar Hill, TX, pro se. Tina Thomas, Lancaster, TX, pro se. Kristina L. Page, Law Office of Kristina L. Page PLLC, Cedar Hill, Joe T. McKay, Law Office of Joe T. McKay, Lancaster, TX, for Appellant.

Opinion by Justice Whitehill

Simone Johnson, Cedar Hill, TX, pro se.

Tina Thomas, Lancaster, TX, pro se.

Kristina L. Page, Law Office of Kristina L. Page PLLC, Cedar Hill, Joe T. McKay, Law Office of Joe T. McKay, Lancaster, TX, for Appellant.

Before Justices Whitehill, Partida -Kipness, and Pedersen, III

Opinion by Justice Whitehill

This is a restricted appeal from an order authorizing a receiver to sell real property although the trial court did not conduct a hearing on the receiver's sale motion. We conclude that it is apparent on the face of the record that the trial court erred by rendering the order without a hearing. Accordingly, we reverse the order and remand the case for further proceedings.

I. BACKGROUND AND PROCEDURAL POSTURE

We draw these facts from the clerk's record and the trial evidence.

Three sisters, all adults, inherited a house in south Dallas from their mother in 2010. The sisters are appellee Tina Thomas, appellant Sandra Sims, and Simone Johnson. Trial evidence indicated that Sims lived in the house, at least intermittently, after their mother died.

Dallas County sued all three sisters for delinquent property taxes.

Thomas filed this suit against Johnson and Sims, seeking an order to sell the property and partition the proceeds among the sisters.

Sims answered Thomas's suit and filed a counterclaim for reimbursement of property taxes and money she had spent maintaining and improving the property.

The case was tried to the bench in July 2017. Thomas was represented by counsel, while Sims and Johnson appeared pro se.

Thomas testified that when she last checked, about $5,000 in property taxes were still owed. Sims and Johnson
882 were the only other witnesses at trial. Sims *882 opposed sale and partition of the property. Johnson supported the sale and partition.

On August 24, 2017, the trial judge signed the final judgment. The judgment granted each sister a one-third interest in the property and granted Sims $2,500 in reimbursement for improvements to the property. It also gave Sims thirty days to attempt to negotiate a buy-out with her sisters, failing which the property would be sold by a receiver, Rosalita Lucas. The judgment required Lucas to file an oath and post a $500 bond, and it recited that "the Receivership shall not commence until the Oath is filed and the bond posted." The judgment further provided that, after any sale of the property, the net proceeds would be "returned to the court to be partitioned in proportion to the parties' respective interests."

The clerk's record reflects that Lucas posted the $500 bond, but it does not show that she ever filed the required oath.

More than thirty days after the judgment was signed, Lucas filed a report reciting that Sims had failed to negotiate a buy-out with her sisters.

The clerk's record contains an unfilemarked copy of a letter and proposed order from Lucas dated January 18, 2018. The letter is unclear, but it seems to ask the court to require the parties to sign all documents necessary to close a sale of the property. The proposed order refers to a "Motion for final approval to close this case," apparently referring to the letter.

On January 22, 2018, an associate judge signed an order authorizing Lucas to accept a cash bid on the property from Thomas and directing Lucas to proceed with the sale.

On April 26, 2018, an attorney filed a notice of appearance for Sims.

On June 21, 2018, Sims filed a notice of restricted appeal stating that she desired to appeal both the August 2017 final judgment and the January 2018 order authorizing sale. The notice of appeal was missing the second page. The next day she filed an amended notice of restricted appeal that included the missing page.

In September 2018, after inviting and receiving jurisdictional letter briefs, we dismissed the appeal in part, concluding it was untimely to the extent it attacked the August 2017 judgment.

Sims filed an appellant's brief. Thomas and Johnson, pro se, each filed a letter essentially asking us to affirm the sale order.

Meanwhile, Dallas County and other local taxing authorities prevailed in their tax lawsuit against the sisters, Sims took a restricted appeal from that judgment, and we affirmed. *Sims v. Dallas Cty.* , No. 05-18-00712-CV, 2019 WL 2004054 (Tex. App.—Dallas May 7, 2019, pet. filed) (mem. op.).

We then sent the parties a letter asking them to submit letter briefs addressing whether the January 2018 order authorizing sale was a final, appealable order. Sims submitted a letter brief arguing that appellate jurisdiction is proper.

II. APPELLATE JURISDICTION

As a general rule, an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.* , 39 S.W.3d 191, 195 (Tex. 2001). A judgment rendered after a conventional trial on the merits is presumed final. *Id.* at 199. Here, a final judgment was rendered and signed on August 24, 2017.

In a receivership, however, there can be more than one final, appealable order. "[An] order that resolves a
883 discrete issue in connection with any receivership has the same force and effect as any other *883 final adjudication of a court, and thus, is appealable." *Huston v. Fed. Deposit Ins. Corp.* , 800 S.W.2d 845, 847 (Tex. 1990). The *Huston* court compared receiverships to probate proceedings, in which "[an] order is appealable if it finally adjudicates a substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory." *Id.* at 848. To come within this exception to the final-judgment rule, the order appealed from must finally dispose of all issues in a discrete part or phase of the receivership. *Art Inst. of Chicago v. Integral Hedging, L.P.* , 129 S.W.3d 564, 572 (Tex. App.—Dallas 2003, no pet.).

Eighty-five years ago, we held that an interlocutory order directing a receiver to sell specific personal property is not appealable. *Bean v. Peurifoy* , 74 S.W.2d 126, 126 (Tex. App.—Dallas 1934, no writ). More recently, we held that an order authorizing a receiver to sell unspecified assets in order to pay specified fees was "not sufficient to make the order a final determination subject to appeal." *Art Inst. of Chicago* , 129 S.W.3d at 571 n.9.

But the Houston Fourteenth Court of Appeals has held that an order approving a receiver's sale of a specific asset is an appealable final order under *Huston* . *Lee v. Lee* , 528 S.W.3d 201, 208 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). *But see Rogers v. Rogers* , No. 01-16-00791-CV, 2017 WL 117322, at *1 (Tex. App.—Houston [1st Dist.] Jan. 12, 2017, no pet.) (per curiam) (mem. op.) (holding that order authorizing receiver to sell property was not appealable, but not mentioning *Huston*). Another appellate court has held that a probate order for the public sale of specific real estate is an appealable order. *Vineyard v. Irvin* , 855 S.W.2d 208, 209–11 (Tex. App.—Corpus Christi–Edinburg 1993, orig. proceeding).

We conclude that the trial court's order authorizing the sale of property resolves a discrete issue and disposes of all issues for this particular phase of the receivership, namely, whether the house should be sold on the terms obtained by the receiver. Once the house is sold, the receiver's expenses and commission will be paid, and then the court will partition the net proceeds among the sisters. But we view those matters as separate from the discrete issue of whether the house should be sold as the receiver requested. Accordingly, the order is appealable under *Huston* .

To the extent our 1934 *Bean v. Peurifoy* decision is to the contrary, we conclude that *Huston* effectively disapproved it. We need not address whether *Art Institute of Chicago* is correctly decided because that case did not involve an order authorizing a receiver to sell a specific piece of property.

III. ANALYSIS

A. Issues Presented

Sims presents three issues attacking the order authorizing sale: (i) the receiver did not file an oath, (ii) no hearing was held on the receiver's motion for authorization and no notice was given of the motion or any hearing, and (iii) the motion and order did not state the terms of the sale.

B. Restricted Appeal Elements

To prevail on a restricted appeal, the appellant must establish that (i) she filed the appeal within six months after judgment was signed, (ii) she was a party to the lawsuit, (iii) she did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law, and (iv) error is apparent on the face of the record. *Sims* , 2019 WL
884 2004054, at *1 ; *see also* TEX. R. APP. P. 30 ("Restricted Appeal to Court of Appeals in Civil Cases").*884 There is no question that Sims meets the first two elements of a restricted appeal: she timely filed her notice of restricted appeal, and she was a party to the lawsuit.

C. Does Sims satisfy the third element of a restricted appeal?

Yes. She did not timely file any postjudgment motions or requests for findings of fact and conclusions of law. *See* TEX. R. APP. P. 30. Therefore, the question is whether she participated in the "decision-making event" that resulted in the judgment being appealed from. *Texaco, Inc. v. Cent. Power & Light Co.* , 925 S.W.2d 586, 589 (Tex. 1996). The record shows she did not, so she satisfies the third element of a restricted appeal.

Although Sims participated at the bench trial, the resulting judgment is not the order that she attacks in this restricted appeal. Rather, she attacks the subsequent order authorizing sale.

The record shows that the order authorizing sale was signed without a hearing.

First, the order does not recite that any hearing was held; instead, it recites, "Came on for consideration Receiver's Request to Sell House to Highest Bidder. The Court is of the opinion that the request is well-taken and should be authorized." The clerk's record does not contain a "Receiver's Request to Sell House to Highest Bidder," but it does contain the receiver's January 18, 2018 submission in which she (i) advised the trial court that she had an offer she wanted to "move forward" on and (ii) asked the trial court to "have Sandra Lynn Sims sign all documents to close on this file."

Second, the docket sheet, which notes other hearings in the case, shows no hearings between the receiver's January 18 submission and the January 22 order authorizing sale.

Third, Sims asserts in her appellate brief that no hearing was held on the receiver's request submission. No one contradicts this assertion, so we take it as true. *See* TEX. R. APP. P. 38.1(g).

Because Sims did not respond to the receiver's application to sell the property and there was no hearing on that application, we conclude that Sims did not participate in the proceeding that led to the signing of the order authorizing sale. *See Ex parte Egan* , No. 13-16-00618-CV, 2018 WL 3151489, at *2 (Tex. App.—Corpus Christi–Edinburg June 28, 2018, no pet.) (mem. op.) (DPS entitled to restricted appeal when there was "no record of any hearing or proceedings in which [it] could have participate[d].") (internal quotations and citation omitted). The third restricted appeal element is satisfied.

D. Has Sims shown error on the face of the record?

Yes. As discussed above, the docket sheet and the order authorizing sale show that the trial court did not hold a hearing on the receiver's application to sell the property before it rendered the order authorizing the sale. This was error.

By statute, the general rule is that "the rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver." TEX. CIV. PRAC. & REM. CODE § 64.004.

The Houston Fourteenth Court of Appeals, construing § 64.004's predecessor statute, has held that when a receiver seeks to sell property, the rules of equity require (i) an application for sale pertaining to a specific
885 buyer, (ii) notice to all interested parties, and (iii) "a hearing conducted on the sale." *885 *Harrington v. Schuble* , 608 S.W.2d 253, 256 (Tex. App.—Houston [14th Dist.] 1980, no writ). The court held that the trial court erred by granting a receiver's application to sell real property without notice or a hearing, and it vacated the sale. *Id.* at 255–57. We are persuaded by *Harrington* .

Here, the record shows that there was no hearing on the receiver's application to sell the property. This was error. Accordingly, Sims has shown error apparent on the face of the record, and she is entitled to relief by this restricted appeal.

IV. DISPOSITION

We sustain Sims's second issue and need not address her first and third issues.[1]

[1] We note, however, that Sims appears to be correct when she argues under her first issue that the receiver never filed an oath as the trial court's judgment requires.

We reverse the trial court's Order Authorizing Sale and remand the case for further proceedings consistent with this opinion.