No. 03-13-00580-CV

In the Court of Appeals
For the Third Judicial District
Austin, Texas

MARC T. SEWELL,
Appellant

v.

CITY OF LLANO, MIKEL VIRDELL, BRENTON LEWIS, DIANNE FIRESTONE, LETITIA MCCASLAND, MARCY METHVIN, TODD KELLER, JEANNE PURYEAR, TONI MILAM[1],
Appellees.

On Appeal from the
33rd Judicial District Court of Llano County, Texas

Appellees' Reply Brief

Marc T. Sewell
108 Summit
Llano, TX 78643
Pro Se
Appellant

Cary L. Bovey
State Bar No.: 02717700
Luke A. Cochran
State Bar No.: 24087319
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Attorneys for Appellees

Oral Argument is Requested

[1] Toni Milam is the Llano City Secretary. Her name is incorrectly listed in the style of the case as "Tom Milam."

IDENTITY OF PARTIES

APPELLANT:

Marc T. Sewell

APPELLEES:

City of Llano

Mikel Virdell

Brenton Lewis

Dianne Firestone

Letitia McCasland

Marcy Methvin

Todd Keller

Jeanne Puryear

Toni Milam

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STATEMENT OF THE CASE

Nature of the Case:	Petition for judicial review under §211.011 Texas Local Government Code
Trial Court:	The Honorable Allan Garret, 33rd District Court, Llano County, Texas
Course of Proceedings:	The case was appealed after the trial court denied a writ of certiorari under §211.011 Texas Local Government Code. No process was served on defendants, defendants did not waive service, nor was a hearing held.
Trial Disposition:	The trial court denied a writ of certiorari under §211.011 Texas Local Government Code. No final judgment has been rendered.

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. Appellees also request oral argument for the purpose of clarifying the applicable law and facts.

ISSUES PRESENTED

1. Are Appellant's arguments supported by the record and based on a correct application of the law?
2. Did the trial court have subject matter jurisdiction under §211.011 Texas Local Government Code?
3. Did the trial court have personal jurisdiction over the Appellees?
4. Is the "Order Denying Writ of Certiorari" an appealable order?

STATEMENT OF FACTS

On June 13, 2013, the Planning and Zoning Commission of the City of Llano held a regular meeting at which, after proper notice was published, a Public Hearing was held on proposed amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. After the Public Hearing, the Planning and Zoning Commission voted to recommend to the Llano City Council that the proposed amendments to Ordinance Nos. 735 and 1231 be approved by the Council.[2]

On June 17, 2013, the Llano City Council held a regular meeting at which, after proper notice was published, a Public Hearing was held on proposed text amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. After the Public Hearing, the Council voted to approve the proposed amendments to Ordinance Nos. 735 and 1231 by the enactment of Ordinance No. 1247.[3]

On June 25, 2013, Appellant filed a verified petition for judicial review in the trial court under §211.011 Texas Local Government Code attempting to challenge the legislative actions taken by the Llano Planning and Zoning Commission and the Llano City Council as outlined above.[4] On July 23, 2013, the

[2] Brenton Lewis Aff. ¶ 4.
[3] *Id* at ¶ 5.
[4] *See* Clerk's Record.

trial court issued an Order Denying Writ of Certiorari.[5] Appellant subsequently filed his appeal with this Court.

SUMMARY OF THE ARGUMENT

Appellant attempts to support his arguments by relying on and referring to conversations and email correspondence outside the record. The Appellees were not privy to these conversations and emails, and additionally there is nothing in the record verifying the authenticity of said conversations and emails. Further, Appellant's arguments are based on an inaccurate interpretation of the law, §211.011 of the Texas Local Government Code, and its application to the underlying facts.

The trial court lacked subject matter jurisdiction of this cause because §211.011 Texas Local Government Code governs the review of actions taken by a municipal board of adjustment. The actions complained of by the Appellant were taken by the Planning and Zoning Commission and City Council of the City of Llano, Texas. The Llano Board of Adjustment never considered or acted with regard to the actions complained of by the Appellant, and therefore the trial court never acquired subject matter jurisdiction under §211.011. The trial court further lacked personal jurisdiction over the Appellees. The Appellees were never named as defendants by the Appellant at the trial court level, never properly served with

[5] *See* Clerk's Record, Order Denying Writ of Certiorari.

process, Appellees never made an appearance in the trial court, nor did the Appellees waive service of process. Appellate court jurisdiction extends no further than that from which the appeal is taken; therefore, this cause should be dismissed because the trial court had neither subject matter nor personal jurisdiction over the Appellees.

In the alternative, Texas case law holds that an order denying a writ of certiorari under §211.011 Texas Local Government Code is not an appealable order; therefore, this appeal should be dismissed.

ARGUMENT

1. Appellant's arguments are based on facts outside the record and an incorrect application of the law.

With the exception of affidavits to support a challenge to a court's jurisdiction, courts of appeal are bound by the record as it appears in the certified copy made by the district clerk.[6] Thus, a court of appeal's authority to inquire into facts outside the record is limited to inquiries necessary to determine proper exercise of a court's jurisdiction.[7] Appellant bases his arguments on telephone conversations and email exchanges not within the record. Appellees were not privy to these conversations when they took place, were never notified of the

[6] *See* Tex. Gov't Code Ann. § 22.220 (West 2013); *see also Nogle & Black Aviation, Inc. v. Faveretto,* 290 S.W.3d 277, 286 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing Tex. R. App. P. 34.1; *City of Farmers Branch v. Ramos,* 235 S.W.3d 462, 467 (Tex.App.-Dallas 2007, no pet.)

[7] *Foty v. Rotchstein*, 50 S.W.2d 927, 928 (Tex. Civ. App.—Dallas 1932, no writ).

conversations before a notice of appeal was filed, and the emails relied on were never authenticated and entered into evidence before the trial court.

Regarding the Appellant's first issue, Appellant states, "[t]he District Judge denied my petition for judicial review of a zoning ordinance change saying that I did not follow proper procedure by not notifying the opposing sides (Fact #16 pg 10)." To support this claim, Appellant cites his own statement of facts.[8] The statement of facts then cites an email that is supposedly from Lisa Bell to Appellant.[9] This email is not part of the record sent from the district clerk. Appellees have no way of verifying the authenticity of this email. Appellant could have simply typed the contents of this "email" exchange using a word processing program. What is contained in the record is solely the actual order denying the writ of certiorari signed by the trial court judge. The order states, "After consideration of the Verified Petition for Judicial Review, it is hereby ordered that the Writ of Certiorari is Denied."[10] Thus, the order signed by the Honorable Allan Garret does not state a reason for denying the order. Appellant's conclusion that the writ was denied for following the wrong process is based on Appellant's speculation and alleged email exchanges, which are unverified and outside the record. Appellant's second and third issues are also based on facts outside the record, such as further

[8] Appellant's Br. 12.
[9] *Id* at 10, 33.
[10] *See* Clerk's Record, Order Denying Writ of Certiorari.

email exchanges, that were first presented as evidence when attached to Appellant's brief.[11] A court of appeals cannot consider evidence that is only attached to a brief, nor can it consider documents attached to briefs, unless they were before the trial court and are part of the record.[12] Because Appellant's factual allegations and arguments in his brief are not supported by, or contained within, the record, this Court should not consider them.

Appellant's arguments are also based on an incorrect interpretation and misapplication of Texas Local Government Code §211.011. Appellant states in his brief, "The District Judge denied my petition for judicial review of a *zoning ordinance change* saying that I did not follow proper procedure by not notifying the opposing sides. However, I petitioned for a judicial review under Local Government Code 211.011 which does not require any notification."[13] Appellant correctly establishes that the action taken by the Llano City Council was a legislative act amending the City's zoning ordinance. However, Appellant then states that he relied on §211.011 Texas Local Government Code to file a petition for the trial court to review the zoning ordinance amendments. By its own terms, §211.011 only permits a person to submit a verified petition stating that the

[11] Appellant's Br. 13-15.
[12] *See Nogle & Black Aviation, Inc.*, 290 S.W.3d at286; *see also Allen v. Auto. Ins. Co. of Hartford Connecticut*, 892 S.W.2d 198, 200 (Tex. App.—Houston [14th Dist.] 1994, no writ).
[13] Appellant's Br. 12 (citations omitted)(emphasis added).

decision of a board of adjustment is illegal.[14] Section211.011 does not apply to legislative actions of a city council, such as amending a zoning ordinance. Therefore, given the facts of this case, Appellant's reliance on §211.011 is misplaced. Appellant's arguments that the District Court erred by denying the writ and failing to follow the process set out in §211.011 are immaterial, because Appellant erred by filing a petition under §211.011 when there was no action taken by the Llano Board of Adjustment. This was not the correct method for Appellant to bring his complaints before the District Court. The District Court should have dismissed the Appellant's petition because the court lacked subject matter jurisdiction under §211.011.

2. The trial court lacked subject matter jurisdiction under §211.011 Texas Local Government Code.

Appellate court jurisdiction extends no further than that from which the appeal is taken.[15] If the trial court lacked subject matter jurisdiction, then an appellate court only has jurisdiction to set the judgment aside and dismiss the cause.[16] Appellant filed a petition for judicial review pursuant to Texas Local Government Code §211.011. Texas Local Government Code §211.011 only

[14] Tex. Local Gov't Code §211.011 (a) (West 2013).
[15] *Juarez v. Texas Ass'n of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 278 (Tex. App.—El Paso 2005, no pet.); *Ward v. Malone*, 115 S.W.3d 267, 269 (Tex. App.—Corpus Christi 2003, pet denied); *Dallas County Appraisal Dist. V. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied).
[16] *Juarez*, 172 S.W.3d at 278; *Dallas County Appraisal Dist.*, 887 S.W.2d at 468; *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 292 (Tex. App.—Fort Worth 2004, no pet.); *Ward*, 115 S.W.3d at 271.

provides for judicial review of a decision of a municipality's board of adjustment.[17] A municipal board of adjustment is a quasi-judicial body, not a legislative body such as a city council, and pursuant to Texas Local Government Code §211.009(a) is authorized to: 1) hear and decide alleged errors of an administrative official in interpreting and enforcing a zoning ordinance; 2) make special exceptions; 3) grant variances to the terms of a zoning ordinance; and 4) hear and decide other matters authorized by a zoning ordinance.[18] Once a party files a petition under §211.011, within ten (10) days after a zoning board of adjustment decision, the trial court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally.[19] This case does not involve any act or decision of a municipal board of adjustment. Appellant complains of a legislative act of the Llano City Council in amending the City of Llano zoning regulations through the adoption of an ordinance (specifically Ordinance No. 1247, enacted by the Llano City Council on June 17, 2013). [20] This legislative act of the Llano City Council in no way involved the Llano Board of Adjustment, because a board of adjustment does not have legislative power and cannot enact, amend, or repeal ordinances.

[17] *See* Tex. Loc. Gov't Code Ann. §211.011 (West 2013).
[18] Tex. Loc. Gov't Code Ann. §211.009(a) (West 2013); *See also Bd. of Adjustment of City of San Antonio v. Willie*, 511 S.W.2d 591, 593 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *See also City of* Dallas *v. Vanesko*, 189 S.W.3d 769, 771 (Tex. 2006).
[19] *Davis v. Zoning Bd. of Adjustment of City of La Porte*, 865 S.W.2d 941, 942 (Tex. 1993).
[20] *See* Appellant's Pet. For Judicial Review at 2; *see also* Appellant's Br. 15, 16.

The trial court never had subject matter jurisdiction over the actions the Llano City Council took in amending the City's zoning regulations because Appellant relied solely on Texas Local Government Code §211.011 in filing his Petition for Judicial Review with the trial court, which pertains only to a board of adjustment's actions.[21] Additionally, Texas Local Government Code §211.011(f) provides, in pertinent part, that "the court may reverse or affirm, in whole or in part, or modify the decision that is appealed" from a municipal board of adjustment.[22] In this case, there was no decision of the Llano Board of Adjustment for the Appellant to appeal to the trial court under §211.011, therefore the trial court never acquired subject matter jurisdiction, and thus this Court also lacks subject matter jurisdiction in this appeal. Therefore, this cause should be dismissed.

3. The trial court lacked personal jurisdiction over Appellees.

Jurisdiction over the person of a defendant is acquired by service of such process as the law provides, by voluntary appearance, or by waiver of service.[23] Appellees were never named parties to the Appellant's Petition for Judicial Review filed with the trial court (properly characterized by the trial court as requesting a writ of certiorari). Additionally, the City of Llano and Mikel Virdell were not listed

[21] Appellant's Br. 7, 12, 20, 31
[22] Tex. Loc. Gov't Code Ann. §211.011(f) (West 2013).
[23] *Stanley v. Columbus State Bank*, 258 S.W.2d 840, 843 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.); *See also Glass v. Smith*, 66 Tex. 548, 2 S.W. 195 (1886).

as parties or in the style of the case until the appellate level. Appellant states in his brief, "[i]n the District Court's Denial Order, the court changed my case style from a request for judicial review to a traditional "vs." style by selecting names from my petition and using them as defendants…my specification of "Llano City Planning and Zoning Commission and Llano City Council" was correct and should not have been changed."[24] Thus, Appellant agrees that the trial court, acting *sua sponte*, first listed Appellees as "parties" in the style of the case when the trial court issued its Order Denying Writ of Certiorari. Until that time, the style of the case read "IN RE: PETITION to District Court for Judicial Review of Board Decision."[25] Appellees were never named by the Appellant as defendants in the trial court, never served proper citation pursuant to Texas Rules of Civil Procedure 99 and 106, nor did the Appellees make an appearance or waive service of process. The trial court did not have personal jurisdiction over the Appellees in this case, and therefore this Court also lacks personal jurisdiction over Appellees. Accordingly, this cause should be dismissed.

4. The "Order Denying Writ of Certiorari" is not an appealable order.

In the alternative, the order appealed from is an "Order Denying Writ of Certiorari."[26] In *Hagood v. City of Houston Zoning Board of Adjustment*, the Court

[24] Appellant's Br. 15, 16.
[25] *See* Clerk's Record.
[26] *Id*.

of Appeals for the First Judicial District in Houston addressed an appeal from a district court's denial of a writ of certiorari in a zoning board appeal under §211.011 Texas Local Government Code. While the facts of the *Hagood* case were slightly different, the Houston Board of Adjustment took action in that case, opposed to the Llano City Council amending a zoning ordinance in this case, the *Hagood* court held that an Order Denying Writ of Certiorari is not a final judgment within the meaning of Section 51.012 of the Civil Practice and Remedies Code, nor is it an interlocutory order appealable within the meaning of Section 51.014 of the Civil Practice and Remedies Code.[27] The order also is not otherwise appealable in accordance with any rule or statute of the State of Texas.[28] Thus, this Court has no jurisdiction to hear and determine the appeal filed by appellant, and this appeal should be dismissed.

PRAYER

Therefore, based on the foregoing arguments and authorities, Appellees respectfully contend that this cause should be dismissed for lack of jurisdiction; in the alternative, this appeal should be dismissed as the denial of the writ of certiorari is not an appealable order.

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[27] *Hagood v. City of Houston Zoning Bd. of Adjustment*, 982 S.W.2d 17, 18 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (dismissing appeal for want of jurisdiction from appeal of district court's denial of a writ of certiorari in zoning board appeal).
[28] *Id*.

Respectfully submitted,

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)

Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Appellees' Reply Brief on Appellant, Mr. Marc Sewell, on November 6th, 2013 by certified mail, return receipt requested to Mr. Marc Sewell, at 108 Summit, Llano, TX 78643 and by email to marcs@simonlabs.com.

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Bar Card: 02717700
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), this brief contains 2,492 words.

/s/ Cary L. Bovey

Cary L. Bovey
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Dr., Suite 204
Round Rock, TX 78664
cary@boveylaw.com
(512) 904-9441
(512) 904-9445 (fax)
Bar Card: 02717700
Attorney for Appellees

APPENDIX

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MARC T. SEWELL, APPELLANT	§	IN THE COURT OF APPEALS
V.	§	THIRD SUPREME JUDICIAL
CITY OF LLANO, MIKEL VIRDELL, BRENTON LEWIS, DIANNE FIRESTONE, LETITIA McCASLAND, MARCY METHVIN, TODD KELLER, JEANNE PURYEAR, AND TONI MILAM, APPELLEES	§	DISTRICT OF TEXAS AT AUSTIN, TEXAS

AFFIDAVIT OF BRENTON B. LEWIS

STATE OF TEXAS §
§
COUNTY OF LLANO §

Before me the undersigned authority, on this day personally appeared Brenton Lewis, Affiant, who by me first duly sworn upon his oath swears the following statements are true and are within the personal knowledge of Affiant:

"My name is Brenton B. Lewis. I am the City Manager of the City of Llano, Texas and have held that position since April 1, 2013. I hold a Bachelor of Business Administration degree in Management and have also completed 27 hours of coursework toward a Master of Public Administration degree. I have 29 years of professional experience working for local governments in Texas and other states, including 20 years of experience working as a zoning administrator.

As the City Manager, I am the City of Llano employee designated to provide staff support to the City of Llano Board of Adjustment, Planning and Zoning Commission, and City Council. My duties related to these afore-mentioned municipal governing boards include, but are not limited to: 1) coordinating the preparation of public meeting agendas; 2) preparing the agenda item reports, documents and other written materials for review and consideration by the members of said governing bodies; 3) attending the meetings of the said boards to provide City staff recommendations and other resources as requested; 4) presenting various agenda items and reports for review and consideration by the board members; 5) supervising other City employees to ensure that the meeting agendas, minutes, public notices, and similar items are properly prepared and published as required; and 6) other duties as requested by said governing boards.

As a result of the duties I perform as City Manager, as outlined hereinabove, I am personally familiar with the activities, operations, practices and decisions of the City of Llano Board of Adjustment, Planning and Zoning Commission, and City Council. The Planning and Zoning Commission held a regular meeting on June 13, 2013 at which meeting, after proper notice was published, a Public Hearing was held on proposed text amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. Further,

after said Public Hearing, the Planning and Zoning Commission voted to recommend to City Council that the proposed text amendments to Ordinance Nos. 735 and 1231 be approved by the City Council. A copy of the minutes (approved, but unsigned) of the June 13, 2013 Planning and Zoning Commission meeting is attached to this Affidavit as Exhibit "A" and incorporated herein for all purposes.

On June 17, 2013, the Llano City Council held a regular meeting at which meeting, after proper notice was published, a Public Hearing was held on proposed text amendments to Ordinance Nos. 735 and 1231 regarding an Overlay District in the Single Family 1 Zoning District. Further, after said Public Hearing, the City Council voted to approve the proposed text amendments to Ordinance Nos. 735 and 1231 by the enactment of Ordinance No. 1247. A copy of Ordinance No. 1247 and the minutes of the June 17, 2013 Llano City Council meeting are attached to this Affidavit as Exhibits "B" and "C" respectively, and incorporated herein for all purposes.

At no time did the Llano Board of Adjustment take any action, hold any meeting, or make any decision regarding the enactment of Ordinance No. 1247 by the Llano City Council. The Llano Board of Adjustment was not involved at all in the actions, hearings and decisions of the Llano Planning and Zoning Commission or the Llano City Council culminating in the enactment of Ordinance No. 1247 by the Llano City Council on June 17, 2013.

Further, I am aware that Marc T. Sewell filed a Petition for Judicial Review in Cause No. 18504, In the District of Llano County, 33rd/424th Judicial District, the Honorable J. Allan Garrett being the Presiding Judge ("District Court"). The City of Llano, Mikel Virdell (Mayor), Brenton Lewis (City Manager), Dianne Firestone (Planning & Zoning Commission Chairman), Letitia McCasland (Planning & Zoning Commission Member), Marcy Methvin (Planning & Zoning Commission Member), Todd Keller (City Councilmember), Jeanne Puryear (City Councilmember) and Toni Milam (City Secretary), listed as Appellees in No. 03-13-00580-CV, in the Court of Appeals, Third Supreme Judicial District of Texas, at Austin, Texas, as of the date of this Affidavit, have not been served with proper citation issued by the District Court in Cause No. 18504, nor have any of the Appellees made an appearance or waived service in Cause No. 18504."

Further Affiant sayeth not.

Signed this 9th day of October, 2013.

Brenton B. Lewis

Subscribed and sworn to before me by the said Brenton B. Lewis on this 9th day of October, 2013.

Rebecca Bovey
Notary Public of the State of Texas
My commission expires: 9/4/2017

REBECCA BOVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. September 4, 2017

EXHIBIT "A"

City of Llano
Regular Called Planning/Zoning Meeting Minutes
June 13, 2013 – 5:30 p.m.

A. CALL TO ORDER Chairman Diana Firestone called the meeting to order at 5:32 with the following present: Marcy Methvin, Sam Oatman, Leticia McCasland and Stacey Mangum-Oliver was absent.

B. PUBLIC COMMENTS-Non-Agenda Items
No public comments on non-agenda items.

C. CONSENT AGENDA ITEMS All consent agenda items listed are considered to be routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items unless a Council member so requests, in which event the item will be removed from the Consent Agenda and considered in its normal sequence on the Agenda.

1. Approval of the Planning and Zoning minutes as written, dated February 26, 2013.
   Toni Milam, City Secretary
   Motion by Commissioner Methvin, with a second by Commissioner Oatman to approve the minutes of February 26, 2013. With there being no discussion, motion approved.

D. PUBLIC HEARING

1. The City of Llano Planning and Zoning Commission will hold a public hearing on Thursday, June 13, 2013 at 5:30 p.m. in City Hall Council Chambers located at 301 W. Main Street to receive written and/or oral comments from the public, regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 overlay district.
   Chairman Firestone opened the public hearing at 5:32. Public Comments were heard:
   Marc Sewell spoke objecting to the process to get to this point. Mr. Sewell stated property owners were not property notified and that this meeting should have been held as a workshop since there were substantive changes.
   Vivian Koerner is looking to put a beauty salon in the overlay district and asked about the process of obtaining a specific use permit.
   Mayor Mike Virdell spoke in favor of opening up the SF-1 Overlay District to more uses; adding more value to the homes by adding more uses with expanded zoning. He stated it would be unlikely that a residence will sell without adding more uses. With there being no further comments, Chairman Firestone closed the public hearing at 5:40 p.m.

E. REGULAR AGENDA ITEMS

1. Discuss and consider possible action regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 Overlay District, and making recommendations to the City Council.
   Brenton Lewis, City Manager

After a brief discussion, motion by Commissioner McCasland, with a second by Commissioner Methvin to add the following uses of home occupation, accounting/book-keeping office, architect office, engineering office, insurance office, office general, barber/beauty salon, florist, gunsmith, palm reading and soil testing laboratory to the SF-1 Overlay District and to make the recommendation to the City Council. These additional uses would require a Specific Use Permit. Motion approved with Sam Oatman abstaining.

2. Discuss and consider action specifying meeting dates and times for future meetings.
   Brenton Lewis, City Manager
   By-laws currently state the Commission will meet the third Thursday of each month. No formal action taken.

3. Discussion only regarding the Planning and Zoning Commission's future projects.
   Brenton Lewis, City Manager
   After a brief discussion, it was discussed to take one section at a time in reviewing and coming up with ideas for suggestions on changing the zoning ordinance.

F. ADJOURNMENT

_____
Diana Firestone, Chairman

_____
Toni Milam, City Secretary

EXHIBIT "B"

ORDINANCE NO. _1247_

AN ORDINANCE OF THE CITY OF LLANO, TEXAS AMENDING ORDINANCE NO. 1231; DEFINING ADDITIONAL SPECIFIC USES; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

Whereas the Planning and Zoning Commission and City Council of the City of Llano, have given the requisite notices by posting and publication, and have held due hearings to afford a full and fair hearing to all property owners generally, and the City Council of the City of Llano is of the opinion that the Ordinance is in compliance with the Comprehensive Plan,

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LLANO, TEXAS:

SECTION 1. AMEND ORDINANCE 1231 BY INCLUSION OF SPECIFIC USES IN A SF-1 OVERLAY DISTRICT:

Section 1. Purpose-The City Council of the City of Llano finds that the preservation of residential properties and providing additional uses to the area defined within the overlay district will promote commerce and aesthetic continuity; encourage the orderly development along highway corridors; and is compatible with adjacent Zoning Districts and land uses.

Section 2. Definitions

Alteration: A physical change to the exterior appearance of a building as seen from any public Right of Way. Alterations shall include the changing of roofing or siding materials; changing, eliminating , or adding doors, door frames, windows, window frames, shutters, fences, railings, porches, or balconies.

Accounting or Bookkeeping Office: A facility or group of offices for one or more professional accountants, bookkeepers, and support staff for conducting consultation, accounting or bookkeeping work and research, and to prepare other documents and correspondence.

Architect's Office: A facility or group of offices for one or more professional architects and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Barber Shop or Beauty Salon: An establishment providing to men or women services to improve their appearance, such as hair cutting, hairdressing, manicuring, facial treatment, and massage.

Building: A structure such as a house, garage, accessory structure or similar construction designed for shelter of any form of human activity or for personal property.

CMU: concrete block material commonly called cinder block. Standard CMU is finished flat and is erected with mortar between joints.

Engineering Office: A facility or group of offices for one or more professional engineers and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Florist: An establishment for the display and retail sale of flowers, small plants and accessories.

Gunsmith: A facility or group of offices where the repair, modification, design, or building of firearms is performed.

Home occupation means an occupation which is secondary to the primary use of a dwelling as a residence, conducted on residential premises solely by an occupant of the residence. A home occupation is one that is customarily carried on in the home, but does not include a business that:
(1) Utilizes an advertisement, sign or display on the premises;
(2) Employs persons other than the occupants of the residence;
(3) Utilizes other than the ordinary household equipment;
(4) Operates during hours other than 8:00 a.m.—6:00 p.m. for outdoor activities, and 8:00 a.m.—10:00 p.m. for indoor activities;
(5) Involves more than six patrons on the premises at one time;
(6) Conducts outdoor activities, unless the activities are screened from neighboring property;
(7) Has exterior storage of material, equipment and/or supplies which are used in conjunction with such occupation;
(8) Has offensive noises, vibrations, smoke, dust, odors, heat or glare beyond the property lines; and
(9) Parking required is not more than four spaces, two of which are on site.
Examples of a home occupation are the teaching of music, swimming and operations carried on as telecommuting.

Insurance Office: A facility or group of offices for one or more professional architects and support staff for conducting consultation, design work and research, and to prepare other documents and correspondence.

Normal Business Hours: The period for conducting business or work defined as between the hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, and 8:00 a.m. through 12:00 noon Saturday.

Office, General, Professional: Means a room, or group of rooms, used for the provision of executive, management or administrative services. Typical uses include administrative offices and services, including real estate, insurance, property management, investment, personnel, travel, secretarial services, telephone answering and business offices of public utilities, organizations and associations, but excluding medical offices.

Ordinary Maintenance and Repair: Replacement or repair of like kind and quality of the original structure, façade, windows or doors.

Overlay District: A set of zoning requirements that are described in the Ordinance text, is mapped, and is imposed in addition to, or supplements, those of the underlying District. Development within the overlay zone must conform to the requirements of both zones or the more restrictive of the two. In certain cases, additional uses or requirements may be allowed that are not in the underlying District.

Palm Reading: An establishment where persons practice the art of palmistry or chiromancy.

Residential: A structure or building that is used for single family dwelling only. Residential also includes ancillary uses such as garages or accessory buildings that are incidental to the primary use.

Soil Testing Laboratory: A facility or group of offices that include a designated area for the analysis of soil to determine the content, composition, and other characteristics of the soil.

Section 3. Area Defined

The SF-1 Overlay District is an area designated as a part of the City of Llano Zoning Regulations and Official Zoning Map by reference.

Section 4. Specific Uses

In the SF-1 Overlay District the following Permitted Specific Uses shall be allowed, in addition to Specific Uses defined in Section 8B, City of Llano Zoning Regulations, Ordinance 735, and Ordinance 1231:

Home Occupation	Accountant or Bookkeeping Office	Architect's Office
Engineering Office	Insurance Office	Office, General, Professional
Barber Shop or Beauty Salon	Florist	Gunsmith
Palm Reading	Soil Testing Laboratory	

All other conditions for approval are outlined in Section 20, City of Llano Zoning Regulations, Ordinance 735, and Ordinance 1231.

Section 5. Design Standards

The purpose of the design standards is to maintain the residential character of the corridor while allowing additional options and requirements under a Specific Use Permit. Normal maintenance and repair is allowed without restriction in the SF-1 Overlay District.

Exterior Finishes: All exterior finishes shall be masonry, wood or composite lap siding, or stucco. Alterations and additions shall be constructed with like material and quality as the existing structure. Standard CMU is not allowed as an exterior finish.

Roof: All roofs shall be constructed with a minimum 1 to 12 roof pitch. Allowed roofing materials include metal, asphalt shingles or composite shingles. Eves shall be a minimum of eight inches.

Landscaping: Landscaping shall be maintained according to the City of Llano Property Maintenance Code. All parking areas shall be screened from Highway 16 by a minimum of 30" high plant screening excepting allowed drive way entrances or exits.

Signs: All signs shall conform to City of Llano Sign Ordinance No. 935.

Section 6. Operation

All Specific Uses of Home Occupation, Accountant or Bookkeeping Office, Architect's Office, Engineering Office, Insurance Office, Office - General, Professional, Barber Shop or Beauty Salon, Florist, Gunsmith Palm Reading, Soil Testing Laboratory shall be allowed to operate only during normal business hours except in the case of emergencies. Use of the building or structure for special events, holiday parties or open houses after normal business hours shall be allowed.

Section 7. Conditions

The Planning Commission and City Council may impose additional conditions when granting specific Use Permits per Section 20, City of Llano Zoning Regulations, Ordinance No. 735, and Ordinance 1231.

SECTION 2. CONFLICT / SEVERABILITY

All ordinances of the City of Llano, Texas found to be in conflict with the provisions of this ordinance or the Zoning Regulations are hereby repealed. Should any sentence, paragraph, subdivision, clause or phrase be found unconstitutional, illegal, invalid the same shall not affect the validity or this ordinance as a whole, or any part of provision thereof other than the part decided to be invalid, illegal or unconstitutional, and the same shall not effect the validity of the Ordinance as a whole.

SECTION 3. PENALTY

Any person, firm or corporation violating any of the provisions or terms of this ordinance or the Zoning Ordinance, as amended, shall be subject to the same penalty as provided for the Zoning Regulations of the City of Llano, Texas, and upon conviction shall be subject to a fine not to exceed Two thousand dollars ($2,000.00) for each offence, and each and every day such a violation is continued shall be deemed to constitute a separate offence.

SECTION 4. ENACTMENT

This Ordinance shall take effect immediately from and after its passage and the publication of the caption as the law in such cases provide.

PASSED AND APPROVED, this 17th day of June, 2013.

CITY OF LLANO
LLANO COUNTY, TEXAS

Mikel Virdell, Mayor

ATTEST

Toni Milam, City Secretary

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	USE CHART														
2	CITY OF LLANO, TEXAS														
3	ZONING ORDINANCE														
4		DISTRICT													
5			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
6	1. Primary Residential Uses														
7	Accessory dwelling unit	*	S	S		S	S	S	S				S		
8	Caretaker/guard residence	*	•											•	•
9	Community home		•	•		•	•	•	•	•	•			•	•
10	Detached private garage	*	•	•		•	•	•	;bullt;	•		S			
11	Detached single-family dwelling	*	•	•		•	•	•	;bulet;	•	•		•	•	•
12	Garage apartment	*	•	•		•	•	•	;bllet;	•		S			
13	Home occupations	*	•	•	S	•	•	•	•	•		S			
14	Industrialized housing		•	•		•	•	•	;bullt;	•		•			
15	Manufactured housing, less than than five years old						S	•							
16	Manufactured housing, greater than five years old							S							
17	Manufactured home park	*						•							
18	Multiple-family dwelling	*							•	•					
19	Recreational vehicle park	*												S	
20	Retirement home and/or nursing home	*				S	S	S	•	•	•			•	
21	Single-family dwelling with retail use	*								S	S	•	S	S	
22	Single-, two- or multifamily use above first floor level									•		•	•	•	
23	Two-family dwelling	*				•	•	•	•	•					
24	2. Educational, Institutional, Public and Special Uses														
25	Airport	*	•												
26	Athletic stadium or field, public		•	S		S	S	S	S	•	•			•	•
27	Athletic stadium or field, private	*	S											S	S
28	Child care or day care center	*	S	S		S	S	S	S	•	•			•	•
29	Church, including church related activities (i.e., day care, recreational building)	*	•	•		•	•	•	•	•	•	•	•	•	•
30	City, county, state and governmental offices	*	•	•		•	•	•	•	•	•	•	•	•	•
31	College, university or private boarding school		•											•	•
32	Community center, private	*	S	S		S	S	S	S	•	•	•	•	•	•
33	Farm, ranch, garden or orchard	*	•	•		•	•	•	•	•	•		•	•	•
34	Halfway house	*								S	•			•	•
35	Heliport and helistop	*	•							S					
36	Hospital	*	•							•	•			•	•
37	Hospital for insane, liquor or narcotic related patients	*	S							S	S			•	•
38	Landing fields, private		S												
39	Library, public	*	•	•		•	•	•	•	•	•	•	•	•	•
40	Metal accessory building, in excess of 200 square feet		•	•		•	•	•	•	•	•			•	•
41	Metal building, primary or main													•	•
42	Municipal uses operated by the city	*	•	•		•	•	•	•	•	•	•	•	•	•
43	Museum or art gallery, private									•	•	•	•	•	•
44	Parochial or private school	*	•	•		•	•	•	•	•	•	•	•	•	•
45	Private park	*	•	•		•	•	•	•	•	•	•	•	•	•
46	Private utilities	*	•	•		•	•	•	•	•	•	•	•	•	•
47	Public park or playground	*	•	•		•	•	•	•	•	•	•	•	•	•
48	Radio, television, or communications facilities (commercial)**	*	•	S		S	S	S	S	S	S	S	S	S	•
49	Religious or philanthropic institutions not listed		S	S		S	S	S	S	S	•	•	•	•	•
50	School, public	*	•	•		•	•	•	•	•	•	•	•	•	•
51	School, business or trade	*	•	•		•	•	•	•	•	•	•	•	•	•
52	3. Office and Professional Uses														
53	Accountant or bookkeeping office	*		S	S	S	S	S		•	•	•	•	•	•
54	Armed services recruiting center									•	•	•	•	•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
55			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
56	Architect's office	*		S	S	S	S	S		•	•	•	•	•	•
57	Attorney Office				S										
58	Bank, savings and loan mortgage and and credit unions	*								•	•	•	•	•	•
59	Chamber of commerce									•	•	•	•	•	•
60	Check cashing service and loan agency									•	•		•	•	•
61	Dental Office				S										
62	Engineering office	*		S	S	S	S	S		•	•	•	•	•	•
63	Insurance office			S	S	S	S	S		•	•	•	•	•	•
64	Long distance communication service									•	•		•	•	•
65	Medical clinic or office	*			S					•	•		•	•	•
66	Medical laboratory	*								•	•		•	•	•
67	Minor medical emergency clinic									•	•		•	•	•
68	Office, general, professional	*		S	S	S	S	S	S	•	•	•	•	•	•
69	Radio broadcasting, without tower	*								•	•		•	•	•
70	Real estate sales office	*								•	•	•	•	•	•
71	Surveyor office									•	•	•	•	•	•
72	4. Retail and Related Uses														
73	Art and craft supply store	*								•	•	•	•	•	•
74	Bakery or bake shop, retail	*								•	•	•	•	•	•
75	Barbershop or beauty salon	*			S	S	S	S		•	•	•	•	•	•
76	Bicycle, lawnmower sales/repair, enclosed										•		•	•	•
77	Bookstore	*								•	•	•	•	•	•
78	Boot and shoe sales and repair	*								•	•	•	•	•	•
79	Building materials and hardware, inside	*									•	•	•	•	•
80	Building materials and hardware, outside	*												•	•
81	Ceramics store	*								•	•	•	•	•	•
82	Clothing or apparel store, new	*								•	•	•	•	•	•
83	Computer sales	*								•	•	•	•	•	•
84	Convenience store with gas pumps										S			•	•
85	Convenience store without gas pumps									•	•			•	•
86	Dance studio or gymnastics	*								•	•		•	•	•
87	Department and dry goods store, retail	*									•	•	•	•	•
88	Donut shop	*								•	•	•	•	•	•
89	Driving school										•		•	•	•
90	Dry cleaning or shoe pickup/drop off	*								•	•		•	•	•
91	Dry cleaning, small shop	*								•	•	•	•	•	•
92	Fabric store	*								•	•	•	•	•	•
93	Feedstore	*											•	•	
94	Florist	*		S	S	S	S	S		•	•	•	•	•	•
95	Furnishings	*								•	•	•	•	•	•
96	Gift shop									•	•	•	•	•	•
97	Grocery store or food market	*									•	•	•	•	•
98	Gunsmith				S						•	•	•	•	•
99	Hobby or toy store	*								•	•	•	•	•	•
100	Ice cream or frozen yogurt sales	*								•	•	•	•	•	•
101	Key shop or locksmith									•	•	•	•	•	•
102	Kiosk	*								•	•	•	•	•	•
103	Laundromat, self-service	*									•		•	•	•
104	Manufactured housing sales	*												•	•
105	Meat market, retail	*									•	•	•	•	•
106	Medical aids and equipment									•	•	•	•	•	•
107	Musical instrument sales and repair									•	•	•	•	•	•
108	Novelty or jewelry shop	*								•	•	•	•	•	•
109	Nursery, retail	*		S		S	S	S	S		S	S	S	•	•
110	Outside display	*									•		•	•	•
111	Optical store	*								•		•	•	•	•

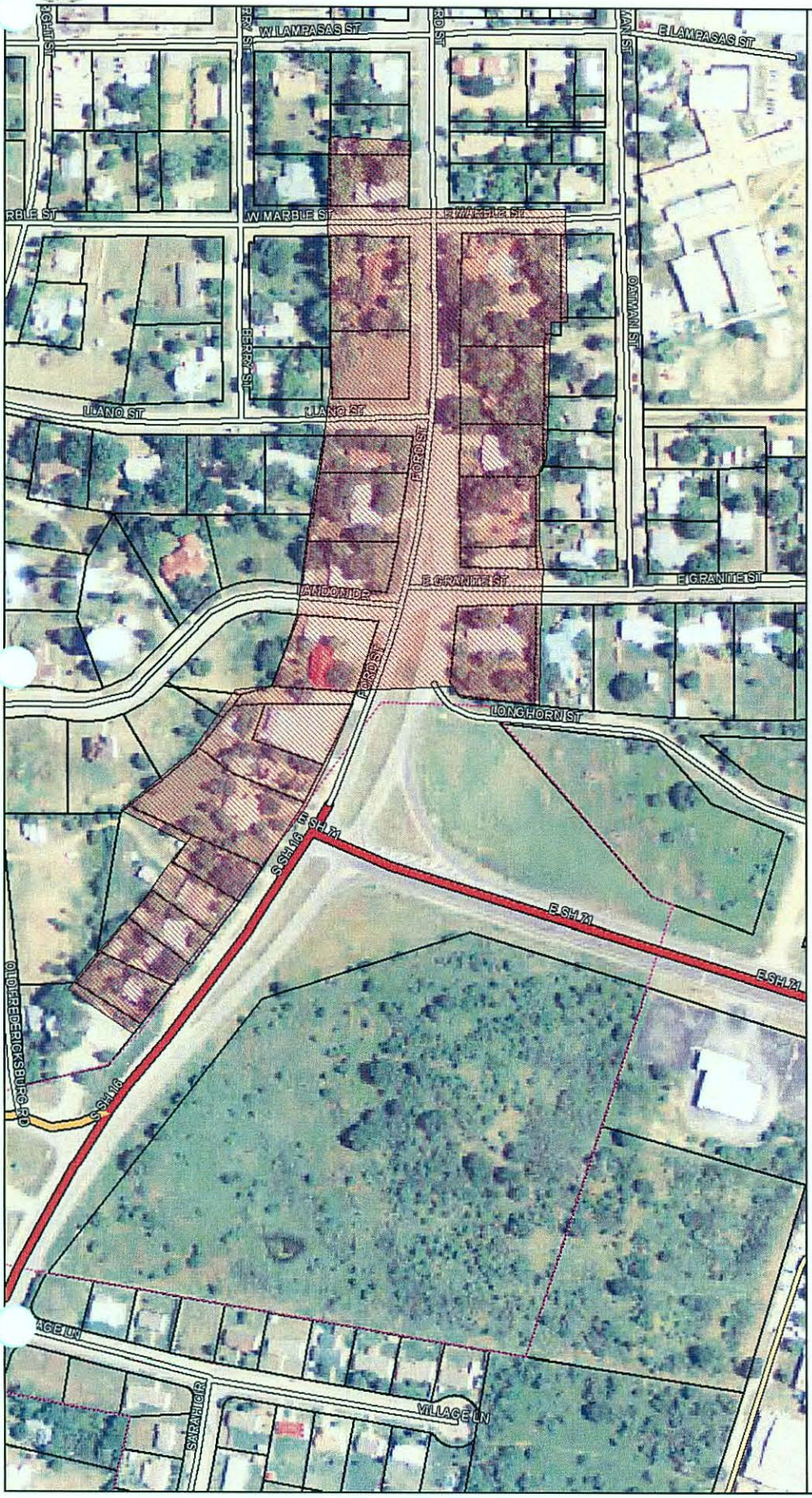
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
112			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
113	Paint store	*									•	•	•	•	•
114	Pawnshop	*									•		•	•	•
115	Pet shop	*									•	•	•	•	•
116	Pharmacist or drugstore	*								•	•	•	•	•	•
117	Printing shop	*								S	•	•	•	•	•
118	Produce stand, including wood and other seasonal sales	*	Temporary certificate of occupancy by building official												
119	Radio sales and installation										•	•	•	•	•
120	Recycling collection center	*									•			•	•
121	Restaurant, cafe or cafeteria	*								•	•	•	•	•	•
122	Restaurant, drive-in	*									•	•		•	•
123	Restaurant with drive-through										•	•	•	•	•
124	Retail service, incidental	*									•	•	•	•	•
125	Security systems installation company									•	•	•	•	•	•
126	Sporting goods, including firearm sales										•	•	•	•	•
127	Temporary sales and street vending[3]	*									•	•	•	•	•
128	Trophy sales and engraving									•	•	•	•	•	•
129	TV sales and repair									•	•	•	•	•	•
130	Used clothing store									S	S		•	•	•
131	Vacuum cleaner sales and service									•	•	•	•	•	•
132	Veterinarian clinic, no outside pens	*									•		•	•	•
133	Wallpaper, flooring and carpet supply									•	•	•	•	•	•
134	Weight and aerobic center									•	•	•	•	•	•
135	5. Automobile, Transportation, Utility, Communication and Related Uses														
136	All local utilities, municipal or franchised	*	•	•		•	•	•	•	•	•	•	•	•	•
137	Amateur radio, TV or CB antenna	*	•	•		•	•	•	•	•	•	•	•	•	•
138	Antenna (commercial radio, TV, relay or microwave over 40 feet)	*	S											•	•
139	Auto glass sales and repair													•	•
140	Automobile leasing or renting	*									S		•	•	•
141	Automobile parts and sales	*									•	•	•	•	•
142	Automobile reconditioning, body/fender repair													•	•
143	Automobile repair, major	*												•	•
144	Automobile repair, minor	*									S			•	•
145	Automobile sales, new	*												•	•
146	Automobile sales, used	*												•	•
147	Automobile service station	*									S		•	•	•
148	Boat sales, new													•	•
149	Bus terminal	*										•	•	•	•
150	Electric transmission substation	*	S	S		S	S	S	S	S	S	S	S	S	S
151	Freight or truck terminal yard	*												•	•
152	Gas regulating station		S	S		S	S	S	S	S	S	S	S	S	S
153	Heavy machinery sales and service	*												•	•
154	Heavy vehicle storage	*												S	•
155	Heliport	*	•							S					
156	Motorcycle sales, new	*												•	•
157	Motor raceway	*												S	•
158	Private landing field		•												
159	Recreation vehicle, new	*												•	•
160	Recreation vehicle, used	*												•	•
161	Trailer rental	*												•	•
162	Truck rental or leasing	*												•	•
163	Truck repair and overhaul	*												•	•
164	Truck sales, new	*												•	•
165	Truck sales, used	*												•	•
166	Used automotive auction	*												•	•
167	Vehicle or car wash	*												•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
168			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
169	6. Amusement and Commercial Uses														
170	Alcohol sales	*									•	•	•	•	•
171	Amusement arcade	*									•	•	•	•	•
172	Antique shop and used furniture	*									•	•	•	•	•
173	Appliance rental										•	•	•	•	•
174	Banking, automated teller only										•	•	•	•	•
175	Bed and breakfast	*	S	S		S	S	S	S	S	•	•	•	•	•
176	Boardinghouse	*												•	•
177	Cabinet and upholstery shop	*									•		•	•	•
178	Cemetery or mausoleum, new or expansion	*	S	S		S	S	S	S	S	S			S	S
179	Commercial amusement, indoor	*									•		•	•	•
180	Commercial amusement, outdoor	*									S		S	S	•
181	Dancehall	*										S	S	•	•
182	Dancehall (as incidental/accessory use only)	*										S	S	•	•
183	Firing range, indoor/outdoor													•	•
184	Flea market	*									S	S	S	S	•
185	Fraternal club, lodge, sorority and fraternity, etc.	*								•	•	•	•	•	•
186	Funeral parlor or mortuary	*											•	•	•
187	Golf course and county club	*	S	S		S	S	S	S						S
188	Miniature golf, driving range and putting course	*												•	•
189	Greenhouse and nursery, commercial	*												•	•
190	Horse racing track		S												S
191	Hotel or motel	*									S	•	•	•	•
192	Interior decorator's office	*								•	•	•	•	•	•
193	Insurance or insurance estimator's office	*								•	•	•	•	•	•
194	Kindergarten, private		S	S		S	S	S	S	S	•		S	•	S
195	Leather goods shop										•	•	•	•	•
196	Massage establishment	*								•	•		•	•	•
197	Open or outside storage of products or materials, not screened		*											S	•
198	Outside storage, screened	*												S	•
199	Palm reading				S										S
200	Printing company, commercial	*											•	•	•
201	Private club with alcoholic beverage sales	*									•	•	•	•	•
202	Roller skating rink												•	•	•
203	Sign shop											•		•	•
204	Stable, commercial	*												S	•
205	Stable, private	*	•	S		S	S	S	S						•
206	Stained glass studio										•	•	•	•	•
207	Studio, photography	*								•	•	•	•	•	•
208	Tattoo parlor	*													S
209	Taxidermist													•	•
210	Theater, indoor	*									•		•	•	•
211	Theater, outdoor	*												•	•
212	Tire dealer, new	*									•		•	•	•
213	Tool and machinery rental shop	*									•		•	•	•
214	Video rental store										•	•	•	•	•
215	7. Light Industrial and Heavy Commercial Uses														
216	Assembly of heavy electronic devices	*												•	•
217	Assembly of light electronic instruments and devices, enclosed building	*												•	•
218	Assembly of radios and phonographs												•	•	•
219	Bakery and confectionary works, commercial	*									•		•	•	•
220	Batching plant, concrete or asphalt	*												S	•
221	Batching plant, temporary	*	(Temporary permit issued by building official)												
222	Book bindery												•	•	•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
223			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
224	Boot or shoe manufacturer													•	•
225	Bottling works													•	•
226	Brick company, sales													S	•
227	Building materials and lumber storage yards and sales	*												•	•
228	Candy manufacturing											•		•	•
229	Carting or express hauling													•	•
230	Commercial engraving												•	•	•
231	Contractor's shop or storage yard	*												•	•
232	Cosmetics manufacturing, enclosed building													•	•
233	Dairy products													•	•
234	Dog kennel and veterinarian office, outside pens	*												•	•
235	Drapery manufacturing and sales												•	•	•
236	Drug and pharmaceutical manufacturing, enclosed building													•	•
237	Dry cleaning plant or commercial laundry	*												•	•
238	Feedlot														S
239	Food product manufacturing													•	•
240															
241	Foundry casting, nonferrous, enclosed building													S	•
242	Frozen food locker													•	•
243	Fur goods manufacturing, but no tanning, dyeing or slaughtering													•	•
244	Furniture manufacture	*												•	•
245	Furniture restoration										S		S	•	•
246	Glass products from previously manufactured glass													•	•
247	Heating and air conditioning sales and service										•		•	•	•
248	Heat processing													•	•
249	Housing prefabrication													•	•
250	Ice company sales, wholesale	*												•	•
251	Instrument and meter manufacturing	*												•	•
252	Jewelry and watch manufacturing										•		•	•	•
253	Landfill, commercial														S
254	Landscaping service										S			•	•
255	Leather goods fabrication										•		•	•	•
256	Light fabrication and assembly													•	•
257	Light manufacturing	*												•	•
258	Light sheet metal products													•	•
259	Machine shop													•	•
260	Metal fabrication													•	•
261	Monument and headstone sales													•	•
262	Moving company												•	•	•
263	Newspaper printing												•	•	•
264	Office showroom	*											•	•	•
265	Official goods manufacturing													•	•
266	Overnight delivery and service center												•	•	•
267	Paper and chemical supply												•	•	•
268	Paper products manufacturing														•
269	Perfume toilet soaps, enclosed building													•	•
270	Plaster shop													•	•
271	Plastic products manufacturing, but not raw materials processing														•

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
272			A Agricultural	SF-1 Single-family-1	SF-1 Single-Family Overlay District	SF-2 Single-family-2	SF-3 Single-family-3	SF-4 Single-family-4	GR General Residential	OM Office Medical	R Retail	NBD North Business District	CBD Central Business	C Commercial	I Industrial
273	Plumbing shop and related services													•	•
274	Portable building sales	*												•	•
275	Private utility service yard													S	•
276	Research and scientific laboratory	*											•	•	•
277	Restaurant, incidental to main use	*									•	•	•	•	•
278	Restaurant supply													•	•
279	Rock quarry, sand, gravel or earth excavation														S
280	Roofing and siding supply										S			•	•
281	Self-service or miniwarehouse	*											•	•	•
282	Soil testing laboratory				S									•	•
283	Sporting goods manufacturing	*												•	•
284	Tire retreading														•
285	Tool manufacturer													•	•
286	Welding shop or company													•	•
287	Wholesale beauty supply												•	•	•
288	Wholesale distribution center	*											•	•	•
289	Wholesale food distribution	*												•	•
290	Wholesale sales	*											•	•	•
291	Wrecking yard, auto salvage, junkyard or outside reclamation														S
292	8. Industrial Processing Uses														
293	High risk or hazardous industrial manufacturing, not wholly enclosed within a building														S
294	High risk or hazardous industrial manufacturing, wholly enclosed within a building														S
295	Low risk industrial manufacturing, not wholly enclosed within a building														S
296	Low risk industrial manufacturing, wholly enclosed within a building													S	S
297															

SF-1 Overlay District



City Street Labels
- City Street Labels

City Streets
- City Streets
- Private Drives

Local Road Labels
- Local Road Labels

Local Roads
- State Hwy
- FM or RR Road
- County Road
- Other City Streets
- Private Drives

Extra-territorial Jurisdiction
- Extra-territorial Jurisdiction

City Limits
- City Limits

Rivers
- Rivers

LCAD Tax Parcels
- Parcels

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EXHIBIT "C"

City of Llano
Regular Called City Council Minutes
June 17, 2013 – 5:30 p.m.

A. CALL TO ORDER
Mayor Virdell called the City Council meeting to order at 5:37 p.m. Those in attendance were Mayor Pro-Tem Hazel, Alderman Hopson, Alderwoman Puryear, Alderman Keller, and Alderman Miiller;

B. PLEDGE OF ALLEGIANCE

C. INVOCATION – Pastor Gretal Morgan

D. PUBLIC COMMENTS – Non Agenda Items
No public comments

E. PRESENTATION

1. Jonathan Blackwell from the company LEED AP to make a presentation to the Mayor and Council regarding the electronic meter reading equipment.
   Brenton Lewis, City Manager
   Jonathan Blackwell with Aqua Metrics made a presentation to the Mayor and Council regarding the electronic meter reading equipment. Some of the highlights of the presentation include but were not limited to the accuracy of the meter reading equipment; utilizing existing towers. The project scope would replace all existing residential and commercial water meters and replace with Sensus iPERL and Omni water meters. Replacing all existing residential and commercial electric meters with Sensus AMI electric meters. Every meter will be connected to the Sensus FlexNet system enabling the City of Llano to read all meters remotely. Installation of all meters is included in scope; performed by a sister company Utiliuse. Installation also includes data integration into billing system and access to Utilicenter for daily project progress tracking. Logic Customer Connect is included, plus 5 years of annual support. This would be approximately a 7-12 month project schedule. Other additional benefits would be real-time monitoring of all water and electric meters. Alerts of tampering and other issues delivered to city daily; frequency controlled by city; water conservation capabilities; water rates not having to be adjusted, future water loss costs controlled; and efficiency warranty.

F. CONSENT AGENDA ITEMS All consent agenda items listed are considered to be routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items unless a Council member so requests, in which event the item will be removed from the Consent Agenda and considered in its normal sequence on the Agenda.

1. Approval of the regular called City Council meeting minutes as written, dated June 3, 2013.
   Mayor Mike Virdell/Toni Milam, City Secretary

2. Approval of the special called City Council meeting minutes as written, dated June 10, 2013.
   Mayor Mike Virdell/Toni Milam, City Secretary

3. Approval on the request from the Llano County Library System Foundation for temporary street closure on Haynie Street for a street dance to be held on June 21, 2013.

Mayor Mike Virdell/Toni Milam, City Secretary

Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to approve the consent agenda as presented. With there being no discussion, motion approved.

G. PUBLIC HEARING

Mayor Videll opened the public hearing at 5:58 p.m.

1. The City of Llano City Council will hold a public hearing on Monday, June 17, 2013 at 5:30 p.m. in City Hall Council Chambers located at 301 W. Main Street to receive written and/or oral comments from the public, regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 overlay district.

Marc Sewell, resident of Llano spoke during the public hearing portion of the meeting. Mr. Sewell stated there were four issues: technical errors, legal violations, no respect for property owners, and concerns regarding zoning overhaul. He recommended not approving these changes except for the beauty salon. Suggested finishing the comprehensive plan. Sherry Simpson, resident of Llano also spoke stating she isn't ready to see a palm reading use in the overlay district. With there being no further public comments, Mayor Virdell closed the public hearing at 6:15 p.m.

H. REGULAR AGENDA ITEMS

1. Discuss and consider action on the approval of Ordinance 1247 regarding amending the text and defining uses of the Zoning Ordinance No. 735; specifically in the SF-1 Overlay District, and making recommendations to the City Council.

Mayor Mike Virdell/Brenton Lewis, City Manager

Motion by Alderman Bryan Miiller, with a second by Mayor Pro-Tem Hazel to approve Ordinance 1247 amending the text and defining the following uses specifically in the SF-1 Overlay District: Barber/beauty salon, home occupation, accountant or bookkeeping office, architect office, engineering office, insurance office, office general professional, palm reading florist, gunsmith, and soil testing laboratory. With there being no further discussion, motion was approved.

2. Discussion and update on the "Llano Red Top Jail".

Mayor Mike Virdell/Brenton Lewis, City Manager

Sherri Zoch, Friends of the Llano Red Top Jail reported to Council that due to the contractor not being able to get bonding to perform the work. Ms. Zoch expressed a concern for future projects using local contractors not being able to secure the required bonding. She also advised the Council the Friends of the Llano Red Top Jail 501C3 was revoked by the IRS and they are currently working on getting their 501C3 status reinstated. She requested the City deed both the building and the property over to the Friends of the Llano Red Top Jail. No formal action taken.

3. Discuss and consider action on the award of the bid on the City of Llano Disaster Relief Project Raw Water Aeration System Improvement Project.

Mayor Mike Virdell/Brenton Lewis, City Manager

John Ferguson, resident spoke regarding the agenda item, and provided a list of questions proposed to Council. Mr. Ferguson inquired about the sediment, total cost per year, and any other purification, and if there were any other hidden costs. Marc Sewell asked what the budget was for this project, and stated there were incomplete business plans submitted by Staff.

Dan Hejl, with Hejl, Lee & Associates spoke briefly regarding the Disaster Relief Project Raw Water Aeration System Improvement project. After a lengthy presentation and discussion between Mr. Hejl and Council, questions were answered as was the cost of the project.

Motion by Mayor Pro-Tem Hazel, with a second by Alderman Miiller to award the bid Excel Construction contingent upon a confirmation from the State on the approved contractor and subject to the approval of the change order number. With there being no further discussion, motion was approved.

4. Discuss and consider action regarding a Request for Proposal on audit services for FY12-13.

Mayor Mike Virdell/Brenton Lewis, City Manager

Sherry Simpson, resident, stated Neffendorf, the current auditor was a good auditor, however, during the last audit, they were asked to provide specific information and didn't. Motion by Alderman Keller, with a second by Alderwoman Puryear to direct Staff to send a Request for Proposal for audit services for the FY12-13. With there being no further discussion, motion was approved.

5. Discuss and consider action regarding a business license.

Mayor Mike Virdell/Brenton Lewis, City Manager

Marc Sewell spoke regarding the business license and saw no benefit to business owners. Vivian Koerner spoke and agreed a business license is needed and had that been in place she may not have incurred issues when opening her business. Doris Messer stated it could be a process issue. Sherry Simpson agreed with Ms. Messer.
No formal action taken.

6. Discuss and consider action on the approval of Ordinance 1246 regarding the creation of a Recreation Board, and the proposed by-laws.

Mayor Mike Virdell/Brenton Lewis, City Manager

Jessie Blackmon with the Llano Parks Project reported the group has filed for a 501C3 and is ready to move forward. Mayor Pro-Tem Hazel complimented the group for taking action themselves and stepping up.
Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to approve Ordinance 1246 creating the Recreation Board and proposed by-laws. With there being no further discussion, motion was approved.

7. Discuss and consider action on authorizing the hiring of a Permit Clerk in the Public Works Department.

Mayor Mike Virdell/Brenton Lewis, City Manager

Marc Sewell spoke regarding this agenda item. He state the hiring of a permit clerk is just the opposite of the direction the City needs to go. Don't need GED's, but rather needs more skill, and there was no salary in the job description, suggested hiring a temporary employee and to wait until after the budget process. Gail Lang spoke and stated she was offended by Mr. Sewell's comments about GED's being unskilled. Mr. Sewell did apologize for the comment. Sherry Simpson spoke and stated whenever the City had a Code Enforcement Officer, he worked well with the citizens. Alderwoman Puryear stated that with the previous Code Enforcement Officer, there were also complaints.
Motion by Alderman Keller, with a second by Mayor Pro-Tem Hazel to table this item until the budget hearings. With there being no further discussion, motion was approved.

8. Discuss and consider action on setting dates for the upcoming FY13-14 budget workshop sessions.

Mayor Mike Virdell/Brenton Lewis, City Manager

Discussion was held regarding the upcoming budget workshop sessions.
Motion by Mayor Pro-Tem Hazel, with a second by Alderwoman Puryear to direct Staff to set the budget schedules. With there being no further discussion, motion was approved.

I. ADJOURNMENT 7:50 p.m.

Mayor Mike Virdell

CITY OF LLANO
LLANO COUNTY, TEXAS

Toni Milam, City Secretary

892 S.W.2d 198
Court of Appeals of Texas,
Houston (14th Dist.).

Christopher J. ALLEN, Appellant,
v.
The AUTOMOBILE INSURANCE COMPANY OF HARTFORD CONNECTICUT, Farmers Insurance Exchange, Texas Farmers Insurance Company and Truck Insurance Exchange, and Transcontinental Insurance Company, Appellees.

No. B14–93–00590–CV. | Dec. 29, 1994.

Insurer brought declaratory judgment suit seeking determination that its homeowners' policy did not provide coverage for insured's sexual molestation of child. The 215th District Court, Harris County, Eugene Chambers, J., entered judgment in favor of homeowners' insurer and other insurers who had joined in action. Child appealed. The Court of Appeals, Lee, J., held that: (1) sexual molestation was to be treated as intentional injury as matter of law under inferred intent doctrine; (2) thus, homeowners' policy which excluded coverage for intentional acts precluded coverage for sexual molestation, regardless of insured's subjective intent; and (3) umbrella policies did not provide coverage for alleged invasion of privacy.

Affirmed.

Attorneys and Law Firms

***199** David Slaughter, Houston, for appellant.

Wayne D. Davidson, Jay W. Brown, Denise A. Acebo, Barclay A. Manley, Houston, for appellees.

Before SEARS, LEE and BARRON, JJ.

Opinion

OPINION

LEE, Justice.

This Declaratory Judgment suit arises from the sexual molestation of a child, Christopher J. Allen. The Automobile Insurance Company of Hartford Connecticut (Hartford) brought this action against Clifford A. Metcalfe (Metcalfe) and Christopher Allen (Allen) requesting the court declare Hartford had no duty to defend or indemnify the molester, Metcalfe, under Metcalfe's homeowner's insurance policy. The trial court granted summary judgment in favor of the insurance companies. Allen appeals bringing four points of error. We affirm.

Hartford issued a Texas Standard Homeowners' Policy to Metcalfe; the policy specifically excluded insurance coverage for bodily injury or property damage which the insured intentionally caused. Allen alleges Metcalfe sexually molested him on several occasions between 1987 and 1989. Allen was a minor during that time frame. On January 16, 1990, in *State of Texas v. Clifford A. Metcalfe*, C.A. No. 542355 in the 263rd Criminal District Court of Harris County, Texas, Metcalfe pled guilty to the felony offense of indecency with a child [Christopher J. Allen]. Metcalfe was convicted and sentenced to 10 years, probated. The conviction was upheld on appeal. *See Metcalfe v. State*, No. C14–90–00384–CR, 1991 WL 127357 (Tex.App.—Houston [14th Dist.] July 11, 1991, no pet. h.) (not designated for publication).

Allen brought a lawsuit against Metcalfe, styled *John D. Allen, as next friend of Christopher J. Allen, a minor child, et al., v. Clifford J. Metcalfe, Jr., et al.*, C.A. No. 90–057391 in the 125th District Court of Harris County, Texas (*Allen* suit). In that suit, Allen asserts claims for personal injury resulting from Metcalfe's repeated sexual molestation. Hartford then filed this Declaratory Judgment action. Farmers Insurance Exchange, Texas Farmers Insurance Company and Truck Insurance Exchange, (Farmers) and Transcontinental Insurance Company (Transcontinental) joined or intervened in the Declaratory Judgment suit. All policies in issue exclude from coverage personal injuries intentionally caused by the insured.

[1] In his first and third points of error, Allen asserts the insurance companies failed to prove Metcalfe "intended" to injure Allen when he sexually molested him. In his second point of error, Allen further argues it is possible to have an occurrence or accident arising out of the intentional conduct of an insured. To invoke coverage under the terms of Hartford's policy, there must be an "accident" or "occurrence." Accident or occurrence is defined as an unexpected happening without intention or design. *See Argonaut Southwest Insurance Co. v. Maupin*, 500 S.W.2d 633, 655 (Tex.1973); *see also Pierce v. Benefit Trust Life Ins. Co.*, 784 S.W.2d 516, 518 (Tex.App.—Amarillo 1990, writ

denied); *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501, 503 (Tex.App.—Texarkana 1979, no writ).

It is undisputed that all of Allen's claims arise out of Metcalfe's sexual molestation of Allen. Allen argues the insurance companies failed to present evidence that Metcalfe intended to injure him and thus were not entitled to summary judgment. Moreover, Allen asserts his suit is not for injuries caused by the intentional acts of Metcalfe, but for injuries caused by negligence, gross negligence, and negligent infliction of emotional distress.

[2] We disagree. Sexual molestation is an intentional injury as a matter of law. *Maayeh v. Trinity Lloyds Insurance Co.*, 850 S.W.2d 193, 196 (Tex.App.—Dallas 1992, no writ); *see also* ***200** *Commercial Union Ins. Co. v. Roberts*, 815 F.Supp. 1006, 1007 (W.D.Tex 1992); *State Farm Fire & Cas. Co. v. Gandy*, 880 S.W.2d 129, 139–140 (Tex.App.—Texarkana 1994, writ granted). In *Maayeh* the court of appeals ruled that in cases of sexual molestation intent may be inferred as a matter of law and further, that intentional injury exclusions contained in homeowners' policies exclude from coverage the insured's acts of molestation. *Maayeh*, 850 S.W.2d at 196. Other courts which have adopted this rule acknowledge that in child molestation cases some harm is inherent in the act. The "act" is the "harm," and, because there cannot be one without the other, the "intent to molest is, by itself, the same as the intent to harm." *J.C. Penney Casualty Insurance Company v. M.K.*, 52 Cal.3d 1009, 278 Cal.Rptr. 64, 70, 804 P.2d 689, (1991); *see also Allstate Ins. Co. v. Kim W.*, 160 Cal.App.3d 326, 332–33, 206 Cal.Rptr. 609, 613 (1984). Thus, regardless of any subjective intent to injure, these courts hold an adult's sexual molestation of a child is excluded from insurance coverage as a matter of law. This has become the majority rule nationwide. *See, e.g., Lehmann v. Metzger*, 355 N.W.2d 425, 426 (Minn.1984).

Allen relies on *S.S. and G.W. v. State Farm and Casualty*, 808 S.W.2d 668 (Tex.App.—Austin 1991), *aff'd*, *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 379 (Tex.1993), for the proposition that intent cannot be inferred as a matter of law in cases involving sexual misconduct with a child. Allen's reliance on this case is misplaced. In *State Farm*, a woman sued a man with whom she had engaged in sexual intercourse and from whom she had contracted genital herpes. The two entered into an agreed settlement and tried to collect under the man's homeowners' insurance policy. State Farm claimed coverage was excluded under the intentional injury provision of the policy. State Farm further argued intent to harm could be inferred from the insured's intentional act of engaging in sexual intercourse without informing the woman he was infected with genital herpes.

The Texas Supreme Court rejected this argument because there was evidence the man did not know he was contagious. However, it distinguished that case from those involving the sexual molestation of a child. The Court discussed the concept of inferring intent as a matter of law, setting forth the rationale underlying the doctrine, and distinguishing the facts in *State Farm* from those involving sexual misconduct with a child. *Id.* at 379 (discussing origin of rule and citing numerous cases from other jurisdictions). Thus, we conclude *State Farm* is not applicable in this context.

Allen also argues Metcalfe's subjective intent should be the focus of any inquiry regarding his intent to injure Allen when he molested him. He states expert affidavit testimony presented at the hearing indicated that many child molesters suffer from personality and psychological disorders, including pedophilia, narcissistic or dependent personality disorders, or impulse control disorders. Many also rationalize their behavior as teaching or helping the child, or believe that the child initiated the contact. Consequently, Allen argues that many offenders are not aware of the effect of their acts and the harm they are causing. Therefore, they are incapable of intending to inflict injury.

[3] **[4]** We reject this argument for three reasons. First, the expert's affidavit is not part of the appellate record, but is attached to Allen's brief. We cannot consider documents attached to briefs, unless they were before the trial court and are part of the record. TEX.R.APP.P. 50(d); *Mitchison v. Houston ISD*, 803 S.W.2d 769, 771 (Tex.App.—Houston [14th Dist.] 1991, writ denied). Second, although the expert testified about these various disorders, he did not testify that Metcalfe suffered from one of these disorders, or that he was unaware of the consequences of his act. Third, this type of evidence focuses on the *subjective* intent of Metcalfe, an approach already rejected by two Texas courts of appeals and the majority of other jurisdictions which have adopted the inferred intent rule. *See Maayeh*, 850 S.W.2d at 196; *Gandy*, 880 S.W.2d at 139–140.

[5] We also note the Federal District Court for the Western District of Texas concluded in *Roberts* that strong public policy considerations warranted a determination ***201** that injuries resulting from sexual molestation are intentional and excluded from coverage under a standard homeowner's

policy. First, the court concluded injuries resulting from sexual molestation are not a "risk contemplated by the parties" to the insurance policy. *Roberts*, 815 F.Supp. at 1007. Second, homeowner's policies are an inexpensive method of providing general coverage and allowing individuals to insure themselves against unforeseen *occurrences.* Without coverage, such occurrences might financially overwhelm individuals. If, however, courts expand coverage to include child molestation, the rates for all insured's would increase, and homeowners' policies would become too costly for a majority of the public. *Id.*

We adopt the inferred intent doctrine in cases involving the sexual molestation of a child. Therefore, Metcalfe's intent to injure was established as a matter of law. We overrule Allen's first and third points of error.

[6] Allen also argues it is possible to have an occurrence or accident arising out of the intentional conduct of the insured. Allen contends Metcalfe did not intend to harm him by sexually molesting him, and sexual molestation is not so inherently injurious that injury is certain to follow. He concludes sexual molestation, as a contributing cause of the injury which ultimately occurred, should be treated as an accident or occurrence. This argument sidesteps the primary reason for inferring intent in a case like this: the degree of certainty that sexual molestation of a child will cause injury. We overrule Allen's second point of error.

[7] In his final point, Allen alleges the trial court erred by granting summary judgment in favor of Farmers under umbrella liability policies issued to Metcalfe, which provide coverage for personal injuries including mental injury or injury arising out of humiliation, where the acts were not done with the intent to cause injury. He also contends the trial court erred by finding there was no coverage under those policies for injuries arising out of invasion of privacy.

This point is likewise without merit. All the policies contain provisions which exclude from coverage personal injury committed by the insured. Invasion of privacy is included within the policy's definition of the term "bodily injury." Metcalfe's intent was established as a matter of law. We overrule Allen's final point of error and affirm the judgment.

BARRON, J., not participating.

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511 S.W.2d 591
Court of Civil Appeals of Texas,
San Antonio.

The BOARD OF ADJUSTMENT OF the CITY OF SAN ANTONIO, Texas, Appellant,
v.
David WILLIE et al., Appellees.

No. 15309. | June 19, 1974.
| Rehearing Denied July 17, 1974.

The 45th District Court, Bexar County, James A. McKay, Jr., J., granted summary judgment in favor of three landowners, reversing a height variance granted by city board of adjustment pursuant to a request by owners of a neighboring lot, and the board of adjustment appealed. The Court of Civil Appeals, Barrow, C.J., held that the evidence adduced in support of request for variance, did not support board's finding of 'unnecessary hardship', required to authorize the granting of such a variance.

Affirmed.

Attorneys and Law Firms

***592** Foster, Lewis, Langley, Gardner & Banack, Jake N. Talley, Jr., William T. Armstrong, San Antonio, for appellant.

Barry Snell, San Antonio, for appellees.

Opinion

BARROW, Chief Justice.

The Board of Adjustment of the City of San Antonio has perfected its appeal from a summary judgment granted David Willie and three other residents which reversed and held for naught a height variance granted by appellant pursuant to a request by the owners of a lot in said City.

The owners of a lot located at the north-east corner of Loop 410 and McCullough Avenue requested a variance to allow construction of a building up to 100 feet in height rather than the 35 foot maximum building height allowed under Section 42—55 of the City Code of San Antonio. The property is zoned 'F local retail' district, and the Code restricts the height of buildings in such zone to two and a half stories or 35 feet. The Code authorizes a height of eight stories or 100 feet for buildings in 'H local retail' districts. The permitted uses are the same in 'F, G and H local retail' zones, but different height and off-set restrictions apply to each of said zones. [1]

The Board granted said variance after a full hearing wherein the property owners presented favorable evidence and numerous residents of the residential area just north of the lot in question testified in opposition to the proposed multi-storied building. The Board did require that certain architectural recommendations be incorporated in the structure as constructed so as to in the structure as constructed so as to cause the least amount of interference with filed a petition for writ of certiorari to the district court to review such decision of the Board pursuant to Article 1011g, Vernon's Tex.Rev.Civ.Stat. Ann.

A transcript of the proceedings before the Board was filed in said cause along with a stipulation of the applicable provisions of the City Code. Both parties moved for summary judgment based on this record. The trial court concluded that the decision of the Board was supported by substantial evidence, but that the variance granted is so extensive as to constitute in substance a rezoning of the property which exceeds the authority of the Board and usurps the function of the City Council. It, therefore, granted the residents' motion for summary judgment to set aside the variance.

Appellant Board asserts herein that the trial court erred in granting appellees' motion for summary judgment in that the Board's granting of the variance was within its authorized power, and that the trial court erred in not granting Board's motion for summary judgment in that there was substantial evidence to support the Board's decision. Appellees urge in reply that the summary judgment was properly granted, and further, that appellees were denied due process in that they were not permitted to cross-examine the witnesses presented by the property owners.

Article 1011g, permits cities to establish Boards of Adjustment and defines the ***593** powers of such a board. The Board is specifically granted the power to 'authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.' Article 1011g, subd. 3, supra.

The Code of the City of San Antonio has created a Board of Adjustment and by Section 42—45.8 thereof the Board is given the power to grant variances 'where a literal enforcement of the provisions of this chapter (zoning chapter) will result in unnecessary hardship.' However, such power to grant a variance is specifically limited as follows:
'(a) Such variance will not be contrary to public interest.

(b) Such variance will not authorize the operation of a use other than those uses specifically authorized for the district in which the property for which the variance is sought is located.

(c) Such variance will not substantially or permanently injure the appropriate use of adjacent conforming property in the same district.

(d) Such variance will not alter the essential character of the district in which it is located the property for which the variance is sought.

(e) Such variance will be in harmony with the spirit and purposes of this chapter.

(f) The plight of the owner of the property for which the variance is sought is due to unique circumstances existing on the property, and The unique circumstances were not created by the owner of the property And are not merely financial, and are not due to or the result of general conditions in the district in which the property is located. (Emphasis ours)

(g) The variance will not substantially weaken the general purposes of this chapter or the regulations herein established for the specific district.

(h) The variance will not adversely affect the public health, safety or welfare of the public.

[1] **[2]** A Board of Adjustment acts as a quasi-judicial body, having no statutory power to legislate. It is restricted in its decisions to the powers vested in it by the legislature and city council. It may not materially alter the specific intent and extent of the zoning ordinance as this power is within the province of the city council. Swain v. Board of Adjustment of University Park, 433 S.W.2d 727 (Tex.Civ.App.—Dallas 1968, writ ref'd n.r.e.); Baylor University: Goodwin, Recent Decisions, 1 Baylor L.Rev. 228 (1948); Sw. Legal Foundation, Institute on Planning and Zoning, 69, 83 (1962).

[3] It is seen that under the Texas statute and the San Antonio City Code, the Board's power to grant a variance is expressly limited by the words 'unnecessary hardship.' The principal question on this appeal is whether there is substantial evidence to support a finding that a variance in the height limitations of this 'F local retail' district is required to avoid an unnecessary hardship to the owners of this lot.

The Board did not make a specific finding of unnecessary hardship. Rather, it found that the unique characteristics of the subject property, such as the higher ground elevation as compared to the surrounding properties, frontage on a one-way access road of the expressway and a relatively shallow depth (441 feet) in comparison with the approximately 1,500 feet of frontage, creates a situation where development by a single developer under one master plan will allow the property to be utilized ***594** to its highest and best use. This finding is based on the testimony of the developer's architect and the realtor who handled the transaction between owners and the developer. The essence of their testimony in support of a finding of 'unnecessary hardship' is that a multi-storied building for use as an office building or motor hotel would be the highest and best use of this very valuable commercial property in that by going up you spread the costs of the land. Otherwise, the property could only be used for food service centers, filling stations, discount stores or franchises. These witnesses also testified that a multi-storied building would not be contrary to the public interest and demonstrated how the structure could be designed to minimize the height appearance of the building in relationship to adjoining property.

[4] This testimony does not support a finding of 'unnecessary hardship' which is required to authorize the granting of a variance. The Code expressly provides that the unique circumstances existing on the property so as to justify granting a variance must be something other than a financial hardship. A variance is not authorized merely to accommodate the highest and best use of the property, but where the zoning ordinance does not permit any reasonable use of such lot. Board of Adjustment v. Stovall, 218 S.W.2d 286 (Tex.Civ.App.—Fort Worth 1949, no writ); Baylor University: Goodwin, Recent Decisions, 1 Baylor L.Rev. 228 (1948); 3 Anderson American Law of Zoning, Variances, Section 14.48 (1968).

[5] We, therefore, conclude that the trial court properly set aside and held for naught the order of the Board granting the height variance on the property in question. It is, therefore, unnecessary to consider the effect of the Board's refusal

to permit the attorney representing the opposing residents to cross-examine the witnesses for the property owners. Nevertheless, it should be pointed out for future guidance of the Board that while the Board is not bound to apply the strict rules of evidence followed in courts of law, the right to produce relevant evidence and to cross-examine witnesses should be afforded the parties. See Sw. Legal Foundation, Institute on Planning and Zoning, 79 (1962), Parsons v. Zoning Board, 140 Conn. 290, 99 A.2d 149 (1953); 2 Am.Jur.2d, 234, Administrative Law, Section 424; 27 A.L.R.3d 1304, 1306.

The judgment is affirmed.

Footnotes

1 A building in a 'G local retail' district is restricted to a height of three stories or 45 feet.

189 S.W.3d 769
Supreme Court of Texas.

CITY OF DALLAS, Texas, Board of Adjustment of the city of Dallas, Texas, and Raj Sharma, in his capacity as the Building Official of the City of Dallas, Petitioners,
v.
Doug VANESKO and Grace Vanesko, Respondents.

No. 04–0263. | Argued Feb. 15, 2005. | Decided April 7, 2006.

Synopsis

Background: Landowners applied for a variance to height for roof of house that they had completed. City board of adjustment refused to grant the variance, and landowners filed an application for a writ of certiorari. Following a bench trial, the 193rd Judicial District Court, Dallas County, David Evans, J., reversed and remanded, and city appealed. The Court of Appeals, Martin Richter, J., 127 S.W.3d 220, affirmed, and city appealed.

[Holding:] The Supreme Court, Green, J held that landowners' hardship was personal and self-created, a condition for which city zoning ordinance prohibited relief, and thus, landowners were not entitled to variance from applicable height restrictions.

Reversed and rendered.

O'Neill, J., filed dissenting opinion.

Attorneys and Law Firms

***770** Christopher D. Bowers, Asst. City Atty., Dallas, Paul A. Fletcher, San Antonio, for petitioners.

Roger Albright, Law Offices of Roger Albright, Dallas, for respondents.

Maxine Aaronson, Angela Annette Hunt, McKool Smith, Julia F. Pendery, Jonathan G. Vinson, Jackson Walker L.L.P., Dallas, Snapper L. Carr, Texas Municipal League, Austin, for amicus curiae

Opinion

Justice GREEN delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice HECHT, Justice WAINWRIGHT, Justice BRISTER, Justice MEDINA, Justice JOHNSON and Justice WILLETT joined.

In this zoning case, we determine whether a city can enforce a zoning ordinance against a property owner whose substantially completed new home has been built in violation of the ordinance, even though the city had given preliminary approval to the owner's building plans. We conclude that it can.

[1] Dallas residents Doug and Grace Vanesko wanted a larger home, so they decided to tear down their existing house and build a new one in its place on the same lot. To save money, they also decided to design the new structure themselves, without the assistance of architects and engineers, and act as their own general contractor. When submitting their building plans to the City of Dallas for a permit, the Vaneskos paid an additional fee for the City to do a more extensive plan review to ensure that the plans were in compliance with all city building codes and ordinances. The City approved the plans as submitted and issued a building permit. During the following year, as the new house was being constructed, City inspectors frequently visited the site without complaint. Then, after the roof was framed in, an inspector advised the Vaneskos that the structure ***771** was too high, in violation of the zoning ordinance. [1] Rather than order the work to be stopped, the inspector recommended that the Vaneskos seek a height variance from the City of Dallas Board of Adjustment ("the Board"). The City staff and eighty percent of the neighbors surrounding the property supported the Vaneskos' request for a variance. The remaining twenty percent of neighbors did not actively support the variance, but neither did they object to it. Nevertheless, the Board denied the Vaneskos' variance request. [2]

The Vaneskos appealed the action of the Board by application for writ of certiorari to the Dallas County District Court, naming as defendants the City, the Board, and Raj Sharma, in his official capacity as the Building Official of the City of Dallas. [3] On a stipulated record, the district court reversed the Board's ruling and ordered the matter "remanded to the Board for further proceedings consistent [with] the holdings of *Town of South Padre Island, Texas v. Cantu*, 52 S.W.3d 287 (Tex.App.—Corpus Christi, 2001, no [pet.]) and *Board*

of Adjustment v. McBride, 676 S.W.2d 705, 709 (Tex.App.—Corpus Christi, 1984, no writ)." A divided panel of the court of appeals affirmed. 127 S.W.3d 220, 228 (Tex.App.—Dallas 2003). We subsequently granted the City's petition for review. 48 Tex. Sup.Ct. J. 181 (Dec. 17, 2004).

I.

[2] [3] [4] [5] [6] [7] As a quasi-judicial body, the decisions of a zoning board are subject to appeal before a state district court upon application for a writ of certiorari. *See* TEX. LOCAL GOV'T CODE § 211.011(a), (b); *Bd. of Adjustment v. Flores*, 860 S.W.2d 622, 625 (Tex.App.—Corpus Christi 1993, writ denied). The district court sits only as a court of review, and the only question before it is the legality of the zoning board's order. *City of Alamo Heights v. Boyar*, 158 S.W.3d 545, 549 (Tex.App.—San Antonio 2005, no pet.). To establish that an order is illegal, the party attacking the order must present a "very clear showing of abuse of discretion." *City of San Angelo v. Boehme Bakery*, 144 Tex. 281, 190 S.W.2d 67, 71 (1945). A zoning board abuses its discretion if it acts without reference to any guiding rules and principles or clearly fails to analyze or apply the law correctly. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (orig. proceeding). With respect to a zoning board's factual findings, a reviewing court may not substitute its own judgment for that of the board. *See Walker*, 827 S.W.2d at 839. Instead, a party challenging those findings must establish that the board could only have reasonably reached one decision. *See id.* at 840. Our abuse-of-discretion review is necessarily less deferential when considering any legal conclusions made by the zoning board and is similar in nature to a de novo review. *See id.* [4]

*772 II.

The Vaneskos do not dispute that their home, as currently constructed, violates the applicable height restrictions for a single-family dwelling in an R–10 zoning area. *See* DALLAS, TEX., CITY CODE § 51A–4.112(e)(4)(E). Under state law, however, a local board of adjustment may

> authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done....

TEX. LOCAL GOV'T CODE § 211.009(a)(3). In Dallas, the Board's ability to grant variances is further regulated by city ordinance. *See* DALLAS, TEX., CITY CODE § 51A–3.102(d)(10). That ordinance permits the Board

> [t]o grant variances from ... height ... regulations that will not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land in districts with the same zoning classification.

Id.

While the first portion of subsection 51A–3.102(d)(10) tracks the language in subsection 211.009(a)(3) of the Local Government Code, the city ordinance adds a number of additional restrictions. First, the variance must be "necessary" to permit development on the land such that the land *could not otherwise be developed* in accordance with the applicable ordinance. Second, the ordinance forbids a variance that relieves only a self-created or personal hardship. Third, financial reasons alone cannot justify the issuance of a variance. Finally, a variance may not be granted to offer a

development privilege not available to other developers in similarly-zoned lots.

Taken together, these restrictions impose significant barriers to obtaining a variance and sharply curtail the Board's discretion in issuing one. Nevertheless, the trial court found that all of the prerequisites for a variance set forth in subsection 51A–3.102(d)(10) of the Dallas City Code were met and concluded that the Board clearly abused its discretion in denying the variance. In doing so, we believe the trial court substituted its own judgment for that of the Board.

Both the trial court and the court of appeals relied on *Cantu* and *McBride*, two cases they described as being "remarkably similar" to the case at bar. *See* 127 S.W.3d at 225–26. In both cases, a property owner who was constructing a house appealed the decision of a zoning board to deny him a variance from the mandatory setback line for the property. *Bd. of Adjustment* ***773** *v. McBride*, 676 S.W.2d 705, 706 (Tex.App.—Corpus Christi 1984, no writ); *Town of S. Padre Island, Tex. v. Cantu*, 52 S.W.3d 287, 288–89 (Tex.App.—Corpus Christi 2001, no pet.). Like the Vaneskos, the McBrides and the Cantus had previously sought and received approval of their building plans from the city. *McBride*, 676 S.W.2d at 706–07; *Cantu*, 52 S.W.3d at 288. In *McBride*, the court of appeals held that the zoning board abused its discretion in denying the variance because the undisputed facts showed that a hardship would exist and that the exception would not adversely affect other interests. 676 S.W.2d at 709. Although the factual findings in *Cantu* were disputed, the court of appeals reached a similar result after reviewing the record of the proceedings before the zoning board. 52 S.W.3d at 291.

While *Cantu* and *McBride* bear some factual resemblance to the instant case, particularly in the sense that the property owners sought and received city approval of their building plans, neither case involved a zoning ordinance as restrictive as the Dallas ordinance. The governing ordinance in *McBride* permitted a variance for "other extraordinary and exceptional situations or conditions of such piece of property." CORPUS CHRISTI, TEX., ZONING ORDINANCE, § 29–5.01. The ordinance governing in *Cantu* merely incorporated the provisions of Chapter 211 of the Local Government Code. TOWN OF SOUTH PADRE, TEX., CODE OF ORDINANCES, § 20–16. As the dissent below correctly noted,

> Neither [ordinance] specifically prohibited variances for self-created or personal hardships, nor did they specify that a variance must be sought to resolve a hardship arising from a restrictive condition relating to the area, shape, or slope of the parcel. Thus, the ordinances governing *McBride* and *Cantu* were significantly broader than the Dallas code provision applicable here, and could be read as authorizing variances where the landowner built on the basis of an erroneously-issued permit.... [W]e can construe the Dallas City Code as authorizing a variance under the circumstances here only by largely ignoring its terms.

127 S.W.3d at 233–34 (Moseley, J., dissenting). [5]

[8] Under the more restrictive scheme imposed by the Dallas City Code, we cannot conclude that the Board clearly abused its discretion by declining to grant the Vaneskos' request for a variance from the applicable height restrictions. While the cost involved in re-pitching the roof of the structure may constitute a hardship, that hardship is not in any way related to the "area, shape, or slope" of the parcel. *See* DALLAS, TEX., CITY CODE § 51A–3.102(d)(10). Rather, the hardship is personal in nature because it arose from decisions the Vaneskos made in designing their home, as opposed to the nature and configuration of the lot in question. *See Currey v. Kimple*, 577 S.W.2d 508, 512–13 (Tex.Civ.App.—Texarkana 1978, writ ref'd n.r.e.) (where lot is oddly shaped, setback requirements create hardships that are not personal in nature and are thus appropriate candidates for variances). As the *Currey* court noted, "[a]n example of a personal or self-created hardship might be a situation in which the owner of a square lot divides it into two triangles and then tries to secure ***774** a variance in order to sell the property at a high price." *Id.* at 513. Similarly, it was the way the Vaneskos chose to design their house that created the hardship about which they now complain, for there was nothing about this parcel of land which required a roof higher than what the zoning ordinance allowed. As a result, we are left to conclude that the Vaneskos' hardship is personal and self-created—a condition for which the Dallas zoning ordinance prohibits relief.

[9] **[10]** The Vaneskos contend the Board's decision was erroneously influenced by the city attorney's instruction that the Board could not consider whether a permit had been

issued in error, or whether the structure had already been built. But the city attorney's actions are irrelevant to our analysis. The mere issuance of a building permit does not render a city's zoning ordinances unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance in every case.[6] Were this so, the City would never be able to correct errors in the permitting process. Furthermore, subsection 51A–3.102(d)(10) of the Dallas City Code makes no mention of the particular relevance of a building permit, and we can hardly say the Board abused its discretion by failing to consider a factor that it was not directed, by ordinance, to consider in the first place.[7]

Because we conclude both that the Vaneskos' hardship was personal in nature and that the Board was not required to consider the erroneous issuance of a building permit, we cannot say on the facts before us that a clear abuse of discretion occurred. Accordingly, the judgment of the court of appeals is reversed, and judgment is rendered in favor of the City of Dallas.

Justice O'NEILL filed a dissenting opinion.

Justice O'NEILL, dissenting.

I agree that a trial court's power to review a board of adjustment's decision is limited, and the trial court in this case exceeded that power by ignoring the specific city ordinance that controlled the board's review of the Vaneskos' variance request. However, I am concerned that the board of adjustment misunderstood the level of discretion that the ordinance afforded. An attorney for the city admonished the board, I believe incorrectly, that it must ignore evidence that (1) the city had erroneously issued the permit upon which the Vaneskos relied, (2) the house had been substantially built in accordance with the plans the city had approved before the problem was discovered, (3) the cost to remedy the problem would be significant, and (4) there might be an adverse aesthetic effect on the neighborhood if the roof was torn off and re-pitched. Had the ***775** board taken this evidence into account and nevertheless denied the Vaneskos' variance request, I believe that decision would have been within the board's considerable discretion. But from the record it is impossible to tell whether the board felt constrained by its attorney's admonishment. As a result, I would remand the case to the board for reconsideration of the Vaneskos' variance request with the proper legal principles in mind. Because the Court does not afford the board or the Vaneskos that opportunity, I respectfully dissent.

Under the Local Government Code, a board of adjustment may authorize a variance from the terms of a zoning ordinance if it is not contrary to the public interest and, due to special conditions, literal enforcement of the ordinance would result in unnecessary hardship, and so that "the spirit of the ordinance is observed and substantial justice is done." TEX. LOC. GOV'T CODE § 211.009(a)(3). This same language is echoed in the Dallas city ordinance, which further limits the board's decision-making authority, although not to the extent that the Court determines today. That ordinance describes the following parameters that govern the board's discretion in considering variance requests, which, for ease of reference, I have numbered [1] through [3]. Specifically, the board may grant variances from height regulations

> [1] that will not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship and so that the spirit of the ordinance will be observed and substantial justice done. [2] The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. [3] A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land in districts with the same zoning classification.

DALLAS CITY CODE § 51A–3.102(d)(10).

The evidence that the board in this case was admonished not to consider is certainly relevant to the elements described in clause [1]. Evidence was presented at the board-of-adjustment hearing that the Vaneskos' neighbors, although understandably agitated by what had occurred, were not opposed to the variance. And there was some discussion that,

because of the way the house was designed, a re-pitched roof would make the house look disproportionate and less aesthetically pleasing to the neighborhood. Thus, there was some indication, though not conclusive, that the variance would not be "contrary to the public interest." Further, any assessment of "unnecessary hardship" and "special conditions" necessarily requires a fact-specific inquiry that should allow the Vaneskos to explain, and the board to consider, how their need for the variance arose.

The Court, however, ignores the clause [1] elements because it reads clause [2] as the ultimate requirement for a variance. I disagree, for if that were the case there would have been no reason to include clause [1] in the ordinance. Instead, I believe clause [2]'s plain language speaks to parcels of land that have not yet been improved and, due to restrictions that are inherent in the land itself, a variance is "necessary to permit development...." Clause [2] simply does not address the situation presented when a structure has already been built on the land. I agree ***776** with the *amici curiae* homebuilders [1] that there is a substantial difference between a hardship caused by the inability to build something desired, and a hardship caused by having to remove a nearly completed structure at considerable expense. I do not read the city ordinance here to preclude consideration of that difference.

Finally, I believe that the Court misinterprets clause [3]. The hardship here was not entirely self-created, as the city inspector was at least equally culpable. And although the hardship was in fact personal, there was some evidence that the remedy necessary to effect compliance would require eliminating trees and re-pitching the roof in a way that would be less aesthetically pleasing—something the neighbors might consider a hardship that they shared. Nevertheless, interpreting the ordinance to mean that whenever personal hardship is involved a variance is prohibited is surely wrong. It is hard to imagine the need for a variance that does not in some way implicate personal hardship. Rather, the logical interpretation is that personal hardship cannot be the *sole* basis for a variance. If official error and detrimental reliance are involved, the fact that personal hardship results shouldn't defeat the variance if other conditions are met, *i.e.*, the variance is not contrary to the public interest and literal enforcement would cause unnecessary hardship. Such a determination should be within the board's discretion.

I agree with the Court that the court of appeals and the trial court erred in tying the board's discretion to *Cantu* and *McBride*, in effect ignoring the strictures that the city ordinance imposed. *See Town of S. Padre Island v. Cantu*, 52 S.W.3d 287 (Tex.App.—Corpus Christi 2001, no pet.); *Bd. of Adjustment v. McBride*, 676 S.W.2d 705 (Tex.App.—Corpus Christi 1984, no writ). But I do not read the ordinance's strictures as divesting the board of any discretion at all, as the city's attorney appeared to advise. And while I agree with the Court that "the mere issuance of a building permit does not render a city's zoning ordinances unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance in every case," this doesn't answer the question of what evidence the board of adjustment could consider in deciding the Vaneskos' variance request. All needs for a variance that might arise after an erroneous permit has been issued are not by definition self-created, personal hardships for which variances may not be granted. If that were so, homeowners would be strictly liable for city errors regardless of the circumstances, marginalizing the need for boards of adjustment at all and rendering other parts of the city's ordinance meaningless.

Because I believe the board of adjustment may have reached its decision to deny the Vaneskos' variance request by "fail[ing] ... to analyze or apply the law correctly," *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992), I would afford the board and the Vaneskos another chance. Accordingly, I would affirm the lower courts' remand to the board of adjustment for reconsideration, although on different grounds. Because the Court does not, I respectfully dissent.

Parallel Citations

49 Tex. Sup. Ct. J. 487

Footnotes

1 The Vaneskos' property is in an R–10 zoning area, which provides for a maximum structure height of thirty feet. DALLAS, TEX., CITY CODE § 51A–4.112(e)(4)(E). The approved plans provided for a 38.25 foot height. In actuality, the Vaneskos' home is 38.11 feet high. Apparently, the plan reviewer in the city inspector's office believed the lot to be in an R–1/2ac(A) zoning area, which would have allowed for a maximum height of thirty-six feet. *Id.* § 51A–4.112(b)(4)(E).

2 The record indicates that a motion to *deny* the variance was initially brought before the Board and failed because the required 4/5 majority could not be met. However, a subsequent motion to *grant* the variance was brought and also failed. For the purposes of this opinion, we construe the failure of the motion to grant the variance as an implied denial of the variance.

3 For the purposes of this opinion, we will use the term "the City" to refer collectively to all three defendants.

4 We are mindful that *Walker* arose in the context of a mandamus proceeding. 827 S.W.2d at 835. However, *Walker* 's description of the standard of review is particularly useful here because like mandamus proceedings, the standard of review in a zoning case requires a "clear" abuse of discretion to warrant a reversal of the zoning board's decision. *See id.* at 839–40.

5 Although we distinguish *Cantu* and *McBride* from this case on the basis that the Dallas ordinance is more restrictive, we do not mean to say that the precise fact patterns in *Cantu* or *McBride* would always justify a variance. A zoning board's decision to grant or deny a variance is discretionary in nature, and each case must be considered in light of its own facts and circumstances.

6 We note that in the proceedings below, the Vaneskos initially raised an equitable estoppel argument before the trial court. However, on the Vaneskos' own motion, that claim was severed from the case and assigned a new docket number. We express no opinion on the validity of any estoppel claim that the Vaneskos may have currently pending before the trial court.

7 We also note that in applying for the building permit, the Vaneskos specifically agreed in writing that if a permit were to be issued, "all provisions of the City ordinances and state laws will be complied with *whether herein specified or not*." (emphasis added). Additionally, when the City approved the Vaneskos' building plans, the building inspector stamped the plans with the following statement: "This approval does not permit the violation of any city or state law." Thus, the record indicates that both the Vaneskos and the City were well aware that the issuance of a building permit did not excuse compliance with the applicable city ordinances.

* * *

1 We received a joint amicus brief from the Home Builders Association of Greater Dallas, the Greater Fort Worth Builders Association, and Randall Goss.

235 S.W.3d 462
Court of Appeals of Texas,
Dallas.

CITY OF FARMERS BRANCH, Texas; Bob Phelps, in his official capacity; Tim O'Hare, in his official capacity; Bill Moses, in his official capacity; Charlie Bird, in his official capacity; James Smith, in his official capacity; and Ben Robinson, in his Official Capacity, Appellants
v.
Guillermo RAMOS, Appellee.

No. 05–07–00137–CV. | Oct. 12, 2007.

Synopsis

Background: Resident brought action against city and city officials alleging violation of Texas Open Meetings Act (TOMA). City and officials filed a plea to the jurisdiction, seeking dismissal on the grounds of sovereign immunity. The 116th Judicial District Court, Dallas County, Bruce Priddy, J., denied the plea. City and officials appealed.

Holdings: The Court of Appeals, Molly Francis, J., held that:

[1] resident's allegations were sufficient to state a claim that city violated TOMA, and

[2] resident's TOMA claims were not mooted by city ordinance that repealed the two ordinances forming the basis of the claims.

Affirmed.

Attorneys and Law Firms

***464** Trey Dowdy, P. Michael Jung, Scott Allen Shanes, Strasburger & Price, L.L.P., Dallas, for Appellant.

***465** William A. Brewer, III, James S. Renard, C. Durham Biles, Bickel & Brewer, Dallas, TX, for Appellee.

Before Justices RICHTER, FRANCIS, and LANG–MIERS.

Opinion

OPINION

Opinion by Justice FRANCIS.

Guillermo Ramos sued the City of Farmers Branch and Bob Phelps, Tim O'Hare, Bill Moses, Charlie Bird, James Smith, and Ben Robinson, each in his official capacity, after the City Council adopted two controversial ordinances Ramos alleged violated the Texas Open Meetings Act (TOMA). Appellants filed a plea to the jurisdiction seeking dismissal of the lawsuit on sovereign immunity grounds, and the trial court denied the plea. Appellants brought this interlocutory appeal under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code.

In three issues, appellants contend the trial court erred in denying their plea because (1) Ramos's suit fails to plead sufficient facts to assert a valid cause of action under TOMA and overcome their sovereign immunity; (2) Ramos's claims are moot; and (3) no valid cause of action exists based upon subsequent ratification. For reasons set out below, we reject all arguments and affirm the trial court's order.

On November 13, 2006, the Farmers Branch City Council adopted two ordinances, numbered 2892 and 2893. Ordinance 2892 mandated that owners and/or property managers of apartment complexes require proof of citizenship or eligible immigration status for prospective tenants. Ordinance 2893 was directed at property maintenance and required, among other things, that flower pots and other landscape receptacles contain living plants. Opponents denounced the ordinances as illegally targeting the city's Hispanic population.

Three weeks later, Ramos filed this lawsuit asserting that appellants enacted the ordinances in violation of the Texas Open Meetings Act. Ramos alleged that appellants deliberated on and agreed upon both ordinances in closed meetings in violation of TOMA. Ramos also alleged that the notice for the vote on Ordinance 2892 was insufficient. Ramos sought injunctive and declaratory judgment relief as well as attorney's fees. Appellants denied the allegations and filed a plea to the jurisdiction, asserting that Ramos failed to plead sufficient facts to establish a valid TOMA violation.

While the plea to the jurisdiction was pending, Ramos and other residents presented the City with a petition, signed by more than ten percent of the registered voters, seeking either

repeal of Ordinance 2892 or a public vote. On January 8, 2007, appellants adopted Ordinance 2900, which submitted the rental ordinance for a public vote. Nine days later, appellants adopted ordinance 2903, which repealed both Ordinances 2892 and 2900, restated the substance of the rental ordinance, and called a public vote for May 2007. During the time in which appellants took these actions, the trial court conducted several hearings on matters related to this lawsuit, including the plea to the jurisdiction. Although appellants did not amend their plea, they notified the trial court of repeal of Ordinance 2892 in a status conference in late January. One week later, the trial court denied appellants' plea to the jurisdiction.

[1] We begin by addressing Ramos's contention that we do not have jurisdiction over the individual council members sued in their official capacity. Relying on this Court's opinion in ***466** *Dallas County Community College District v. Bolton,* 990 S.W.2d 465, 467 (Tex.App.-Dallas 1999, no pet.), Ramos argues that because the individual defendants are not "governmental units," they are not entitled to an interlocutory appeal. Three days after this appeal was argued and submitted, the Texas Supreme Court addressed the precise issue presented and concluded that a person sued in an official capacity, as here, may appeal an interlocutory order denying the jurisdictional plea. *See Tex. A & M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 843 (2007, no pet. h.). Accordingly, we have jurisdiction over the mayor and council members.

[2] **[3]** **[4]** **[5]** **[6]** **[7]** **[8]** Turning to the appellants' their first issue, appellants argue the trial court improperly denied their jurisdictional plea because Ramos's pleadings fail to allege facts constituting a TOMA violation. A plea to the jurisdiction based on sovereign immunity challenges a trial court's jurisdiction. *State v. Holland,* 221 S.W.3d 639, 642 (Tex.2007). A plea questioning the trial court's jurisdiction raises a question of law that we review de novo. *Id.* We focus first on the plaintiff's petition to determine whether the facts pled affirmatively demonstrate that jurisdiction exists. *Id.* We construe pleadings liberally, looking to the pleader's intent. *Id.* If the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the plaintiff should be afforded the opportunity to replead. *Id.* In some instances, a plea to the jurisdiction may require the court to consider evidence pertaining to jurisdictional facts. *Id.* A plea should not be granted if a fact issue is presented as to the court's jurisdiction, but if the relevant undisputed evidence negates jurisdiction, then the plea to the jurisdiction must be granted. *Id.*

[9] **[10]** TOMA is intended to provide public access to and increase public knowledge of government decision making. *City of San Antonio v. Fourth Court of Appeals,* 820 S.W.2d 762, 765 (Tex.1991) (orig.proceeding); *City of Laredo v. Escamilla,* 219 S.W.3d 14, 18 (Tex.App.-San Antonio 2006, pet. denied). It "is not a legislative scheme for service of process; it has no due process implications. Rather, its purpose is to provide 'openness at every stage of [a governmental body's] deliberations.' " *City of San Antonio,* 820 S.W.2d at 765 (quoting *Acker v. Tex. Water Comm'n,* 790 S.W.2d 299, 300 (Tex.1990)); *City of Laredo,* 219 S.W.3d at 18. TOMA therefore mandates that "every regular, special, or called meeting of a governmental body shall be open to the public," with certain narrowly drawn exceptions. TEX. GOV'T CODE ANN. §§ 551.002, 551.071–.088 (Vernon 2004 & Supp.2006); *City of Laredo,* 219 S.W.3d at 18. A "meeting" includes any deliberation involving a "quorum" or majority of the members of a governing body at which they act on or discuss any public business or policy over which they have control. *Id.* at § 551.001(4)(A) (Vernon 2004).

[11] One exception to open meetings allows a governmental body to privately consult with its attorney when it is seeking advice about pending or contemplated litigation or a settlement offer or on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with TOMA. TEX. GOV'T CODE ANN. § 551.071 (Vernon 2004). This exception is an affirmative defense on which the governmental entity bears the burden of proof. *Olympic Waste Servs. v. City of Grand Saline,* 204 S.W.3d 496, 504 (Tex.App.-Tyler 2000, no pet.).

[12] **[13]** TOMA requires a governmental body to give notice of the date, hour, place, and subject of each meeting. TEX. GOV'T CODE ANN. § 551.041. The notice provided ***467** by the governmental body must be sufficiently specific to alert the general public to the topics to be considered at the upcoming meeting. *Cox Enterps., Inc. v. Bd. of Trus.,* 706 S.W.2d 956, 959 (Tex.1986). The provisions of TOMA are mandatory and are to be liberally construed in favor of open government. *Willmann v. City of San Antonio,* 123 S.W.3d 469, 473 (Tex.App.-San Antonio 2003, pet. denied).

With respect to Ordinance 2892, Ramos alleged appellants violated TOMA by (1) failing to properly notice the City

Council meeting of November 13, 2006 and (2) drafting, deliberating, debating, and agreeing upon the ordinance behind closed doors. We begin with notice.

[14] In his amended petition, Ramos alleged that "the agenda for the November 13, 2006 City Council meeting, which was purportedly posted on the bulletin board at Farmers Branch City Hall on Friday, November 10, 2006 at 1:30 p.m., did not mention or otherwise describe the Ordinance—although numerous other proposed ordinances and resolutions are specifically identified therein."

Appellants assert proper notice was given and, as evidence, rely not on the agenda, but the City Council minutes of the meeting. The minutes of the meeting, however, cannot negate allegations that the *agenda* failed to provide sufficient notice. Although appellants have attached a copy of the agenda as an exhibit to their brief, attachments to a brief are not evidence before the court. *Elk River, Inc. v. Garrison Tool & Die, Ltd.*, 222 S.W.3d 772, 788 (Tex.App.-Dallas 2007, pet. filed).

To the extent appellants request this Court to take judicial notice of the November 13 agenda, we decline to do so. Texas Rule of Evidence 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX.R. EVID. 201; *Dallas Co. Constable Pct. 5 Michael Dupree v. KingVision Pay–Per–View, Ltd.*, 219 S.W.3d 602, 613 (Tex.App.-Dallas 2007, no pet.). The agenda for the November 13 meeting does not fall within either category. Ramos's petition sufficiently states a claim for a notice violation under TOMA, and we reject appellants' assertion otherwise.

[15] With respect to closed door deliberations, Ramos alleged the following:

> Notably, Defendants, with a quorum present and/or in an effort to circumvent the requirements of TOMA, engaged in closed sessions and otherwise secret deliberations during which the provisions of Ordinance 2892 were drafted, deliberated, negotiated, debated, and agreed upon. Among other things, during these secret deliberations, Defendants discussed the need and importance of there being a unanimous vote by the City Council in support of Ordinance 2892. In order to obtain this unanimity and to evade TOMA, it is now evident that, behind closed doors, Ordinance 2892 was negotiated, modified, and revised to secure the votes of all Defendants. Indeed, the unanimous vote in favor of Ordinance 2892 was secured in these secret meetings through, among other things, an agreement to exclude public libraries and recreation centers from the English-as-an-official-language resolution. In fact, Mayor Phelps admits that in closed session and through serial secret conversations, Defendants deliberated on Ordinance 2892 and discussed how they would vote on the Ordinance. Thus, when the City Council voted publicly on Ordinance 2892, the ***468** vote was merely a rubber-stamp of Defendant's agreement reached in secret. Tellingly, it was only *after* the vote on Ordinance 2892 that the floor was opened for public discussion.
>
> Defendants have thwarted the residents of Farmers Branch's right to know how and why their government passed Ordinance 2892 by: (1) failing to provide adequate notice that the Ordinance would be considered at the meeting on November 13, 2006; and (2) drafting, negotiating, deliberating, and in fact, agreeing upon Ordinance 2892 behind closed doors, in violation of TOMA. No debate occurred at the open meeting because Ordinance 2892 had already been agreed to during Defendants' improperly-closed and otherwise secret deliberations. The subsequent public vote on Ordinance 2892 was merely a confirmation of the deliberations and decisions already reached behind closed doors.

In their brief, appellants rely on the attorney consultation exception to open meetings, apparently because there was some threat of litigation at an earlier council meeting. Appellants argue that TOMA does not prohibit the expression of opinions in a closed executive session as long as the vote or final decision is made in open session. Specifically, they urge that the "only affirmative claim of an allegedly improper discussion is the allegation that '[appellants] discussed the need and importance of there being a unanimous vote by the City Council.' " They contend that even if true, such activity "does not constitute more than an expression of opinion at most."

While we agree with the general proposition that TOMA does not prohibit expression of opinions in proper, closed meetings, we first question whether appellants even made a showing that a closed executive session was proper. Our record does not contain evidence of the threat of litigation, when it was made, or its scope. (In fact, at the hearing, Ramos's counsel asserted that Ordinance 2892 had not been conceived or drafted at the time of the alleged threat, therefore suggesting it could not have been the subject of the threat.)

Given that the exception is an affirmative defense, it was appellants' burden to conclusively show its application.

Regardless, even assuming the exception applied and having read Ramos's allegations, we cannot agree that Ramos's allegations constitute nothing more than "expression of opinion." Ramos alleged that the City, in closed meetings, "drafted, deliberated, negotiated, debated, and agreed upon" the provisions of the ordinance and then "negotiated, modified and revised" the ordinance to "secure the votes" of appellants. Further, Ramos alleged that the public vote was no more than a rubberstamp of the "agreement reached in secret." These allegations, if true, suggest appellants acted outside the lawful bounds of an executive session and would constitute more than an expression of opinion. We conclude these allegations are sufficient to state a claim for violation of TOMA with respect to Ordinance 2892.

As for Ordinance 2893, appellants argue Ramos's TOMA claim is based on the allegation that appellants met together in "unnoticed and unscheduled meetings to discuss the proposed ordinance." Appellants assert that because Ramos did not allege such discussions included a quorum of council members, he has not pleaded sufficient facts to support a TOMA violation. A review of Ramos's pleading, however, belies appellants' claim. Specifically, Ramos alleged that appellants "failed to comply with TOMA in connection with the enactment of [the ordinance] by, with a quorum present and/or in an effort to circumvent ***469** TOMA, drafting, deliberating, an [sic] in fact agreeing upon Ordinance 2893 in closed meetings." Consequently, appellants' issue is without merit.

Finally, Ramos also alleged appellants violated TOMA when they adopted Ordinance 2900. In their brief, appellants have not challenged the trial court's ruling with respect to this ordinance. Consequently, we will not address it. For the reasons stated above, we conclude the trial court did not err in denying appellants' plea to the jurisdiction for reasons related to the sufficiency of pleadings.

[16] In their second issue, appellants argue the trial court erred in denying their plea because Ramos's claims with respect to Ordinance 2892 are moot because they repealed the ordinance. As with the previous issue, appellants rely on evidence that they failed to admit below despite the fact it was available, i.e., Ordinance 2903. Appellants again ask that we take judicial notice of the ordinance.

A court, upon the motion of a party, shall take judicial notice of a municipal ordinance, provided the party requesting the notice furnishes the court with sufficient information to comply with the request and the court gives the opposing party an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. TEX.R. EVID. 204; *Flores v. State*, 33 S.W.3d 907, 914 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). Here, appellants provided the Court with a copy of the ordinance, verified by the city secretary. Thus, given rule 204, we take judicial notice of Ordinance 2903.

[17] **[18]** The mootness doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a "live" controversy at the time of the decision. *Camarena v. Tex. Employment Comm'n*, 754 S.W.2d 149, 151 (Tex.1988); *Young v. Young*, 168 S.W.3d 276, 287 (Tex.App.-Dallas 2005, no pet.). An issue becomes moot when (1) it appears that one seeks to obtain a judgment on some controversy, which in reality does not exist or (2) when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy. *Young*, 168 S.W.3d at 287.

[19] Ramos contends that repeal of Ordinance 2892 does not moot the issue because the question remains as to whether appellants violated TOMA and, if so, what remedial relief should be entered. In particular, Ramos argues that while repeal of the ordinance "may obviate the need to void the ordinance, it does not remedy [a]ppellants' breach of their duties owed to residents of Farmers Branch under TOMA—namely, the public's right 'not only to know what government decides but to observe how and why every decision is reached.' " Ramos argues that the trial court could declare that appellants violated TOMA and compel them to disclose to the public all transcripts, minutes, recordings, and other evidence of closed meetings as well as require appellants to comply with TOMA in the future. At the hearing on the plea, appellants' counsel, who is also the assistant city attorney, represented that there were no recordings of the executive session but that a certified agenda, under seal, did exist. *See* TEX. GOV'T CODE ANN. § 551.103.

While making no comment on whether a violation has in fact occurred or any particular remedy that should be enforced should the trial court find a violation, we agree with Ramos. If a governmental body illegally deliberates and decides an issue in closed session, repealing the action so that it can be retaken in a later setting does not vindicate the very right

***470** protected by TOMA. As stated by our supreme court: "Our citizens are entitled to more than a result. They are entitled not only to know what government decides but to observe how and why every decision is reached." *Acker*, 790 S.W.2d at 300. Accordingly, we conclude that Ramos's request for a declaration that appellants violated the statute, coupled with the potential remedy involving the certified agenda, establishes that this issue is not moot. We overrule the second issue.

[20] In their third issue, appellants argue the trial court erred in denying their plea to the jurisdiction because no valid cause of action exists based upon subsequent ratification. Specifically, appellants argue that any TOMA violation can be ratified by and through subsequent action by a governmental entity. This issue was not raised in appellants' plea to the jurisdiction and, therefore, is not properly before this Court. *See* TEX.R.APP. P. 33.1(a). Regardless, appellants' contention seems to be an extension of their mootness argument that we have previously rejected. Accordingly, we overrule the third issue.

We affirm the trial court's order.

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887 S.W.2d 465
Court of Appeals of Texas,
Dallas.

DALLAS COUNTY APPRAISAL DISTRICT, Appellant,
v.
FUNDS RECOVERY, INC. d/b/a Asset Resolution Corporation, Appellees.

No. 05–93–01575–CV. | Aug. 31, 1994.

Putative agent of homeowners sought writ of mandamus requiring appraisal district to accept and process homestead property tax exemption applications. The 134th District Court, Dallas County, Anne Packer, J., issued writ, and district appealed. The Court of Appeals, Lagarde, J., held that trial court lacked jurisdiction to issue writ of mandamus due to putative agent's failure to first exhaust its administrative remedies.

Set aside and dismissed.

Attorneys and Law Firms

***466** Mike Tabor, Henry J. Voegle, Robert J. Davis, Dallas, for appellant.

Jay S. Fichtner, Dallas, for appellee.

Before LAGARDE, BURNETT, and MALONEY, JJ.

Opinion

OPINION

LAGARDE, Justice.

The Dallas County Appraisal District (the District) appeals from the trial court's grant of mandamus ordering it to "accept and process" the property tax exemption applications filed by appellee Funds Recovery, Inc. d/b/a Asset Resolution Corporation (A.R.C.) under the Property Tax Code (the Code). [1] Because we conclude that the trial court lacked jurisdiction, we dismiss. [2]

***467** After reviewing public property tax records to find homeowners with unclaimed homestead exemptions, A.R.C. contacts these homeowners to secure an authorization and appointment to act as the homeowners' agent to obtain their legally entitled refunds. A.R.C. is compensated for its service. The District is a political subdivision of the State of Texas that processes tax exemption applications through its chief appraiser.

In October 1991, A.R.C. filed with the District a large number of applications for individual residential homestead exemptions for the 1990 and 1991 tax years. Each application contained the required Appointment of Agent form promulgated by the state comptroller's office under authority of the Code. [3] Through its president, A.R.C. had signed the Appointment of Agent forms appointing *itself* as tax agent for each homeowner. Each application also contained a form signed by the homeowner ("Homeowner Authorization") containing the following:

> I hereby authorize and appoint A.R.C. to act as my agent in accordance with V.T.C.A. Tax Code Section 1.111, to do anything legally reasonably necessary to apply for and obtain the funds to which they believe I am entitled, to use my name, to receipt for me and endorse on my behalf checks, drafts or instruments, negotiable or otherwise.

On October 29, 1991, the District returned all the applications to A.R.C. with a letter from Junell Pogue, Manager of Exemptions for the District. The letter stated that A.R.C.'s Homeowner Authorizations did not authorize A.R.C. to appoint tax agents. The letter explained that "the Appointment of Agent form [s] must be signed by one of the following: the property owner; a person the owner has *specifically authorized* to name tax agents; or by a corporate officer (if the owner is a corporation)." [4] The letter requested A.R.C. to resubmit the exemption applications with appropriate signatures. The letter noted that those "applications that were submitted are not valid and new applications will need to be filed with this office."

[1] A.R.C. petitioned the district court for a writ of mandamus and other relief. [5] A.R.C. alleged that "[d]espite written and oral *demands* made by [A.R.C.] *upon [the District],* it has persisted in its *refusal to accept* applications for refund from [A.R.C.] and *refuses to process* applications for refund filed by [A.R.C.]." Neither A.R.C.'s petition nor its summary-judgment evidence reflected any appeal of the District's action to the Appraisal Review Board, the protest board established by the Code. *See* TEX.TAX CODE ANN. §§ 6.41, 41.41 (Vernon 1992). A.R.C. prayed, in part, that the

District "immediately receive and process" the 1990 and 1991 applications, pay A.R.C. and its clients monetary damages, and indemnify A.R.C. for its attorney's fees.

Both parties moved for summary judgment on the mandamus claim. A.R.C. based its motion on the grounds that it "complied with all of the provisions, conditions and requirements of the Texas Property Tax Code in acting as tax agent for its clients, and therefore, there is no issue as to any material fact to preclude summary judgment." A.R.C. contends, essentially, that, as a matter of law, the authority delegated to it by the Homeowner Authorizations is broad enough to encompass the naming of tax agents.

The District based its motion for summary judgment in the mandamus action on an absence of a clear legal duty to perform nondiscretionary acts. It argues that because the forms submitted did not *specifically grant* authority to name tax agents, the District exercised its discretion to determine the sufficiency of the forms. The District moved for summary judgment on A.R.C.'s remaining claims based on the doctrine of sovereign immunity. After a hearing, the trial court (i) granted A.R.C. summary judgment for mandamus relief, (ii) denied the District summary judgment on the mandamus action, and ***468** (iii) granted the District summary judgment on A.R.C.'s remaining claims.

Jurisdiction over Appeal

During oral argument, A.R.C. re-urged its presubmission motion to dismiss the appeal for lack of jurisdiction. A.R.C.'s motion challenged our jurisdiction over this appeal on the grounds that the District (i) failed to file a cost bond, (ii) filed a defective notice of appeal, and (iii) asserted an indefinite point of error. A motions panel of this Court denied A.R.C.'s motion without opinion. We conclude that A.R.C.'s jurisdictional arguments are meritless.

[2] First, an appraisal district is exempt from filing an appeal bond. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 751 S.W.2d 860, 861 (Tex.1988). As an intermediate appellate court, we are bound by supreme court authority that has not been overruled. *Howe State Bank v. Crookham*, 873 S.W.2d 745, 749 (Tex.App.—Dallas 1994, no writ). A.R.C. asserts, however, that the *Institute for Aerobics Research* opinion has been called into doubt by *Monsanto Co. v. Cornerstones Municipal Utility District*, 865 S.W.2d 937, 939 (Tex.1993). We disagree. *Monsanto* is a statutory construction case interpreting section 16.061 of the civil practice and remedies code. *Monsanto Co.*, 865 S.W.2d at 938. *Monsanto* does not overrule, or even question, the supreme court's *Institute for Aerobics Research* opinion interpreting section 42.28 of the tax code. We overrule A.R.C.'s first jurisdictional argument. [6]

[3] Second, A.R.C. asserts that the District's notice of appeal was defective in identifying the appealed-from judgment. We overrule this argument as moot because the defect has been cured by an amended notice of appeal. *See* TEX.R.APP.P. 46(f); 83.

[4] **[5]** Finally, A.R.C. asserts this Court lacks jurisdiction because the District's "point of error is too indefinite" [7] and "fail[ed] to comply with the briefing requirements." *See* TEX.R.APP.P. 74. This Court has jurisdiction over any appeal where the appellant files an instrument that was filed in a bona fide attempt to invoke appellate court jurisdiction. *Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex.1991) (per curiam) (quoting, in part, *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 581 (Tex.1989)). We have already concluded that the District's notice of appeal was sufficient to vest this Court with jurisdiction over this appeal. Indefiniteness *in a brief* is not a jurisdictional defect. We overrule A.R.C.'s re-urged motion to dismiss the appeal for lack of jurisdiction.

Subject Matter Jurisdiction

[6] **[7]** **[8]** **[9]** Jurisdiction over an appeal and subject matter jurisdiction, however, are two different concepts. Subject matter jurisdiction is fundamental error and may be raised for the first time on appeal. *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 893 (Tex.1986); *see Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex.1993). We must inquire into our own jurisdiction, even if it is necessary to do so *sua sponte*. *White v. Schiwetz*, 793 S.W.2d 278, 281 (Tex.App.—Corpus Christi 1990, no writ). Appellate court jurisdiction of 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, 315 S.W.2d 935, 938 (Tex.1958). If the trial court lacked jurisdiction, then an appellate court only has jurisdiction to set the judgment aside and dismiss the cause. *See State ex rel. Kelly v. Baker*, 580 S.W.2d 611, 612–13 (Tex.Civ.App.—Amarillo 1979, no writ); *see also Fulton v. Finch*, 162 Tex. 351, 356, 346 S.W.2d

823, 827 (1961). Thus, on our own motion, we address the issue of jurisdiction.

***469** **[10]** **[11]** Our standard for reviewing subject matter jurisdiction requires the pleader to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Texas Ass'n of Business*, 852 S.W.2d at 446. When reviewing subject matter jurisdiction *sua sponte*, we must construe the petition in favor of the pleader, and if necessary, review the entire record to determine if any evidence supports jurisdiction. *See id.*

[12] A.R.C.'s main contention in this suit is that it should not be required to resubmit its applications. A.R.C.'s argument is based on the premise that its agent authorization forms *are* sufficient as a matter of law to grant it the authority to name itself as tax agent for the homeowners. The District disagreed with A.R.C.'s interpretation of its agent authorization forms, concluding that those authorizations were not "specific" enough as required by the comptroller's form.

There is no dispute about the comptroller's authority to require specificity of a tax agent's authority. *See* TEX.TAX CODE ANN. § 1.111(h). At oral argument, A.R.C. stated that the only issue before us is a question of law. "Specificity," however, is an issue where reasonable minds can differ. We cannot conclude, therefore, that "specificity" is a pure question of law; thus, the doctrine of exhaustion of remedies is applicable. *Cf. Grounds*, 707 S.W.2d at 892.

Choosing to ignore any administrative remedies it had, A.R.C. challenged the District's decision through this mandamus action. We now turn to consider whether the Code provides A.R.C. an administrative remedy.

The Code requires the chief appraiser to "accept and approve or deny" applications for residence homestead exemptions. TEX.TAX CODE ANN. § 11.431(a) (Vernon 1992). The Code then explains in detail the duties of the chief appraiser's office regarding the exemption applications:

> (a) The chief appraiser *shall determine* separately each applicant's right to an exemption. After considering the application and all relevant information, the chief appraiser shall, as the law and facts warrant:
>
> (1) approve the application and allow the exemption;
>
> (2) modify the exemption applied for and allow the exemption as modified;
>
> (3) *disapprove the application and request additional information* from the applicant in support of the claim; or
>
> (4) deny the application.
>
> (b) If the chief appraiser requests additional information from an applicant, the *applicant must furnish it* within 30 days after the date of the request *or the application is denied.*
>
> . . . . .
>
> (d) If the chief appraiser modifies or denies an exemption, he shall deliver a written notice of the modification or denial to the applicant within five days after the date he makes the determination. He shall include with the notice a brief explanation of the procedures for protesting his action.

TEX.TAX CODE ANN. § 11.45 (Vernon 1992). A.R.C. admits that the chief appraiser is given broad discretion in determining the applicant's right to an exemption, "provided it exercises its discretion 'as the law and facts warrant.' " *See id.* § 11.45(a). Relying on subsection (a), A.R.C. asserts that the chief appraiser has "refused" to "receive and determine" its applications. [8]

Section 11.45(a) of the Code expressly grants the chief appraiser four options in evaluating exemption applications. One of those options is to disapprove the application and request additional information. TEX.TAX CODE ANN. § 11.45(a)(3) (Vernon 1992). The District's rejection letter stated that the applications as submitted were invalid and requested their resubmission with additional information. The letter explained the deficiency in the applications and how it could be corrected. In our opinion, section 11.45(a)(3) of the Code authorized the District's action on A.R.C.'s applications.

***470** A.R.C. was obligated to provide the requested additional information within thirty days; otherwise, the application would be "denied" by operation of law. *See* TEX.TAX CODE ANN. § 11.45(b) (Vernon 1992). A.R.C. provided no summary judgment evidence that it submitted the additional information to the District, arguing instead that it was unnecessary to submit the requested additional information. We conclude that the summary judgment evidence shows, under the Code's express provisions, that A.R.C.'s applications were denied by operation of law thirty

days after the date of the rejection letter. Accordingly, the District has already "received and determined" appellee's applications.

The Code authorizes the District's appraisal review board to hear and determine protests by property owners about decisions of the District. TEX.TAX CODE ANN. § 41.41 (Vernon 1992); *see Dallas County Appraisal Dist. v. Lal*, 701 S.W.2d 44, 45 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). The purpose of the administrative review procedures is to provide aggrieved taxpayers relief without the necessity of resorting to the courts. *Webb County Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W.2d 952, 954 (Tex.1990) (citing *Lal*, 701 S.W.2d at 47). The Code's procedures are exclusive regarding tax refunds. TEX.TAX CODE ANN. § 42.09(a)(2) (Vernon 1992); *see Shenandoah v. Swaggart Evangelistic Ass'n*, 785 S.W.2d 899, 903 (Tex.App.—Beaumont 1990, writ denied). An adverse decision of the appraisal review board is subject to review in district court by a trial *de novo*. TEX.TAX CODE ANN. §§ 42.01, 42.23 (Vernon 1992); *Lal*, 701 S.W.2d at 45–46.

Section 41.41 of the Code provides eight specific determinations by the District that may be protested by a property owner or agent to an Appraisal Review Board. *See* TEX.TAX CODE ANN. § 41.41 (Vernon 1992). One of the enumerated protests is "denial to the property owner in whole or in part of a partial exemption." *Id.* § 41.41(4). Subsection (9) authorizes a protest of "any other action of the chief appraiser [or] appraisal district ... that applies to and adversely affects the property owner." *Id.* § 41.41(9). We conclude that subsections (4) and (9) of section 41.41 of the Code provide administrative remedies for the denial of A.R.C.'s exemption applications. [9]

[13] Under the exhaustion of administrative remedies doctrine, failure to comply with the administrative review procedures of the Code to their fullest extent precludes judicial review. *Webb County Appraisal Dist.*, 792 S.W.2d at 954; *Lal*, 701 S.W.2d at 46. These requirements are jurisdictional. *Appraisal Review Bd. v. International Church of Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex.1986). An exception exists when the dispute involves a pure question of law. *Grounds*, 707 S.W.2d at 892.

We can find no evidence in the appellate record to support an inference that A.R.C. attempted any review under the Code. [10] Because A.R.C. did not exhaust its administrative remedies, it is precluded from challenging the denial of the exemptions in a judicial proceeding. *See Webb County Appraisal Dist.*, 792 S.W.2d at 954; *Northwest Tex. Conference v. Happy Indep. Sch. Dist.*, 839 S.W.2d 140, 143 (Tex.App.—Amarillo 1992, no writ) (citing *Keggereis v. Dallas Cent. Appraisal Dist.*, 749 S.W.2d 516, 519 (Tex.App.—Dallas 1988, no writ)). Without rationale or cited authority, one of our sister courts has concluded, however, that the failure to exhaust administrative remedies under the Code should result in a *denial* of a writ for mandamus, not its *dismissal*. ***471** *Watson v. Robertson County Appraisal Review Bd.*, 795 S.W.2d 307, 311 (Tex.App.—Waco 1990, no writ). *But see Employees Retirement Sys. v. McDonald*, 551 S.W.2d 534, 536 (Tex.Civ.App.—Austin 1977, writ ref'd) (failure to exhaust administrative remedies resulted in dismissal of writ of mandamus without prejudice to seek administrative relief); *Arnold v. City of Sherman*, 244 S.W.2d 880, 883 (Tex.Civ.App.—Dallas 1951, writ ref'd) (relator in no position to apply for writ of mandamus without exhausting administrative remedies).

[14] A writ of mandamus is an extraordinary writ. However, "[a]n original proceeding for writ of mandamus *initiated in the trial court* is a civil action subject to trial and appeal on substantive law issues and the rules of procedure *as any other civil suit.*" *Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 n. 1 (Tex.1991); *Griffin v. Wakelee*, 42 Tex. 513, 516 (1875) ("[T]here is no distinguishable difference in principle in the course of proceeding and result attained in it [a mandamus action] and any other suit in the District Court.")

We hold that the trial court lacked jurisdiction to issue the writ of mandamus in this case due to A.R.C.'s failure to exhaust its administrative remedies. Where the trial court does not have jurisdiction to render a judgment, the proper practice is for the reviewing court to set the judgment aside and dismiss the cause. *See Fulton v. Finch*, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); *State ex rel. Kelly*, 580 S.W.2d at 612–13. Accordingly, we set aside the trial court's judgment and dismiss the cause.

Footnotes

1 TEX.TAX CODE ANN. §§ 1.01–43.04 (Vernon 1992 & Supp.1994).

2 At trial, the Director of Revenue and Taxation for the City of Dallas and the Tax Assessor–Collector of Dallas County were also defendants; however, neither pursued an appeal of the trial court's order. The District and A.R.C., therefore, are the only parties to this appeal.

3 *See* TEX.TAX CODE ANN. § 1.111(h) (Vernon 1992).

4 All emphasis supplied by author unless otherwise noted.

5 A common-law mandamus action has three requisites: a legal duty to perform a nondiscretionary act, a demand for performance, and a refusal. *Stoner v. Massey,* 586 S.W.2d 843, 846 (Tex.1979).

6 Assuming, *arguendo,* that A.R.C.'s argument is correct, we could not dismiss for lack of jurisdiction without first providing the District an opportunity to file a cost bond. *Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc.,* 813 S.W.2d 499, 500 (Tex.1991) (per curiam); *see* TEX.R.APP.P. 46(f); 83.

7 The District's sole point of error is:

> The District Court erred in granting the [A.R.C.'s] Cross–Motion for Summary Judgment and in failing to grant [the District's] Motion for Summary Judgment in its entirety.

8 Assuming, without deciding, that section 11.45(d) applies to the denial of an *application,* the rejection letter did not comply with section 11.45(d) of the Code; however, A.R.C. made no complaint of this deficiency at trial or on appeal.

9 Assuming, *arguendo,* that we are incorrect that A.R.C.'s applications were "denied" by operation of law under section 11.45(b), subsection (9) of section 41.41 of the Code provides A.R.C. an administrative remedy for the District's refusal to "receive and process" its applications.

10 Our supreme court has noted the potential prejudice from the inability of a party to amend its pleadings if an appellate court *sua sponte* dismisses for lack of jurisdiction. *See Texas Ass'n of Business,* 852 S.W.2d at 446. Although our review of the record and comments at oral argument convince us that A.R.C. did not pursue any administrative remedies, we would entertain affidavits asserting facts to the contrary in any motion for rehearing. *See* TEX.GOV'T CODE ANN. § 22.220(c) (Vernon 1988); *Jones v. Griege,* 803 S.W.2d 486, 488 (Tex.App.—Dallas 1991, no writ).

865 S.W.2d 941
Supreme Court of Texas.

Albert W. DAVIS, Rita Davis, Betty Mills, and Edwin N. Mills, Petitioners,
v.
ZONING BOARD OF ADJUSTMENT OF the CITY OF LA PORTE, Respondent.

No. D–3831. | Nov. 24, 1993.

Landowners petitioned for review of decision of local zoning board of adjustment. The 269th District Court, Harris County, David West, J., granted board's plea and abatement, and appeal was taken. The Houston Court of Appeals, Fourteenth Judicial District, 853 S.W.2d 650, Sam Robertson, J., affirmed, and writ of error was sought. The Supreme Court held that failure to timely obtain service of writ of certiorari did not preclude judicial review of zoning board's decision.

Reversed and remanded.

Attorneys and Law Firms

***941** Jack G. Carnegie, Jack E. Urquhart, Houston, for petitioners.

***942** John D. Armstrong, La Porte, Victor N. Makris, Houston, for respondent.

Opinion

PER CURIAM.

In this cause, we consider whether a trial court abused its discretion in dismissing a zoning board appeal. The court of appeals held that service of the writ of certiorari, as required by section 211.011 of the Texas Local Government Code, is a jurisdictional prerequisite to appeal a zoning board's decision, and therefore upheld the trial court's dismissal of the Petitioners' case. 853 S.W.2d 650. We disagree, and therefore reverse.

Albert Davis and others (the "Davises") sought judicial review of a decision made by the Zoning Board of Adjustment of the City of La Porte (the "Board") allowing David and Debbie Couch to construct a large building on a residential lot. After reviewing the Davises' petition, the court ordered the court clerk, upon the posting of a $100 bond, to issue a writ of certiorari to the Board. The bond was not posted, and the writ was not served.

Eleven days before trial, the Board filed a plea in abatement complaining that it had not been served with the writ of certiorari. The Board did not seek dismissal for want of prosecution; nor did it attempt to establish that it had suffered any prejudice. The trial court granted the Board's plea in abatement and allowed the Davises thirty days to file an amended complaint. In a hearing conducted as the result of the Davises' amended complaint, the trial court dismissed the Davises' appeal. The court of appeals affirmed, reasoning that the Davises "did not timely invoke the jurisdiction of the court." 853 S.W.2d at 653.

[1] **[2]** Jurisdictional power is defined as "jurisdiction over the subject matter, the power to hear and determine cases of the general class to which the particular one belongs." *Middleton v. Murff,* 689 S.W.2d 212, 213 (Tex.1985). Once a party files a petition within ten (10) days after a zoning board decision, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally. *See* TEX.LOC.GOV'T CODE § 211.011. [1] The writ of certiorari is the method by which the court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the particular zoning decision being challenged. [2] *See* Tex.R.App.P. 54 (filing of a record is not jurisdictional); *Hare v. Hare,* 786 S.W.2d 747, 748 (Tex.App.—Houston [1st Dist.] 1990, no writ) (filing a bond is jurisdictional but service of a bond is not). [3]

[3] The statute does not contain a specific time limit for issuance of the writ; nor has the Board shown any prejudice caused by the delay. Thus, having complied with the procedures established by the legislature for challenging board of adjustment decisions, the Davises are entitled to their day in court. *See Scott v. Board of Adjustment,* 405 S.W.2d 55, 56 (Tex.1966). Accordingly, we conclude that the trial court abused its discretion in dismissing the Davises' appeal for lack of jurisdiction. We therefore grant Petitioner's application for writ of error and pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, a majority of the court reverses the judgment of the court of appeals and remands this cause to the trial court for further proceedings.

Footnotes

1 "[A] petition must be filed within 10 days after the [board's] decision is filed in the board's office ... On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision." TEX.LOC.GOV'T CODE § 211.011(b), (c).

2 The jurisdiction of district courts to issue writs is derived from the Texas Constitution. *See* TEX. CONST. ART. V, § 8.

3 We disapprove the opinion in *City of Lubbock v. Bownds*, 623 S.W.2d 752 (Tex.App.—Amarillo 1981, no writ) to the extent it holds that a trial court's jurisdiction under § 211.011 depends upon service and return of the writ of certiorari.

50 S.W.2d 927
Court of Civil Appeals of Texas, Dallas.

FOTY ET AL.
v.
ROTCHSTEIN.

No. 11240. | May 28, 1932.

Appeal from Grayson County Court; A. S. Noble, Judge.

Proceedings between J. P. Foty and others and Ike Rotchstein. From the judgment, first named parties appeal. On appellants' motion for a writ of certiorari directed to the trial court and clerk as a means of perfecting the record.

Motion granted, with directions.

Attorneys and Law Firms

***927** Billingsley & Billingsley, of Fort Worth, and Finley, Wolfe & Barron, of Sherman, for appellants.

Brame & Brame, of Sherman, for appellee.

Opinion

LOONEY, J.

Appellants make application for a writ of certiorari directed to the trial court and clerk as a means of perfecting the record, by having certain omitted matter supplied, and certain matter erroneously included expunged. The application, supported by affidavit and exhibits, alleges in substance that a judgment, materially different from the judgment originally pronounced, written up and signed by the trial judge, was entered after appellants' motion for a new trial had been overruled and notice of appeal to this court given; that appellants were without notice or knowledge of the substituted judgment until after receiving the transcript on appeal, which contained only the later or substituted judgment. Appellants allege further that, after the case was tried on plaintiff's original petition, judgment pronounced, and motion for new trial overruled, there was filed, as of the day of the trial and without notice to appellants, plaintiff's so-called first supplemental petition containing new matter; that the same was an afterthought, an attempt to cure defects in the original petition, and designed ***928** to render the alleged substituted judgment more secure.

Appellants pray that they be allowed thirty days within which, by appropriate proceedings, to have the trial court correct the alleged errors in the record by supplying proper matter omitted, and expunging matter not properly belonging thereto; that said court be directed to hear and determine the questions, that the proceedings on said hearing, including the evidence, be by the clerk properly certified to this court, and, for the accomplishment of these purposes, that a writ of certiorari issue.

[1] **[2]** Appellee has contested the application and supports the contest by affidavit, but the issues thus framed cannot be determined by this court, as our authority to inquire into the existence of facts not contained in the record is limited by statute to such inquiries as may be necessary to the proper exercise of the jurisdiction of this court. See article 1822 (1593) (998), R. S. 1925. Material alterations of the record certified to by the clerk below and filed in this court, such as correcting errors, supplying matter improperly omitted, and rejecting matter erroneously included, can only be had in the court having jurisdiction of the record. See Paris v. Du Bose, 27 Tex. 6; Dennis v. Kendrick (Tex. Civ. App.) 163 S. W. 693, 694; Sumrall v. Russell (Tex. Civ. App.) 262 S. W. 507; Boggess v. Harris, 90 Tex. 476, 39 S. W. 565; Willis & Bro. v. Smith, 90 Tex. 635, 40 S. W. 401; Ennis, etc., v. Wathen, 93 Tex. 624, 625, 57 S. W. 946.

In the case of Boggess v. Harris, supra, the Supreme Court had before it this situation: After the statement of facts was approved by the trial judge and filed with the clerk, thus becoming a part of the record, counsel for plaintiff in error, without the knowledge or consent of the judge, interlined certain material language, and, because of the unauthorized interlineation, defendant in error filed & motion to strike out the statement of facts as a whole, which was sustained by the Court of Civil Appeals, but its action in this respect was reversed by the Supreme Court in an opinion by Judge Denman, who said: “If, however, as in this case, a paper which is prima facie properly part of the transcript be correctly copied therein, and it is sought to strike it out in whole or in part, by showing that a portion thereof, as it appears on file in the lower court, was improperly written therein, the proceeding for that purpose can only be had in the court having jurisdiction of the original record of which said paper is a part; for, in the absence of some special provision, each court has exclusive jurisdiction of proceedings to determine the correctness of or to change the face of its own records. Therefore the court of civil appeals was without jurisdiction to determine whether the portion of the statement of facts

objected to was improperly written therein; but, upon the filing of said motion, it might have delayed proceedings in the cause until appellee could, by appropriate proceedings, have had the court below determine that question, and make its record speak the truth, and thereupon might have issued a writ of certiorari to bring up such corrected record, and this course can still be taken."

[3] We therefore grant appellants' motion and allow thirty days within which appropriate proceedings in the trial court may be had to determine the questions presented, in order that the record may speak the truth; and the clerk of the court below is directed to certify to this court a transcript of the proceedings on said hearing, including the evidence, if any, and further proceedings here will be suspended pending said hearing and the certification thereof to this court.

Motion for certiorari granted, with instructions.

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66 Tex. 548
Supreme Court of Texas.

GLASS
v.
SMITH and others.

October 26, 1886.

Appeal from district court, Titus county.

Injunction to enjoin a judgment at law. Judgment for defendant. Plaintiff appealed. The facts are stated in the opinion.

Attorneys and Law Firms

***549** ****195** *Hiram Glass*, for appellant.

Opinion

STAYTON, J.

It appears that R. D. Smith sued II. C. Glass in the justice's court to recover a yoke of oxen, which were sequestrated, and remained in the hands of the officer who executed the writ of sequestration. There was a judgment rendered in favor of the plaintiff, in which the defendant acquiesced. Subsequently a person, without authority from Glass, and without his knowledge, and contrary to his wish, but in his name, sued out a writ of *certiorari*, by which the cause was taken to the district court. Glass made no appearance in the district court, and, when the cause was reached, a motion was made by the attorneys of R. D. Smith to dismiss the case, because there was no bond on file; the bond for *certiorari* which the unauthorized person had executed in the name of Glass having been misplaced. For some reason the motion was overruled, and a judgment was, as upon default, entered against Glass for the oxen, and, in case they were not delivered, for their value, which was fixed at $50. On that judgment an execution issued, which was returned under direction of the plaintiff without a levy. Another execution issued, and was levied upon land, which was sold under it, and it was returned; whereupon an execution issued to another county, which was also levied upon land, which was also sold. After this the fourth execution issued, and this was levied on personal property of Glass, who then brought this suit to enjoin the enforcement of that judgment. It appears that Glass knew of the proceeding ***550** by *certiorari* at some time while it was on the district court docket, and that the plaintiff was informed that it was not thereby his authorization or consent. There is evidence tending to show that Glass was authorized to believe that the plaintiff would not seek an adjudication or judgment against him under the proceeding. There is no conflict in the evidence, and the court below found most of the material facts now stated to be true; but dissolved the injunction, holding that the judgment rendered in the proceeding by *certiorari* was valid and subsisting.

A judgment rendered against a person, personal in its character, when the court has not acquired jurisdiction over his person, is a nullity. A court acquires jurisdiction over a plaintiff by his voluntary submission of a real of supposed cause of action to its determination; and, in this respect, one who ****196** institutes proceedings for the purpose of having reviewed by another court some proceedings had in an inferior court, is held thus to give to the court, exercising appellate or revisory power, jurisdiction over his person. Jurisdiction over the person of a defendant is acquired by his voluntary appearance, or by the service upon him of such process as the law provides. In the case before us, Glass had ot voluntarily come before the court as a litigant, and thus conferred jurisdiction on the court over his person; nor had he been brought before the court by any process known to the law. Had he availed himself of the unauthorized proceeding by *certiorari*, as by asking an adjudication under it, or had he in any way ratified the act of the person who caused it to be instituted while it was pending, it might with propriety now be held that he is not entitled to the relief which he seeks. There is, however, nothing of the kind in the case, and the judgment rendered against him from which he now seeks relief was and is a nullity.

There has been some conflict in the decisions of different courts as to whether relief can be given against a void judgment by injunction, but in this state this has been deemed the appropriate relief. *Smith* v. *Deweese*, 41 Tex. 595; *Cooke* v. *Burnham*, 32 Tex. 129; *Chambers* v. *Hodges*, 23 Tex. 110.

The judgment of the court below will be reversed, and judgment here rendered perpetuating the injunction heretofore granted. It is so ordered.

Parallel Citations

2 S.W. 195

2 S.W. 195

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982 S.W.2d 17
Court of Appeals of Texas,
Houston (1st Dist.).

Gene S. HAGOOD and Cyndal Porter, Appellants,
v.
CITY OF HOUSTON ZONING
BOARD OF ADJUSTMENT, Appellee.

No. 01–97–00172–CV. | March 5, 1998.

Appeal was taken from an order of the 190th District Court, Harris County, John P. Devine, J., denying a writ of certiorari seeking review of a city zoning board decision granting a variance. The Court of Appeals, Nuchia, J., held that: (1) writ of certiorari is method by which court conducts review, and has nothing to do with court's jurisdiction; (2) granting of writ of certiorari was discretionary; (3) it did not appear to be an abuse of discretion for district court to have denied writ; and (4) until district court rendered final judgment on appeal which disposed of all parties and all issues pending, Court of Appeals lacked jurisdiction to review merits.

Dismissed.

Mirabal, J., filed dissenting opinion.

Attorneys and Law Firms

***17** Gene Hagood, Alvin, for Appellants.

Robert Cambrice, John J. Hightower, Houston, for Appellee.

Before NUCHIA, MIRABAL and O'CONNOR, JJ.

Opinion

***18 OPINION**

NUCHIA, Justice.

This is an appeal from the district court's denial of a writ of certiorari in zoning board appeal. We dismiss for want of jurisdiction.

BACKGROUND

The City of Houston Zoning Board ("the Board") granted a variance to David Weekley Homes, Inc., for a lot at 5354 Navarro, Houston, Texas. Hagood and Porter took exception to this variance and filed a petition for writ of certiorari on May 31, 1996. In response, the Board filed a motion to deny writ of certiorari which requested that the district court refuse to assert its jurisdiction. Porter and Hagood filed a response. The trial court, without granting an oral hearing, issued an order stating it had considered the petition, the Board's motion to deny, the evidence presented, the pleadings and other documents on file, and denied the petition for writ of certiorari. In a single point of error, Hagood and Porter argue that the trial court erred and abused its discretion in denying, on the merits, their petition for writ of certiorari.

DISCUSSION

Apparently, the parties and district court have mistakenly assumed that the writ of certiorari in TEX. LOC. GOV'T CODE ANN § 211.011(c) (Vernon 1988) is a discretionary appeal and that the district court by denying the writ of certiorari was refusing to exercise its discretion to assert jurisdiction. These are incorrect assumptions.

[1] [2] [3] Once a party files a petition within 10 days after a zoning board decision, the court has subject matter jurisdiction to hear and determine a claim that a board of adjustment acted illegally. TEX. LOC. GOV'T CODE ANN § 211.011 (Vernon 1988); *Davis v. Zoning Bd. of Adjustment,* 865 S.W.2d 941, 942 (Tex.1993). The *Davis* court held that where the appellants comply with the procedures established by the legislature for challenging board of adjustment decisions, they "are entitled to their day in court." *Davis,* 865 S.W.2d at 942. A writ of certiorari is the method by which the court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the zoning decision being challenged, and has nothing to do with the court's jurisdiction. *Id.*

[4] [5] The granting of the writ itself is discretionary, because TEX. LOC. GOV'T CODE ANN § 211.011 (C) (Vernon 1988), provides that upon application, the district court "may" issue the writ. However, section 211.011(e) provides that evidence may also be submitted at a hearing on the appeal. Should the district court not issue the writ, then the appellants would have the burden of providing a sufficient record at the hearing to determine the illegality of the Board's decision. *Cf. Barry Nussbaum v. City of Dallas,*

948 S.W.2d 305, 307 (Tex.App.—Dallas 1996, no writ) (holding that under the similar TEX. LOC. GOV'T CODE ANN § 214.0012(a), where appellant failed to request writ of certiorari and no evidence existed in record, presumption was that sufficient evidence existed to uphold board's decision).

It does not appear to be an abuse of discretion for the district court to have denied the writ of certiorari. However, the denial of the writ does not end this case. TEX. LOC. GOV'T CODE ANN § 211.011(f) (Vernon 1988) prescribes the final decisions the trial court may reach: "The court may reverse or affirm, in whole or in part, or modify the decision that is appealed." *Id.*

[6] **[7]** Jurisdiction of this Court is vested only in cases where a final judgment has been rendered, or where a statute specifically authorizes an interlocutory appeal. *See Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex.1985); *see, e.g.*, TEX. CIV. PRAC. & REM.CODE ANN. § 51.014 (Vernon 1997 & Supp.1998). Until the district court renders a final judgment which disposes of all parties and all issues pending, this Court lacks jurisdiction to review the merits of this case. *See, e.g., Schlipf v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex.1982); *Central Nat'l Ins. Co. of Omaha v. Glover*, 856 S.W.2d 490, 492 (Tex.App.—Houston [1st Dist.] 1993, no writ).

***19** Accordingly, we dismiss this appeal for want of jurisdiction.

MIRABAL, J., dissenting.

MIRABAL, Justice, dissenting.
What we have here is a failure to communicate.

Appellants tell us they are appealing a judgment on the merits. Appellee totally agrees. The majority, however, insists that the trial court did not rule on the merits—rather, according to the majority, the trial court refused to exercise jurisdiction over the case and never ruled on the merits.

What we also have here is "form" reigning victorious over "substance."

Appellants and appellee all say that the trial court affirmed the decision of the zoning board of adjustment. The majority, however, insists that the trial court, in *denying the writ of certiorari*, did not "reverse or affirm or modify the decision appealed" as prescribed for final decisions under section 211.011(f) of the Local Government Code. TEX. LOC. GOV'T.CODE ANN. § 211.011(f) (Vernon 1988). Therefore, the majority concludes that no final, appealable judgment has been rendered.

In my opinion, the trial court did exercise jurisdiction over the appeal; the trial court considered and ruled on the merits of the appeal, affirming the zoning board of adjustment's decision; and the case is properly before us for review.

Accordingly, I dissent.

Procedure

An appeal from a decision of a zoning board of adjustment is governed by section 211.011 of the Local Government Code. TEX. LOC. GOV'T.CODE ANN. § 211.011 (Vernon 1988). [1] A writ of certiorari is the method by which a court conducts its review; its purpose is to require a zoning board of adjustment to forward to the court the record of the particular zoning decision being challenged. *Davis v. Zoning Bd. of Adjustment*, 865 S.W.2d 941, 942 (Tex.1993).

In the present case, it is uncontested that it was not necessary for the trial court to "grant a writ of certiorari directed to the zoning board of adjustment" because the board automatically filed in the trial court all of the records from the board of adjustment's proceedings, as well as a verified response that stated "pertinent and material facts that show the grounds of the decision under appeal." Thus, the zoning board of adjustment filed the "return" required by section 211.011(d) of the Local Government Code without a writ of certiorari first being granted ***20** and served on it. TEX. LOC. GOV'T CODE ANN. § 211.011(d) (Vernon 1988). Effectively, the zoning board of adjustment waived service, and the issues were joined for the trial court's consideration.

The Pleadings

Appellants filed in the trial court a "Petition for Writ of Certiorari to Review Decision of Board of Adjustment." The petition states in part:

VII

Plaintiffs allege that the decision made by the Board of Adjustment of the City of Houston, Texas, is a clear abuse of discretion for the following reasons: The decision is illegal, arbitrary, unreasonable and capricious and would cause unnecessary hardship on plaintiffs and would materially reduce the value of plaintiffs' properties.

....

IX

The decision of the Board of Adjustment is final. The Board erred in making its decision, and a new trial or hearing of such matter in this court should result in a judgment that the exception granted be reversed and denied.

WHEREFORE, PREMISES CONSIDERED, plaintiffs request that:

1. The Court order a writ of certiorari to issue herein to the Board of Adjustment of the City of Houston, Texas;

2. The cause be removed to this court;

3. The Defendant be cited to appear and answer herein;

4. A new trial of the cause be had herein;

5. The action of the Board of Adjustment granting the exception to the zoning ordinance be reversed.

....

The zoning board of adjustment filed an original answer, and later filed "Defendant's Motion to Deny Writ of Certiorari." The motion sets out the factual background of the proceedings before the zoning board of adjustment, and then presents the following argument, in part:

Plaintiffs have filed their Petition for Writ Certiorari for this Court to review this decision of the Board.

....

In order to prevail on a challenge by writ of certiorari, "The party attacking the order must present a *very clear showing* that the board abused its discretion." *Board of Adjustment of Dallas v. Patel,* 882 S.W.2d 87 (Tex.App.—Amarillo 1994, writ denied). The test for abuse of discretion is whether the Board of Adjustment acted arbitrarily, unreasonably, or without reference to any guiding rules and principles. *Id.* at 89.

In the instant case, the guiding rules and principles followed by the Zone are set forth in the Regulations adopted by the Board of Directors of Reinvestment Zone Number 1. The evidence set forth in the Affidavit of David Hawes attached hereto as Exhibit 1, and the documents authenticated thereby, clearly establish that the Board acted in reliance upon the Regulations adopted by the Reinvestment Zone and that the Board acted within its discretion in approving the variance requested by David Weekley Homes. Finally, the evidence before the Board and before this Court, clearly supports the Board's granting of the variance in question. Therefore, the Board acted neither arbitrarily, unreasonably, or without reference to any guiding rules or principles. In addition, the house that is the subject of the variance has already been constructed.

Conclusion and Prayer

Because the Board followed the required procedures and made the required findings before granting the variance to David Weekley Homes, the Board's actions were not illegal. In light of the evidence accompanying this Motion, this Court should decline to accept jurisdiction over this matter and deny Petitioner's Petition for Writ of Certiorari. Attached to the zoning board of adjustment's motion are six exhibits and an affidavit, amounting to 91 pages of supporting evidence.

***21** More than 30 days later, appellants filed "Plaintiffs' Response to the Defendant's Motion to Deny Writ of Certiorari." The 11–page response, with 33 pages of supporting documents and photos, contested the accuracy of the board of adjustment's recitation of the evidence, and submitted additional evidence to "show the defendant abused its discretion in allowing the variance." The response concluded with the prayer that "the Court grant the Plaintiffs' Application for Writ of Certiorari overruling the Board's granting of the variance."

Almost two months after the filing of the last pleading, the trial court signed an order that states in full:

The Court, having considered petitioners' Petition for Writ of Certiorari and having reviewed the City of Houston Tax Increment Reinvestment Zone No. 1 Zoning Board of Adjustment's Motion to Deny Writ of Certiorari, *the*

evidence presented, and the pleadings *and other documents on file with this Court,* finds that the Writ of Certiorari should not be granted. It is therefore,

ORDERED that the Petition for Writ of Certiorari be DENIED.

(Emphasis added).

On appeal, appellants bring a sole point of error complaining that the trial court erred and abused its discretion in making its ruling because the merits of the case show appellants are entitled to have the board of adjustment's decision set aside. In its reply brief, the board of adjustment argues that the trial court ruled correctly because the decision by the board of adjustment was not an abuse of discretion, and thus, not illegal.

There is no complaint raised in this appeal about the "procedure" followed in the trial court, *i.e.*, we have no issue to decide regarding the submission of the case without oral argument; or the sufficiency of the record transmitted from the board of adjustment to the trial court; or the adequacy of notice at any point; or the adequacy of the amount of time to file pleadings and responses. The only issue the parties present to us is whether the trial court ruled correctly *on the merits,* considering all the evidence in the record.

I acknowledge that the parties used the wrong titles to describe what they were seeking in the trial court. But the record is crystal clear that when the trial court "denied" the "petition for writ of certiorari," it was denying the relief sought by appellants in their petition: the reversal of the board of adjustment's decision. The issue presented to the trial court for ruling by full briefing and presentation of evidence, and by the prayers for relief in the parties' pleadings, was whether the board of adjustment's decision was illegal.

We are to judge the character of a motion by its ***substance*** rather than its form or caption. *State Bar v. Heard,* 603 S.W.2d 829, 833 (Tex.1980); *Toubaniaris v. American Bureau of Shipping,* 916 S.W.2d 21, 23 (Tex.App.—Houston [1st Dist.] 1995, no writ). To determine the character of the motion, we look to the ***substance of the plea for relief,*** not merely at the title. *Toubaniaris,* 916 S.W.2d at 23. The majority has not followed these basic tenets in this case.

I would not dismiss this case for want of jurisdiction. We should reach the merits of the appeal.

Footnotes

1 **211.011. Judicial Review of Board Decision**

(a) Any of the following persons may present to a court of record a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:
(1) a person aggrieved by a decision of the board;
(2) a taxpayer; or
(3) an officer, department, board, or bureau of the municipality.
(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.
(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.
(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.
(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.
(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith or with malice in making its decision.

172 S.W.3d 274
Court of Appeals of Texas,
El Paso.

Ricardo JUAREZ, Appellant,
v.
TEXAS ASSOCIATION OF SPORTING OFFICIALS EL PASO CHAPTER, Ruben Espinoza, Sheldon Wheeler, Dan McGlasson, Chris Gilmore, Robert Hemphill, and Edgar Dominguez, Appellees.

No. 08–04–00283–CV. | Aug. 25, 2005.

Synopsis

Background: Executive secretary of sporting official association brought action against association and board of directors, alleging violation of his due process rights, breach of fiduciary duty, and breach of contract in connection with his suspension from association. The 210th District Court, El Paso County, Gonzalo Garcia, J., dismissed based on a Rule 11 settlement agreement. Executive secretary appealed.

[Holding:] The Court of Appeals, Richard Barajas, C.J., held that trial court lacked subject matter jurisdiction over executive's complaint regarding association membership.

Vacated and dismissed.

Attorneys and Law Firms

***276** Mark T. Davis, El Paso, for Appellant.

Victor M. Firth, El Paso, for Appellees.

Before BARAJAS, C.J., McCLURE, and CHEW, JJ.

Opinion

OPINION

RICHARD BARAJAS, Chief Justice.

This is an appeal from the trial court's entry of an Order of Dismissal based on a Rule 11 settlement agreement entered into by the parties. Appellant appeals contending that the order should not have been entered without an evidentiary hearing on any motion or pleading pending before the court. Appellees assert that the decision of the trial court was correctly issued in light of the valid Rule 11 agreement existing among the parties and alternatively that the case should be dismissed for lack of subject matter jurisdiction. Because we agree that we do not have subject matter jurisdiction over this matter, we vacate the trial court's dismissal order and dismiss the case for want of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The substantive facts in this case are not disputed. Appellant Ricardo Juarez was the executive secretary of the El Paso Chapter of the Texas Association of Sporting Officials, ("TASO"). TASO is a statewide organization which provides sporting officials to Texas public schools to officiate ***277** various athletic activities through its local chapters. The El Paso chapter is governed by a board of directors and officers. The organization provides officials to serve as referees at public school games, pursuant to an internal constitution and bylaws that govern the qualifications, training, and assignment of its members to officiate games.

The underlying dispute among the parties arose over the allegations of wrongdoing on the part of Appellant in connection with the assignment of Appellant to officiate at a certain game as well as certain other complaints related to Appellant's conduct as a member of the organization. Pursuant to the bylaws and internal operating procedures of the organization, the matter was set for a hearing on January 6, 2003 and a hearing was held. Mr. Juarez and his attorney appeared and participated in the proceedings. On January 8, 2003, the board of directors issued a Notice of Board Findings pursuant to the bylaws of the organization and found a violation of the rules had occurred, suspending Appellant for a one-year period. The board also requested the Appellant comply with certain other requests, not relevant here. The notice also informed Appellant of his right to appeal the "Chapter-level decision" pursuant to the bylaws of the organization.

Appellant filed suit against TASO and the individual members of the local board of directors on February 21, 2003 alleging that the organization had violated his due process rights and that the individuals had breached their fiduciary responsibilities to Appellant and asserting a cause of action based upon a breach of contract theory. TASO filed a Motion to Dismiss for Lack of Jurisdiction on the

grounds that the internal disputes of a private association are not subject to judicial review and that Appellant had failed to exhaust the administrative remedies available to him. At a status conference held July 2, 2003, the attorneys for both sides read a settlement agreement into the record. The agreement provided that the parties agreed to submit the matter to binding arbitration and provided for dismissal of the matter with prejudice.

For reasons not clear from the record, the parties did not timely submit a written, agreed order, disposing of the case, though the agreement was dictated to the court on the record in compliance with Rule 11 of the Texas Rules of Civil Procedure. Further, the record does not reflect whether the parties participated in the arbitration contemplated by the Rule 11 agreement. Included in the record is an Order of Dismissal signed by the Honorable Gonzalo Garcia, judge presiding, stating an effective date of dismissal of the 2nd of July, 2003, but filed on the 9th of June, 2004. This Court, on its own motion, ordered clarification of the record and was informed that the trial court signed the Order of Dismissal on June 1, 2004. This appeal follows.

II. SUBJECT MATTER JURISDICTION

[1] **[2]** **[3]** Subject matter jurisdiction is essential for a court to have authority to decide a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex.1993). Subject matter jurisdiction is never presumed, and it cannot be waived. *Id.* at 443–44. Because subject matter jurisdiction is a question of law, our review is *de novo. See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998).

[4] **[5]** **[6]** Subject matter jurisdiction is fundamental error and may be raised for the first time on appeal. *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 893 (Tex.1986); *see* ***278** *Texas Ass'n of Business*, 852 S.W.2d at 445; *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). We must inquire into our own jurisdiction, even if it is necessary to do so *sua sponte*. *Dallas County Appraisal Dist.*, 887 S.W.2d at 468; *White v. Schiwetz*, 793 S.W.2d 278, 281 (Tex.App.-Corpus Christi 1990, no writ). Appellate court jurisdiction of 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, 315 S.W.2d 935, 938 (1958); *Ward v. Malone*, 115 S.W.3d 267, 269 (Tex.App.-Corpus Christi 2003, pet. denied); *Dallas County Appraisal Dist.*, 887 S.W.2d at 468.

[7] If the trial court lacked jurisdiction, then an appellate court only has jurisdiction to set the judgment aside and dismiss the cause. *Dallas County Appraisal Dist.*, 887 S.W.2d at 468; *see State ex rel. Kelly v. Baker*, 580 S.W.2d 611, 612–13 (Tex.Civ.App.-Amarillo 1979, no writ); *see also Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961).

A. Standard of Review

[8] **[9]** Our standard for reviewing subject matter jurisdiction requires the pleader to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Dallas County Appraisal Dist.*, 887 S.W.2d at 469; *Texas Ass'n of Business*, 852 S.W.2d at 446. When reviewing subject matter jurisdiction, we must construe the petition in favor of the pleader, and if necessary, review the entire record to determine if any evidence supports jurisdiction. *Dallas County Appraisal Dist.*, 887 S.W.2d at 469; *Tellez v. City of Socorro*, 164 S.W.3d 823, 828 (Tex.App.-El Paso 2005, pet. filed).

[10] **[11]** "Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel at any stage of a proceeding." *Tourneau Houston, Inc. v. Harris County Appraisal Dist.*, 24 S.W.3d 907, 910 (Tex.App.-Houston [1st Dist.] 2000, no pet.) (citing *Fed. Underwriters Exch. v. Pugh*, 141 Tex. 539, 174 S.W.2d 598, 600 (1943)). Lack of subject matter jurisdiction is fundamental error that may be recognized by the appellate court, *sua sponte*, or raised by a party, by appellate challenge, for the first time on appeal. *See id.; Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 n. 6 (Tex.App.-Houston [1st Dist.] 2002, no pet.) ("In an appeal properly before it, an appellate court may always address fundamental error, even without an appellate challenge."). "A judgment is void only when it is apparent that the court rendering judgment 'had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.' Errors other than lack of jurisdiction render the judgment merely voidable...." *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex.1987) (quoting *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex.1985)).

[12] **[13]** The question of subject matter jurisdiction is a legal question which we review *de novo. City of Midland v. Sullivan*, 33 S.W.3d 1, 6 (Tex.App.-El Paso 2000, pet. dism'd w.o.j.). Our task is to examine the pleadings, to take as true the

facts pleaded, and to determine whether those facts support jurisdiction in the trial court. *Texas Association of Business,* 852 S.W.2d at 446. We construe the pleadings in favor of the pleader. *Id.* If necessary, we may review the entire record to determine if there is jurisdiction. *Id.* If the petition does not allege jurisdictional facts, the plaintiff's suit is subject to dismissal only when it is impossible to amend the pleadings to confer jurisdiction. *Id.*

B. Facts Before Us

[14] **[15]** We have carefully reviewed the record provided on appeal and must ***279** draw the conclusion that the matter in controversy before us is precisely the type of internal dispute among members of an association wherein the courts of this state have declined to interfere. The constitution and bylaws of TASO govern membership in the organization and provide for a procedure whereby complaints against a member are addressed. Appellant, as a member of the organization, was notified of the complaints filed against him and began the process provided for in the rules. For reasons not reflected in the record, Appellant did not complete the appellate process provided for by the bylaws. Instead, he determined that he should seek judicial review of the decisions made by the association with regard to his membership therein. Regardless of the manner in which Appellant has attempted to couch his lawsuit, the courts of this state recognize the right of a private association to govern its own affairs. Appellant's complaints clearly seek judicial intervention because he is unhappy with the outcome of the initial review of the charges and complaints filed against him. We think it is the right of a private, non-profit organization to manage, within legal limits, its own affairs without interference from the courts. *See Hoey v. San Antonio Real Estate Board,* 297 S.W.2d 214 (Tex.Civ.App.-San Antonio 1956, no writ); *Brotherhood of Railroad Trainmen v. Price,* 108 S.W.2d 239 (Tex.Civ.App.-Galveston 1937, writ dism'd); *Combs v. Texas State Teachers Ass'n,* 533 S.W.2d 911 (Tex.Civ.App.-Austin 1976, writ ref'd n.r.e.).

Appellant maintains that his association with TASO entitles him to certain rights and that the association's failure to follow the procedures have deprived him of due process, amounted to a breach of contract, and was a breach of a fiduciary duty owed to him. There is no allegation or proof that Appellees' interpretation of its bylaws which resulted in the hearing on the complaints proffered against Appellant and providing him with notice of suspension and the right to appeal, was arbitrary, fraudulent, or capricious. Nothing in the record suggests that anything that TASO has done regarding this matter was contrary to its bylaws. Appellant merely pleads conclusory allegations that TASO breached its contract with him by refusing to allow him to continue as executive secretary, that the board members owed to him a fiduciary duty which they breached, and finally, that his due process rights were violated. These allegations are not sufficient to invoke the jurisdiction of the courts of this state.

[16] The right of a voluntary club or association to interpret its own organic agreements, such as its charter, its bylaws and regulations, after they are made and adopted, is not inferior to its right to make and adopt them, and an individual, by becoming a member, subjects himself, within legal limits, to the association's power to administer as well as its power to make its rules. *Dallas Athletic Club Pro. Com. v. Dallas Athletic Cl.,* 407 S.W.2d 849, 850 (Tex.Civ.App.-Austin 1966, writ ref'd n.r.e.).

[17] The courts will not interfere with the internal management of a voluntary association so long as the governing bodies of such association do not substitute legislation for interpretation, and do not act totally unreasonably or contravene public policy or the laws in such interpretation and administration. *Brotherhood of Railroad Trainmen,* 108 S.W.2d 239; *see also Frey v. DeCordova Bend Estates Owners Ass'n,* 632 S.W.2d 877, 880 (Tex.App.-Fort Worth 1982), *aff'd,* 647 S.W.2d 246 (Tex.1983); *Adams v. American Quarter Horse Ass'n,* 583 S.W.2d 828 (Tex.Civ.App.-Amarillo 1979, writ ref'd n.r.e.).

As has been repeatedly held:

> ***280** Courts are not disposed to interfere with the internal management of a voluntary association. The right of such an organization to interpret its own organic agreements, its laws and regulations, after they are made and adopted, is not inferior to its right to make and adopt them. And a member, by becoming such, subjects himself, within legal limits, to his organization's power to administer, as well as to its power to make, its rules. To say that the courts may exercise the power of interpretation and administration reserved to the governing bodies

> of such organizations would plainly subvert their contractual right to exercise such power of interpretation and administration.... Without such latitude of action, associations organized to promote the legitimate welfare of its members would be deprived of power to do so.

Brotherhood of Railroad Trainmen, 108 S.W.2d at 241; *see also Frey,* 632 S.W.2d at 880.

[18] **[19]** The policy of non-intervention in the affairs of private associations, as shown above, is a well-established and a wise and necessary policy. Without such policy, organizations such as Appellees simply could not function. If the courts were to interfere every time some member, or group of members, had a grievance, real or imagined, the non-profit, private organization would be fraught with frustration at every turn and would founder in the waters of impotence and debility. *Harden v. Colonial Country Club,* 634 S.W.2d 56, 60 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.). For instance, if every time a member of the association did not agree with the internal procedure devised for assigning members to officiate at certain games, the law required a court or jury to resolve the dispute and establish a schedule, the organization would cease to function. Further, an association is free to establish rules of conduct and procedures that apply to membership within the organization. Constant interference by the courts would lead to a virtual inability to function with no independence of purpose. Most important, we recognize that when an association's bylaws and constitution provide for a process by which action may be taken against a member, the member must participate in and complete the internal administrative process. We hold that the actions of the board of directors of Appellees, so long as they are not illegal, not against some public property, not arbitrary, capricious, or fraudulent, are proper actions, permissible and binding on the members of this association. *See Harden,* 634 S.W.2d at 60.

[20] Appellant suggested that as an officer of a chapter, he was entitled to certain rights governing complaints against him under the bylaws of TASO. What is clear from the record, is that Appellant did not pursue any appeal to TASO. The record is not clear whether the complaints against him were related to his function as an officer of the chapter or as a member. Nothing in the record before us suggests that TASO acted improperly. At most, Appellant contends that the El Paso chapter acted prematurely or without authority to discipline him. It is clear that his appropriate remedy was to pursue his complaints with TASO. This he did not do. We recognize that Appellees have the right to promulgate rules and regulations which control the participation of all members of its association and decline to interfere in the internal operations. Because in this case we have found that there is no subject matter jurisdiction with the trial court, we dismiss this appeal for lack of subject matter jurisdiction, and further hold that the trial court lacked jurisdiction to issue a decision in the case below. ***281** Where the trial court does not have jurisdiction to render a judgment, the proper practice is for the reviewing court to set the judgment aside and dismiss the cause. *Dallas County Appraisal Dist.,* 887 S.W.2d at 468.

Insofar as the trial court lacked subject matter jurisdiction, we vacate the trial court's dismissal order and dismiss the case for want of jurisdiction and do not reach Appellant's issue on appeal. Tex.R.App. P. 43.2(e). *Le Clair v. Wood,* No. 10–04–00232–CV, 2005 WL 1303187, at *2 (Tex.App.-Waco June 1, 2005, no pet. h.).

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290 S.W.3d 277
Court of Appeals of Texas,
Houston (14th Dist.).

NOGLE & BLACK AVIATION, INC.
and Charles Judson Nogle, Appellants,
v.
Anna Maria FAVERETTO as Next Friend of
Alejandro Migliori and Mariana Migliori, Minors,
and Americo Migliori as Administrator of the
Estate of Peitro Foster Migliori, Appellees.

No. 14–08–00272–CV. | April 9, 2009. | Supplemental Opinion on Overruling of Rehearing July 30, 2009.

Synopsis

Background: Administrator of student pilot's estate, along with a plaintiff acting as next friend for family members who were minors, filed suit against nonresident aircraft service company and its owner following plane crash that killed student pilot. The Probate Court No. 1, Harris County, Russell P. Austin, J., denied defendants' special appearances. Defendants appealed.

Holdings: The Court of Appeals, Leslie B. Yates, J., held that:

[1] nonresident owner of aircraft service company did not purposefully avail himself of benefits of conducting activities in Texas and, thus, was not subject to specific jurisdiction;

[2] nonresident aircraft service company purposefully availed itself of benefits of conducting activities in Texas;

[3] substantial connection existed between operative facts of litigation and aircraft service company's contacts with Texas, thereby supporting exercise of specific jurisdiction; and

[4] exercise of specific jurisdiction over aircraft service company would not offend traditional notions of fair play and substantial justice.

Affirmed in part; reversed and rendered in part; motion for rehearing overruled.

Attorneys and Law Firms

***280** Kenneth R. Breitbeil, Houston, James S. Strawinski, Atlanta, GA, for appellants.

Ladd Sanger, Dallas, for appellees.

Panel consists of Justices YATES, SEYMORE, and BOYCE.

Opinion

OPINION

LESLIE B. YATES, Justice.

Appellants Nogle & Black Aviation, Inc. (“N & B”) and Charles Judson Nogle appeal the trial court's orders denying their special appearances. We conclude that the trial court lacked personal jurisdiction over Nogle but properly exercised personal jurisdiction over N & B. Therefore, we affirm in part and reverse and render in part.

BACKGROUND

Nogle, an Illinois resident, owns N & B, which is an Illinois company in the business of performing maintenance, inspections, and modifications on aircraft, primarily Beechcraft T–34 planes. N & B built the aircraft at issue in this case in 1990 and included a certain type of modified wing spars. N & B then sold the accident aircraft to a Georgia company later that year. In 1991, a T–34 with the same type of modified wing spars crashed. The Federal Aviation Administration (“FAA”) grounded the altered T–34s and issued an airworthiness directive concerning T–34 wing spars, which set forth criteria for correcting the unsafe condition so that an aircraft could regain its airworthy status. In response, N & B developed an Alternative Means of Compliance (“AMOC”) with the airworthiness directive. If the FAA approves an AMOC, then an aircraft can regain its airworthy status by complying with the AMOC rather than the criteria in the airworthiness directive. The FAA approved N & B's AMOC, and the accident aircraft as well as many other T–34s around the country complied with the AMOC and resumed airworthy status. The accident aircraft was later sold again to a Texas entity known as PRVNY Pluk and operated by Texas Air Aces, also a Texas entity.

In 2003, another T–34 crashed, and the FAA issued another airworthiness directive concerning T–34 wing spars and

grounded affected aircraft. N & B developed a second AMOC to address these concerns, which the FAA approved, and the accident aircraft and other T–34s around the country complied with this procedure and resumed airworthy status. Several months after the accident aircraft resumed airworthy status, Peitro Montgomery Migliori was flying it as a student pilot when a wing broke off during flight, causing a crash that killed him and the instructor pilot. Mr. Migliori was a Venezuelan citizen, and the crash occurred in Texas.

Appellees Anna Maria Faveretto as Next Friend of Alejandro Migliori and Mariana Migliori, Minors, and Americo Migliori as Administrator of the Estate of Peitro Foster Migliori (collectively "the Miglioris") sued Nogle and N & B, among others, in Texas. Nogle and N & B filed special appearances, which the trial court denied. They now appeal.

ANALYSIS

A. Legal Standard

[1] **[2]** **[3]** **[4]** Whether a trial court has personal jurisdiction over a defendant is a question of law. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex.2002); *Schott Glas v. Adame*, 178 S.W.3d 307, 312 (Tex.App.-Houston [14th Dist.] 2005, pet. denied). When the facts underlying the jurisdictional issue are undisputed, ***281** we review the trial court's determination de novo. *Schott Glas*, 178 S.W.3d at 312; *see American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex.2002). However, when the relevant facts are disputed, a party may challenge the trial court's underlying conclusions for legal and factual sufficiency. *Schott Glas*, 178 S.W.3d at 312. If the trial court does not issue findings of fact, we presume the trial court resolved all factual disputes in favor of its judgment. *Id.* The plaintiff bears the initial burden of pleading facts sufficient to establish personal jurisdiction. *Marchand*, 83 S.W.3d at 793; *Schott Glas*, 178 S.W.3d at 313. The burden then shifts to the defendant challenging personal jurisdiction to negate all bases of jurisdiction alleged by the plaintiff. *Marchand*, 83 S.W.3d at 793; *Schott Glas*, 178 S.W.3d at 313.

[5] **[6]** The Texas long-arm statute governs Texas courts' exercise of personal jurisdiction over a nonresident defendant. *See* TEX. CIV. PRAC. & REM. CODE ANN.. §§ 17.041–.045 (Vernon 2008); *Schott Glas*, 178 S.W.3d at 312. The long-arm statute reaches as far as federal constitutional due process will allow, and thus the long-arm statute is satisfied if an assertion of personal jurisdiction comports with due process. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex.2007); *Schott Glas*, 178 S.W.3d at 312. Personal jurisdiction is proper when the nonresident defendant has established "minimum contacts" with the forum and the exercise of jurisdiction comports with " 'traditional notions of fair play and substantial justice.' " *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

[7] **[8]** **[9]** When analyzing personal jurisdiction, the touchstone of the minimum contacts analysis is purposeful availment—the defendant's contacts must show that it purposefully availed itself of the privileges and protections of the forum's law to subject itself to jurisdiction there. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784–85 (Tex.2005); *see also Brocail v. Anderson*, 132 S.W.3d 552, 557 (Tex.App.-Houston [14th Dist.] 2004, pet. denied) (noting that "[t]he purposeful availment requirement is a threshold"). Any contacts that do not amount to purposeful availment are irrelevant in the jurisdictional analysis. *See Olympia Capital Assocs., L.P. v. Jackson*, 247 S.W.3d 399, 406 (Tex.App.-Dallas 2008, no pet.). What is important is the quality and nature of the defendant's contacts with the forum rather than the number of contacts. *American Type Culture*, 83 S.W.3d at 806.

[10] **[11]** **[12]** A defendant's contacts can give rise to either general or specific jurisdiction. General jurisdiction is based on continuous and systematic contacts with the forum. *Moki Mac*, 221 S.W.3d at 575. Specific jurisdiction is based on purposeful contacts that give rise or relate to the litigation. *Id.* at 576. The Miglioris allege the trial court has specific jurisdiction over both Nogle and N & B and also general jurisdiction over N & B.

B. Jurisdiction Over Nogle

[13] In two issues, Nogle alleges the trial court improperly exercised personal jurisdiction over him individually. Nogle holds a certification from the FAA that gives him authority to sign off on major repairs or alterations on aircraft. Such a sign off is necessary for a grounded aircraft to regain airworthy status. At the request of PRVNY Pluk and Texas Air Aces, Nogle provided technical assistance over the telephone to the mechanics working to make the accident aircraft compliant with the second AMOC. Nogle then signed off on the modification and mailed the ***282** certificate to Texas. The Miglioris claim these actions by Nogle individually are sufficient to establish personal jurisdiction over him because

Nogle knew the accident aircraft was owned and operated in Texas, he mailed the certificate to Texas, and without this certification, which the Miglioris claim relates to the portion of the aircraft that failed in the crash, the accident aircraft would not have been in the air. We disagree.

[14] In analyzing specific jurisdiction, we first determine whether Nogle made minimum contacts with Texas by purposefully availing himself of the privilege of conducting activities here. *See Moki Mac,* 221 S.W.3d at 576. Purposeful availment focuses on the defendant's actions, not on the actions of third parties. *Michiana Easy Livin',* 168 S.W.3d at 787; *Olympia Capital Assocs.,* 247 S.W.3d at 416–17. Nogle did not advertise or otherwise target his services to Texas specifically. *See Olympia Capital Assocs.,* 247 S.W.3d at 416; *cf. Moki Mac,* 221 S.W.3d at 578–79. His technical support services to assist in implementing the second AMOC and his services in signing off on repairs to comply with this AMOC were available to all T–34 owners across the country. It was PRVNY Pluk and Texas Air Aces's request, not Nogle's initiative, that led to Nogle providing his services regarding the accident aircraft, and such contacts are insufficient to show purposeful availment. *See Olympia Capital Assocs.,* 247 S.W.3d at 416–17 (providing bid to potential client at client's sole request is not purposeful availment); *Weldon–Francke v. Fisher,* 237 S.W.3d 789, 797 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (answering questions and responding to requests is not purposeful availment). This case is similar to *Michiana Easy Livin',* in which the Texas Supreme Court held that a single sale to Texas that was initiated completely by the buyer, when the seller did nothing to target Texas specifically, did not establish purposeful availment of the laws and benefits of Texas. *See Michiana Easy Livin',* 168 S.W.3d at 787.

Even though Nogle had a role in the chain of events that put this Texas accident aircraft in the air before crashing in Texas, that is not enough to establish purposeful availment. *See Michel v. Rocket Eng'g Corp.,* 45 S.W.3d 658, 671 (Tex.App.-Fort Worth 2001, no pet.) (noting that a "generalized 'but for' relationship between the forum and a non-resident defendant falls far short of meeting the requirement for specific jurisdiction that the plaintiff's cause of action must 'relate to' or 'arise out of' the non-resident's activities within the forum"). We sustain Nogle's third issue. Because we determine that Nogle did not purposefully avail himself of the benefits of conducting activities in Texas, we need not consider his fourth issue, in which he argues that the exercise of personal jurisdiction over him would offend due process.

C. Jurisdiction Over N & B

In two issues, N & B contends the trial court erred in concluding it had personal jurisdiction over it, either based on specific or general jurisdiction, and that exercising jurisdiction would violate traditional notions of fair play and substantial justice.

1. Minimum Contacts

[15] Although the Miglioris base their specific jurisdiction theory on many different contacts, we find specific jurisdiction is proper based on N & B's interactions with Victor Juarez. Juarez, a Texas resident, is an engineer. He was paid to perform engineering work regarding the design of an inspection procedure on the T–34 wing spar. N & B used Juarez's work, which was performed in Texas, in submitting its AMOC to the FAA for approval. The FAA approved the AMOC, which N & B ***283** then sold for profit to many T–34 owners. In their petition, the Miglioris allege, among other things, that N & B was negligent in its "design, installation, and inspection of the wing spar."

[16] **[17]** We first consider whether N & B's contacts with Juarez amount to purposeful availment. Purposeful availment analysis considers not only the conduct of the defendant, as opposed to the plaintiff or a third party, but also whether those contacts were random or fortuitous and whether the defendant benefitted from those contacts. *See Moki Mac,* 221 S.W.3d at 575. We conclude that N & B's relationship with Juarez amounted to purposeful availment. A contract with a Texas resident alone does not show a purposeful contact with Texas. *See Ashdon, Inc. v. Gary Brown & Assocs.,* 260 S.W.3d 101, 113 (Tex.App.-Houston [1st Dist.] 2008, no pet.); *Olympia Capital Assocs.,* 247 S.W.3d at 417. Other factors about the nature of the relationship are much more important, such as the place of performance. *See Barnstone v. Congregation Am Echad,* 574 F.2d 286, 288–89 (5th Cir.1978) (noting that "it is the place of performance rather than execution, consummation or delivery which should govern the determination of jurisdiction" and holding that plaintiff's "unilateral partial performance" in Texas was insufficient to establish jurisdiction); *Ashdon,* 260 S.W.3d at 113 ("Generally, a contract calling for performance outside of Texas does not subject a party to jurisdiction here."). Juarez performed his engineering work in Texas. *See Fleischer v. Coffey,* 270 S.W.3d 334, 338 (Tex.App.-Dallas 2008, no pet.) (finding jurisdiction proper based in part on contract being performed in Texas); *cf. American Type Culture,* 83 S.W.3d

at 807–08 (no jurisdiction, contract performed out of state); *Olympia Capital Assocs.*, 247 S.W.3d at 417–18 (same).

[18] Furthermore, unlike Nogle's technical assistance, this relationship was not unilaterally initiated by the Texas resident. *Cf. Michiana Easy Livin'*, 168 S.W.3d at 787. N & B specifically chose Juarez among other possible candidates because it liked his work the best. The doctrine of purposeful availment recognizes that a defendant can make choices to avoid benefitting from activities in Texas. *See Moki Mac*, 221 S.W.3d at 575; *Michiana Easy Livin'*, 168 S.W.3d at 785. Even though N & B may have made some such choices, such as not locating any employees or offices in Texas and not targeting the Texas market, it specifically chose to use the work of this Texas resident. That work was performed in Texas, N & B used it in completing its AMOC, and N & B made money doing so when it sold the AMOC to T–34 owners. It is not unreasonable to expect that the choice to use a Texas engineer doing work in Texas to assist with the design of a wing spar modification could lead to litigation in Texas for a claim relating to a wing spar failure. *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 880–81 (Tex.App.-Austin 2008, no pet.) (noting nonresident defendants controlled whether transaction occurred in Texas and that "it is not unreasonable or unexpected that they might be hailed into court here in regard to claims arising from that activity"). For these reasons, we conclude N & B's use of Juarez's services amounts to purposeful contact with Texas. [1]

***284** **[19]** **[20]** Having concluded that N & B's use of Juarez's services amounted to purposeful contact, we now consider whether the litigation arises from or relates to that contact. *See Moki Mac*, 221 S.W.3d at 576. In making this determination, we focus on relationship among the defendant, Texas, and the litigation. *Id.* at 575–76. To support an exercise of specific jurisdiction, there must be a substantial connection between a nonresident defendant's forum contacts and the operative facts of the litigation. *Id.* at 585. The issue of whether negligence in the design and inspection of the wing spar modification in the AMOC caused the wing separation on the accident aircraft is an operative fact in this litigation, and Juarez's engineering work is directly related to that. *See Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex.2009) (finding personal jurisdiction and stating, in litigation over unpaid royalties, that the Texas real property itself "will also be an operative fact, or at the very least, will have a substantial connection to the operative facts").

[21] N & B asserts that Juarez's work is irrelevant because there is no evidence to show N & B actually worked on the part of the accident aircraft that failed. Nogle states in an affidavit that the AMOC-related modifications to the accident aircraft were applicable only to the wing spars and that the wing's center section, rather than its spars, failed on the accident aircraft. In their petition, the Miglioris allege negligence against N & B in causing the crash, based in part on its alleged negligent design, installation, and inspection of the wing spars. [2] Whether N & B actually was negligent regarding the wing spars and whether a problem with the wing spars actually caused the crash are merits-based questions that should not be resolved in a special appearance. *See Pulmosan Safety Equip. Corp. v. Lamb*, 273 S.W.3d 829, 839 (Tex.App.-Houston [14th Dist.] 2008, pet. filed); *Kelly v. Gen. Interior Constr., Inc.*, 262 S.W.3d 79, 86 (Tex.App.-Houston [14th Dist.] 2008, pet. filed); *see also Moki Mac*, 221 S.W.3d at 582 (declining to adopt jurisdiction rule that "would require a court to delve into the merits to determine whether a jurisdictional fact is actually a legal cause of the injury"); *Michiana Easy Livin'*, 168 S.W.3d at 790 (rejecting jurisdiction theory that would "confuse[ ] the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits"). We take the allegations in the petition as true at the special appearance stage. *Pulmosan Safety*, 273 S.W.3d at 839; *Flanagan v. Royal Body Care, Inc.*, 232 S.W.3d 369, 377 (Tex.App.-Dallas 2007, pet. denied). For jurisdictional purposes, Nogle's affidavit at most creates a fact issue regarding the allegations in the petition, and that is sufficient to support the trial court's determination that it had jurisdiction over N & B based on the connection between the AMOC and the accident. *See Pulmosan Safety*, 273 S.W.3d at 839; ***285** *Kelly*, 262 S.W.3d at 86; *Flanagan*, 232 S.W.3d at 377.

Because we conclude that N & B had purposeful contacts with Texas through its relationship with Juarez and those contacts are substantially connected to the operative facts of the litigation, we conclude the trial court properly determined that it had specific jurisdiction over N & B. Thus, we overrule N & B's first issue.

2. Fair Play and Substantial Justice

[22] **[23]** **[24]** N & B argues that even if it had sufficient purposeful contacts to establish specific jurisdiction, the trial court erred in exercising jurisdiction because doing so violates traditional notions of fair play and substantial justice. In making this determination, we consider (1) the

burden on the defendant, (2) the interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental substantive social policies. *Retamco Operating*, 278 S.W.3d at 341–42. Only in rare cases will the exercise of personal jurisdiction fail to comport with fair play and substantial justice. *Id.*

N & B argues that forcing it to defend litigation in Texas would be unduly burdensome because it is an Illinois resident without employees or offices in Texas. N & B asserts that Texas has only a minimal interest in the litigation because the Miglioris are from Venezuela rather than Texas and the crash could have happened anywhere. Finally, N & B contends the Miglioris can obtain relief against N & B in Illinois, where all of N & B's employees and witnesses are located. After considering the relevant factors, we easily determine that the exercise of jurisdiction here is consistent with due process. N & B will certainly incur more expense to defend litigation in Texas as opposed to its home state, but that would be true for virtually any nonresident defendant. *See id.* Distance to travel is usually not a significant consideration with the ease of modern transportation. *Glencoe Capital Partners II, L.P. v. Gernsbacher*, 269 S.W.3d 157, 168 (Tex.App.-Fort Worth 2008, no pet.). That is particularly true in this case as N & B has several aircraft at its disposal. Texas does have an interest in the litigation because the owner and operator of the accident aircraft are Texas entities, the crash was in Texas, a Texas resident helped design part of the accident aircraft that is alleged to have failed, the instructor pilot who died was a Texas resident, and Migliori's estate administration is pending in Texas. *See Kelly*, 262 S.W.3d at 87; *Flanagan*, 232 S.W.3d at 378. The crash litigation involves multiple defendants, and forcing the Miglioris to litigate the plane crash both in Texas and in Illinois is costly and inconvenient for them as well as the witnesses and parties in Texas and is a waste of judicial resources. *See Kelly*, 262 S.W.3d at 87; *Control Solutions, Inc. v. Gharda Chems. Ltd.*, 245 S.W.3d 550, 562 (Tex.App.-Houston [1st Dist.] 2007, no pet.).

This is not one of the rare cases when exercising personal jurisdiction would violate traditional notions of fair play and substantial justice. We overrule N & B's second issue.

CONCLUSION

We hold that the trial court properly exercised personal jurisdiction over N & B but that it erred in exercising personal jurisdiction over Nogle. Accordingly, we affirm the trial court's judgment as to N & B and reverse the trial court's judgment as to Nogle and render judgment that the ***286** Miglioris' claims against Nogle be dismissed for lack of personal jurisdiction.

SUPPLEMENTAL OPINION ON REHEARING

N & B has moved for rehearing on several grounds. We overrule its motion, and we issue this supplemental opinion to address one issue raised in the motion.

[25] Based on a new deposition page not included in the appellate record and another deposition page in the record but never cited in any of its pre-opinion briefing, N & B argues that our conclusion that jurisdiction is proper based on its relationship with Juarez is mistaken. We disagree. First, we may not consider evidence that is only attached to briefs. [1] *See* TEX.R.APP. P. 34.1; *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 467 (Tex.App.-Dallas 2007, no pet.). Second, the remaining evidence does not establish that the trial court's decision was erroneous. When, as here, the trial court does not issue findings of fact, we presume the trial court resolved all fact issues in favor of its judgment, and we will uphold those findings if supported by sufficient evidence. *See Luxury Travel Source v. Am. Airlines, Inc.*, 276 S.W.3d 154, 161 (Tex.App.-Fort Worth 2008, no pet.); *Schott Glas v. Adame*, 178 S.W.3d 307, 312 (Tex.App.-Houston [14th Dist.] 2005, pet. denied). We imply that the trial court found that even if N & B did not, as N & B argues, have a contract with Juarez, it had a substantial enough relationship to justify the exercise of personal jurisdiction. We will construe N & B's argument as a challenge to the sufficiency of the evidence supporting this implied finding.

N & B argues that a separate entity, the T–34 Spar Corporation, alone hired Juarez, that the data Juarez provided to N & B was only through this corporation, and that N & B had no input in or control over the scope of the work Juarez performed. However, the deposition testimony N & B cites does not clearly establish this theory. N & B's deposition evidence states that Juarez provided data to N & B through the T–34 Spar Corporation and that the T–34 Spar Corporation offered N & B a certain inspection procedure that the FAA would not accept unless it was renumbered. This evidence does not negate the other relevant evidence, which shows

that (1) N & B paid Juarez for his work, (2) Juarez's work was performed in Texas, (3) N & B specifically chose to use Juarez's work because it liked Juarez's inspection procedure the best, (4) the work played an important part in securing FAA approval of the AMOC, and (5) N & B profited from the use of Juarez's work. At most, N & B's evidence raises a fact issue about the nature and extent of its relationship with Juarez, which does not render the remaining evidence insufficient to support the trial court's implied finding of a substantial relationship between N & B and Juarez. *See Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex.1987); *Milacron Inc. v. Performance Rail Tie, L.P.*, 262 S.W.3d 872, 875 (Tex.App.-Texarkana 2008, no pet.). For these additional reasons, we hold the trial court properly exercised personal jurisdiction over N & B.

Footnotes

1 Even though it cites personal jurisdiction case law regarding the effects of contracts with Texas residents, N & B also asserts in its brief that there is no evidence of an actual contract with Juarez. Nogle's deposition testimony shows that Juarez was paid for performing engineering work, which N & B used in developing the AMOC and submitting it to the FAA. Thus, even if N & B did not have a contract with Juarez, it had a substantial relationship where it knowingly used his work, which was performed in Texas, to develop its AMOC.

2 The causation evidence in the court's record is thin. We have not been presented with even the crash report, much less expert testimony. We have only the allegations in the petition and Nogle's affidavit. At oral argument, the Miglioris complained that they were limited to jurisdictional discovery and thus could not conduct discovery on causation. By focusing on the operative facts of the litigation, *Moki Mac* would seem to suggest that some level of discovery regarding causation could be jurisdictional discovery when the contacts the plaintiff alleges supports jurisdiction relate to causation. However, we need not resolve this issue because the Miglioris raised no appellate issue regarding any improper limitations on discovery. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex.1993).

1 It is also for this reason that we grant N & B's motion to strike the new affidavits the Miglioris attached to their brief on rehearing, which relate to a causation argument we do not discuss further in this supplemental opinion.

127 S.W.3d 286
Court of Appeals of Texas,
Fort Worth.

SHELL CORTEZ PIPELINE COMPANY, Shell CO_2 Company, Ltd. n/k/a Kinder Morgan CO_2 Company, L.P., Shell Oil Company, Shell Western E & P Inc., SWEPI LP, Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., and Mobil Cortez Pipeline, Inc., Appellants,

v.

Gary H. SHORES, John W. Barfield, and Frank Gibson, in their Representative Capacities as Co–Trustees of the Alicia L. Bowdle Trust, William G. Kemp and Marie J. Bench, in their Representative Capacities as Co–Trustees of the Bernard M. Bench Family Trust, Bonnie Lynn Whiteis, Individually, William C. Armor, Jr., Individually, and Gary H. Shores, in his Representative Capacity as Administrator with Will Annexed of the Estate of Margaret Bridwell Bowdle, Deceased, Appellees.

No. 2–01–006–CV. | Jan. 8, 2004.

Synopsis

Background: Royalty owners sought class certification on claims for breach of contract, declaratory judgment, breach of agency duty to market, breach of the duty of good faith and fair dealing, action on account, and conspiracy against petroleum companies, arising from the alleged underpayment of carbon dioxide royalties. The Probate Court, Denton County, Don R. Windle, J., granted class certification. Petroleum companies appealed.

[Holding:] The Court of Appeals, Sue Walker, J., held that probate court did not have subject matter jurisdiction to grant class certification to royalty owners.

Dismissed.

Attorneys and Law Firms

***288** Griffin, Whitten, Jones & Reib, Michael J. Whitten, Denton, McGinnis, Lochridge & Kilgore, L.L.P., Brian S. Engel, Marc O. Knisely, Richard Kelley, Akin Gump Strauss Hauer & Feld, L.L.P., Shannon H. Ratliff, Austin, Exxon Mobil Corp., Jack Balagia, Taylor Snelling, Houston, for appellants Mobil.

Wood, Thacker & Weatherly, P.C., R. William Wood, Grace Weatherly, Denton, Vinson & Elkins, L.L.P., Andrew McCollam III, Phillip B. Dye, Jr., Gwen J. Samora, Alan B. Daughtry, Jennifer H. Davidow, Houston, for appellants Shell.

McKool Smith, Gary Cruciani, Charles Cunningham, Robert M. Manly, Rader & Campbell, Donovan Campbell Jr., Robert E. Rader, Jr., Lalon C. Peale, Hartnett Law Firm, James J. Hartnett, Jr., Will F. Hartnett, Robert B. Perry, Dallas, Robison & Robison, Douglas M. Robison, Denton, Ikard & Golden, P.C., Frank Ikard, Austin, for appellees.

PANEL A: CAYCE, C.J.; WALKER, J.; and SAM J. DAY, J. (Retired, Sitting by Assignment).

Opinion

OPINION

SUE WALKER, Justice.

I. INTRODUCTION

Two groups of Appellants, the Mobil defendants [1] (collectively referred to as "Mobil") and the Shell defendants [2] (collectively referred to as "Shell") bring interlocutory appeals from a class certification order entered by the statutory probate court of Denton County. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014 (Vernon Supp.2004). The probate court certified a nationwide class of current and former overriding royalty owners in the McElmo Dome Unit, located in Colorado, and their claims for breach of contract, declaratory judgment, breach of agency duty to market, breach of the duty of good faith and fair dealing, action on account, and conspiracy against Shell and Mobil stemming from the alleged underpayment of carbon dioxide royalties since 1982. The primary issue we address in this appeal is whether the probate court has subject matter jurisdiction. Because we hold that the statutory probate court in this instance does not have subject matter jurisdiction over the class claims at issue here, we vacate the trial court's class certification order and dismiss the case.

II. FACTUAL BACKGROUND

In the early 1980s, Shell and Mobil possessed extensive interests in oil fields in West Texas in the Permian Basin. Shell and Mobil decided to maximize the oil ***289** output of these fields by flooding them with carbon dioxide. To this end, Shell and Mobil set about obtaining carbon dioxide from the nearby McElmo Dome CO_2 formation in Colorado. Shell and Mobil drafted and executed a Unit Agreement for the development and operation of the McElmo Dome (Leadville) Unit. This Agreement designated Shell as the Unit Operator. Shell and Mobil agreed to jointly build and operate a pipeline to transport the carbon dioxide from the McElmo Dome Unit to the West Texas oil fields.

Before the Colorado Oil and Gas Conservation Commission would approve formation of the Unit, Shell and Mobil were required to obtain the consent and approval of requisite percentages of the working interests in the Dome and also of the royalty owners and overriding royalty owners. To accomplish this, Shell, with the approval of Mobil, prepared and sent all overriding and royalty owners a solicitation package. The solicitation package contained information indicating that the working interest owners would pay all installation and operating costs of the "program" and that there would be no costs to royalty owners. The package also indicated that the royalty owners would not "have to pay for the pipeline, transportation or injection of CO_2."

Appellees allege that since 1982, Shell and Mobil have deducted tens of millions of dollars in transportation charges in calculating and paying royalties to the royalty owners of the McElmo Dome Unit. Moreover, Appellees allege that Shell and Mobil concealed from royalty owners the deduction of the carbon dioxide transportation charges by deducting them off-the-top and showing on the monthly statements mailed to the royalty owners a "gross price" received for the CO_2 that was in fact a gross price minus transportation costs. Appellees also contend that at times the transportation costs charged back to royalty owners by Shell and Mobil exceeded the price Shell and Mobil sold the carbon dioxide for, resulting in a "negative netback" to royalty owners.

III. OTHER APPEALS & PROCEEDINGS

Previously in this same litigation, Shell, Mobil, and other defendants perfected interlocutory appeals pursuant to civil practice and remedies code section 15.003(c) challenging the probate court's order denying their motions to transfer venue to Harris County. TEX. CIV. PRAC. & REM.CODE ANN. § 15.003(c). We held that three of the four named plaintiffs in the underlying lawsuit, the Bench Family Trust, Bonnie Lynn Whiteis, and William C. Armor, Jr., could not independently establish proper venue in Denton County, that the probate court therefore necessarily determined the joinder issue, and that the these three plaintiffs failed to establish section 15.003(a)'s four joinder requirements. Consequently, we reversed the trial court's order denying Shell's and Mobil's motions to transfer venue as to these three plaintiffs and ordered their claims transferred to Harris County. *See id.* The parties filed motions for rehearing of this decision, and Appellees also filed a motion for en banc rehearing. As of the date of the issuance of this opinion, the motions for rehearing remain pending before this court.

In addition to the joinder appeal, three mandamus proceedings have been filed in this litigation. Two of the original proceedings were consolidated with the joinder appeal and denied. We also denied the third mandamus, but the supreme court conditionally granted the writ. *In re SWEPI,* 85 S.W.3d 800 (Tex.2002) (orig.proceeding). Additionally, a second class certification appeal has been filed with this court, *Mobil v. First State Bank* ***290** *of Denton*, No. 2–02–119–CV. As of the date of the issuance of this opinion, that appeal has not yet been submitted in this court. We abated all of these cases on the joint motion of the parties pending settlement negotiations, but at the parties' request, they have been reinstated.

IV. THE CLASS CERTIFICATION HEARING AND ORDER

The trial court conducted a four-day evidentiary hearing on Appellees' motion for class certification and admitted and considered over 430 exhibits. Ultimately, the trial court certified the following class "under Rule 42(a) and 42(b)(1), (b)(2), (b)(3), and (b)(4):"

> All non-governmental owners of overriding royalty interests from August 24, 1982 to the commencement of the class certification hearing herein under mineral leases granted to one or more of the Mobil Defendants and Shell

> Defendants, or their predecessors-in-interest, in any property that became unitized by virtue of the McElmo Dome Unit Agreement.

The trial court specifically excluded the following from the "Plaintiff Class:"

> (a) all Defendants and their affiliates; (b) any such overriding royalty interest owner who also is or was, during said timeframe, a working interest owner of the Unit; (c) Harry Ptasynski, W.L. Gray & Co., and all plaintiffs in *Grynberg et al. v. Shell Oil Company, et al.*, Cause No. 98–CV–43, District Court, Montezuma County, Colorado; and (d) as to those claims arising from the wrongful pricing of CO_2 (the "Wrongful Pricing Claim") and/or from the wrongful setting of the tariff of the Cortez Pipeline (the "Unreasonable Transportation Claim"), and members of the CO_2 Claims Coalition, L.L.C. (The "Claims Coalition") who, as of the commencement of the class certification hearing herein, have executed a written assignment of their Wrongful Pricing Claim and their Unreasonable Transportation Claim to the Claims Coalition and have not received back a written reassignment of such claims (the "Claims Coalition Assignors").

V. PROBATE COURT'S SUBJECT MATTER JURISDICTION

In its first issue, Shell asserts that neither the Texas Probate Code nor the Texas Trust Code confers subject matter jurisdiction on the trial court, the statutory probate court of Denton County, over a "national class action of over 1,000 different overriding royalty owners spanning 27 states." Mobil, likewise, in one of its subissues contends that the probate court lacks jurisdiction over this class litigation. Appellees contend, however, that this court itself has no jurisdiction to review Shell's and Mobil's jurisdictional complaints in these interlocutory class certification appeals. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014. We disagree and we hold that the trial court lacks subject matter jurisdiction over the class claims.

A. Appellate Court Jurisdiction

Before the probate court signed the class certification order at issue here, Shell and Mobil filed pleas to the jurisdiction. They challenged the probate court's jurisdiction over the existing plaintiffs' claims. The probate court denied Shell's and Mobil's pleas to the jurisdiction. Appellees point out that section 51.014(a)(8) of the civil practice and remedies code permits an interlocutory appeal from an order that "grants or denies a plea to the jurisdiction *by a governmental unit* as that term is defined in Section 101.001." *Id.* § 51.014(a)(8) (emphasis added). Shell and Mobil are not governmental units and therefore, Appellees argue, we lack jurisdiction to review the trial court's denial of ***291** Shell's and Mobil's pleas to the jurisdiction in this interlocutory class certification appeal.

[1] **[2]** **[3]** Generally, a Texas appellate court has jurisdiction to hear appeals from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex.2001); *Kaplan v. Tiffany Dev. Corp.*, 69 S.W.3d 212, 217 (Tex.App.-Corpus Christi 2001, no pet.). An appellate court has jurisdiction to hear appeals from interlocutory orders and judgments only when specifically authorized by statute. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex.2000); *Fort Worth Star–Telegram v. Street*, 61 S.W.3d 704, 707–08 (Tex.App.-Fort Worth 2001, pet. denied). A statute authorizing interlocutory appeals is strictly construed because it is an exception to the general rule that only a final judgment is appealable. *Tex. Dep't of Transp. v. Sunset Valley*, 8 S.W.3d 727, 730 (Tex.App.-Austin 1999, no pet.).

[4] The Texas Supreme Court and numerous courts of appeals have, however, repeatedly recognized that when an appellate court is granted jurisdiction to review an interlocutory order or judgment, that jurisdiction encompasses a review of the validity of the interlocutory order or judgment. *See, e.g., State v. Cook United, Inc.*, 464 S.W.2d 105, 106 (Tex.1971) (holding order denying plea in abatement could be attacked in appeal from temporary injunction "only in so far as the questions raised affect the validity of the injunction order"); *Tex. State Bd. of Examiners In Optometry v. Carp*, 162 Tex. 1, 2, 343 S.W.2d 242, 243 (1961) (holding orders overruling motion for severance and plea to the jurisdiction could be attacked in appeal from

another interlocutory order "in so far as the questions raised might affect the validity of the latter order"); *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex.App.-Amarillo 1998, pet. denied) (holding trial court's alleged lack of jurisdiction to enter temporary injunction could be addressed in appeal from injunction); *R.R. Comm'n of Tex. v. Air Prods. & Chems., Inc.*, 594 S.W.2d 219, 221–22 (Tex.Civ.App.-Austin 1980, writ ref'd n.r.e.) (same). *But see Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 211 (Tex.App.-El Paso 2001, no pet.) (holding refusal to abate case because another court acquired dominant jurisdiction was not reviewable in appeal of temporary injunction). This exception has been applied to permit appellate review of a trial court's jurisdiction to enter a class certification order. *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631, 638–39 (Tex.App.-Corpus Christi 1997, pet. dism'd w.o.j.) (reviewing order that trial judge was recused rather than disqualified to determine whether class certification order was void); *see also In re M.M.O.*, 981 S.W.2d 72, 79 (Tex.App.-San Antonio 1998, no pet.) (recognizing that an appellate court may review whether a justiciable controversy exists in the appeal of a class certification order). In other words, the trial court's authority or jurisdiction to enter the appealable interlocutory order or judgment is subject to appellate review along with the merits of the ruling because "[s]imply put, if the court has no authority to act, it can hardly be said that the court's action is valid." *Letson*, 979 S.W.2d at 417.

[5] **[6]** **[7]** Moreover, a trial court's subject matter jurisdiction is never presumed and cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex.1993). Our jurisdiction over the merits of an appeal extends no further than that of the court from which the appeal is taken. *Ward v. Malone*, 115 S.W.3d 267, 268 (Tex.App.-Corpus Christi 2003, pet. denied); ***292** *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). Thus, if the trial court lacked jurisdiction, we only have jurisdiction to set the trial court's judgment aside and dismiss the cause. *Ward*, 115 S.W.3d at 271.

[8] We agree with Appellees that in this interlocutory class certification appeal we may not review the probate court's denial of Shell's and Mobil's pleas to the jurisdiction, and we do not review that ruling. *See, e.g., Witt v. Witt*, 205 S.W.2d 612, 615 (Tex.Civ.App.-Fort Worth 1947, no writ) (holding appellate court could not review order denying plea to the jurisdiction in appeal of order granting temporary injunction). But we are authorized to review the trial court's authority or jurisdiction to enter the very order appealed here: the class certification order. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(3); *Cook United, Inc.*, 464 S.W.2d at 106; *Carp*, 343 S.W.2d at 243; *Letson*, 979 S.W.2d at 417; *Air Prods. & Chems., Inc.*, 594 S.W.2d at 221–22. To hold otherwise would nonsensically preclude our review of a fundamental tenet—subject matter jurisdiction—underlying an order the legislature has statutorily authorized us to review. We hold that we have jurisdiction in this section 51.014(a)(3) class certification appeal to address whether the statutory probate court has subject matter jurisdiction over the class claims. We address that issue next.

B. Probate Court Jurisdiction

[9] Texas probate jurisdiction is, to say the least, somewhat complex. *Palmer v. Coble Wall Trust Co.*, 851 S.W.2d 178, 180 n. 3 (Tex.1992). A statutory probate court may exercise only that jurisdiction accorded it by statute. *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933–34 (Tex.App.-Austin 1997, no pet.); *City of Beaumont v. West*, 484 S.W.2d 789, 791 (Tex.Civ.App.-Beaumont 1972, writ ref'd n.r.e.). Our analysis begins, therefore, with a review of the jurisdiction accorded to a statutory probate court.

Section 25.003(e) of the Texas Government Code provides that, in a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction. TEX. GOV'T CODE ANN. § 25.003(e) (Vernon Supp.2004). The statutory probate court in Denton County has the general jurisdiction of a probate court as provided in section 25.0021. *Id.* § 25.0635(a). Section 25.0021 then provides that a probate court has the general jurisdiction provided in the Texas Probate Code. *Id.* § 25.0021.

The probate code provides that statutory probate courts have general original jurisdiction over "all applications, petitions, and motions regarding probate and administrations."[3] All courts exercising original probate jurisdiction also have the power to hear "all matters incident to an estate."[4] In proceedings in statutory probate courts, the phrase "incident to an estate" includes:

> the probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land, and

> for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive ***293** trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons. [5]

A statutory probate court also has concurrent jurisdiction with the district court in all actions involving an inter vivos trust, involving a charitable trust, and involving a testamentary trust, regardless of whether the actions involving trusts are "incident to an estate." TEX. PROB.CODE ANN. § 5A(e). Specifically, probate code sections 5A(c), (d), and (e) provide:

> (c) A statutory probate court has concurrent jurisdiction with the district court in all actions:
>
> ....
>
> (2) involving an inter vivos trust;
>
> (3) involving a charitable trust; and
>
> (4) involving a testamentary trust.
>
> (d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.
>
> (e) Subsections (c)(2), (3), and (4) and Subsection (d) apply whether or not the matter is appertaining to or incident to an estate.

Id. § 5A(c)–(e)

Appellees contend that probate code section 5A, subsection (c) controls jurisdiction in this case. Appellees point out that one of the original named plaintiffs, the Bowdle Trust, is an inter vivos trust and assert that this fact triggers probate court jurisdiction under section 5A(c)(3). Alternatively, Appellees contend that the probate court acquired jurisdiction over the class claims under section 5A(d), granting a probate court the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy. [6]

The parties, in addressing probate code section 5A(c)'s grant of jurisdiction to a probate court concurrent with the district court in all actions involving inter vivos trusts, focus on the district court's jurisdiction under trust code section 115.001 and then assume that the probate court's jurisdiction is identical to that of the district court. But more fundamental questions exist: do the class claims for breach of contract, declaratory judgment, breach of agency duty to market, breach of the duty of good faith and fair dealing, action on account, and conspiracy against Shell and Mobil constitute "actions involving an inter vivos trust" as required to trigger statutory probate court jurisdiction under probate code section 5A(c)? Or, alternatively, do the Bowdle Trust's claims authorize the ***294** probate court to exercise ancillary or pendent jurisdiction over the class claims? We apply rules of statutory construction to properly interpret the scope of the statutory grant of jurisdiction.

[10] **[11]** **[12]** **[13]** Statutory interpretation is a question of law. *In re Canales,* 52 S.W.3d 698, 701 (Tex.2001) (orig.proceeding). Our primary goal is to ascertain and effectuate the legislature's intent. *Bragg v. Edwards Aquifer Auth.,* 71 S.W.3d 729, 734 (Tex.2002). In doing so, we begin with the statute's plain language because we assume that the legislature tried to say what it meant and, thus, that its words are the surest guide to its intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 865–66 (Tex.1999). We presume the legislature intended a just and reasonable result in enacting a statute. *In re D.R.L.M.,* 84 S.W.3d 281, 290 (Tex.App.-Fort Worth 2002, pet. denied).

[14] Giving the phrase "actions involving an inter vivos trust" its plain meaning, we do not believe the class claims raised in the underlying suit against Shell and Mobil are actions involving an inter vivos trust. *See* TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998) (requiring words used in statutes to be read in context and construed according to rules of grammar and common usage). The Bowdle Trust's claims may constitute actions involving an inter vivos trust, but the mere fact that an inter vivos trust has the same or similar claims as the members of the class does not transform the class claims into actions that involve the trust under section 5A(c). Thus, the plain language of probate code section 5A(c)'s grant of jurisdiction over "actions involving inter vivos trusts" does not confer probate court jurisdiction over class claims having nothing to do with an inter vivos trust.

Additionally, in interpreting a statute, we may consider the consequences of a particular construction. *Id.* §§ 311.021(3), 311.023(5). To hold, as Appellees request, that probate code section 5A(c) vests the statutory probate court with jurisdiction over class claims simply because an inter vivos trust is a member of the class would circumvent and impermissibly broaden the legislature's intentionally narrow

grant of jurisdiction to statutory probate courts. *See, e.g., Borden Inc. v. Sharp*, 888 S.W.2d 614, 618 (Tex.App.-Austin 1994, writ denied). For these reasons, we hold that the class claims do not *involve* an inter vivos trust as that term is used in section 5A(c). Accordingly, probate code section 5A(c) does not confer jurisdiction upon the statutory probate court over the class claims. [7]

[15] We next address Appellees' contention that, alternatively, the probate court has jurisdiction over the class claims pursuant to probate code section 5A(d). TEX. PROB.CODE ANN. § 5A(d). That section confers ancillary or pendent jurisdiction on a statutory probate court over claims that bear some relationship to the estate pending before the court. *Goodman*, 952 S.W.2d at 932. Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the nonprobate claims and the claims against the estate. *See Sabine Gas Trans. Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 202 (Tex.App.-Houston [14th Dist.] 2000, no pet.). That is, probate courts exercise ***295** their ancillary or pendent jurisdiction over nonprobate matters only when doing so will aid in the efficient administration of an estate pending in the probate court. *Id.*

Here, there is no estate pending in the probate court, no close relationship exists between non-probate class claims and pending probate matters, and resolution of the class claims here will not aid in the efficient administration of anything related to the Bowdle Trust. Rather, the class claims stand independently of, and bear no relationship to, the Bowdle Trust's probate claims. Likewise, resolution of the Bowdle Trust's own claims against Shell and Mobil may aid in the administration of that trust, but the resolution of the class claims will not. Thus, the facts of this case are not analogous to those cases in which a statutory probate court has exercised section 5A(d) ancillary or pendent jurisdiction. [8] *Cf. id.* at 201 (involving exercise of ancillary or pendent jurisdiction over third-party claims against executors of estate pending in probate court); *Goodman*, 952 S.W.2d at 932 (involving exercise of ancillary or pendent jurisdiction over defendant's third-party claims after executrix of estate sued defendant to clear title to property). We hold that section 5A(d) does not confer jurisdiction over class claims on the statutory Denton County probate court.

VI. CONCLUSION

Because the Denton County statutory probate court lacks subject matter jurisdiction over the class claims, the class certification order it entered is void. *See, e.g., Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex.2003) (explaining the difference between void and voidable judgments). We sustain Shell's first issue and Mobil's subissue, vacate the trial court's class certification order, and dismiss this class certification case. *See* TEX.R.APP. P. 43.2(e).

Parallel Citations

166 Oil & Gas Rep. 643

Footnotes

1 The Mobil defendants are Mobil Oil Corporation, Mobil Producing Texas and New Mexico, Inc., and Mobil Cortez Pipeline, Inc.

2 The Shell defendants are Shell Cortez Pipeline Company, Shell CO_2 Company, Ltd. n/k/a Kinder Morgan CO_2 Company, L.P., Shell Oil Company, Shell Western E & P Inc., and SWEPI LP.

3 For the version of probate code section 5 applicable to this case, see Act of May 1, 2001, 77th Leg., R.S., ch. 63 § 1, 2001 Tex. Gen. Laws 104, 106, setting forth and amending the 1999 version of TEX. PROB.CODE ANN. § 5 (current version at TEX. PROB.CODE ANN. § 5 (Vernon Supp.2004)).

4 *Id.* § 1, sec. 5(f).

5 Act of April 26, 1999, 76th Leg. R.S., ch. 64, § 1, 1999 Tex. Gen. Laws 422, 422, setting forth an amending TEX. PROB.CODE ANN. § 5A(b) (current version at TEX. PROB.CODE ANN. § 5A (Vernon Supp.2004)). Although some provisions of probate code section 5 were amended in 2001 and 2003, and some provisions of probate code section 5A were repealed and others were amended in 2003, the enabling legislation for all these amendments provides that the changes in the code apply only to a probate proceeding or other action commenced on or after the effective date of the amendments. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 63, § 3, 2001 Tex. Gen. Laws 104, 106 (amending probate code section 5); Act of June 20, 2003, 78th Leg., R.S. ch. 1060, § 17, 2003 Tex. Gen. Laws 3052, 3057 (amending probate code sections 5 and 5A). Thus, we apply the 1999 version of the probate code which was in effect when the underlying suit was filed, and all references hereinafter to the probate code are to the 1999 version unless otherwise indicated.

6 The class action clearly does not fall within the statutory probate court's general original jurisdiction over "all applications, petitions, and motions regarding probate and administrations." TEX. PROB.CODE ANN. § 5(d). Nor does it fall within a probate court's jurisdiction to hear matters incident to an estate because no estate is pending before the probate court. *Id.* § 5(f). Indeed, Appellees do not argue these inapplicable jurisdictional grounds.

7 Because we hold that the class claims are not "actions involving an inter vivos trust," the statutory probate court does not have concurrent jurisdiction with the district court pursuant to section 5A(c) over the class claims. Therefore we need not address whether any concurrent jurisdiction of the statutory probate court is equivalent to the district court's jurisdiction under the Texas Trust Code. *See* TEX.R.APP. P. 47.1 (requiring appellate court to address only issues necessary to final disposition of appeal).

8 Our research has not revealed any other class litigation in a statutory probate court.

258 S.W.2d 840
Court of Civil Appeals of Texas, Fort Worth.

STANLEY et ux.
v.
COLUMBUS STATE BANK.

No. 15420. | May 22, 1953.
| Rehearing Denied June 12, 1953.

Suit by holder, to which note had been assigned by payee as collateral security, against makers, upon the note. The District Court, Colorado County, Lester Holt, J., overruled makers' plea in abatement, and entered judgment for holder for the amount of the note, with interest, and makers appealed. The Court of Civil Appeals, Boyd, J., held that where makers sued payee, in prior suit in Harris County, to cancel note on ground of fraud, but failed to make holder a party to such suit, holder could maintain action for collection of note in a forum of its own choosing, and the present suit, subsequently brought by holder in Colorado County, was not abated by the Harris County suit, but that, there being an issue between makers and payee, the amount of holder's claim in present suit was determined by the amount of the debt owing to holder by payee, for which debt makers' note was held as collateral.

Judgment reformed and affirmed.

Attorneys and Law Firms

***841** Bracewell & Tunks and Joe H. Reynolds, all of Houston, for appellants.

Massey, Hodges, Moore & Gates, of Columbus, for appellee.

Opinion

BOYD, Justice.

On May 17, 1952, appellants Lincoln H. Stanley and wife, as part consideration for the purchase of an 18-acre tract on which was situated a motel, executed and delivered to Mrs. Monetta V. Daniels a note in the principal sum of $37,722.50, bearing interest from date at five per cent per annum, and at ten per cent per annum after maturity, due in monthly installments of $400.13, beginning July 1, 1952, with accelerated maturity and ten per cent attorney's fees clauses, and secured by vendor's and deed of trust liens on said property. Mrs. Daniels immediately endorsed and assigned the note and liens to appellee Columbus State Bank as collateral security for a note owed by her to the bank in the principal sum of $15,500, dated May 17, 1952, bearing interest from date at five per cent per annum, providing for ten per cent attorney's fees, and due in sixty days.

On June 19, 1952, appellants filed suit in the 133rd District Court of Harris County against Mrs. Daniels, Cause No. G407011, for cancellation of the $37,722.50 note and the liens on the ground of fraud in their procurement, and in the alternative for damages. On July 3, 1952, appellee Bank filed suit in the District Court of Colorado County against appellants for the principal, interest and attorney's fees on said note and for foreclosure of the liens. Appellants filed their original answer in the Colorado County suit on August 22, 1952, being a general denial. Appellants' amended answer filed on September 12, 1952, contained special exceptions, a general denial, and a special answer alleging that the instruments declared upon were procured by fraud and that appellee had knowledge of the fraud at the time it became the holder of the note. Such knowledge was denied by the Bank. Appellants filed a second amended answer on September 24, which consisted of a plea in abatement setting up the pendency of the Harris County suit, special exceptions, general denial, and special answer as in the first amended answer. On September 25, the plea in abatement was heard and overruled, and the cause on its merits was tried before the court on September 26, resulting in a judgment for appellee against appellants for $42,233.73, with interest from that date at ten per cent per annum, and for foreclosure of the vendor's lien and deed of trust lien on the property. This is an appeal from that judgment.

Appellants' first point is that the court erred in overruling the plea in abatement. The question as to whether the pendency of another cause will abate a suit involving the same subject matter and between substantially the same parties has been many times ***842** before our courts, and before the decision by the Supreme Court in Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063, there was a lack of uniformity in the holdings. In some cases it was held that the commonlaw doctrine that a pending suit between two parties would abate a second suit between the same parties on the same cause of action was not the rule in Texas. Garza & Co. v. Jesse French Piano & Organ Co., 59 Tex.Civ.App. 590, 126 S.W. 906; Liberty Milling Co. v. Continental Gin Co., Tex.Civ.App., 132 S.W. 856; Cole v. State ex rel. Cobolini, Tex.Civ.App., 163 S.W. 353; Hartzog v. Seeger Coal Co., Tex.Civ.App., 163 S.W. 1055. The plea of another action pending has been held to be unavailing where the plaintiff in one suit was the defendant in the other. McCoy

v. Bankers' Trust Co., Tex.Civ.App., 200 S.W. 1138, citing 1 C.J., p. 82, and Standard Encyc. of Proc., p. 1018. See, also, 1 C.J.S., Abatement and Revival, s 61. In some cases where the common-law doctrine has been recognized as in force in Texas, the courts have refused to apply it where one suit was for debt and foreclosure and the other was a suit to cancel the debt and lien. Garza v. Sullivan, Tex.Civ.App., 27 S.W. 1032.

Appellants strongly rely upon the decision in Cleveland v. Ward, supra, as authority for holding that their plea in abatement should have been sustained. In that case, a suit was filed in the District Court of Johnson County to cancel certain notes and liens. The defendant in the Johnson County case, along with others who claimed to be holders of some of the notes involved, thereafter filed a suit in a District Court of Dallas County to collect the notes and foreclose the liens. A plea in abatement was filed in the Dallas County case setting up the pendency of the suit in Johnson County. Before the plea in abatement was heard, the plaintiffs in the Johnson County case amended and made all the plaintiffs in the Dallas County District Court parties defendant in the Johnson County case. The Johnson County plaintiffs having finally sued all the Dallas County plaintiffs in Johnson County, the Supreme Court held that the Johnson County District Court had jurisdiction of the subject matter and all the parties, and the power and right to proceed to judgment, and the plea in abatement was therefore good. The Supreme Court said, (116 Tex. 1, 285 S.W. 1070), 'The district court of Johnson county, then, in permitting the pleadings in that court to be amended so as to bring in parties interested in and to be affected by the decree sought, acted clearly within its express statutory jurisdiction and power to permit additional parties to be made 'when they are necessary or proper parties to the suit.'

'The case therefore stands in that court, in so far as any jurisdictional question is concerned, precisely upon the same basis as if the original pleading filed had embraced fully the declarations of the last amendment, and had made all of those who are now parties to the suit parties in the first instance.

'The reason of the abatement of the subsequent suit by the first, where the latter is filed in a court of competent jurisdiction, and that jurisdiction has attached, is that, when the suit is brought, it is thereby segregated as it were from the general class to which it belonged, and withdrawn from the authority and jurisidction of all other courts of co-ordinate power. * * *' The opinion quotes from State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S.W. 487, 15 L.R.A.,N.S., 963, as follows:

"It is the possession of jurisdiction of the court over the particular case in litigation that segregates and takes it from the general classes of cases to which it belongs which excludes the jurisdiction of another court of co-ordinate jurisdiction from attaching to the same cause; and the reason for this is apparent, because it no longer belonged to the class of cases over which the latter court has jurisdiction at the time the second suit was filed therein. It had become extinct or ceased to exist as a cause of action so far as the latter court was concerned, and had become merged, as it were, into an action pending in another court."

[1] In the case before us, the only defendant in appellants' suit in Harris County was Mrs. Daniels, the payee of the note. The Bank, the holder of the note, had a right to file a suit for its collection, and, not ***843** being a party to the Harris County suit, it had a right to choose the forum in which it would litigate. Had appellants amended and made the Bank a party to the Harris County suit, the situation then might have been controlled by the decision in Cleveland v. Ward. We know of no authority for the proposition that the holder of a note, who is not an actual party to a former suit by the maker against the payee to cancel the note, although he could have properly been made a party, cannot maintain against the plaintiff in the former suit a cause in another court for collection of the note. If the Harris County suit had been tried and had resulted in a judgment cancelling the note and liens as against Mrs. Daniels, the Bank could still maintain suit upon the debt and liens to the extent of its interest in the subject matter. Hickman v. Cooper, Tex.Civ.App., 210 S.W.2d 858, writ refused, n. r. e.; McKenzie v. Frey, Tex.Civ.App., 198 S.W. 1009.

[2] **[3]** **[4]** We are of the opinion that the District Court of Harris County did not have jurisdiction of the Bank's cause of action, the Bank not having been made a party to that suit. Jurisdiction is the power of a court to hear and determine a controversy between parties to a suit. Farmers' Nat. Bank of Stephenville v. Daggett, Tex.Com.App., 2 S.W.2d 834. 'There are three elements of jurisdiction: (1) The court must have cognizance of the class of cases to which the one to be adjudicated belongs; (2) the proper parties must be present; (3) the point decided must be in substance and in effect within the issue. * * *' Stewart v. Moore, Tex.Com.App., 291 S.W. 886, 891; see also 21 C.J.S., Courts, s 35a, page 43. Jurisdiction of the person of a defendant is acquired by service of such process as the law provides, or by his voluntary appearance, or by his waiver of service. Glass v. Smith, 66 Tex. 548, 2 S.W. 195; 15 C.J., p. 786, sec. 82; Walker v. Koger, Tex.Civ.App., 99 S.W.2d 1034, writ dismissed; Lipscomb v. McCart, Tex.Civ.App., 295 S.W. 245; Swartz v.

Caudill, 279 Ky. 206, 130 S.W.2d 80. Appellants' first point is overruled.

[5] Appellants' next contention is that the court erred in overruling their exceptions to appellee's petition because of the failure to allege that it had no other security for its debt from Mrs. Daniels, and that its debt is not collectible otherwise than by this suit. However, appellee's second supplemental petition alleged that it had no other security for Mrs. Daniels' note and she owns no property out of which the debt can be collected and appellee would lose its debt unless allowed to recover in this cause. Although this pleading amounted to an amended rather than a supplemental petition, no complaint was made of the misnomer, and we think the allegation was sufficient, and the court's action in overruling the exceptions was not error.

[6] **[7]** Appellants' final point is that the court erred in granting judgment for more than the amount of Mrs. Daniels' indebtedness to the Bank. The point is sustained. When there is an issue between the maker and the payee of a note, the holder of the note pledged as collateral security for a debt is protected only to the extent of the indebtedness thereby secured. Blackburn v. Temple Nat. Bank, Tex.Civ.App., 216 S.W.2d 233, writ refused, n. r. e.; Iowa City State Bank v. Friar, Tex.Civ.App., 167 S.W. 261; Live Stock State Bank v. Locke, Tex.Civ.App., 277 S.W. 405, writ refused; City Nat. Bank of Galveston v. Pearce, Tex.Civ.App., 291 S.W. 291; Wright v. Hardie, 88 Tex. 653, 32 S.W. 885; Harrington v. H. B. Claflin & Co., 91 Tex. 294, 42 S.W. 1055; Van Winkle Gin & Machinery Co. v. Citizens' Bank of Buffalo, 89 Tex. 147, 33 S.W. 862; Wharton v. Washington County State Bank, Tex.Civ.App., 153 S.W. 699. In Iowa City State Bank v. Friar, supra, it is said (167 S.W. 263): 'The innocent holder of a negotiable note as collateral security, to which there is a valid defense against the original payee, is protected, but only to the extent of his interest-the amount of the debt for which it is held as collateral.' Since the debt owing to appellee Bank by Mrs. Daniels determines the amount of its claim, appellee can recover for interest only as provided for in its note made by Mrs. Daniels, and not as provided for in the note executed by appellants. Blackburn v. Temple Nat. Bank, supra.

***844** **[8]** In this case, it is immaterial that appellants have not established their right to cancel the note as against Mrs. Daniels. That issue can only be determined by the District Court of Harris County. Although the Bank alleged that no fraud had been practiced upon appellants in the procurement of the note, and that if they ever had the right to rescind, they lost it by continuing to use the property and by renting it to other persons, we do not construe the trial court's judgment as a holding that those issues were resolved against appellants. That cause of action having been 'segregated' by the filing of the Harris County suit and 'withdrawn from the authority and jurisdiction of all other courts of co-ordinate power,' the 133rd District Court of Harris County alone had jurisdiction of that cause. Cleveland v. Ward, supra; Conn v. Campbell, 119 Tex. 82, 24 S.W.2d 813.

A computation will show that the total amount due on Mrs. Daniels' note at the date of the judgment, including principal, interest and attorney's fees, was $17,355.46. The judgment of the trial court is reformed to allow recovery by appellee for its debt in the amount of $17,355.46, with interest from September 26, 1952, at five per cent per annum; in all other respects the judgment is affirmed.

The costs of the appeal are adjudged against appellee.

115 S.W.3d 267
Court of Appeals of Texas,
Corpus Christi–Edinburg.

Charles WARD, III, Appellant,
v.
Charles MALONE and Diana Malone, Appellees.

No. 13–02–00587–CV. | Aug. 28, 2003.

One party to contract for deed (plaintiff) filed two forcible detainer suits against other parties (defendants), alleging default under contract. The Justice Court granted relief on one action and denied relief on other. Judgments were appealed and consolidated. The County Court of Law No. 5, Nueces County, Carl Eric Lewis, J., denied relief and granted defendants attorney fees. Plaintiff appealed. The Court of Appeals, Hinojosa, J., held that Justice Court and County Court at Law would have been required to determine issue of title to resolve right to immediate possession of real property, and thus, those courts lacked jurisdiction to consider case.

Dismissed.

Attorneys and Law Firms

***268** Bradford M. Condit, Corpus Christi, for Appellant.

Ward H. Thomas, Jr., Corpus Christi, for Appellees.

***269** Before Justices HINOJOSA, YAÑEZ, and GARZA.

Opinion

OPINION

Opinion by Justice HINOJOSA.

Appellant, Charles Ward, III, filed two forcible detainer suits against appellees, Charles Malone and Diana Malone, in justice court following appellees' alleged default under a contract for deed. After the justice court granted relief in one action and denied relief in the other, the judgments were appealed to the county court at law and consolidated. The county court at law denied appellant relief and granted appellees attorney's fees. In two issues, appellant contends the trial court erred in denying his suit for forcible detainer and awarding attorney's fees to appellees. We dismiss the appeal.

[1] Before we reach the merits of this case, we must first consider the matter of the trial court's jurisdiction, as well as our own. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex.1993). In considering the question of the trial court's jurisdiction, we note that subject matter jurisdiction is never presumed and cannot be waived. *Id.* at 443–44; *Garcia–Marroquin v. Nueces County Bail Bond Bd.*, 1 S.W.3d 366, 373 (Tex.App.-Corpus Christi 1999, no pet.). Furthermore, it is appropriate for this Court to raise the issue of subject matter jurisdiction sua sponte and address it for the first time on appeal. *Tex. Ass'n of Bus.*, 852 S.W.2d at 445–46; *Condit v. Nueces County*, 976 S.W.2d 278, 279 (Tex.App.-Corpus Christi 1998, no pet.). Appellate court jurisdiction of the merits of a case extends no further than that of the court from which the appeal is taken. *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). If the trial court lacked jurisdiction, then the appellate court only has jurisdiction to set the judgment aside and dismiss the cause. *Id.* It is incumbent upon the pleading party to allege sufficient facts to affirmatively show that the trial court has subject matter jurisdiction. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *Condit*, 976 S.W.2d at 280. When we review subject matter jurisdiction sua sponte, this Court construes the pleading party's allegations in his favor, and where necessary, we examine the entire record to ascertain whether there is any evidence establishing subject matter jurisdiction. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *Condit*, 976 S.W.2d at 280.

[2] Jurisdiction over forcible detainer actions is expressly given to the justice court of the precinct where the property is located and, on appeal, to the county court for a trial de novo. *See* TEX. PROP.CODE ANN. § 24.004 (Vernon 2000); *Aguilar v. Weber*, 72 S.W.3d 729, 731 (Tex.App.-Waco 2002, no pet.); *Home Sav. Ass'n v. Ramirez*, 600 S.W.2d 911, 913 (Tex.Civ.App.-Corpus Christi 1980, writ ref'd n.r.e.). The disposition of this case depends on the extent to which a county court has appellate jurisdiction.

[3] **[4]** The appellate jurisdiction of a statutory county court is confined to the jurisdictional limits of the justice court, and the county court has no jurisdiction over an appeal unless the justice court had jurisdiction. *Aguilar*, 72 S.W.3d at 731. A justice court is expressly denied jurisdiction to determine or adjudicate title to land. TEX. GOV'T CODE ANN. § 27.031(b) (Vernon Supp.2003); *see Ramirez*, 600 S.W.2d at 913. Thus, neither a justice court, nor a county court on appeal, has jurisdiction to determine the issues of title to real property in a forcible detainer suit. *See* TEX.R. CIV. P.

746; ***270** *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

[5] **[6]** **[7]** The forcible detainer action is the procedure by which the right to immediate possession of real property is determined. *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex.App.-Dallas 2001, no pet.) (citing *Kennedy v. Highland Hills Apartments*, 905 S.W.2d 325, 326 (Tex.App.-Dallas 1995, no writ)). It is a special proceeding governed by particular statutes and rules. *Rice*, 51 S.W.3d at 709. It was created to provide a speedy, simple and inexpensive means for resolving the question of the right to possession of real property. *Id.* To preserve the simplicity and speedy nature of the remedy, the applicable rule of civil procedure provides that "the only issue shall be as to the right to actual possession; and the merits of the title shall not be adjudicated." TEX.R. CIV. P. 746; *Rice*, 51 S.W.3d at 705; *Johnson v. Fellowship Baptist Church*, 627 S.W.2d 203, 204 (Tex.App.-Corpus Christi 1981, no writ). Thus, the sole issue in a forcible detainer action is who has the right to immediate possession of the premises. *Fandey v. Lee*, 880 S.W.2d 164, 168 (Tex.App.-El Paso 1994, writ denied); *Cuellar v. Martinez*, 625 S.W.2d 3, 5 (Tex.Civ.App.-San Antonio 1981, no writ); *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493, 495 (Tex.Civ.App.-Dallas 1977), *writ ref'd n.r.e. per curiam*, 568 S.W.2d 661 (Tex.1978).

[8] **[9]** **[10]** To prevail in a forcible detainer action, a plaintiff is not required to prove title but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Rice*, 51 S.W.3d at 709; *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex.App.-Houston [14th Dist.] 1993, no writ). However, where the right to immediate possession necessarily requires resolution of a title dispute, the justice court has no jurisdiction to enter a judgment and may be enjoined from doing so. *Rice*, 51 S.W.3d at 709; *Haith v. Drake*, 596 S.W.2d 194, 196 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.); *see also Rodriguez v. Sullivan*, 484 S.W.2d 592, 593 (Tex.Civ.App.-El Paso 1972, no writ) (justice court judgment void when possession depended on whether defendant complied with contract for deed); *Am. Spiritualist Ass'n v. Ravkind*, 313 S.W.2d 121, 124 (Tex.Civ.App.-Dallas 1958, writ ref'd n.r.e.) (same). Because a forcible detainer action is not exclusive, but is cumulative of any other remedy a party may have in the courts of this state, the displaced party is entitled to bring a separate suit in the district court to determine the issue of title. *Scott v. Hewitt*, 127 Tex. 31, 35, 90 S.W.2d 816, 818–19 (1936); *Rice*, 51 S.W.3d at 709; *Ramirez*, 600 S.W.2d at 913; *Martinez v. Beasley*, 572 S.W.2d 83, 85 (Tex.Civ.App.-Corpus Christi 1978, no writ); *see also Juneman v. Franklin*, 67 Tex. 411, 3 S.W. 562, 563 (1887) (statute which created forcible detainer action in justice courts did not impliedly abrogate landlord's common-law remedies, but created additional summary method of regaining possession of premises).

[11] **[12]** In most situations, the parties in a forcible detainer suit are in a landlord-tenant relationship. *Home Sav. Ass'n*, 600 S.W.2d at 913. One indication that a justice court, and county court on appeal, is called on to adjudicate title to real estate in a forcible detainer case—and, thus exceed its jurisdiction—is when a landlord-tenant relationship is lacking. *Aguilar*, 72 S.W.3d at 733; *Rice*, 51 S.W.3d at 712.

[13] **[14]** **[15]** In the case before us, appellant and appellees entered into a contract for deed. A contract for deed is an agreement by a seller to deliver a deed to property once certain conditions have been ***271** met. *Graves v. Diehl*, 958 S.W.2d 468, 470 (Tex.App.-Houston [14th Dist.] 1997, no pet.). These contracts typically provide that upon the making of a down payment, the buyer is entitled to immediate possession of the property; however, the seller is not obliged to deliver legal title to the property until the buyer pays the purchase price in full. *See id.* at 471; *see also Salinas v. Beaudrie*, 960 S.W.2d 314, 319 (Tex.App.-Corpus Christi 1997, no pet.). The purchase price is typically paid in installments over a course of several years. *Graves*, 958 S.W.2d at 471. The legal effect of the contract is the same as that of a deed with a retained vendor's lien. *See Bucher v. Employers Cas. Co.*, 409 S.W.2d 583, 584–85 (Tex.Civ.App.-Fort Worth 1966, no writ). Several courts have held that despite the existence of a contract for purchase, or contract for deed, the justice court and county court at law were not required to determine the issue of title to resolve the right to immediate possession, and thus, did not exceed their jurisdiction to issue a writ of possession. [1] However, in all of those cases, the contracts at issue provided for a landlord-tenant relationship in the event of default, provided that the buyers would become tenants-at-sufferance in the event of default, or provided that the buyer was subject to a forcible detainer action upon default.

Here, the contract for deed does not provide that a default creates a landlord-tenant relationship or tenancy-at-sufferance. Nor does the contract provide that in the event of a default, appellant can institute a detainer suit to establish possession.

Because the justice court and county court at law would be required to determine the issue of title to resolve the right to immediate possession, we conclude they lacked jurisdiction to consider this case. *See Aguilar*, 72 S.W.3d at 735; *Mitchell*, 911 S.W.2d at 171; *Am. Spiritualist Ass'n*, 313 S.W.2d at 125.

Having concluded that the lower courts lacked jurisdiction to consider this case, we need not address the merits of this appeal.

Accordingly, we set aside the judgment of the trial court and dismiss this appeal for want of jurisdiction.

Footnotes

1 *See Rice v. Pinney*, 51 S.W.3d 705, 712 (Tex.App.-Dallas 2001, no pet.); *Martinez v. Daccarett*, 865 S.W.2d 161, 163–64 (Tex.App.-Corpus Christi 1993, no pet.); *Home Sav. Ass'n v. Ramirez*, 600 S.W.2d 911, 913–14 (Tex.Civ.App.-Corpus Christi 1980, writ ref'd n.r.e.); *Haith v. Drake*, 596 S.W.2d 194, 196 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.).

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter C. Courts of Appeals (Refs & Annos)

V.T.C.A., Government Code § 22.220

§ 22.220. Civil Jurisdiction

Effective: September 1, 2009
Currentness

(a) Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs.

(b) If a court of appeals having jurisdiction in a case, matter, or controversy that requires immediate action is unable to take immediate action because the illness, absence, or unavailability of the justices causes fewer than three members of the court to be present, the nearest available court of appeals, under rules prescribed by the supreme court, may take the action required in the case, matter, or controversy.

(c) Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

Credits
Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 2009, 81st Leg., ch. 1351, § 3, eff. Sept. 1, 2009.

Notes of Decisions (388)

V. T. C. A., Government Code § 22.220, TX GOVT § 22.220
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 7. Regulation of Land Use, Structures, Businesses, and Related Activities
Subtitle A. Municipal Regulatory Authority
Chapter 211. Municipal Zoning Authority (Refs & Annos)
Subchapter A. General Zoning Regulations (Refs & Annos)

V.T.C.A., Local Government Code § 211.009

§ 211.009. Authority of Board

Currentness

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and

(4) hear and decide other matters authorized by an ordinance adopted under this subchapter.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

(c) The concurring vote of 75 percent of the members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 126, § 2, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 724, § 2, eff. Aug. 28, 1995.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits as unnecessary the source law reference to the exercise of board authority "in conformity with the provisions of this Act," since the revised law is drafted to conform to the act.

Notes of Decisions (38)

V. T. C. A., Local Government Code § 211.009, TX LOCAL GOVT § 211.009
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 7. Regulation of Land Use, Structures, Businesses, and Related Activities
Subtitle A. Municipal Regulatory Authority
Chapter 211. Municipal Zoning Authority (Refs & Annos)
Subchapter A. General Zoning Regulations (Refs & Annos)

V.T.C.A., Local Government Code § 211.011

§ 211.011. Judicial Review of Board Decision

Currentness

(a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, § 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 646, § 1, eff. Aug. 30, 1999.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits as unnecessary the statement that persons may “jointly or severally” seek judicial review because other provisions adequately govern the filing of suits jointly or severally. For example, see Rule 40, Texas Rules of Civil Procedure.

Notes of Decisions (115)

V. T. C. A., Local Government Code § 211.011, TX LOCAL GOVT § 211.011
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)
Rule 34. Appellate Record (Refs & Annos)

TX Rules App.Proc., Rule 34.1

34.1. Contents

Currentness

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Even if more than one notice of appeal is filed, there should be only one appellate record in a case.

Credits
Eff. Sept. 1, 1997.

Notes of Decisions (214)

Rules App. Proc., Rule 34.1, TX R APP Rule 34.1
Current with amendments received through April 15, 2013

End of Document