NO. 12-21-00083-CV
Court of Appeals of Texas, Tyler.

In re Rushing

644 S.W.3d 383 (Tex. App. 2022)
Decided Apr 14, 2022

NO. 12-21-00083-CV

04-14-2022

In the MATTER OF the ESTATE OF Donnie M. RUSHING, Deceased

Amy Boudreaux, for Appellant. Courtney A. Harris, Daingerfield, for Appellee.

Brian Hoyle, Justice

Amy Boudreaux, for Appellant.

Courtney A. Harris, Daingerfield, for Appellee.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

OPINION

Brian Hoyle, Justice

Jodie Velin appeals the trial court's order imposing a constructive trust against her for the proceeds of her deceased ex-husband's Veterans' Group Life Insurance (VGLI) policy naming her as the beneficiary. Velin raises three issues on appeal. We vacate the order for want of jurisdiction, render judgment dismissing in part, and remand in part.

BACKGROUND

Bradley Rushing is the administrator of the estate of Donnie M. Rushing, Velin's deceased ex-husband. After initiating probate proceedings in the Upshur County Court, Rushing learned that Velin was named the beneficiary of the deceased's VGLI policy with $200,000 in benefits payable to her. VGLI policies are governed by federal law, namely the Servicemembers' Group Life Insurance Act (SGLIA).[1] Rushing also learned that Velin generally disclaimed any interest in decedent's life insurance policies in their May 2002 divorce decree granted by the 76th/276th Judicial District Court in Titus County, Texas.[2]

[1] *See* 38 U.S.C. §§ 1965 -1980a.

[2] The divorce decree recites that it was issued by the "76th/276th Judicial District Court of Titus County, Texas." The record is unclear as to which specific court issued the decree.

Rushing filed a "Motion to Enforce Court Order for Property and Create Constructive Trust" against Velin in the Upshur County Court as part of the probate proceeding. In his motion, Rushing sought to enforce the waiver provision of the divorce decree between Velin and the decedent and impose a constructive trust over the

VGLI death benefit. Rushing alleged in the motion that the decedent believed Velin had been removed as the beneficiary of the VGLI policy, but that Prudential Life Insurance paid at least $55,000 under the policy to her. Rushing did not assert a claim against Prudential for wrongful payment, but instead requested a contempt finding and constructive trust against Velin for wrongfully accepting the proceeds of the policy. Velin, who was not a party to the probate proceeding, objected to being directed into court by way of the motion instead of being sued, and she alleged that she was deprived of her right to remove the matter to federal court. Nevertheless, she complied with the show cause order and opposed the motion.

After a hearing, the trial court granted Rushing's motion, found that it had jurisdiction under its pendent and ancillary jurisdiction, and imposed a constructive trust against Velin, requiring that she pay the full $200,000 in
386 proceeds from the VGLI policy into the court's registry.[3] Alternatively, *386 the court authorized Velin to execute a release with Prudential designating that all unreceived payments be directly paid by it into the court's registry as a lump sum. This appeal followed.

[3] The record does not contain a reporter's record transcript from the hearing, even though the parties agree that a hearing took place.

JURISDICTION

As part of Velin's third issue, she contends that the Upshur County Court lacked subject matter jurisdiction.

Standard of Review

Subject matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 443 (Tex. 1993). Subject matter jurisdiction is never presumed and cannot be waived. *Id.* at 443–44. Subject matter jurisdiction is an issue that may be raised for the first time on appeal. *Id.* at 445. Because subject matter jurisdiction is a question of law, we review it de novo. *Tex. Dep't of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004).

We review the plaintiff's pleadings to determine whether he "affirmatively demonstrate[d] the court's jurisdiction to hear the cause." *Tex. Ass'n of Bus.* , 852 S.W.2d at 446 ; *see Ward v. Malone* , 115 S.W.3d 267, 269 (Tex. App.—Corpus Christi 2003, pet. denied) ("It is incumbent upon the pleading party to allege sufficient facts to affirmatively show that the trial court has subject matter jurisdiction."). We construe the pleadings in favor of the plaintiff and look to the pleader's intent. *Miranda* , 133 S.W.3d at 226 ; *Tex. Ass'n of Bus.* , 852 S.W.2d at 446. Regarding a plaintiff's responsibility to plead an amount-in-controversy that falls within a court's prescribed jurisdictional limits, it is presumed a trial court has jurisdiction "unless lack of jurisdiction affirmatively appears on the face of the petition." *Peek v. Equip. Serv. Co. of San Antonio* , 779 S.W.2d 802, 804 (Tex. 1989) (citation omitted); *see also Dowell v. Quiroz* , 462 S.W.3d 578, 582 (Tex. App.—Corpus Christi 2015, no pet.) (describing standard of review in similar case).

Applicable Law

Life insurance policies that are contractual in nature, become effective at the decedent's death, and control the disposition of the asset by reason of the death, along with the proceeds paid to the named beneficiary therefrom, are nontestamentary transfers and nonprobate assets that pass according to their contractual terms. *See* TEX. ESTATES CODE ANN. § 111.052(a)(1)(A), (b) (West 2020). Nonprobate assets such as life insurance policies are those that are not subject to disposition by will or the laws of intestate succession. *See Valdez v. Ramirez* , 574 S.W.2d 748, 750 (Tex. 1978) ; *In re Estate of Perez-Muzza* , 446 S.W.3d 415, 422 (Tex. App.—San Antonio 2014, pet. denied) (stating that proceeds from nontestamentary transfer pass outside

probate proceedings, decedent's personal representative has no authority with respect to them, and no rights to proceeds accrue to those who would take under decedent's will or through the laws of intestacy). However, any person, including a personal representative, asserting an interest in a life insurance policy, shall have access to Texas courts for a judicial determination of (1) whether a nontestamentary transfer of the assets or interests has occurred; or (2) the ownership of the assets or interests following a possible nontestamentary transfer.[4] *See* TEX. ESTATES CODE ANN. § 111.054(c) *387 (West 2020). It is axiomatic that the Texas court be a proper court with subject matter jurisdiction.

387

[4] This provision applies if more than 50% of the interests under the life insurance policy are owned, immediately prior to the transfer, by one or more persons domiciled in Texas, as is the case here. *See* Tex. Estates Code Ann. § 111.054(a) (West 2020).

"Texas probate jurisdiction is, to say the least, somewhat complex." *Palmer v. Coble Wall Tr. Co.* , 851 S.W.2d 178, 180 n.3 (Tex. 1992). Each county has a constitutional county court, which is the office of the chief administrator of the county. *See* TEX. CONST. art. V, §§ 15 - 16. A county court has the jurisdiction conferred by the Texas Constitution and statutes. *See* TEX. GOV'T CODE ANN. § 26.041 (West 2019). The Upshur County Court has the general jurisdiction of a probate court and has concurrent jurisdiction with the district court in all other matters over which county courts are given jurisdiction by the constitution and general laws of this state. *See id.* § 26.330(a) (West 2019).

Courts such as the Upshur County Court have original probate jurisdiction over "probate proceedings" and "matters related to a probate proceeding." *See* TEX. EST. CODE ANN. § 32.001(a) (West 2020). The term "probate proceeding" is defined by statute as eight enumerated matters such as the probate of a will, issuance of letters testamentary, an heirship determination, and various other matters, none of which apply here. *See id.* § 31.001(a) (West 2020). "A matter related to a probate proceeding" is also statutorily defined, and such matters are determined by the type of trial court considering the matter. *See generally id.* § 31.002 (West 2020). As relevant here, in a county such as Upshur County without a county court at law or statutory probate court, the matters listed in Section 31.002(a) are "matters related to a probate proceeding," which include the following:

> (1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;
>
> (2) an action against a surety of a personal representative or former personal representative;
>
> (3) a claim brought by a personal representative on behalf of an estate;
>
> (4) an action brought against a personal representative in the representative's capacity as personal representative;
>
> (5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and
>
> (6) an action for trial of the right of property that is estate property.

Id. § 31.002(a). The amount-in-controversy limits do not limit the county court's original probate jurisdiction. *See Womble v. Atkins* , 160 Tex. 363, 331 S.W.2d 294, 299 (1960).

Probate courts also have "pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." TEX. EST. CODE ANN. § 32.001(b). "Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the nonprobate claims and the claims against the estate." *Jurgens v. Martin* , 631 S.W.3d 385, 400 (Tex. App.—Eastland 2021, no pet.) (quoting *Shell Cortez Pipeline Co. v. Shores* , 127 S.W.3d 286, 294 (Tex. App.—Fort Worth 2004, no pet.)); *see also Narvaez v. Powell* , 564 S.W.3d 49, 57 (Tex. App.—El Paso 2018, no pet.) ; *Sabine Gas Trans. Co. v. Winnie Pipeline Co.* , 15 S.W.3d 199, 202 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In reviewing a probate court's exercise of pendent and ancillary jurisdiction, "the fundamental question ... is whether there was a close relationship between [the non-probate claims and the probate proceeding] such that the probate court's exercise of jurisdiction will aid it in the efficient *388 administration of the [estate]." *In re Estate of Hallmark* , 629 S.W.3d 433, 438 (Tex. App. —Eastland 2020, no pet.) (quoting *Schuchmann v. Schuchmann* , 193 S.W.3d 598, 603 (Tex. App.—Fort Worth 2006, pet. denied)). A probate court has jurisdiction to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction. *Id.* "Pendent and ancillary" claims are nonprobate claims. *Jurgens* , 631 S.W.3d at 400 (citing *Shores* , 127 S.W.3d at 294).

In contrast to a pure probate proceeding, the amount-in-controversy limits of Texas Government Code Section 26.042 apply to pendent and ancillary claims brought in constitutional county courts because they are nonprobate claims resolved by a probate court when doing so will aid in the efficient administration of the estate. *See, e.g.* , *id.* (citing *Dowell* , 462 S.W.3d at 585–86). That section provides that a county court has concurrent jurisdiction with the justice courts in civil cases in which the matter in controversy exceeds $200 in value but does not exceed $20,000, exclusive of interest. TEX. GOV'T CODE ANN. § 26.042(a) (West Supp. 2021). Similarly, a county court has concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds $500 but does not exceed $5,000, exclusive of interest. *Id.* § 26.042(d). Among other types of actions not relevant here, a county court does not have jurisdiction in a suit for divorce. *Id.* § 26.043(4) (West 2019).

Discussion

The initial proceeding giving rise to this claim was in the constitutional county court of Upshur County, Texas, with the court exercising its original probate jurisdiction. Thus, under the current jurisdictional framework, the "motion" must qualify as a "probate proceeding," a "matter related to a probate proceeding," or the court must have proper "ancillary or pendent jurisdiction" over the claim. We hold that this claim qualifies as none of these, and the trial court was without jurisdiction to resolve the matter.

As we have stated, federally controlled VGLI life insurance policies such as the policy at issue here are nontestamentary, nonprobate assets. *See* TEX. ESTATES CODE ANN. § 111.052(a)(1)(A), (b) ; *Valdez* , 574 S.W.2d at 750 ; *In re Estate of Perez-Muzza* , 446 S.W.3d at 422. Therefore, by its very nature, the disposition of this policy's proceeds is a nonprobate matter and does not fall within any of the enumerated "probate proceeding" matters identified in the statute. *See* TEX. EST. CODE ANN. §§ 31.001, 32.001(a). Furthermore, the claim is not a "matter related to a probate proceeding," because as a nonprobate asset not belonging to the decedent's estate, the VGLI policy and claim concerning its disposition does not fall within any of the matters identified within the "matters related to probate proceedings" statute. *See* TEX. EST. CODE ANN. §§ 31.002(a), 32.001(a) (i.e. this is not a claim against the personal representative or his surety based on the performance of his duties in his capacity as personal representative, nor is it a claim brought on behalf of an estate for trial of title to real property or other estate property). Accordingly, since Rushing attempted to litigate the disposition of this nonprobate asset as part of the underlying probate proceeding in the Upshur County Court, the court could have exercised jurisdiction only as a nonprobate claim derived from the court's pendent

and ancillary jurisdiction. Indeed, the Upshur County Court recited its pendent and ancillary jurisdiction as the
389 basis for its jurisdiction in the order granting Rushing's motion.*389 As previously discussed, a court exercising its probate jurisdiction may exercise its pendent or ancillary jurisdiction over nonprobate matters when there is a close relationship between the probate and nonprobate claims and doing so will aid in the efficient administration of the estate. *See Jurgens* , 631 S.W.3d at 400 ; *In re Estate of Hallmark* , 629 S.W.3d at 438. We question whether there is such a nexus here. *See Schuchmann* , 193 S.W.3d at 603 (holding statutory probate court erred in exercising pendent and ancillary jurisdiction over postdivorce action for division of community property when there was no relationship between postdivorce action and earlier inter vivos trust suit); *but see* TEX. ESTATES CODE ANN. § 111.054(c). We need not resolve this issue, because even if such a close relationship existed between the administration of the decedent's estate and the disposition of this nonprobate asset, the Upshur County Court lacked subject matter jurisdiction on an independent ground, namely that Rushing's pleading affirmatively negated jurisdiction when he sought the proceeds of the VGLI policy in the amount of $200,000. *See Jurgens* , 631 S.W.3d at 400 (describing generally how amount-in-controversy limits apply to pendent and ancillary claims); *In re Estate of Hallmark* , 629 S.W.3d at 438 (holding county court at law sitting as probate court did not have ancillary and pendent jurisdiction to create rehabilitative receivership for estate property, because only district court could make such order under applicable statute granting jurisdiction); *Dowell* , 462 S.W.3d at 585-86 (holding plaintiff's survival and wrongful death claims attempted to be brought into probate proceeding barred because court's jurisdiction did not extend to those types of claims and also because plaintiff pleaded in excess of maximum amount-in-controversy limits of court's general civil jurisdiction as ancillary claims).

Constitutional county courts such as the Upshur County Court have only concurrent jurisdiction in general civil matters with district courts and justice courts for amount-in-controversy of $5,000 and $20,000 respectively, exclusive of interest. *See* TEX. GOV'T CODE ANN. §§ 26.042 (describing constitutional county court jurisdiction generally, along with amount-in-controversy limitations for civil matters), 26.330(a) (detailing Upshur County Court jurisdiction). Rushing's pleading requests liquidated damages for the VGLI policy in the amount of $200,000, which is far in excess of the Upshur County Court's jurisdictional limits. Accordingly, the Upshur County Court's lack of jurisdiction affirmatively appears on the face of Rushing's motion, which was purportedly the operative pleading against Velin. *See Dowell* , 462 S.W.3d at 582 (citing *Peek* , 779 S.W.2d at 804).

We are aware that some cases hold that subject matter jurisdiction cannot be lost when circumstances in the case increased damages beyond the amount-in-controversy requirements. *See, e.g.* , *Mr. W. Fireworks, Inc. v. Mitchell* , 622 S.W.2d 576, 577 (Tex. 1981) (per curiam) (trial court had jurisdiction to render judgment greater than jurisdictional limits since attorney's fees increased during trial of case); *Flynt v. Garcia* , 587 S.W.2d 109, 109–110 (Tex. 1979) (per curiam) (trial court did not lose jurisdiction over case despite fact that amount-in-controversy grew beyond the court's jurisdictional limits). However, one of our sister courts distinguished the holdings in those cases because they involved original jurisdiction, rather than pendent and ancillary jurisdiction, as is the case here. *See Goodman v. Summit at W. Rim, Ltd.* , 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.). Moreover, Rushing's original motion asserting the claim against Velin affirmatively
390 exceeded the limits of *390 the Upshur County Court's jurisdiction on its face, another distinguishing characteristic of this case and those in *Mitchell* and *Flynt* , where the pleadings were initially within the jurisdictional limits of the trial court, but later grew beyond the court's limits. *See id.*

Rushing also points to a provision in the Texas Family Code stating that "[t]he court that rendered the decree of divorce or annulment retains the power to enforce the property division ...[,] including a property division and any contractual provisions under the terms of an agreement incident to divorce or annulment under [Texas Family Code] Section 7.006 that was approved by the court." TEX. FAM. CODE ANN. § 9.002 (West 2020). However, it is undisputed that Velin and decedent were divorced in the 76th/276th Judicial District Court in Titus County, Texas. Therefore, this provision is unavailing and confers no jurisdiction on the Upshur County Court. Moreover, the statute outlining the Upshur County Court's jurisdiction makes clear that the court lacks any jurisdiction over matters of divorce. *See* TEX. GOV'T CODE ANN. § 26.043(4).

The portion of Velin's third issue challenging the Upshur County Court's subject matter jurisdiction to resolve the claim brought against her in Rushing's motion is sustained.

REMAINING ISSUES

In her first issue, Velin contends that the trial court erred when it granted Rushing's motion and found that the earlier Titus County divorce decree acted to divest her of any interest in the decedent's federal VGLI death benefit. In her second issue, Velin argues that the trial court erred when it imposed a constructive trust over the VGLI death benefit, which is federally protected from attachment.[5] In the remaining portion of her third issue, Velin maintains that the trial court erred by overruling various objections to the trial court's jurisdiction and due process rights violations. Because we have held that the Upshur County Court lacked jurisdiction over the matter asserted against Velin in Rushing's motion, we need not address these issues. *See* TEX. R. APP. P. 47.1.

[5] It is not entirely clear, under current law, whether a constitutional county court maintains the authority to grant a constructive trust in these circumstances. Many Texas courts, including this court, have held that constitutional county courts lack the authority to grant a constructive trust as part of their probate jurisdiction. *See, e.g.* , *In re Burns* , No. 12-09-00261-CV, 2010 WL 2982917, at *2-3 (Tex. App.—Tyler July 30, 2010, no pet.) (mem. op.) ; *In re Estate of Alexander* , 188 S.W.3d 327, 331 (Tex. App.—Waco 2006, no pet.) ; *Enax v. Noack* , 12 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2000, no pet.). However, we note that the reasoning in those cases is based on the now repealed Texas Probate Code Section 5A. *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 957, § 6, 1993 Tex. Gen. Laws 4081, 4161–62, *repealed by* Act of May 31, 2009, 81st Leg., R.S., ch. 1351, § 12(h), 2009 Tex. Gen. Laws 4275, 4279. Because we hold that the Upshur County Court lacked jurisdiction to resolve this matter because it is not a probate proceeding, a matter related to a probate proceeding, or a proper exercise of the court's pendant and ancillary jurisdiction, we need not address this issue. *See* Tex. R. App. P. 47.1.

DISPOSITION

Having sustained the portion of Velin's third issue and holding that the trial court lacked jurisdiction to resolve the matter, we *vacate* the trial court's order granting the "Administrator's Motion to Enforce Court Order for Property and Create Constructive Trust," *render* judgment *dismissing* that portion of the proceeding against
391 Velin for want of jurisdiction, and *remand* for further probate proceedings consistent *391 with this opinion. *See* TEX. R. APP. P. 43.2(c)-(e).

No. 11-18-00316-CV
State of Texas in the Eleventh Court of Appeals

Jurgens v. Martin

631 S.W.3d 385 (Tex. App. 2021)
Decided Mar 18, 2021

No. 11-18-00316-CV

03-18-2021

Brenda JURGENS, Appellant v. Gary MARTIN, Appellee

M. Michele Greene, for Appellant. Michael Martinez, Bedford, for Martinez Hsu, P.C. Bernard R. Given II, John P. Mobbs, for Appellee. Jules P. Slim, for Intervenor.

JOHN M. BAILEY, CHIEF JUSTICE

M. Michele Greene, for Appellant.

Michael Martinez, Bedford, for Martinez Hsu, P.C.

Bernard R. Given II, John P. Mobbs, for Appellee.

Jules P. Slim, for Intervenor.

Panel consists of: Bailey, C.J., and Wright, S.C.J.[1]

[1] Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

395 JOHN M. BAILEY, CHIEF JUSTICE*395 This appeal arises from an ancillary civil action related to a probate proceeding. The related probate matter was the Estate of Alice Jean Martin, deceased.[2] The parties to this appeal are two of her children.

[2] Throughout this opinion, we will refer to Alice Jean Martin as "Alice" and to her husband, Billy Martin, as "Billy."

Gary Martin filed the underlying suit against his sister, Brenda Jurgens.[3] Jurgens was the executor of Alice's estate. She was also the executor of Billy's estate, and she had held a power of attorney for both of her parents prior to their deaths. Martin alleged that Jurgens wrongfully took and appropriated money from their parents and their parents' estates. Martin alleged causes of action for breach of fiduciary duties, conversion, fraud, fraud by nondisclosure, and civil theft.

[3] We will refer to Appellant Brenda Jurgens as "Jurgens," and we will refer to Appellee Gary Martin as "Martin."

After several hearings concerning Jurgens's compliance with discovery orders, the trial court imposed death penalty sanctions against her and subsequently entered a default judgment against her solely as to liability. The trial court later entered a final judgment against Jurgens and in favor of Martin in the amount of $353,000 in

damages and $341,418 in attorney's fees. The trial court's judgment also ordered Jurgens to pay damages of $79,978.38 to Alice's estate. Jurgens timely filed a motion for new trial that was overruled by operation of law. *See* TEX. R. CIV. P. 329(b).

Jurgens brings fifteen issues on appeal. Issues One through Four and Issue Six are jurisdictional issues. The first two issues relate to an *in terrorem* clause in Alice's will, and the second two issues relate to the ancillary nature of the underlying proceeding. Issue Six concerns Martin's standing to assert a claim for fraud on the community on behalf of his mother's estate. In Issue Five, Jurgens challenges the death penalty sanctions entered against her. In Issue Nine, Jurgens challenges evidentiary rulings made by the trial court. Jurgens challenges the terms of the final judgment in Issues Seven, Eight, Ten, Eleven, Twelve, Thirteen, and Fourteen. Finally, in Issue Fifteen, Jurgens challenges the trial court's denial of her motion for new trial. We affirm in part, reverse and render in part, and reverse and remand in part.

Background Facts

Billy and Alice were the parents of Jurgens, Martin, and Greg Martin.[4] Billy passed away in September 2010. Alice passed away in June 2012.

[4] We will refer to Greg Martin as "Greg."

Billy and Alice experienced health problems during their later years. Jurgens and Greg were both actively
396 involved in taking *396 care of their parents. Martin was not involved in taking care of either parent. He has been estranged from his family since 2000, and he admitted to having "very minimal" contact with his parents in the last five years before they passed away. Martin attributed his minimal contact with his parents to the alleged influence that Jurgens had over their parents.

Martin alleged that, for approximately the last four years of her life, Alice resided in nursing facilities and suffered from dementia and "an Alzheimer's-like condition." In August 2008, Alice signed a power of attorney granting Jurgens power over Alice's affairs. Nearly two years after Alice died, Jurgens produced a handwritten will that Alice had purportedly executed that appointed Jurgens as executor. In the will, Alice left Martin only a $100 specific cash bequest. Jurgens, Greg, and Alice's grandchildren were all to receive $1,000. The will also provided that Jurgens "will decide and oversee who gets what." Additionally, the will contained an *in terrorem* clause that provided as follows: "Alice wishes that if anyone contest [sic] this will that they be excluded from the will."

Soon after Jurgens's appointment as the executor of Alice's estate, Martin filed a will contest based on Alice's alleged lack of testamentary capacity when making the will that was admitted to probate. Martin then filed the underlying action asserting that Jurgens had misappropriated their parents' funds both before and after their deaths.

In the probate proceeding, Martin pursued discovery and filed multiple motions seeking to hold Jurgens in contempt for noncompliance with the trial court's discovery orders. The trial court entered oral and written discovery orders and contempt orders in the lawsuit underlying this appeal, ultimately imposing death penalty sanctions against Jurgens and entering a default judgment on liability due to Jurgens's noncompliance.

After a hearing on damages, the trial court entered the final judgment referenced above. In addition to the money judgment, the trial court imposed a constructive trust over all of Jurgens's assets, including her real property in Montana.

Analysis

Subject-Matter Jurisdiction

In her first four issues, Appellant challenges the trial court's subject-matter jurisdiction. Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction is never presumed and cannot be waived. *Id.* at 443–44. Because subject-matter jurisdiction is a question of law, we review it de novo. *Tex. Dep't of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004).

In her first issue, Jurgens challenges Martin's standing to bring the underlying action. Based on the *in terrorem* clause, Jurgens contends that Martin's alleged injuries were purely conjectural or hypothetical when the underlying suit was filed because Alice's will had not been set aside. For the same reason, Jurgens asserts in her second issue that Martin's claims were not ripe.

In order for a court to have subject-matter jurisdiction, the plaintiff must have standing to sue, and the plaintiff's claim must be ripe. *Sw. Elec. Power Co. v. Lynch* , 595 S.W.3d 678, 683 (Tex. 2020). The doctrines of both standing and ripeness stem from the prohibition of advisory opinions, which in turn is rooted in the separation-of-powers doctrine. *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.* , 971 S.W.2d 439, 442 (Tex. 1998).*397 Standing is a component of subject-matter jurisdiction and focuses on whether a party has a sufficient relationship with the lawsuit to have a justiciable interest in its outcome. *Austin Nursing Ctr., Inc. v. Lovato* , 171 S.W.3d 845, 848 (Tex. 2005). If a party lacks standing, the trial court lacks subject-matter jurisdiction to hear the case. *Id.* at 849. A party's standing to sue is implicit in the concept of subject-matter jurisdiction and will not be presumed—it must be proved. *Linegar v. DLA Piper LLP (US)* , 495 S.W.3d 276, 279 (Tex. 2016). In Texas, standing requires that the plaintiff have suffered a concrete and distinct injury and that there be a real controversy between the parties that will actually be resolved by the judicial relief sought. *Id.* (citing *Heckman v. Williamson Cty.* , 369 S.W.3d 137, 154–55 (Tex. 2012)). The plaintiff must show that it —rather than a third party or the public generally—was personally injured. *Heckman* , 369 S.W.3d at 155.

Like standing, ripeness "emphasizes the need for a concrete injury for a justiciable claim to be presented." *Sw. Elec. Power Co.* , 595 S.W.3d at 683 (quoting *Patterson* , 971 S.W.2d at 442). Standing focuses on the issue of who may bring an action, and ripeness focuses on when that action may be brought. *Waco Indep. Sch. Dist. v. Gibson* , 22 S.W.3d 849, 851 (Tex. 2000). In determining whether a case is ripe, the focus is on whether "the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote' " at the time the lawsuit is filed. *Id.* at 851–52 (quoting *Patterson* , 971 S.W.2d at 442). If the plaintiff's injury is based on "hypothetical facts, or upon events that have not yet come to pass," then the case is not ripe, and the court lacks subject-matter jurisdiction. *Id.* at 852. A claim is not required to be ripe at the time of filing. *Robinson v. Parker* , 353 S.W.3d 753, 755 (Tex. 2011) (citing *Perry v. Del Rio* , 66 S.W.3d 239, 251 (Tex. 2001)). However, the plaintiff must be able to demonstrate a reasonable likelihood that the claim will soon ripen. *Id.* Also, "just as a case may become moot after it is filed, it may also ripen." *Perry* , 66 S.W.3d at 251.

Subject-matter jurisdiction is an issue that may be raised for the first time on appeal. *Tex. Air Control Bd.* , 852 S.W.2d at 445. Jurgens did not raise the issue of standing or ripeness in the trial court by filing a plea to the jurisdiction.[5] When an appellate court reviews the standing of a party or the ripeness of a controversy for the first time on appeal, it must construe the petition in favor of the party and, if necessary, review the entire record to determine if any evidence supports standing and ripeness. *Id.* at 446 ; *see Gibson* , 22 S.W.3d at 853. Based upon our review of the record, we conclude that Martin had a sufficient connection to the suit and a sufficiently ripe claim in order to vest the trial court with subject-matter jurisdiction.

5 Jurgens raised the issues of standing and ripeness in a plea in abatement. However, the record does not indicate that the trial court issued a ruling on these issues.

Martin asserted in his original pleading that he was a "lawful heir" of Alice and Billy, a named beneficiary under Billy's will, and a named beneficiary under Alice's will. He further alleged that Jurgens was the current executor appointed for the estates of Alice and Billy. Martin alleged that Jurgens "abused her position as a fiduciary, both as power of attorney for Alice Jean Martin, but also as executor for the estates of Alice Jean
398 Martin and Billy Martin."*398 Martin filed his claim in the underlying proceeding essentially as an effort to collect estate property from Jurgens, the executor of the estates. Ordinarily the personal representative of the estate of a decedent is the only person entitled to sue for the recovery of property belonging to the estate. *Moody v. Moody* , 613 S.W.3d 707, 718 (Tex. App.—Houston [14th Dist.] 2020, pet. filed) (citing *Shepherd v. Ledford* , 962 S.W.2d 28, 31 (Tex. 1998) ; *Frazier v. Wynn* , 472 S.W.2d 750, 752 (Tex. 1971) ; *Chandler v. Welborn* , 156 Tex. 312, 294 S.W.2d 801, 806 (1956)); *In re Estate of Preston* , 346 S.W.3d 137, 163 (Tex. App.—Fort Worth 2011, no pet.). There is an exception to this general rule, however, when the personal representative cannot, or will not, bring the suit or when the personal representative's interests are antagonistic to those of the estate. *Moody* , 613 S.W.3d at 718 (citing *Chandler* , 294 S.W.2d at 806); *Estate of Preston* , 346 S.W.3d at 163. This exception is applicable to Martin's claims against Jurgens, the personal representative of their parents' estates, because the claims are brought against her.

We disagree with Jurgens's contention that Martin lacked standing or a ripe claim by virtue of either *in terrorem* clause or the small bequest to him under Alice's will. The underlying proceeding was filed in conjunction with the pending probate wherein Martin sought to invalidate the will that had been probated. Under the Estates Code, Martin was an "interested party" with standing to contest the will because he was an heir or devisee of the estate. *See* TEX. EST. CODE ANN. §§ 22.018(1), 256.204(a) (West 2020); *Ferreira v. Butler* , 575 S.W.3d 331, 334–35 (Tex. 2019). If Martin prevailed on his will contest, he would have a pecuniary interest in the recovery obtained in the underlying proceeding. *See Ferreira* , 575 S.W.3d at 335.

Martin was not required to successfully prosecute the will contest to conclusion in order to have standing in the underlying proceeding to recover estate property from Jurgens. We addressed a similar contention in *In re Estate of Redus.* We held in *Redus* that a claimant relying on a will for standing does not have to show that the will is valid in order to establish standing because the validity of the will is a question to be decided at a trial on the merits. 321 S.W.3d 160, 162–64 (Tex. App.—Eastland 2010, no pet.) ; *see Bland Indep. Sch. Dist. v. Blue* , 34 S.W.3d 547, 554 (Tex. 2000) (Procedurally, a plea to the jurisdiction is a dilatory plea, the purpose of which is generally to defeat an action "without regard to whether the claims asserted have merit."). That principle applies to Martin's claim in the underlying proceeding—he was not required to have the will set aside in order to have a justiciable interest in the underlying suit's outcome. *See Lovato* , 171 S.W.3d at 848.

In terrorem clauses, also referred to as forfeiture or no-contest clauses, make gifts in a will or other instrument conditional on the beneficiary not challenging or disputing the validity of the instrument. *Di Portanova v. Monroe* , 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Martin asserts that this clause and his subsequent challenge of the will's validity do not deny him the opportunity to sue Jurgens for breach of fiduciary duties. We agree. By statute, a forfeiture clause does not prevent a beneficiary from seeking redress against a fiduciary for breach of the fiduciary's duties. EST. § 254.005(b); *see Lesikar v. Moon* , 237 S.W.3d 361, 370–71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (A beneficiary has an inherent right to
399 challenge the actions of a fiduciary, and he does not trigger a forfeiture clause by doing so.); *399 *McLendon v. McLendon* , 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied) ("The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship.").

In addition to his pleadings, the evidence in the record supports Martin's standing and establishes that his claims against Jurgens were ripe for consideration. Alice's physician, Eric L. Olson, M.D., testified that on the date the will was executed, Alice was totally incapacitated and not capable of making a will. Dr. Olson admitted her to hospice care on that same day. Using the power of attorney she had been granted by Alice, Jurgens wrote checks to herself for thousands of dollars from her parents' accounts, charged her parents' accounts for her own personal purchases, and ultimately was not able to account for all of the monetary transfers.

Jake Costin, a financial expert witness for Martin, examined all of the documents produced by Jurgens. Costin performed a reconciliation and determined that there were approximately $292,000 in charges and withdrawals from the accounts for which there were no receipts and no verification as being for the benefit of the estates. Additionally, after reconciling the funds, Costin testified that there was still approximately $61,000 missing from the estates. Accordingly, both Martin's pleadings and the evidence in the record establish that he had standing and a ripe claim. We overrule Jurgens's first and second issues.

In her third issue, Jurgens challenges the trial court's jurisdiction with respect to the amount in controversy. She contends that the trial court erred in refusing to dismiss Martin's claims because they exceeded the jurisdictional limit of the trial court. Jurgens asserts that the jurisdictional limit of the trial court for Martin's claims was $500,000 and that his claims exceeded that because he sought damages of at least $591,000. In that regard, Midland County courts at law have jurisdiction in civil cases in which the matter in controversy exceeds $500 but does not exceed $500,000 "as alleged on the face of the petition." TEX. GOV'T CODE ANN. § 25.1672(a)(2) (West 2019).

Conversely, Martin contends that the jurisdictional limit of Section 25.1672(a)(2) did not apply to his claims because the trial court was exercising probate jurisdiction over his claims. The trial court agreed with Jurgens's contention that the $500,000 limitation in Section 25.1672(a)(2) applied to Martin's claims. However, the trial court disagreed with Jurgens's contention that Martin had pleaded himself out of court because it permitted him to subsequently amend his pleadings to limit his recovery to $500,000.

County courts at law are courts of "limited jurisdiction." *United Servs. Auto Ass'n v. Brite* , 215 S.W.3d 400, 401 (Tex. 2007). "Statutory county courts are not courts of general jurisdiction ‘with the power to hear and determine any cause that is cognizable by courts of law or equity.’ " *Eris v. Giannakopoulos* , 369 S.W.3d 618, 623 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd) (internal quotation marks omitted) (quoting *Thomas v. Long* , 207 S.W.3d 334, 340 (Tex. 2006) (describing general jurisdiction of district courts)). County courts at law have concurrent civil jurisdiction with the district court to the monetary limits set out by statute. *See* GOV'T § 25.0003(c) (West Supp. 2020). Thus, Midland County courts at law have concurrent civil jurisdiction with the district court when the matter in controversy is between $500 and $500,000. *Id.* § 25.1672(a)(2).

County courts at law also have concurrent original probate jurisdiction with the county court in counties that do
400 *400 not have a statutory probate court. *Id.* § 25.0003(d).[6] Midland County does not have a statutory probate court. When exercising original probate jurisdiction, a county court at law is not subject to the amount-in-controversy limits that would apply to civil cases generally. *English v. Cobb* , 593 S.W.2d 674, 675 (Tex. 1979) ; *Lee v. Hersey* , 223 S.W.3d 439, 444–45 (Tex. App.—Amarillo 2006, pet. denied) ; *Hailey v. Siglar* , 194 S.W.3d 74, 76 (Tex. App.—Texarkana 2006, pet. denied). Accordingly, the applicability of the $500,000 limit set out in Section 25.1672(a)(2) to Martin's claims depends on whether the trial court was exercising probate jurisdiction or general civil jurisdiction. *See Dowell v. Quiroz* , 462 S.W.3d 578, 585–86 (Tex. App.—Corpus Christi–Edinburg 2015, no pet.) (mem. op.).

6 "Texas probate jurisdiction is, to say the least, somewhat complex." *Palmer v. Coble Wall Tr. Co.* , 851 S.W.2d 178, 180 n.3 (Tex. 1992).

Courts that have original probate jurisdiction have probate jurisdiction over two types of matters: "probate proceedings," *see* EST. §§ 31.001, 32.001(a), and "matters related to a probate proceeding," *see* EST. § 31.002, 32.001(a). The term "probate proceeding" is defined by Section 31.001 as eight enumerated matters. Under Section 31.002, "a matter related to a probate proceeding" is determined by the type of trial court considering the matter. For a county court at law, the matters listed in Section 31.002(a) and (b) are matters related to a probate proceeding. EST. § 31.002(b).

Probate courts also have "pendant and ancillary jurisdiction as necessary to promote judicial efficiency and economy." *Id.* § 32.001(b). "Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the nonprobate claims and the claims against the estate." *Shell Cortez Pipeline Co. v. Shores* , 127 S.W.3d 286, 294 (Tex. App.—Fort Worth 2004, no pet.) (citing *Sabine Gas Trans. Co. v. Winnie Pipeline Co.* , 15 S.W.3d 199, 202 (Tex. App.—Houston [14th Dist.] 2000, no pet.)). As reflected in *Shores* , "pendant and ancillary" claims are nonprobate claims. *Id.* As a nonprobate claim, the amount-in-controversy limits of Section 25.1672(a)(2) would apply to an ancillary claim. *See, e.g., Dowell* , 462 S.W.3d at 585–86.

In his petitions, Martin alleged that his claims were "ancillary" to the pending probate case for Alice's estate. However, "[w]e look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it." *State Bar of Tex. v. Heard* , 603 S.W.2d 829, 833 (Tex. 1980) (citing TEX. R. CIV. P. 71). As we previously noted, Martin's claims were in the nature of a claim seeking to recover estate property from Jurgens on behalf of the estates. Even though Martin used the label of "ancillary" in describing his claims, they were in fact matters related to a probate proceeding under Section 31.002 because they were claims "against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative," *see* EST. § 31.002(a)(1), or claims "brought against a personal representative in the representative's capacity as personal representative," *see* EST. § 31.002(a)(4). As such, Martin's claims were not subject to the amount-in-controversy limits that would apply to civil cases generally. *See English* , 593 S.W.2d at 675 ; *Dowell* , 462 S.W.3d at 585–86 ; *Lee* , 223 S.W.3d at 444–45 ; *Hailey* , 194 S.W.3d at 76.

We disagree with the trial court's determination that the $500,000 limit set out in Section 25.1672(a)(2) applied
401 to Martin's claims. However, the trial court did not *401 dismiss Martin's claims on this basis. Accordingly, the trial court did not err by not dismissing Martin's claims because he pleaded for damages in excess of $500,000. We overrule Jurgens's third issue.

Jurgens's fourth issue is related to her third issue. She contends that the trial court erred by permitting Martin to amend his pleadings to seek damages of $500,000 or less so that his claims would come within the amount-in-controversy limit of Section 25.1672(a)(2). Jurgens asserts that the trial court was without jurisdiction to permit Martin to amend his pleadings because he had pleaded himself out of court. This contention is premised on Jurgens's assertion that Martin's claims were subject to the $500,000 limit of Section 25.1672(a)(2). However, we rejected this contention in our disposition of Jurgens's third issue. For the same reason, we overrule Jurgens's fourth issue.

Fraud on the Community

In her sixth issue, Jurgens contends that Martin did not have standing to bring a claim for fraud on the community. In this regard, the final judgment ordered Jurgens to pay $79,978.38 in damages to Alice's estate for one-half of the amount of various accounts received by Jurgens. The trial court's findings of fact clarify that this recovery was for community property funds that were improperly gifted to Jurgens by Billy. The trial court determined that these gifted funds constituted a fraud against the community estate of Billy and Alice. Relying upon our holding in *Grothe v. Grothe* , Jurgens asserts that Martin did not have standing to assert a claim on behalf of Alice's estate. *See Grothe v. Grothe* , No. 11-14-00084-CV, 2016 WL 1274059, at *3–4 (Tex. App.—Eastland Mar. 31, 2016, no pet.) (mem. op.). We agree.

"Fraud on the community" is the wrongful disposition of community assets—it is "[t]he breach of a legal or equitable duty which violates [the] fiduciary relationship existing between spouses." *In re Marriage of Moore* , 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ). The Texas Supreme Court has held that there is not an independent tort for fraud on the community. *Schlueter v. Schlueter* , 975 S.W.2d 584, 586 (Tex. 1998). Rather, "[a] claim of fraud on the community is a means to an end, either to recover specific property wrongfully conveyed, ... or ... to obtain a greater share of the community estate upon divorce, in order to compensate the wronged spouse for his or her lost interest in the community estate." *Id.* at 588 (second and third alterations in original) (quoting *Belz v. Belz* , 667 S.W.2d 240, 247 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)).

In *Grothe* , two children of a decedent asserted a claim on behalf of their father's estate against their stepmother for fraud on the community. 2016 WL 1274059, at *1. We noted that a claim for fraud on the community "is generally reserved for divorce proceedings and can be brought only by a party who has an interest in the community property itself." *Id.* at *4 (citing *Chu v. Hong* , 249 S.W.3d 441, 444–45 (Tex. 2008)). We held that an heir or personal representative of an estate cannot bring a claim for fraud on the community estate. *Id.* at *3–4. We concluded that an heir or personal representative does not have standing to bring a claim for fraud on the community. *Id.*

Our holding in *Grothe* that an heir or personal representative of an estate does not have standing to assert a claim for fraud on the community is significant from a procedural standpoint. As we noted above, standing can be raised for the first time on appeal because it is a component of subject-matter jurisdiction. *See Tex. Air Control Bd.* , 852 S.W.2d at 445. In this *402 regard, Jurgens did not assert in the trial court that Martin did not have standing to assert a claim for fraud on the community.

We relied on *Harper v. Harper* for our holding in *Grothe. See Harper v. Harper* , 8 S.W.3d 782 (Tex. App.—Fort Worth 1999, pet. denied). *Harper* involved similar facts—an executor of an estate bringing a claim for fraud on the community against his stepmother. *Id.* at 783. The Fort Worth Court of Appeals held that an independent cause of action for fraud on the community does not survive a spouse's death for the benefit of that spouse's estate. *Id.* at 783–84. The court relied on the Texas Supreme Court's holding in *Schlueter* that there is no independent tort cause of action for wrongful disposition by a spouse of community assets. *Id.* at 784 (citing *Schlueter* , 975 S.W.2d at 589).

Martin asserts that *Grothe* is inapplicable to his claim for fraud on the community because he is not suing a surviving spouse. He contends that his claim is distinguishable because he is suing an "unjustly-enriched fiduciary" for a return of "wrongfully received funds." Martin further asserts that the decision in *Harper* was not based on standing. Based on these contentions, Martin asserts that Jurgens failed to preserve error because she did not present her claim in the trial court. We disagree with Martin's analysis.

Our holding in *Grothe* that an heir or personal representative of an estate does not have standing to assert a claim for fraud on the community was not based on the identity of the defendant. 2016 WL 1274059, at *3–4. Instead, it was based on our conclusion that the heir or personal representative "did not have a justiciable interest in the community property." *Id.* at *3. The court in *Harper* concluded that a claim for fraud on the community does not survive the death of the allegedly defrauded spouse, which in this case is Alice. *See Harper* , 8 S.W.3d at 783–84. Thus, when Alice died, the claim for fraud on the community expired, and her estate no longer had a justiciable interest for the purpose of standing. *See id.*

The Corpus Christi–Edinburg Court of Appeals addressed an analogous situation in *Wackenhut Corrections Corp. v. de la Rosa* , 305 S.W.3d 594, 632–34 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.), *abrogated on other grounds by Zorrilla v. Aypco Constr. II, LLC* , 469 S.W.3d 143 (Tex. 2015). In *Wackenhut* , a wrongful death claimant died prior to trial. 305 S.W.3d at 632. The defendant asserted that the decedent's estate no longer had standing to assert the claim because the wrongful death claim did not survive the decedent's death. *Id.* ; *see Coffey v. Johnson* , 142 S.W.3d 414, 417 (Tex. App.—Eastland 2004, no pet.) (a claim for wrongful death does not survive the claimant's death). Conversely, the decedent's estate asserted that the matter did not involve standing and that the defendant had failed to sufficiently present the complaint in the trial court. The court agreed with the defendant's contention by holding that the decedent's estate did not have standing to assert the wrongful death claim. *Wackenhut* , 305 S.W.3d at 632–33.

The court in *Wackenhut* cited *Lovato* for the proposition "that an estate's standing to pursue a decedent's claim depends on whether the claim survives the death." *Id.* at 633 (citing *Lovato* , 171 S.W.3d at 850). *Lovato* dealt with the opposite situation—an estate continued to have a justiciable interest in a claim that survived the decedent's death. 171 S.W.3d at 850 ("Because a decedent's survival claim becomes part of her estate at death, it follows that the estate retains a justiciable interest in the survival action." (footnote omitted)); *see also* *403 *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* , 192 S.W.3d 780, 786 (Tex. 2006) ("Because legal malpractice claims survive in favor of the decedent's estate, the estate has a justiciable interest in the controversy sufficient to confer standing."). Thus, the court in *Wackenhut* concluded that, because the decedent's wrongful death claim did not survive his death, his estate lacked standing to pursue the claim. 305 S.W.3d at 634.

403

We agree with the reasoning in *Wackenhut*. Alice's claim for fraud on the community did not survive her death. *See Harper* , 8 S.W.3d at 783–84. Thus, Alice's estate did not have standing to assert a claim for fraud on the community. *See Wackenhut* , 305 S.W.3d at 634. Accordingly, we reaffirm our holding in *Grothe* that an heir or a personal representative of an estate does not have standing to prosecute a claim for fraud on the community because the estate does not have standing to purse the claim. As applied to the facts in the case, Jurgens may raise for the first time on appeal the issue of Martin's standing to assert a claim on behalf of Alice's estate for fraud on the community. We agree that Martin did not have standing to assert the claim. We sustain Jurgens's sixth issue. We reverse the judgment of the trial court as to Martin's claim for fraud on the community in the amount of $79,978.38, and we render judgment that Alice's estate takes nothing on that claim.

Death Penalty Sanctions

In her fifth issue, Jurgens contends that the trial court abused its discretion by imposing death penalty sanctions and entering an interlocutory default judgment as to liability. Jurgens asserts that the sanctions were unjust because (1) the discovery motions and orders upon which the death penalty sanctions were based were filed in a separate lawsuit; (2) the trial court punished her for her inability to produce documents that were not within her possession, custody, and control; (3) there was a lack of harm to Martin; (4) the discovery orders and

contempt orders were not specific enough; (5) some of the discovery problems were due solely to Jurgens's trial counsel; (6) Jurgens's defenses were not meritless; (7) the trial court sanctioned her for supplementing her discovery; (8) the trial court sanctioned her based on credibility issues; and (9) her actions did not reflect bad faith. Jurgens contends that she attempted in good faith to comply with overly broad and ever-changing discovery orders and requests. As such, she contends that the trial court erred in adjudicating the merits of her defenses without ever going to trial.

We review a trial court's decision to impose discovery sanctions for an abuse of discretion. *Cire v. Cummings* , 134 S.W.3d 835, 838–39 (Tex. 2004). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to any guiding rules or legal principles. *Id.* ; *Downer v. Aquamarine Operators, Inc.* , 701 S.W.2d 238, 241–42 (Tex. 1985). An appellate court reviews the entire record, including the evidence, arguments of counsel, written discovery on file, and the circumstances surrounding the party's discovery abuse. *Tidrow v. Roth* , 189 S.W.3d 408, 412 (Tex. App.—Dallas 2006, no pet.).

A trial court has discretion to impose sanctions for discovery abuses under Rule 215 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 215. If a party fails to comply with an order compelling discovery or abuses the discovery process, a trial court can strike the party's pleadings or render a judgment by default after notice and hearing. TEX. R. CIV. P. 215.2(b)(5), 215.3. Any sanction by the trial court that is based on the party's conduct during discovery, and by which a trial court adjudicates a party's claim without regard to the merits, constitutes
404 a "death-penalty" *404 sanction. *State v. Bristol Hotel Asset Co.* , 65 S.W.3d 638, 647 (Tex. 2001) (Baker, J., dissenting). Because the ultimate sanction imposed here was the striking of Jurgens's pleadings, we also consider whether Jurgens's conduct justified the presumption that her claims or defenses lacked merit. *Paradigm Oil, Inc. v. Retamco Operating, Inc.* , 372 S.W.3d 177, 184 (Tex. 2012) ("Thus, a death-penalty sanction cannot be used to adjudicate the merits of claims or defenses unless the offending party's conduct during discovery justifies a presumption that its claims or defenses lack merit.").

Discovery sanctions serve three purposes: (1) to secure compliance with discovery rules; (2) to deter other litigants from similar misconduct; and (3) to punish parties for violating the discovery rules. *Response Time, Inc. v. Sterling Commerce (N. Am.), Inc.* , 95 S.W.3d 656, 659 (Tex. App.—Dallas 2002, no pet.). When an appellate court determines whether sanctions imposed are just, it is to consider (1) whether there is a direct relationship between the offensive conduct and the sanctions imposed and (2) whether the sanctions are excessive. *TransAmerican Nat. Gas Corp. v. Powell* , 811 S.W.2d 913, 917 (Tex. 1991). Further, the trial court should always consider and test lesser sanctions before imposing case-determinative sanctions. *Chrysler Corp. v. Blackmon* , 841 S.W.2d 844, 849 (Tex. 1992). As noted in *TransAmerican* :

> Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. However, if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it.... Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules.

811 S.W.2d at 918 (citations omitted).

The death penalty sanctions in this case had their genesis in an agreed discovery order entered in the probate case of Alice's estate on December 5, 2014.[7] This order required Jurgens to "serve upon counsel for Petitioner Gary H. Martin all property, estate, and financial records of John William (Billy) and Alice Martin, from

August 1, 2008 to the present date including without limitation the following categories of documents."[8] The order listed seventeen categories of documents for which Jurgens was required to produce "all" documents. Jurgens was required by the agreed discovery order to produce these documents on or before January 2, 2015.

7 Unless otherwise noted, "probate case" as used in this opinion refers to the probate case for Alice's estate.

8 At the time of the entry of the agreed order, Martin had filed a will contest to the will that Jurgens filed for probate in Alice's estate. However, the underlying action had not yet been filed.

On January 7, 2015, Martin filed in the probate case a Motion to Show Cause and for Contempt for Violation of Agreed Order. He alleged that Jurgens had failed to comply with the agreed order by the deadline of January 2, 2015. Martin also alleged that, although Jurgens had provided some documents after January 2, she had failed to provide most of the records for Alice's estate.

The trial court heard this motion in the probate case on February 13, 2015. Jurgens was represented at this
405 hearing by *405 counsel that she had recently hired. Martin's counsel advised the trial court that Jurgens's counsel had been helpful in providing some documents but that several categories of documents had not been produced, including bank records for several accounts. Jurgens's attorney explained that it was not Jurgens's intent to not comply with the discovery order. Jurgens's attorney also acknowledged that Jurgens had not produced some of the documents that she had been requested to produce. The trial court gave Jurgens until March 16 to "comply completely" with the agreed order. The trial court also ordered Jurgens to provide records for a bank account that Jurgens asserted was her own account.

The trial court additionally granted Jurgens's request to have Martin's counsel provide her with a list of the accounts or items for which Martin needed information. Martin's counsel subsequently sent Jurgens's counsel a letter on February 3, 2015, that listed the items for which Martin sought documentation. The letter listed thirty different items that Martin asserted were missing from the production under the agreed order.

Martin filed the underlying action on March 14, 2015. The next hearing occurred on May 6, 2015. The reporter's record for this hearing bears the caption for both the probate case and the underlying action. Among other things, the trial court considered Martin's motion for contempt and motion to compel in the probate case. Martin's counsel detailed the difficulty Martin experienced in getting discovery from Jurgens by using the sale of Billy and Alice's house as an example. Martin's counsel advised the trial court that Jurgens had still not presented a clear depiction of what had happened to the sale proceeds of the home and that Jurgens had presented five different versions of what had occurred with the sale. Martin characterized Jurgens's compliance with discovery orders as "a game of catch me if you can," and he indicated that he had spent "thousands of dollars" trying to obtain discovery from Jurgens.

The May 6 hearing also addressed Martin's motion for a temporary injunction in the underlying matter. During Jurgens's testimony, the matter of Jurgens paying funds to herself from Alice's accounts was addressed. Jurgens stated that she paid these funds to reimburse herself for expenditures that she made on behalf of Alice. The trial court asked Jurgens if she had documentation to back up the expenses that she asserted she had paid for Alice. Jurgens replied, "Absolutely." Jurgens also testified that she sometimes transferred funds from her personal accounts to Alice's account to offset personal expenditures that she or someone erroneously made from Alice's accounts. As a result of these transfers, the trial court directed Jurgens to provide documents for her personal accounts.

At the conclusion of the May 6 hearing, the trial court stated that a lot of the issues in the cases remained unresolved because of Jurgens's failure to provide the documents that she was supposed to provide. The trial court commended Jurgens's counsel based on the fact that "until [he] got to this [matter], we didn't get much discovery." However, the trial court noted that Jurgens's document production remained incomplete, and it ordered her to complete discovery by June 19, 2015. The trial court commented that Jurgens's "excuses with me have run out" and that there would be no acceptable excuses if she failed to produce everything by June 19. The trial court found Jurgens in contempt for failing to provide the discovery required by the agreed discovery order
406 of December 5, 2014, and it assessed a fine of $1,000 and a probated jail sentence of thirty days.*406 The next court hearing occurred on July 7, 2015. The reporter's record for this hearing also bears the caption for both the probate case and the underlying action. During the consideration of Martin's motion to remove Jurgens as independent executor of Alice's estate, Martin's counsel advised the trial court that Jurgens had not produced supporting documentation for checks that she had written herself from Alice's accounts. Martin's counsel also advised the trial court that Jurgens had not paid the $1,000 sanction imposed at the conclusion of the previous hearing. The trial court denied Martin's motion to remove Jurgens as the independent executor. However, it was unable to issue a ruling on Martin's request for enforcement and sanctions because Jurgens had recently filed bankruptcy.

The fourth hearing occurred on January 28, 2016. The reporter's record for this hearing only bears the caption for the underlying action. The trial court heard Martin's June 2015 motion for enforcement, contempt, and sanctions at this hearing. At the end of the hearing, the trial court noted that Jurgens had not produced checks that Martin's attorney was able to obtain by subpoenaing banks. The trial court also noted that it had ordered Jurgens to produce all documents, thus implying that Jurgens should have produced the checks that Martin had to obtain from third parties.

The trial court found Jurgens in contempt for failing to produce these checks, and it assessed an additional sanction of $2,500. The trial court also ordered Jurgens to supplement her document production within twenty days of the hearing. Martin then presented an oral request to the trial court to strike Jurgens's pleadings as a discovery sanction. The trial court delayed ruling on Martin's request for death penalty sanctions by stating, "I'm going to keep that open as an option for the Court. I'm going to keep that open because it's going to depend on what happens out of [Jurgens's] deposition that we're about to order here in a little while."

The next hearing occurred on July 26, 2016. The reporter's record for this hearing only bears the caption for the underlying action. Jurgens appeared pro se at this hearing because her attorneys had previously filed a motion to withdraw, which the trial court had granted. The trial court considered Martin's motion for enforcement, contempt, and sanctions. Martin's counsel advised the trial court that Jurgens had not paid the $2,500 sanction and that she had failed to produce all of the records that were required of her to be produced. Martin's counsel also informed the trial court about a discrepancy in an answer that Jurgens gave to a deposition question about a $10,000 payment that was allegedly made for the benefit of Alice. Specifically, Jurgens stated that the $10,000 payment was for a law firm to advise Jurgens about moving Alice to Montana. However, an attorney at the firm testified that the firm did not advise Jurgens on a matter concerning Alice but, rather, that the firm represented Jurgens in a lawsuit she had with a landscaping company. Jurgens also stated that her secretary had entered her purse and retrieved the wrong debit card to pay for Jurgens's personal expenses, including a cruise and plumbing bill, from Alice's account. However, Martin deposed the secretary and she testified that she had never gone into Jurgens's purse or wallet.

Jurgens asserted at the July 26 hearing that she relied on her attorneys to comply with the document production requirements. She also asserted that they told her to produce only what was in her "possession, custody or
407 control" but that her attorneys' interpretation differed with the *407 trial court's interpretation of that term. Jurgens claimed that she had "basically done every single thing for over a year [to comply with the document production]." She faulted banks for not complying with document requests presented by her and her attorneys. Jurgens stated that she did not know what to do "other than throw [herself] at the mercy of the Court." She begged the court for help, stating that she had been misled by her attorneys.

Martin's attorney responded to Jurgens's arguments by asserting that Jurgens had only produced documents in the past after the trial court had entered the previous contempt and sanction orders. Martin also asserted that Jurgens had still not produced receipts for $292,000 in purchases that were purportedly made on behalf of Alice. Martin asserted that he could not litigate his case until Jurgens complied with the document production and that he had incurred attorney's fees of $15,000 in preparation for the July 26 hearing. Martin again requested that the trial court strike Jurgens's pleadings for discovery abuse.

The trial court did not strike Jurgens's pleadings at the July 26 hearing. The trial court also did not grant Martin's oral request to impose a constructive trust on Jurgens's home in Montana. Instead, the trial court ordered Jurgens to pay the $2,500 that it had previously ordered within thirty days. The trial court also ordered Jurgens to pay an additional sanction of $10,000 within sixty days. Finally, the trial court ordered Jurgens to produce everything required by the agreed discovery order within ninety days. The trial court encouraged Jurgens to retain new counsel in order to comply with the agreed discovery order, and it noted that it gave her ninety days to produce everything in order to give her time to find counsel to assist her.

The next hearing concerning discovery occurred on June 1, 2017, nearly a year after the previous discovery hearing. The reporter's record for this hearing bears the caption for both the probate case and the underlying action. This hearing was for the purpose of considering Martin's request for death penalty sanctions. Jurgens appeared pro se at this hearing. The trial court explained at the outset of the hearing that, while it had not consolidated the cases, they were both "concerned with each other" and that granting Martin's request for death penalty sanctions in the underlying proceeding would have an effect in the probate case. Martin's attorney noted that he had served a subpoena *duces tecum* on Jurgens to produce documents one week prior to her deposition but that she did not comply with the subpoena as required. Martin cited Jurgens's noncompliance with the subpoena as another example of Jurgens's "ongoing pattern of failure to honor Court orders." Martin asked the trial court to strike all of Jurgens's pleadings.

In response, Jurgens asserted that she "Googled" the term "duces tecum" and from that she determined that she just needed to bring the documents with her to her deposition. She also stated that she was having difficulty producing the documents "from the beginning" and that she was working to get things "untangled." She stated that she had not been able to locate boxes that contained relevant records. Jurgens asserted that she had "tried extremely hard" to comply with the document production and that she "would beg of [the trial court] to please take this case to trial." The trial court gave the following response to Jurgens:

> I will tell you that the Court has had as much patience as I could muster in dealing with you, Ms. Jurgens, through the life of this case. I can't think of a

408 *408

> case that is more appropriate -- and this is something that is kind of an extraordinary relief in terms of the Court that this Court has ever granted. I am going to strike your pleadings in this case and I am going to grant judgment in favor of the Plaintiff in these cases.

The trial court entered an interlocutory order granting Martin's motion for death penalty sanctions and entry of default judgment. The order contained a detailed history of Jurgens's failures to comply with the agreed discovery order during the three plus years that the underlying proceeding had been on file. The order also contained a finding that "[Jurgens] has still not fully complied with the Court's orders of production." The trial court also found that Jurgens abused her position as a fiduciary and that Jurgens misappropriated estate funds for her own benefit to the detriment of Martin and the other heirs and beneficiaries.

With the assistance of counsel, Jurgens challenged the interlocutory order by filing a motion for new trial, which the trial court permitted to be overruled by operation of law. The trial court then conducted a prove-up hearing on December 20, 2017, as to damages. At the conclusion of the hearing, the trial court entered final judgment against Jurgens. Jurgens then filed another motion for new trial that was also overruled by operation of law.

Jurgens first challenges the death penalty sanction on the basis that the agreed discovery order of December 5, 2014, was entered in the probate case. However, Jurgens did not present this argument to the trial court as a basis for setting aside the death penalty sanctions despite the fact that she filed two motions for new trial. Furthermore, Jurgens never objected to the trial court's numerous orders in the underlying proceeding requiring her to comply with the agreed discovery orders or the imposition of sanctions in the underlying proceeding on the basis that the agreed discovery order was initially entered in the probate proceeding. Our rules for preservation of error preclude a party from raising a complaint for the first time on appeal. *Burbage v. Burbage* , 447 S.W.3d 249, 258 (Tex. 2014). Accordingly, Jurgens failed to preserve this argument for our review. *See* TEX. R. APP. P. 33.1.

Moreover, we have previously noted the related nature of the underlying proceeding to the probate case. Many of the hearings occurred in both cases at the same time. And while the trial court did not consolidate the actions, it obviously considered the terms of the agreed discovery order to be applicable to the underlying proceeding. The trial court also noted at the damages prove-up hearing that the probate case and the underlying action were "concerned with each other." Thus, the trial court did not err by sanctioning Jurgens in the underlying proceeding on the basis that the agreed discovery order was originally entered in the probate case.

Jurgens next complains that the trial court punished her for her inability to produce documents that were not within her possession, custody, or control. Jurgens focuses this contention on the fact that the death penalty sanctions were based in part on her failure to produce bank records. She cites the applicable discovery rule for the proposition that a party is only required to produce those documents that are "within the person's possession, custody, or control." *See* TEX. R. CIV. P. 196.3(a) ; *see also* TEX. R. CIV. P. 192.3(b). Jurgens asserts that bank records that are not in her possession do not fall within the purview of the rule.

As noted previously, the trial court did not impose death penalty sanctions solely because Jurgens did not
409 produce bank records. *409 For example, Jurgens did not produce itemized receipts for $292,000 in purchases that she alleged she had made for Alice's benefit—despite her representations to the court that she had this documentation. The agreed discovery order, which Jurgens and her attorney at the time signed, required the production of "all property, estate[,] and financial records" of Billy and Alice "without limitation." Thus, the agreed discovery order did not provide an exception for documents that were not within Jurgens's possession, custody, or control.

The agreed discovery order required Jurgens to produce documents relevant to the performance of her fiduciary duties as the executor of Billy's and Alice's estates and as the attorney-in-fact under Alice's power of attorney. In *Cartwright v. Minton* , we noted as follows concerning the duties of an executor:

> As executor of the estate, appellee occupied a position of trust to all parties having an interest in the estate. Because of his confidential and fiducial relationship[9] to appellant he owed her the highest degree of fidelity. It was his duty to fully and fairly disclose to her all of the pertinent facts as candidly as possible.
>
> 9 In *Cartwright* , we also described a fiduciary relationship in the following terms:
>
> > The term "fiduciary" is derived from the civil law. It is impossible to give a definition of the term that is comprehensive enough to cover all cases. Generally speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.
>
> 318 S.W.2d 449, 453 (Tex. App.—Eastland 1958, writ ref'd n.r.e.).

318 S.W.2d 449, 453 (Tex. App.—Eastland 1958, writ ref'd n.r.e.) (citation omitted). An executor owes a fiduciary duty of full disclosure of all material facts known to the executor that might affect an heir's or a devisee's rights, even if their relations are strained. *Montgomery v. Kennedy* , 669 S.W.2d 309, 313 (Tex. 1984).

A person holding a power of attorney also owes a fiduciary duty to his principal. *See Plummer v. Estate of Plummer* , 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied). An attorney-in-fact also has a duty to account to the principal's estate for actions taken under the power of attorney. *See Dawson v. Lowrey* , 441 S.W.3d 825, 833 (Tex. App.—Texarkana 2014, no pet.). In summary, a fiduciary "owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Ludlow v. DeBerry* , 959 S.W.2d 265, 279 (Tex. App.—Houston [14th Dist.] 1997, no writ). Thus, as a fiduciary, Jurgens had a higher duty of disclosure than the typical opposing party.

Additionally, the rules of civil procedure provide that "[*p*]*ossession* , [*c*]*ustody* , or [*c*]*ontrol* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item." TEX. R. CIV. P. 192.7(b). Thus, a party must produce items it either physically possesses or constructively possesses, meaning the party has the right to obtain possession from a third party, such as an agent or representative. *GTE Commc'ns Sys. Corp. v. Tanner* , 856 S.W.2d 725, 729 (Tex. 1993). At a minimum, Jurgens had constructive possession of the bank records because they were either her own accounts or accounts that she had authority over as power of attorney and executor of Alice's *410 estate. Accordingly, the trial court did not abuse its discretion by entering death penalty sanctions because it did not order Jurgens to produce documents that were not within her possession, custody, or control.

Jurgens next asserts that Martin did not suffer harm from her failure to produce documents. She contends that Martin obtained several documents on his own and that many documents no longer existed, including Jurgens's itemized receipts for purchases that she had made. We disagree with Jurgens's assertion that "Martin suffered no true prejudice" as a result of her failure to produce documents. Jurgens's noncompliance with the agreed

discovery order required Martin to incur attorney's fees of several thousand dollars to file numerous motions and attend court hearings in order to obtain production.[10] Also, both Martin's attorney and the trial court noted that Jurgens's noncompliance precluded a quicker resolution of the case.

[10] The two attorneys that represented Martin in the discovery hearings presented fee affidavits totaling in excess of $450,000.

Jurgens next contends that the discovery orders and contempt orders were not specific enough to justify the imposition of death penalty sanctions. She asserts that the agreed discovery order was "vast in scope and lacking in specificity." Jurgens faults the trial court for not identifying the specific documents that she had failed to produce. We disagree with Jurgens's analysis. We first note that she did not present a complaint to the trial court that death penalty sanctions were improper because the orders were not specific enough. Therefore, Jurgens has not preserved this argument for appellate review. *See* TEX. R. APP. P. 33.1.

We further note that, while Jurgens asserted at the July 26, 2016 hearing that she did not know what else she needed to produce, she was unwilling to pay Martin's attorney's fees that would be incurred to produce this list for her. Martin's attorney had previously provided Jurgens's attorney a letter listing thirty items for which Martin was seeking production. Additionally, the reporter's records from the discovery hearings detailed the deficiencies in Jurgens's document production.

Jurgens next asserts that some of the discovery problems were due solely to her trial counsel and that the trial court failed to properly apportion fault between her and her attorneys. She cites her argument[11] at the July 26, 2016 hearing where she attributed her production shortcomings to her former counsel. She contends that the sanctions imposed against her were improper because the trial court did not apportion them between her conduct versus her attorney's conduct and because the trial court improperly apportioned the sanctions solely to her conduct.

[11] Jurgens appeared pro se at the July 26, 2016 hearing. She did not present sworn testimony at this hearing. Instead, she presented arguments to the trial court in response to Martin's attorney's argument seeking enforcement, sanctions, and contempt.

As noted in *TransAmerican* :

> The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This we recognize will not be an easy matter in many instances. On the one hand, a lawyer cannot shield his client from sanctions; a party must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the violation of discovery rules. On the other hand, a party should not be

411 *411

> punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation. The point is, the sanctions the trial court imposes must relate directly to the abuse found.

811 S.W.2d at 917. This case is not one where the sanctioned party was represented by counsel during the entire pendency of the case. Jurgens was pro se for over a year prior to the imposition of the death penalty sanctions.

Jurgens's claims that her attorneys were responsible for her discovery shortcomings were based entirely upon her arguments to the trial court. At a discovery hearing, the trial court is entitled to judge the credibility of the witnesses and the weight to be given their testimony because it has the opportunity to observe the demeanor of the witnesses. *Daniel v. Kelley Oil Corp.* , 981 S.W.2d 230, 232 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (en banc); *City of Dallas v. Cox* , 793 S.W.2d 701, 724 (Tex. App.—Dallas 1990, no writ). The trial court may believe all, none, or part of the witnesses' testimony. *Cox* , 793 S.W.2d at 724 ; *Tate v. Commodore Cty. Mut. Ins. Co.* , 767 S.W.2d 219, 224 (Tex. App.—Dallas 1989, writ denied). Accordingly, it was within the trial court's province to reject Jurgens's claims that her attorneys were at fault for her discovery inadequacies.

The reporter's records from the discovery hearings provided the trial court with ample evidence to apportion fault between Jurgens and her counsel. As noted previously, the trial court commended Jurgens's trial counsel for assisting in the discovery process. Additionally, after Jurgens became pro se, the trial court recommended to Jurgens that she retain new counsel to obtain assistance for complying with discovery. On this record, the trial court did not abuse its discretion by apportioning fault solely on Jurgens for the discovery noncompliance.

Jurgens next asserts that the trial court erred in concluding that her reimbursement claims against the estate lacked merit. She asserts that she did not need individual receipts because her credit card statements should have been sufficient. Jurgens asserted at trial that she believed credit card statements were sufficient because the IRS accepts them as valid proof.[12] We disagree with Jurgens's contention that her credit card statements were sufficient to show the nature of her purchases as being for the benefit of Alice. While the credit card statements show the amount of the purchases and the retailers involved, they do not show the items purchased or for whom the items were purchased. Many of the credit card purchases were made in Montana where Jurgens lived, and their connection to Alice, who lived in Midland, was not self-evident.

12 We express no opinion on Jurgens's contention that credit card statements are sufficient for IRS purposes.

All transactions between a fiduciary and her principal are presumptively fraudulent and void; therefore, the burden lies on the fiduciary to establish the validity of any particular transaction in which she is involved. *Lesikar v. Rappeport* , 33 S.W.3d 282, 298 (Tex. App.—Texarkana 2000, pet. denied). In transactions involving parties with a fiduciary relationship, "equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable."
412 *Sorrell v. Elsey* , 748 S.W.2d 584, 585 (Tex. App.—San Antonio 1988, writ denied) (quoting *412 *Stephens Cty. Museum, Inc. v. Swenson* , 517 S.W.2d 257, 260 (Tex. 1974)). Accordingly, we disagree with Jurgens's contention that her reimbursement claims were in the nature of a defense. She had the burden of disproving the presumption of invalidity that attached to the transactions.

Jurgens told the trial court that she had documentation to justify the transactions involving the use of funds from Alice's estate. However, she never produced sufficient documentation. Furthermore, in at least two instances involving third parties, Jurgens's version of the events differed from the sworn testimony that Martin later obtained from the third parties. Accordingly, the trial court did not err by concluding that Jurgens's claims lacked merit.

Jurgens next asserts that the trial court sanctioned her for supplementing her discovery because sanctions were imposed even though she continued to supplement her discovery. We disagree. The reporter's records reflect that the trial court gave Jurgens numerous opportunities to supplement her deficient discovery despite the fact that she had not timely complied with discovery. The trial court only imposed death penalty sanctions after Jurgens failed to supplement her discovery.

Jurgens next contends that the trial court erred by imposing death penalty sanctions because it did so based on its determination that she was not credible. She contends that only a jury could make a credibility determination. As we previously noted, however, the trial court is tasked with making credibility determinations in the discovery context. *Daniel* , 981 S.W.2d at 232 ; *Cox* , 793 S.W.2d at 724. Accordingly, the trial court did not err by imposing death penalty sanctions based on its determination of Jurgens's credibility.

Finally, Jurgens asserts that her actions did not reflect bad faith. She notes that she produced 3,205 pages of documents, that she subpoenaed third parties for documents, that she paid all monetary sanctions imposed against her, and that she communicated with her trial counsel to ensure compliance. Jurgens contends that death penalty sanctions should be a sanction of last resort, not first resort, and that no lesser sanctions were imposed in the underlying proceeding.

We disagree with Jurgens's assertion that no prior sanctions were entered in the underlying suit. As we noted in our discussion of the discovery hearings, many of the hearings occurred only in the underlying proceeding while others occurred in both it and the probate case. We have also noted the related nature of the two proceedings. The death penalty sanctions in this case were not the first resort—as alleged by Jurgens in her brief. In this case, the trial court ordered Jurgens to produce additional documents on five occasions, held her in contempt on two occasions, and imposed progressive monetary sanctions on three occasions. The trial court repeatedly warned Jurgens that her pleadings would be stricken if she did not comply with discovery requests, and it encouraged her to obtain counsel in order to comply. As reflected in the trial court's statement when it imposed the death penalty sanctions against Jurgens, they were the last resort.

The court in *TransAmerican* stated that death penalty sanctions should be the "exception rather than the rule." 811 S.W.2d at 919. They are never justified unless there is an affirmative showing of "flagrant bad faith" or "callous disregard" for the rules. *Id.* at 918. While sanctions can promote the orderly conduct of court
413 proceedings by securing compliance and deterring noncompliance with court orders, *413 a "trial by sanctions" should be avoided whenever possible. *Altesse Healthcare Sols., Inc. v. Wilson* , 540 S.W.3d 570, 575 (Tex. 2018). Case-determinative sanctions may be imposed only in " 'exceptional cases' where they are 'clearly justified' and it is 'fully apparent that no lesser sanctions would promote compliance with the rules.' " *Cire* , 134 S.W.3d at 840–41 (quoting *GTE* , 856 S.W.2d at 729–30).

The death penalty sanctions imposed by the trial court in this case comply with the two-part standard established by *TransAmerican* . *See* 811 S.W.2d at 917. There was a direct relationship between the offensive conduct and the sanction imposed because Jurgens's failure to produce complete documentation of what she did as a fiduciary justifies a presumption that she abused her role to the prejudice of Martin and the other heirs and devisees. Jurgens failed to comply with discovery orders throughout the trial proceedings despite the imposition of lesser, progressive sanctions. The death penalty sanctions imposed by the trial court "fit the crime" because Jurgens's actions as a fiduciary indicate that she engaged in self-dealing and commingling of accounts for which she could not adequately account. *See TransAmerican* , 811 S.W.2d at 917. We conclude that the trial court did not abuse its discretion in imposing death penalty sanctions and striking Jurgens's pleadings. We overrule Jurgens's fifth issue.

Evidentiary Objections

In her ninth issue, Jurgens raises numerous evidentiary complaints about documentary exhibits admitted over her objections at the damages trial. The exhibits are supporting documents to a damage report prepared by Martin's accounting expert, Jake Costin. Whether or not to admit evidence at trial is a preliminary question to

be decided by the trial court. TEX. R. EVID. 104(a).

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Fleming v. Wilson* , 610 S.W.3d 18, 21 (Tex. 2020) (citing *In re J.P.B.* , 180 S.W.3d 570, 575 (Tex. 2005)). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone* , 972 S.W.2d 35, 43 (Tex. 1998). An appellate court should not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1 ; *Malone* , 972 S.W.2d at 43 ; *Nat'l Freight, Inc. v. Snyder* , 191 S.W.3d 416, 421 (Tex. App.—Eastland 2006, no pet.) ; *see Gee v. Liberty Mut. Fire Ins. Co.* , 765 S.W.2d 394, 396 (Tex. 1989). When erroneously admitted evidence is merely cumulative, any error in its admission is harmless. *Gee* , 765 S.W.2d at 396 ; *Snyder* , 191 S.W.3d at 423.

We note at the outset that Exhibit No. 1 is Costin's damage report. Costin testified that Exhibit Nos. 2 through 23 are documents that supported his damage report. Jurgens objected to the admission of Exhibit No. 1. On appeal, however, Jurgens does not challenge the trial court's admission of Exhibit No. 1. Exhibit No. 2 is a spreadsheet detailing several bank accounts. Costin agreed that it "[sets] forth various transactions in question which form the basis of the claims in the lawsuit." Jurgens did not object to the admission of Exhibit No. 2. Exhibit Nos. 3 through 23 contain information that supports the various entries on Exhibit Nos. 1 and 2. Jurgens directs her evidentiary complaints at the admission of thirteen of the documents constituting Exhibit Nos. 3 through 23. Martin contends that the admission of these supporting documents could not constitute
414 reversible error because they were cumulative of properly admitted evidence and did not cause the *414 rendition of an improper judgment. *See Snyder* , 191 S.W.3d at 421. We agree.

Jurgens first asserts that the trial court erred by overruling her objection to five exhibits on the basis that they were not sufficiently authenticated. Rule 901(a) of the Texas Rules of Evidence defines authentication as a "condition precedent" to the admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP* , 520 S.W.3d 145, 158 (Tex. App.—Austin 2017, pet. denied) ; *see* TEX. R. EVID. 901(a). To satisfy authenticity requirements, the proponent must "produce evidence" sufficient to support a finding that the item is what the proponent claims it to be. TEX. R. EVID. 901(a).

Exhibit No. 9 consisted of photocopies of account statements for a Wells Fargo account. Costin testified that the exhibit consisted of a collection of statements from Wells Fargo accounts. The trial court overruled Jurgens's authentication objection to the exhibit. In light of Costin's description of the exhibit, coupled with what its contents revealed, the trial court did not abuse its discretion by determining that the exhibits were what Martin asserted they were. *See id.* 901(a), (b)(1), (b)(4). Moreover, a summary of the same information was admitted without objection in Exhibit No. 2.

Exhibit Nos. 16, 18, and 19 consisted of liens and releases to which Jurgens objected on the basis that they were not sufficiently authenticated. Exhibit No. 16 is a "Montana Trust Indenture" that was acknowledged before a notary and was therefore self-authenticating. *See* TEX. R. EVID. 902(8). Additionally, Jurgens testified that she granted a lien on her property in Montana as described in Exhibit No. 16. *See id.* 901(b)(1), (b)(4). Exhibit No. 18 is a copy of partial satisfaction of judgment executed by Jurgens that bears a "filed" mark from a Montana district court. Jurgens testified she paid the sum set out in this exhibit. *See id.* Exhibit No. 19 is

a satisfaction of judgment from Montana. It is a certified copy of a public record and is therefore self-authenticating. *See id.* 902(4). Additionally, Jurgens testified that she "[made] that payment as well" with respect to Exhibit No. 19. *See id.* 901(b)(1), (b)(4).

Exhibit No. 20 is a copy of a HUD settlement statement pertaining to the sale of Billy and Alice's house. Martin questioned Jurgens about this sale prior to Jurgens's authenticity objection to the settlement statement. Additionally, several of the entries on Exhibit No. 20 were also included in Costin's damage summary that had previously been admitted. Costin testified that this information was supplied to him by Martin's previous attorney. Based on these references, the trial court did not abuse its discretion by overruling Jurgens's authenticity objection to Exhibit No. 20.

Jurgens next asserts that the trial court erred by overruling her hearsay objections to twelve documents—Exhibit Nos. 4, 5, 6, 7, 9, 12, 13, 14, 16, 19, 20, and 23. Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d) ; *Bay Area Healthcare Grp., Ltd. v. McShane* , 239 S.W.3d 231, 235 (Tex. 2007). Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or rules prescribed under statutory authority. TEX. R. EVID. 802 ; *McShane* , 239 S.W.3d at 235 (noting that out-of-court statements are normally excluded as
415 hearsay). We note at the outset that Jurgens did not object to *415 Exhibit Nos. 12 and 14 on the basis that they constituted hearsay. Accordingly, Jurgens has not preserved a hearsay complaint about these exhibits for appellate review. *See* TEX. R. APP. P. 33.1.

Exhibit Nos. 4, 5, 6, 7, and 9 are bank statements and related documents. Exhibit No. 13 consists of copies of checks written by Jurgens. And as we previously noted, Exhibit No. 16 is the Montana equivalent of a deed of trust; Exhibit No. 19 is a release of judgment; and Exhibit No. 20 is a HUD settlement statement. "[I]n many instances, experts may rely on inadmissible hearsay, privileged communications, and other information that the ordinary witness may not." *In re Christus Spohn Hosp. Kleberg* , 222 S.W.3d 434, 440 (Tex. 2007) (citing TEX. R. EVID. 703). Thus, an expert can rely upon hearsay to form an opinion if such evidence reasonably would be relied upon by experts in the field in forming opinions or inferences regarding the subject at issue. *See In re Marriage of Bivins* , 393 S.W.3d 893, 901 (Tex. App.—Waco 2012, pet. denied). Given the financial nature of Exhibit Nos. 4, 5, 6, 7, 9, 13, 16, 19, and 20, the trial court could have reasonably concluded that an expert in Costin's field of accounting and finance would reasonably rely on documents of this type to perform an accounting of the estates.

Exhibit No. 23 is a one-page document verifying automobile insurance information for two vehicles that were previously owned by Billy and Alice. Other than indicating the vehicles were once owned by Billy and Alice, Exhibit No. 23 has no significance to the final judgment. Furthermore, Jurgens admitted that the vehicles were owned by her parents. Accordingly, the trial court did not reversibly err by admitting Exhibit No. 23.

Finally, Jurgens asserts that the trial court erred by overruling her relevancy objections to Exhibit Nos. 4, 12, 13, 16, and 18.

To be admissible, evidence must be relevant. TEX. R. EVID. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. The relevance test is satisfied if there is some logical connection, either directly or by inference, between the fact offered and the fact to be proved. *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.* , 336 S.W.3d 764, 793 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Exhibit No. 4 shows Billy's designation of Jurgens as primary beneficiary on his Roth IRA account upon his death, as well as the balances on that account. Exhibit Nos. 12 and 13 are copies of checks written by Jurgens. Exhibit No. 16 is the Montana deed of trust and Exhibit No. 18 is a partial satisfaction of a Montana judgment. The trial court did not abuse its discretion by overruling Jurgens's relevancy objections to these exhibits because they were relevant to the damages that Martin claimed. Moreover, the relevant information from these documents was cumulative of the information in Costin's damage report and his supporting spreadsheet (Exhibit Nos. 1 and 2). *See Snyder* , 191 S.W.3d at 421. We overrule Jurgens's ninth issue.

Constructive Trust

In her seventh issue, Jurgens contends that the trial court had no authority to impose a constructive trust in favor of Martin over all of Jurgens's property. She also asserts that the trial court erred by imposing a constructive trust over unidentified assets. Jurgens contends that she preserved these complaints for appellate
416 *416 review by objecting to the "form, content, and result" of the trial court's final judgment. In this regard, Jurgens filed objections to Martin's proposed final judgment that provided: "Jurgens disagrees with the form of the proposed judgment, disagrees with the content and result of the proposed judgment, and plans to challenge the proposed judgment. *See First Nat'l Bank v. Fojtik* , 775 S.W.2d 632, 633 (Tex. 1989)."

Assuming an objection to a proposed judgment was sufficient to preserve a complaint about a judgment, Jurgens's reliance on *Fojtik* to preserve error was misplaced. The language approved for use in *Fojtik* was intended for use in a motion for judgment filed by a party that desires to later attack the judgment on appeal. 775 S.W.2d at 633. A party would waive his appeal if he filed a motion for judgment without the safe harbor language approved in *Fojtik* . *Id.*

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a) ; *see Holden v. Holden* , 456 S.W.3d 642, 648 (Tex. App.—Tyler 2015, no pet.) ; *Solomon v. Steitler* , 312 S.W.3d 46, 60 (Tex. App.—Texarkana 2010, no pet.). To preserve a complaint related to an error in a judgment, a party must inform the trial court of its objection by a motion to amend or correct the judgment, a motion for new trial, or some other similar method. *Holden* , 456 S.W.3d at 648 ; *Solomon* , 312 S.W.3d at 60 ; *Homes v. Humphrey* , 244 S.W.3d 570, 582 (Tex. App.—Beaumont 2008, pet. denied) ; *Dal–Chrome Co. v. Brenntag Sw., Inc.* , 183 S.W.3d 133, 144 (Tex. App. —Dallas 2006, no pet.). Thus, Jurgens's general statement that she "disagrees" with the judgment was insufficient to preserve any complaints for appellate review.

Jurgens never presented a complaint to the trial court that it was without authority to grant a constructive trust over all of her property or that it erred by imposing a constructive trust over unidentified assets. The Texarkana Court of Appeals addressed a similar situation in *Solomon.* 312 S.W.3d at 60. In *Solomon* , the appellant presented an appellate issue challenging the trial court's issuance of a permanent injunction on the basis that it violated the one-satisfaction rule. *Id.* However, the appellant did not present this legal question to the trial court for consideration. *Id.* at 60–61. The Texarkana Court of Appeals concluded that the appellant waived the issue for appellate review by not presenting the complaint to the trial court. *Id.* at 61.

We agree with the holding in *Solomon.* In order for Jurgens to preserve her legal complaints about the propriety of the constructive trust imposed by the trial court in its final judgment, she was required to present them to the trial court for consideration in a motion challenging the judgment. She did not do so. Accordingly, Jurgens did not preserve her complaints about the constructive trust for appellate review. *See* TEX. R. APP. P. 33.1 ; *Burbage* , 447 S.W.3d at 258. We overrule Jurgens's seventh issue.

Post-Petition Constructive Trust Over a Bankruptcy Asset

In her eighth issue, Jurgens contends that the trial court erred by imposing a "post-petition constructive trust" over a bankruptcy asset. In her brief, Jurgens cites provisions of the Texas Property Code and Montana statutes pertaining to homestead law, and portions of the United States Code pertaining to bankruptcy. She contends
417 that the trial court erred by imposing a post-petition constructive *417 trust over her Montana homestead because it was subject to her bankruptcy proceeding in Montana.

As was the case with her seventh issue, Jurgens cites her general statement in her objection to the proposed judgment that she "disagrees" with the proposed judgment as the method by which she preserved error for her legal complaints presented in her eighth issue. As was the case with Issue Seven, this general statement of displeasure was insufficient to preserve for appellate review her contentions that the constructive trust did not comply with various laws. Jurgens did not preserve for appellate review her legal complaints about the constructive trust because she did not present them to the trial court for consideration. *See* TEX. R. APP. P. 33.1 ; *Burbage* , 447 S.W.3d at 258.

Moreover, Martin cites an order in the appellate record from the bankruptcy court wherein it held Martin's adversary claim in the bankruptcy proceeding in abeyance pending the outcome of the state court proceedings. This order indicates that the bankruptcy court determined that Martin's entitlement to a constructive trust was dependent on the outcome of the state court proceedings. Thus, the bankruptcy court authorized the trial court to adjudicate Martin's claims against Jurgens.

In her eighth issue, Jurgens also challenges the sufficiency of the evidence to support a finding made by the trial court. This finding relates to Jurgens's bankruptcy proceeding. Specifically, the trial found: "[I]t would be inequitable for [Jurgens] to retain any portion of her claimed homestead exemption that resulted from her misappropriation of funds from Alice Jean Martin or the Estate and [Jurgens] would be unjustly enriched to the detriment of the heirs and beneficiaries of the Estate." Jurgens contends that no evidence was offered at the damages trial to support this finding. This finding tracked an allegation in Martin's pleadings wherein he sought a constructive trust and alleged that Jurgens had been unjustly enriched.

As we noted previously, the trial court imposed death penalty sanctions against Jurgens and entered a default judgment against her as to liability. When a default judgment is taken on an unliquidated claim, all allegations of fact set forth in the petition are deemed admitted, except the amount of damages. *Holt Atherton Indus., Inc. v. Heine* , 835 S.W.2d 80, 83 (Tex. 1992) ; *Stoner v. Thompson* , 578 S.W.2d 679, 684 (Tex. 1979). "[I]f the facts set out in the petition allege a cause of action, a default judgment conclusively establishes the defendant's liability." *Morgan v. Compugraphic Corp.* , 675 S.W.2d 729, 731 (Tex. 1984). Thus, in light of the default judgment, Jurgens is deemed to have admitted all of the factual allegations in Martin's pleadings establishing her default judgment liability. *See Estate of Preston* , 346 S.W.3d at 165–66 (citing *Holt Atherton* , 835 S.W.2d at 83 ; *Morgan* , 675 S.W.2d at 731). Jurgens cannot now challenge those admissions. *See id.* We overrule Jurgens's eighth issue.

Attorney's Fees

In her tenth issue, Jurgens challenges the trial court's award of $341,418 in attorney's fees. She asserts that the evidence was insufficient to support the trial court's award. We agree.

We note at the outset that the trial court and the parties did not have the benefit of the Texas Supreme Court's opinion in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* , 578 S.W.3d 469 (Tex. 2019). In *Rohrmoos*
418 *Venture* , the court clarified the manner in which a lower court *418 should determine an award of attorney's

fees. 578 S.W.3d at 496. Texas uses the "lodestar method" which is essentially a "short hand version" of the *Arthur Andersen* [13] factors, to determine reasonable and necessary attorney's fees. *Id.* Under the lodestar method, the factfinder must first determine the reasonable hours spent by counsel and the reasonable hourly rate for counsel's work. *El Apple I, Ltd. v. Olivas* , 370 S.W.3d 757, 760 (Tex. 2012). The factfinder then multiplies the number of hours that counsel worked on the case by the applicable rate to determine the base fee or lodestar. *Id.* The base fee is presumed to reflect the reasonable and necessary attorney's fees. *Rohrmoos Venture* , 578 S.W.3d at 499. The factfinder may adjust the lodestar up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.* at 500–01.

13 *Arthur Andersen & Co. v. Perry Equip. Corp.* , 945 S.W.2d 812, 818 (Tex. 1997).

It is the fee claimant's burden to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Id.* at 498. "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed the services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each attorney performing the services." *Id.*

"General, conclusory testimony devoid of any real substance will not support a fee award." *Id.* at 501. Generalities about tasks performed provide insufficient information for the factfinder to meaningfully review whether the tasks and hours were reasonable and necessary. *El Apple I* , 370 S.W.3d at 764. While contemporaneous billing records are not required, there must be some evidence to inform the trial court of the time spent on specific tasks to enable the factfinder to meaningfully review the requested fees. *Rohrmoos Venture* , 578 S.W.3d at 502 ; *Long v. Griffin* , 442 S.W.3d 253, 253, 255 (Tex. 2014) (per curiam) ; *City of Laredo v. Montano* , 414 S.W.3d 731, 736–37 (Tex. 2013) (per curiam) (reversing and remanding to redetermine attorney's fees when attorney testified to the time expended and the hourly rate but failed to provide evidence of the time devoted to specific tasks).

The evidence to support the amount of attorney's fees awarded to Martin was in the form of affidavits from five of Martin's attorneys and an affidavit from an accountant. The largest amount of attorney's fees was from Martin's former lead counsel, Robyn Frohlin, wherein she asserted attorney's fees of $337,970.93. She averred as follows:

> I have personal knowledge of the work performed on this and the Probate Action by myself and other members of my firm and have personal knowledge of the hourly rates charged. It is my opinion that all of the work performed in these matters was reasonable and necessary and that the total of all fees and costs charged were customary and reasonable. The total of fees and costs incurred and billed by my firm to this matter and the Probate Action is $337,970.93. Full and complete payments have been made on all bills submitted by my firm for payment to date.

This provision is the sole basis provided by Frohlin for a recovery of her attorney's fees. The affidavits from the other attorneys were similarly devoid of specific information. The attorneys' affidavits did not discuss the particular services performed, who performed the services, the reasonable amount of time required to perform
419 *419 the services, or the reasonable hourly rate for each attorney performing the services—all of which are required by *Rohrmoos Venture* . *See* 578 S.W.3d at 498. There is simply no reference to the hours worked and the hourly rate charged. *See id.* Without details about the work done and how much time was spent on each task, the affidavits "lack[ ] the substance required to uphold a fee award." *See id.* at 505.

We sustain Jurgens's tenth issue. We reverse the trial court's award of attorney's fees to Martin in the amount of $341,418 and remand the issue to the trial court for a redetermination of attorney's fees. *See El Apple* , 370 S.W.3d at 765 (concluding that, because record did not provide sufficient evidence to support discretionary award of attorney's fees under the Texas Commission on Human Rights Act, case should be remanded to the trial court for a redetermination of fees); *see also Rohrmoos Venture* , 578 S.W.3d at 505 ; *Long* , 442 S.W.3d at 256.

Fraud

Jurgens's eleventh and twelfth issues concern the trial court's determination that she committed fraud. In Issue Eleven, she contends that the trial court erred by overruling her objection to the inclusion of the fraud finding. In this regard, Jurgens specifically challenged the fraud finding in her objections to Martin's proposed judgment. In Issue Twelve, Jurgens asserts that the trial court erred in denying her "Motion for New Trial and/or Modification of Amended Final Judgment" wherein she challenged the fraud finding. Jurgens based both requests on the same argument—that the trial court issued a prejudgment letter on July 23, 2018, wherein the court stated, "The court does not make a finding regarding fraud."

We first note that, prior to the issuance of the July 23, 2018 letter, the trial court made an affirmative determination that Jurgens committed fraud. The trial court made this previous finding in its June 2017 order granting death penalty sanctions and default judgment on liability. And then, as previously noted, after the July 23, 2018 prejudgment letter, the trial court issued a final judgment that included an affirmative fraud finding. The trial court also included an affirmative fraud finding in its findings of fact and conclusions of law.

We disagree with Jurgens's contention that the trial court was bound by the terms of the prejudgment letter. A letter ruling of this type is not "competent evidence of the trial court's basis for judgment." *Cherokee Water Co. v. Gregg Cty. Appraisal Dist.* , 801 S.W.2d 872, 878 (Tex. 1990) ; *see Bell Helicopter Textron, Inc. v. Burnett* , 552 S.W.3d 901, 912 (Tex. App.—Fort Worth 2018, pet. denied). In this instance, the trial court may have a reached the opposite conclusion when it later signed the final judgment. *See Cherokee Water* , 801 S.W.2d at 878. Furthermore, a letter of this type is not a finding of fact as contemplated by the rules of civil procedure. *See id.* Explanatory letters from the trial court preceding a judgment do not impact the standard or scope of our appellate review. *See Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n* , 375 S.W.3d 464, 482 n.24 (Tex. App.—Austin 2012, pet. denied).

Moreover, because of the default judgment, Jurgens is deemed to have admitted Martin's fraud allegations. *See Holt Atherton* , 835 S.W.2d at 83 ; *Morgan* , 675 S.W.2d at 731 ; *Estate of Preston* , 346 S.W.3d at 165–66. Accordingly, Jurgens is precluded from challenging the sufficiency of the evidence supporting the fraud finding. We overrule Jurgens's eleventh and twelfth issues.*420

420 *Compensatory Damages Awarded to Martin*

In Issues Thirteen[14] and Fourteen,[15] Jurgens asserts that the trial court erred by awarding Martin a "windfall in compensatory damages." She bases her contention on the argument that Martin received a windfall because the $353,000 exceeded the amount that he was entitled to receive from Alice's estate. Jurgens asserts that, at most, Martin would only be entitled to a one-third share of Alice's estate based on the fact that Alice was survived by three children. *See* EST. § 201.001. She contends that the recovery against her in favor of Martin should have been rendered in favor of Alice's estate so that the money could be properly disbursed after Martin's will contest is resolved. We agree.

14 Issue Thirteen concerns the trial court's implicit denial of Jurgens's objections to Martin's proposed final judgment wherein she asserted that any recovery should be in favor of the estates of Alice and Billy.

15 Issue Fourteen concerns the trial court's implicit denial of Jurgens's "Motion for New Trial and/or Modification of Amended Final Judgment."

As we have previously noted, Martin cast his suit against Jurgens as an effort to restore the property of Alice's estate. Thus, while Jurgens's actions derivatively affected the share that Martin would receive from Alice's estate, the harm was suffered by Alice's estate, and the recovery against Jurgens should have been in favor of Alice's estate. *See Holden* , 456 S.W.3d at 655–57 (agent operating under power of attorney granted by decedent ordered to pay wrongfully taken funds to decedent's estate). Accordingly, we sustain Jurgens's thirteenth and fourteenth issues. The portion of the judgment awarding $353,000 in favor of Martin is reversed, and we remand this matter to the trial court with instructions to render judgment in favor of Alice's estate, or Billy's estate, as the trial court may determine. The trial court shall impose any condition that the trial court determines is necessary for the preservation of the funds that are to be paid by Jurgens as damages to the estates (of which she is still the executor).

New Trial

Issue Fifteen concerns Jurgens's second motion for new trial. She contends that the trial court erred in failing to hold a hearing on the motion and that the trial court erred by not granting the motion for new trial in its entirety. With respect to the hearing on the second motion for new trial, the record does not reflect that Jurgens requested a hearing on the motion. She contends in her brief that she requested a hearing on the motion, but the page that she directs us to in the clerk's record is her request for a hearing on her first motion for new trial. Generally, the decision to hold an evidentiary hearing on a motion for new trial in a civil case is within the trial court's discretion. *Hamilton v. Pechacek* , 319 S.W.3d 801, 807 (Tex. App.—Fort Worth 2010, no pet.) ; *Landis v. Landis* , 307 S.W.3d 393, 394 (Tex. App.—San Antonio 2009, no pet.). A trial court is required to conduct a hearing only after it is requested by a party and when the motion for new trial presents a question of fact upon which evidence must be heard. *Hensley v. Salinas* , 583 S.W.2d 617, 618 (Tex. 1979) (per curiam). In the absence of a request for a hearing on Jurgens's motion for new trial, the trial court did not err in not holding a hearing on the motion.

With respect to the merits of her second motion for new trial, Jurgens summarily argues as follows in her brief:

> Jurgens refers this Court to her arguments presented under Issue Nos. 3-6

421 *421

> and Issue Nos. 10-14 in support of her argument that the trial court erred in refusing to grant her a new trial. To avoid a needless repetition of facts and law, Jurgens incorporates herein her arguments under Issue Nos. 3-6 and Issue Nos. 10-14 for all purposes as if quoted verbatim.

We need not consider these issues again in light of our previous disposition of Issues Three, Four, Five, Six, Ten, Eleven, Twelve, Thirteen, and Fourteen. We overrule Jurgens's fifteenth issue.

This Court's Ruling

We reverse the judgment of the trial court as to Martin's claim for fraud on the community in the amount of $79,978.38, and we render judgment that Alice's estate takes nothing on that claim. We also reverse the trial court's judgment insofar as it awarded attorney's fees to Martin in the amount of $341,418, and we remand the issue to the trial court for a redetermination of attorney's fees. Additionally, we reverse the trial court's judgment insofar as it awarded the recovery of $353,000 in favor of Martin, and we remand the issue of

compensatory damages to the trial court with instructions to render judgment in favor of Alice's estate, or Billy's estate, as the trial court may determine. The trial court shall impose any condition that the trial court determines is necessary for the preservation of the funds that are to be paid by Jurgens as damages to the estates (of which she is still the executor). We affirm the trial court's judgment in all other respects.

Trotter, J., and Williams, J., not participating.

No. 02-20-00404-CV
Court of Appeals of Texas, Second District, Fort Worth

In re Stavron

Decided Nov 10, 2021

02-20-00404-CV

11-10-2021

In the Estate of Steven Stavron, Deceased

Dana Womack Justice.

On Appeal from Probate Court No. 1 Tarrant County, Texas Trial Court No. 2013-PR00606-1-C

Before Sudderth, C.J.; Womack and Walker, JJ.

MEMORANDUM OPINION

2 Dana Womack Justice. *2

I. Introduction

This is an appeal from a probate court judgment against Appellant Serafim Stavron awarding Appellee Louis Papaliodis attorney's fees. We will affirm.

II. Background

In March 2013, Stavron was appointed the temporary administrator of the estate of his deceased father. According to attorney Papaliodis, that same month, he and Stavron also "entered into a valid and enforceable contract," and Papaliodis thereafter "fully performed his contractual obligations by representing Stavron and by representing the estate until Stavron ultimately located counsel to assist with his contesting of the 2013 will" of the decedent.

Stavron entered into a mediated settlement agreement in August 2014 with the proponents of the 2013 will, whereby the parties agreed to admit the 2013 will to probate and to take certain other actions with regard to the estate. However, the attorney's fees of Papaliodis were not mentioned in the settlement agreement.

Also in August 2014, Papaliodis filed a claim-the "Account for Final Settlement"-against the estate in the amount of $76,917.47 for his attorney's fees. Ultimately, Greg Shannon, the successor temporary administrator of the estate, rejected Papaliodis's claim. In his "Memorandum of Rejection and Objections to Claim," Shannon
3 set out several reasons for rejecting the claim, including that the *3 attorney's fees which were sought "reflect a prolonged legal battle, and only a portion of the fees at issue relate to the administration of the estate."

Papaliodis ultimately filed suit against Shannon as successor temporary administrator and against Stavron "individually and as Prior Temporary Administrator," contending that "Stavron never paid for the services he received on behalf of the estate." Papaliodis contended that his services "were reasonable and necessary for the

management, preservation, and safekeeping of the Estate, and a benefit to the Estate and to [ ] Stavron individually." With regard to the suit against Stavron individually, Papaliodis explained that "Stavron represented to [ ] Papaliodis that if there was any problem with the estate paying for his services, that he (Stavron) would take care of it." He alleged causes of action for his rejected claim and for quantum meruit, breach of contract, fraud, and declaratory relief. With regard to the declaratory judgment claim, Papaliodis sought "a declaration of his rights to determine his classification as a creditor of the estate." In addition, he sought a declaration of "what effect, if any [,] the August 29, 2014 Settlement Agreement, entered into by [ ] Stavron and the proponent of the 2013 Will[,] have on his status as a creditor, and on his contractual and other claims against the estate, and against Stavron individually and against his sureties."

Prior to trial, Papaliodis settled his claim against Shannon by entering into a compromise settlement agreement wherein Shannon agreed to approve Papaliodis's claim in the amount of $27,000.00 in attorney's fees and
4 $459.97 in expenses as a class *4 2 claim and the amount of $23,000.00 as a class 8 claim, subject to the approval of the probate court.[1] As a result of this settlement, Papaliodis filed a nonsuit as to Shannon, which the probate court later memorialized in a judgment.

[1] *See* Tex. Est. Code Ann. § 355.102 (setting out claims classification and priority of payment); *Hope v. Baumgartner,* 111 S.W.3d 775, 778 (Tex. App.-Fort Worth 2003, no pet.) (explaining that attorney's fees of an unsuccessful will contestant should be classified as a class 8 claim, which includes all claims not described as class 1-7 claims, as opposed to a class 2 claim, which is limited to expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate).

The claims against Stavron then proceeded to a bench trial.[2] At trial, Papaliodis and Stavron testified, and fourteen documents were offered into evidence. Ultimately, the trial court entered judgment for Papaliodis against Stavron individually in the amount of $37,712.50. No findings of fact or conclusions of law were requested or filed. Stavron appealed from the judgment, and Papaliodis filed a cross-appeal.

[2] Although Papaliodis's attorney began trial by telling the trial court that he was proceeding on all claims, by the end he had abandoned quantum meruit.

III. Discussion

On appeal, Stavron raises three issues complaining that the probate court (1) did not have subject-matter jurisdiction over Papaliodis's claims, (2) abused its discretion by overruling his hearsay objection to Papaliodis's attorney billing records, and (3) without the improperly admitted billing records, had insufficient evidence to support its judgment. In his cross-appeal, Papaliodis raises four issues complaining that the probate
5 court erred by (1) awarding an amount for attorney's fees less than *5 $76,917.47, (2) not awarding prejudgment interest on the principal amount in controversy, (3) not awarding attorney's fees on his efforts to collect his damages, and (4) failing to dispose of all parties and causes of action because the judgment did not address his request for declaratory relief

A. Stavron's Issues

1. Jurisdiction

In his first issue, Stavron contends that the probate court lacked subject-matter jurisdiction over Papaliodis's lawsuit because it was not a probate proceeding or a matter related to a probate proceeding. We disagree.

As we have stated before, "Texas probate jurisdiction is, to say the least, somewhat complex." *Shell Cortez Pipeline Co. v. Shores,* 127 S.W.3d 286, 292 (Tex. App.-Fort Worth 2004, no pet.) (citing *Palmer v. Coble Wall Tr. Co.,* 851 S.W.2d 178, 180 n.3 (Tex. 1992)). However, in a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings, and all "probate proceedings" must be filed and heard there. Tex. Est. Code Ann. §§ 32.001(a), .002(c). The term "probate proceeding," as used in the Texas Estates Code, includes "an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent." *Id.* § 31.001(4); *see id.* § 22.029 ("The terms 'probate matter,' 'probate proceedings,' 'proceeding in probate,' and 'proceedings for probate' are synonymous and include a matter or proceeding relating to a decedent's estate."). *6

At the time Papaliodis filed his claim, the probate of Stavron's father's estate was pending in a statutory probate court, Probate Court No. 1 of Tarrant County. *See* Tex. Gov't Code Ann. § 25.2221(c)(1); *see also Narvaez v. Powell,* 564 S.W.3d 49, 57 (Tex. App.-El Paso 2018, no pet.) ("In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court."). Papaliodis filed suit not only against Stavron but also against Shannon as successor temporary administrator. His first cause of action involved a suit on a rejected claim, which must be brought in the probate court. *See* Tex. Est. Code Ann. § 355.064(a) ("A claim or part of a claim that has been rejected by the personal representative is barred unless not later than the 90th day after the date of rejection the claimant commences suit on the claim in the court of original probate jurisdiction in which the estate is pending.").

Even after the claims against Shannon were nonsuited, claims for what Papaliodis described as "valuable legal services and advanced costs and fees on behalf of the estate" remained pending against Stavron. Even if these claims were not expressly a "probate proceeding," they were certainly ancillary to it and within the jurisdiction of the probate court.

The Estates Code gives a probate court pendent and ancillary jurisdiction "as necessary to promote judicial efficiency and economy." *Id.* § 32.001(b). "Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the nonprobate claims and the claims against the estate." *Shell Cortez Pipeline Co.,* *7 127 S.W.3d at 294 (citing *Sabine Gas Transmission Co. v. Winnie Pipeline Co.,* 15 S.W.3d 199, 202 (Tex. App.-Houston [14th Dist] 2000, no pet.)). In reviewing a probate court's exercise of pendent and ancillary jurisdiction, "the fundamental question [a court must ask] is whether there was a close relationship between [the non-probate claims and the probate proceeding] such that the probate court's exercise of jurisdiction will aid it in the efficient administration of the [estate]." *Schuchmann v. Schuchmann,* 193 S.W.3d 598, 603 (Tex. App.-Fort Worth 2006, pet. denied). However, a probate court has jurisdiction "to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction." *Goodman v. Summit at W. Rim, Ltd.,* 952 S.W.2d 930, 934 (Tex. App.-Austin 1997, no pet.).

Here, the probate court clearly had jurisdiction to consider Papaliodis's claim against Stavron because it was premised on what Papaliodis described as Stavron's "duties as Temporary Administrator, and in managing, preserving, and collecting the assets of the Estate." Even as to the individual claims against Stavron, there was a close relationship between the claim for attorney's fees and the claims against the estate. *See Shell Cortez Pipeline Co.,* 127 S.W.3d at 294. There was evidence that all of the legal fees, in Papaliodis's words, were performed "on behalf of the estate." Stavron filed a sworn claim that stated that, at the time, attorney's fees and court costs advanced by Papaliodis in the amount of $76,917.47 "are presently due and owed by the Estate." Stavron even states in his brief that Papaliodis "represented Stavron in *8 connection with Decedent's estate."

While Stavron now contends that Papaliodis's lawsuit "was unrelated to the collection, partition, and distribution of Decedent's estate," his own words belie that contention. Accordingly, we overrule Stavron's first issue.

2. Attorney's Fees

In his second issue, Stavron complains that the probate court overruled his hearsay objection to Papaliodis's attorney billing records. In his third issue, he contends that without the erroneously admitted billing records, there is insufficient evidence to support a finding that the fees sought were reasonable and necessary.

a. Hearsay objection

His hearsay argument centers on two exhibits that contained detailed time entries for Papaliodis's legal services from March 1, 2013, through March 11, 2014, and August 28, 2014, through September 13, 2019. Stavron contends that the exhibits were hearsay and inadmissible under the business-record exception to the hearsay rule because "Papaliodis conceded that the billing records offered were not the original billing records" and that they were "copied from information on notes, [as] separate records, five or six months after the recorded events occurred."

We review a trial court's decision to admit evidence under an abuse-of-discretion standard. *See In re J.F.C.*, 96 S.W.3d 256, 285 (Tex. 2002); *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527-28 (Tex. 2000). A trial court abuses its discretion when it rules without regard for any guiding rules or principles. *Owens-Corning*
9 *Fiberglas Corp. v. Malone,* *9 972 S.W.2d 35, 43 (Tex. 1998). We must uphold a trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.*

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). The business-records exception provides that evidence meeting certain criteria should not be excluded under the hearsay rule. Tex. R. Evid. 803(6). The foundation for the business-records exception has four requirements: (1) the records were made and kept in the course of a regularly conducted business activity; (2) it was the regular practice of the business activity to make the records; (3) the records were made at or near the time of the event that they record; and (4) the records were made by a person with knowledge who was acting in the regular course of business. *Powell v. Vavro, McDonald, & Assocs., L.L.C.*, 136 S.W.3d 762, 765 (Tex. App.-Dallas 2004, no pet.).

In order to admit the two exhibits under the business-records exception to the hearsay rule, Papaliodis testified that the exhibits were (1) invoices "kept in the ordinary course of business"; (2) a "compilation of contemporaneous time sheets" with "[e]very invoice in my office [being] based on a time sheet, just like any other law firm"; (3) "made at or near the time of the record"; and (4) made by "myself" and "kept in the ordinary course of business." "Business records of an attorney are admissible pursuant to Rule 803(6) to support attorney's fees." *Lesikar v. Moon*, No. 14-11-01016-CV, 2012 WL 3776365, at *7 (Tex. App.-Houston
10 [14th Dist.] *10 Aug. 30, 2012, pet. denied) (mem. op.) (citing *Connor v. Wright, 737* S.W.2d 42, 44 (Tex. App.-San Antonio 1987, no writ)). On this record, we hold that the trial court did not abuse its discretion by finding that Papaliodis's testimony coupled with the documents themselves met the requirements of Texas Rule of Evidence 803(6). We overrule Stavron's second issue.

b. Sufficiency of the Evidence

Stavron next argues that, "[a]part from his billing records, Papaliodis provided no information as to the amount of time spent on discrete] tasks," and, therefore, the probate court had insufficient evidence to support its award of $37,712.50. Again, we disagree.

(1) Standard of Review and Applicable Law

We review a trial court's award of attorney's fees for an abuse of discretion. *El Apple I, Ltd. v. Olivas,* 370 S.W.3d 757, 761 (Tex. 2012). Such awards must be supported by sufficient evidence. *Yowell v. Granite Operating Co.,* 620 S.W.3d 335, 354 (Tex. 2020). In reviewing the evidence, we first note that findings of fact and conclusions of law were neither requested nor filed. In a bench trial in which no findings of fact or conclusions of law are filed, the trial court's judgment implies all findings of fact necessary to support it. *Shields Ltd. P'ship v. Bradberry,* 526 S.W.3d 471, 480 (Tex. 2017). When a reporter's record is filed, these implied findings are not conclusive, and an appellant may challenge them by raising issues challenging the
11 legal and factual sufficiency of the evidence to support the judgment. *Id.* We apply the *11 same standard when reviewing the sufficiency of the evidence to support implied findings that we use to review the evidentiary sufficiency of jury findings or a trial court's express findings of fact. *Id; Liberty Mut. Ins. Co. v. Burk,* 295 S.W.3d 771, 777 (Tex. App.-Fort Worth 2009, no pet.). We must affirm the judgment if we can uphold it on any legal theory supported by the record. *Rosemond v. Al-Lahiq,* 331 S.W.3d 764, 766-67 (Tex. 2011); *Liberty Mut. Ins. Co.,* 295 S.W.3d at 777.

We may sustain a legal-sufficiency challenge-that is, a no-evidence challenge- only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Shields Ltd. P'ship,* 526 S.W.3d at 480; *see also Ford Motor Co. v. Castillo,* 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez* , 977 S.W.2d 328, 334 (Tex. 1998) (op. on reh'g). In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas,* 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson,* 168 S.W.3d 802, 807, 827 (Tex. 2005).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the pertinent record evidence, we determine that the credible
12 evidence supporting the *12 finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965).

When seeking to recover attorney's fees, it is the fee claimant's burden to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP,* 578 S.W.3d 469, 498 (Tex. 2019). "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.* While contemporaneous billing records are not required to prove that requested fees are reasonable and necessary, they are valuable as a basis for testifying as to the reasonableness and necessity of the requested fees. *Id.* at 502. This lodestar method of proof is the "starting point" for an attorney's fee calculation. *Id.* at 498. This base can be adjusted up or down in a "second step" based on

consideration of the relevant *Arthur Andersen* factors, to the extent those factors are not already taken into account for purposes of the "first step" or base calculation. *Id.* at 502 (citing *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 818 (Tex. 1997)). *13

(2) Evidence Presented

Papaliodis testified that he attended Texas Wesleyan University School of Law, graduated in July 2003, and passed the bar in May 2004. Papaliodis explained that he had a general civil law practice specializing in probate and that Stavron, whom Papaliodis had known since childhood, contacted him shortly after Stavron's father's death because Stavron needed "help" dealing with "a whole number of highly irregular things" involving his father's death. According to Papaliodis, it was his understanding that Stavron was going to pay him individually "because [when he was first hired] there was no Estate, there was no envisioning that he was going to be an administrator." Papaliodis testified that, after he got Stavron appointed as administrator, "all Hell broke loose" and that he and Stavron "were fought tooth and nail every time [they] made a move."

Papaliodis also testified that he never had a written agreement with Stavron, and although he initially was going to charge $250 per hour, he "re-rated the bill to $175." Regarding his time, rate, and amount of attorney's fees and costs, Papaliodis stated, "I spent 436.9 hours of attorney time at $175 an hour - - became $76,457.50. I had client costs advanced, $459.97. And the total amount due was $76,917.47." In addition, he testified that his rate of $175 per hour was "well below the market," and he "charge[d] paralegal rates for attorney work." He also testified that "$175 [was] a reasonable paralegal rate." *14

He explained that he ultimately settled his suit with Shannon. While he could not remember the exact numbers, he thought "there was $27,000 as a Class 2B Claim, to be paid after [other attorneys'] bills [were] paid. And portions of, . . . another $25-or $28,000 as a Class 8 Claim." By the time of trial, he had not been paid by the estate, although the estate had not been "fully disbursed yet."

Papaliodis offered, and the probate court admitted, fifteen pages of billing records with 296 entries detailing the particular services that Papaliodis rendered from March 1, 2013, through March 11, 2014, and from August 28, 2014, through September 13, 2019. The billing records included (1) a detailed description of the legal services he provided, (2) a column identifying Papaliodis as the attorney who performed the services, (3) the dates on which the services were performed, (4) the amount of time he spent performing the services, and (5) the hourly rate charged for the services. According to his testimony, Papaliodis kept the records of his time in increments of one tenth of an hour.

Stavron's attorney cross-examined Papaliodis. He pointed out that Papaliodis had represented Stavron in other matters in which he had charged Stavron different rates. In addition, Papaliodis did not send an invoice to Stavron for approximately the first six months of his work. Stavron's attorney questioned Papaliodis about the details of his bills, including the fact that he billed 7.4 hours to the case one day, another 7.7 hours the next day, and 9.6 hours the following day. Papaliodis devoted this much time because, according to him, "This case basically shut my firm down for *15 awhile. I was turning away paying business to help [Stavron]." He testified that he segregated the entries on his bill "by that bucket of work." However, Papaliodis ultimately expected Stavron to pay him only what was reasonable and necessary for the work that he did. Finally, Papaliodis confirmed that his attorney's fees, according to the "Account for Final Settlement," represented the largest claim in the estate to that date.

(3) Analysis

As set forth above, Papaliodis's testimony coupled with the billing records that were admitted into evidence show (1) the particular services performed, (2) who performed the services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for the attorney who performed the services. *See Rohrmoos,* 578 S.W.3d at 502. The evidence presented thus informed the trial court of the time spent on specific tasks and enabled the trial court to meaningfully review the requested fees. Taken together, the billing records and Papaliodis's testimony supply sufficient proof of the lodestar essentials described in *Rohrmoos*. *See id.* at 498; *see also Stavron v. SureTec Ins. Co.,* No. 02-19-00125-CV, 2019 WL 6768125, at *7 (Tex. App.-Fort Worth Dec. 12, 2019, no pet.) (mem. op.) (concluding that attorney affidavit and billing records provided sufficient evidence to support attorney's fees in
16 related matter between Stavron and SureTec Insurance Company). We conclude that there is legally *16 and factually sufficient evidence to support the award of attorney's fees.[3] Thus, we overrule Stavron's third issue.

[3] Stavron challenges only the award of any amount as attorney's fees. He does not challenge the total awarded as excessive.

B. Papaliodis's Cross-Appeal Issues

1. Award of Less Than Requested Attorney's Fees

In the first of his cross-appeal issues, [4] Papaliodis complains that the trial court erred by awarding less than $76,917.47, which is the full amount of attorney's fees that he requested. We disagree.

[4] Stavron did not file a brief in response to the issues raised in the cross-appeal.

While Papaliodis testified regarding his attorney's fees and admitted billing records of his fees, Stavron disputed both the reasonableness and the necessity of the fees. Further, Stavron testified at trial that he never agreed to personally pay for any of Papaliodis's attorney's fees: "[Papaliodis] repeatedly told me, over and over, on multiple occasions, that all fees incurred on behalf of the temporary administrator would be paid for by the Estate, and that I would never be personally liable for any of those fees." Stavron also testified that, in addition to having "absolutely no written fee agreement, ever, at all, related to this case," the fee was "too much" and "absolutely asinine."

Papaliodis argues that the "Account for Final Settlement" that was signed by Stavron "conclusively established
17 [Stavron's] liability and the amount of that liability." *17 Therefore, Papaliodis contends that any contrary evidence is barred under the doctrines of judicial admission and judicial estoppel.

A judicial admission is "a formal waiver of proof usually found in pleadings or the stipulations of the parties." *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.,* 606 S.W.2d 692, 694 (Tex. 1980). "A judicial admission is conclusive upon the party making it, and it relieves the opposing party's burden of proving the admitted fact, and bars the admitting party from disputing it." *Id.* (citing *Gevinson v. Manhattan Constr. Co. of Okla.,* 449 S.W.2d 458, 467 (Tex. 1969)). For a judicial admission to exist and be conclusive against a party, it must be shown (1) that the declaration relied on was made during the course of a judicial proceeding; (2) that the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony; (3) that the statement was deliberate, clear, and unequivocal; (4) that giving conclusive effect to the declaration will be consistent with public policy; and (5) that the testimony must be such as relates to a fact upon which a judgment for the opposing party may be based. *Griffin v. Superior Ins. Co.,* 338 S.W.2d 415, 419 (Tex. 1960).

Judicial estoppel is based on inconsistency in judicial proceedings. *Balaban v. Balaban,* 712 S.W.2d 775, 777 (Tex. App.-Houston [1st Dist] 1986, writ refd n.r.e.). Under the doctrine, a party is estopped from taking a position contrary to one alleged or admitted in his pleadings in a former proceeding under oath. *Id.* (citing *Long*
18 *v. Knox,* 291 S.W.2d 292, 295 (Tex. 1956)). *18

Central to both judicial admission and judicial estoppel is a statement contrary to a party's current position. Here, there is none. While Stavron did sign the "Account for Final Settlement," the document did not state that Stavron individually owed the money, which was one of the points in dispute at trial. Rather, it said, "The following debts and expenses of the estate have not been paid and are presently due and owed by the Estate: Attorney's fees and court costs advanced by Louis Pap[a]liodis (fee application to be filed) $76,917.47." At trial, Papaliodis disputed that he would look only to the Estate for payment of his fees: "[T]he proposition that I would agree to be paid by the Estate is laughable. Because in a contested probate it's hard to believe that the judge would say these fees are all reasonable and necessary; they're for the broader management, preservation and safekeeping of the Estate. . . ."

It was ultimately up to the trial court to decide who was responsible for the attorney's fees. And since the "Account for Final Settlement" was not contrary to the position Stavron took at trial, we hold that it fails to establish the requisite elements of either judicial estoppel or judicial admission.

In addition to determining who was responsible for the attorney's fees, the trial court was charged with determining the reasonable amount of fees to award. A trial court is not "a mere rubber stamp or bean-counter; even when evidence of attorney's fees is uncontroverted, a trial court is not obligated to award the requested amount." *Mogged v. Lindamood,* No. 02-18-00126-CV, 2020 WL 7074390, at *18 (Tex. App.- Fort Worth Dec.
19 3, 2020, pet. denied) (en banc op. on reh'g). The trial court, in its *19 role as factfinder, was entitled to evaluate the complexity and necessity of the legal services in light of the $76,917.47 requested. *See Pro-Care Med. Ctr. and Injury Med. Grp. v. Quality Carriers, Inc.,* No. 14-18-01062-CV, 2020 WL 1617116, at *3 (Tex. App.-Houston [14th Dist] Apr. 2, 2020, no pet.) (mem. op.). And as part of its exercise of discretion, the court could "consider the entire record and common knowledge of the participants as lawyers and judges in making its determination." *Mogged,* 2020 WL 7074390, at *18 (citing *In re A.M.,* No. 02-18-00412-CV, 2020 WL 3987578, at *4 (Tex. App.-Fort Worth June 4, 2020, no pet.) (mem. op.)).

Consideration of the entire record includes the settlement entered into with Shannon. Prior to trial, Papaliodis settled his claim against Shannon by entering into a compromise settlement agreement wherein Shannon agreed to approve Papaliodis's claim in the amount of $27,000.00 in attorney's fees and $459.97 in expenses as a class 2 claim and his claim in the amount of $23,000.00 as a class 8 claim, subject to the approval of the probate court. As stated above, Papaliodis also testified about this settlement.

In his closing argument, Stavron's attorney requested the probate court to make an award close to what was granted: "And I think that $35,000 dollars is more than reasonable, and more than enough. I'd ask the Court to render judgment against [Stavron], as former temporary administrator, in the amount of no more than $35,000 dollars." Papaliodis never attempted to segregate the attorney's fees recoverable against the estate from those
20 recoverable against Stavron individually. *20

Ultimately, because findings of fact and conclusions of law were neither filed nor requested in this case, we have no way to ascertain the trial court's reasoning. *See Protect Env't Servs., Inc. v. Norco Corp.*, 403 S.W.3d 532, 543 (Tex. App.-El Paso 2013, pet. denied) (finding that, in the absence of findings of fact and conclusions of law, the trial court did not abuse its discretion by reducing the amount of requested attorney's fees despite uncontroverted testimony). And, as noted above, if findings of fact and conclusions of law are neither filed nor

requested, the judgment of the trial court implies all necessary findings to support it. *See id.* Therefore, the judgment in this case implies that the trial court found the total attorney's fees testified by Papaliodis in some way to be unreasonable or not assessable against Stavron individually. *See id.* Given the scope of the evidence, we conclude that the trial court did not abuse its discretion by awarding $37,712.50 in attorney's fees because Papaliodis did not conclusively prove he was entitled to recover the entire $76,917.47 from Stavron individually. We overrule Papaliodis's first cross-issue.

2. Prejudgment Interest

In his second cross-issue, Papaliodis argues that the probate court erred by not awarding prejudgment interest on the principal amount in controversy. He asserts that he has been deprived of the use of the money that he is owed and, therefore, is entitled to prejudgment interest. However, Papaliodis failed to raise this issue with the
21 probate court, and he cites no controlling authority to support his argument. *21

A party should file a motion to modify the judgment or complain in the trial court of the failure to award prejudgment interest. *Larrumbide v. Doctors Health Facilities,* 734 S.W.2d 685, 693 (Tex. App.-Dallas 1987, writ denied) ("[W]e hold that, by failing to request an award of prejudgment interest in their motion for judgment, or to complain in the trial court of the failure to award prejudgment interest, the Larrumbides waived any error."); *see Allright, Inc. v. Pearson,* 735 S.W.2d 240, 240 (Tex. 1987) (holding that plaintiff, who did not complain to the trial court of its failure to award prejudgment interest nor assign a point of error or crosspoint in the court of appeals, waived any claim for prejudgment interest). By failing to complain to the probate court of its failure to award prejudgment interest, Papaliodis waived this cross-issue.[5] We overrule Papaliodis's second cross-issue.

[5] In any event, prejudgment interest is generally not allowed on an award of attorney's fees. *See C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 325 (Tex. 1994), *abrogated in part on other grounds by Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005); *Alma Invs. v. Bahia Mar Co-Owners Ass'n*, 497 S.W.3d 137, 146 (Tex. App.- Corpus Christi 2016, pet. denied); *Williams v. Colthurst*, 253 S.W.3d 353, 362 (Tex. App.-Eastland 2008, no pet.).

3. Attorney's Fees for Collection Efforts

In his third cross-issue, Papaliodis contends that the probate court erred by not awarding attorney's fees for his "having to file suit to collect his contractual damages." While Papaliodis asserts that he was not awarded attorney's fees for "costs of collection," the judgment did not segregate or allocate the fees in any manner; it
22 simply awarded $37,712.50. Without findings of fact, we are unable to ascertain *22 whether or not the probate court awarded attorney's fees for "costs of collection." *See Pharo v. Chambers Cnty.,* 922 S.W.2d 945, 948 (Tex. 1996) ("Because the trial court did not render findings of fact or conclusions of law, we must assume that it made all findings in support of its judgment . . . ."). We overrule Papaliodis's third cross-issue.

4. Finality of Judgment

In his fourth cross-issue, Papaliodis asserts that the probate court failed to dispose of all parties and all causes of action because it did not address his request for declaratory relief. In five sentences under his final cross-issue, he contends that he remains "befuddled" as to "what effect, if any, the August 29, 2014 Settlement Agreement, entered into by [ ] Stavron, the [ ] Estate and the proponent of the 2013 Will, have on his contractual and other claims against Stavron individually." We disagree.

The judgment followed a conventional trial on the merits and recited that it "finally disposes of all claims and all parties, and is appealable." Under the *Aldridge* presumption, any judgment following a conventional trial on the merits creates a presumption that the judgment is final for purposes of appeal. *Vaughn v. Drennon,* 324 S.W.3d 560, 561 (Tex. 2010) (citing *Ne. Indep. Sch. Dist. v. Aldridge,* 400 S.W.2d 893, 897-98 (Tex. 1966)). Such a judgment need not dispose of every party and claim for the presumption to apply. *Id.* We overrule
23 Papaliodis's fourth cross-issue.[6] *23

6 We also note that Papaliodis failed to raise his concern regarding his claim for declaratory relief with the probate court by filing a post-judgment motion. And to the extent he is complaining about the denial of declaratory relief, Papaliodis's appellate brief fails to offer any legal analysis or to cite any authorities. As such, he presents nothing for us to review. *See* Tex. R. App. P. 38.1(h); *Huey v. Huey,* 200 S.W.3d 851, 854 (Tex. App.-Dallas 2006, no pet.) ("Our appellate rules require an appellant's brief to contain a clear and concise argument for the contentions made with appropriate citations to authorities and the record."); *Long v. Sw. Funding, LP.,* No. 03-15-00020-CV; 2017 WL 672445, at *3 n.5 (Tex. App.-Austin Feb. 16, 2017, no pet.) (mem. op.) ("In his petition, Long also sought declaratory relief. . . . On appeal, Long does not address his declaratory-judgment claims in any way and has therefore waived appellate review of the trial court's resolution of these claims.").

IV. Conclusion

Having overruled all of the issues raised by Stavron and the cross-issues raised by Papaliodis, we affirm the
24 trial court's judgment. *24

No. 08-17-00157-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Narvaez v. Powell

564 S.W.3d 49 (Tex. App. 2018)
Decided Jul 13, 2018

No. 08-17-00157-CV

07-13-2018

Dolores NARVAEZ, Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez, Appellants, v. Darron POWELL, Darron Powell PLLC, Hector Phillips, and Hector Phillips, P.C., Appellees

Hon. Chris M. Borunda, Hon. David S. Jeans, Hon. William A. Elias, El Paso, for Appellees. Hon. John M. Phalen Jr., Hon. Daniel J. Sheehan, Dallas, Hon. Cynthia C. Hollingsworth, for Appellants.

YVONNE T. RODRIGUEZ, Justice

Hon. Chris M. Borunda, Hon. David S. Jeans, Hon. William A. Elias, El Paso, for Appellees.

Hon. John M. Phalen Jr., Hon. Daniel J. Sheehan, Dallas, Hon. Cynthia C. Hollingsworth, for Appellants.

Before McClure, C.J., Rodriguez, and Palafox, JJ.

OPINION

YVONNE T. RODRIGUEZ, Justice

Appellants, Dolores Narvaez, Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez, appeal from an order dismissing their suit against their former attorneys, Darron Powell, Darron Powell PLLC, Hector Phillips, and Hector Phillips, P.C. The primary issue in this case is whether the Probate Court No. 2 of El Paso County, Texas has exclusive jurisdiction of Appellants' claims. Finding that it has exclusive jurisdiction of the breach of fiduciary duty, barratry, and declaratory judgment causes of action, and ancillary jurisdiction of the legal malpractice claim, we affirm the dismissal order.

FACTUAL SUMMARY

Maria Luisa Sienkiewicz executed wills in 2003, 2008, and 2009. The will executed on June 5, 2003 appointed her niece, Margarita C. Rodriguez as independent executrix. The will gave 25% to Rodriguez and 9.375% each to eight other relatives, Jose Antonio Velarde Juarez, Jose Velarde Maese, Jose Juan Velarde Avila, Julieta Duran, Luz Magdalena Escobar, Manuel Candido Velarde Betancourt, Luis Robert Velarde Betancourt, and Eduardo Velarde Betancourt. Sienkiewicz executed another will on December 19, 2008 appointing Luis Narvaez as independent executor. The 2008 will revoked all wills and codicils previously made by Sienkiewicz. The will gave 10% to Eduardo Velarde Betancourt, 10% to Dolores Narvaez, and 8% each to ten

other relatives, including Margarita C. Rodriguez. One year later, on December 4, 2009, Sienkiewicz executed a will appointing Luis Narvaez as independent executor. The will revoked all wills and codicils previously made by Sienkiewicz.

Four months after Sienkiewicz executed the third will, Julieta V. Duran filed an application for appointment of permanent guardian of the person and estate of Sienkiewicz. The application alleged that Sienkiewicz was incapacitated and was unable to make decisions for herself, and she had been diagnosed with Parkinson's Disease, dementia, and epilepsy. The application also asserted that Sienkiewicz had been the victim of abuse, neglect, and exploitation in San Antonio. Sienkiewicz died on January 19, 2003 leaving an estate with a value of approximately $20 million, including an 821-acre ranch in Karnes County, oil and gas interests from production on the ranch valued near $13 million, and cash and securities of approximately $6 million.

Dolores Narvaiz and Luis Narvaez hired Phillips and Powell to probate the 2009 will, and they signed a fee agreement on February 1, 2013. Appellants assert that Phillips and Powell induced Eduardo Velarde Betancourt, Jose Juan Velarde Avila, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez (referred to collectively as the El Paso Heirs) to join the application to probate the 2009 will. Consequently, the
52 El Paso Heirs signed *52 fee agreements with Phillips and Powell in April 2013. Pursuant to the fee agreements, Phillips and Powell would receive a contingency fee on all assets and distributions obtained from Sienkiewicz's estate for the El Paso Heirs. In February 2013, Phillips and Powell filed an application for probate of the 2009 will in the Probate Court No. 2 of El Paso County, Texas.

Margarita C. Rodriguez and Luis Roberto Velarde (the San Antonio Contestants) filed a contest on the grounds of undue influence and lack of testamentary capacity. Rodriguez also filed an application for probate of the 2003 will. In May 2014, the heirs entered into a Family Settlement Agreement under which Appellants received 51% of the Estate, which included the distribution of mineral rights and royalties and the ranch in Karnes County. The San Antonio Contestants received 45% of the Estate, Arturo Alonzo Velarde received 4%, and Daniel Velarde received 0%. Under the Family Settlement Agreement, the El Paso Heirs each received 8.5% of the estate. This was less than the 9.375% they were entitled to under the 2003 Will, but half a percent more than they would have received under the 2009 Will. After attorney's fees, the El Paso Heirs each received 5.95% of the estate.

In February 2016, Dolores Narvaez informed Powell that $510,000 in estate funds were missing. Powell requested that the estate's CPA, Randall Smith, prepare a reconciliation and accounting of all estate inheritance distributions and attorneys' fees and expenses. On April 5, 2016, Dolores Narvaez filed a *pro se* letter with the Probate Court regarding the missing funds. Powell responded by filing the CPA's reconciliation and accounting with the Probate Court. The Probate Court signed an order approving the accounting and reconciliation prepared by the CPA.

On July 21, 2016, Appellants filed suit in the 34th District Court against Powell and Phillips alleging breach of fiduciary duties and legal malpractice. In their first amended petition, Appellants set forth numerous allegations regarding breach of fiduciary duty. The suit includes allegations that Powell and Phillips prepared unconscionable fee agreements, charged and received unconscionable fees, used threats and intimidation to force Dolores Narvaez to sign a contract to sell the ranch in Karnes County so Powell and Phillips could collect a $290,700 fee, filed the accounting with the Probate Court after the clients instructed Powell not to file it, and obtained an order from the Probate Court approving the accounting after Powell's attorney-client relationship with Appellants had terminated. As a remedy for the breaches of fiduciary duty, the suit seeks damages and forfeiture of all fees received by Phillips and Powell in the past, present and future. Appellants' first amended

petition also alleges that Powell and Phillips were negligent in failing to investigate and develop viable defenses in the will-contest litigation. Appellants seek damages with respect to these allegations. The suit includes a barratry claim based on an allegation that the contingency fee contracts with the El Paso Heirs were procured as a result of barratry. Pursuant to Sections 85.065 and 82.0651 of the Government Code, the El Paso Heirs[1] seek to void and rescind the plea agreements, and to recover all fees and expenses paid under the contracts, the balance of any fees and expenses paid to any other person under the contracts, actual damages,
53 and a penalty in the amount *53 of $10,000. Finally, the first amended petition seeks a declaratory judgment that: (1) the fee agreements are unconscionable and void, all fees obtained or sought by Phillips and Powell must be returned; (2) the conveyance of any mineral interests are canceled and those interests distributed to Appellants; (3) a constructive trust should be imposed on the mineral interests and upon any asset of Phillips and Powell purchased with fees received from the El Paso Heirs; and (4) a declaration that the fee agreements of the El Paso Heirs are void pursuant to Section 82.065 of the Government Code.

[1] The barratry claim is brought exclusively by the El Paso Heirs. Dolores Narvaiz and Luis Narvaiz are not a party to the claim.

Powell filed a verified motion to dismiss the suit for lack of jurisdiction on the ground that the Probate Court No. 2 has jurisdiction of the claims. Phillips joined the motion to dismiss. Following a hearing, the trial court granted the motion to dismiss for lack of jurisdiction. Appellants challenged the dismissal order by filing a petition for writ of mandamus and notice of appeal.[2]

[2] We denied mandamus relief because Appellants' have an adequate remedy by direct appeal of the dismissal order. *See In re Dolores Narvaez,Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez,* No. 08-17-00149-CV, 2018 WL 3407667 (Tex.App.—El Paso July 13, 2018, orig. proceeding).

SUBJECT MATTER JURISDICTION

In their sole issue, Appellants argue that the trial court erred by dismissing their case because the breach of fiduciary duty and legal malpractice claims are not probate proceedings or related to probate proceedings, and therefore, the Probate Court No. 2 does not have exclusive or dominant jurisdiction over the claims.

Standard of Review

Whether a trial court has subject-matter jurisdiction is a question of law subject to *de novo* review. *Frost National Bank v. Fernandez* , 315 S.W.3d 494, 502 (Tex. 2010) ; *Texas Natural Resource Conservation Commission v. IT–Davy* , 74 S.W.3d 849, 855 (Tex. 2002). A motion to dismiss based on a lack of subject matter jurisdiction is the functional equivalent of a plea to the jurisdiction. *In re Elamex, S.A. de C.V.* , 367 S.W.3d 891, 897 (Tex.App.—El Paso 2012, orig. proceeding).

A plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction. *Texas Association of Business v. Texas Air Control Board* , 852 S.W.2d 440, 446 (Tex. 1993). In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case. *Texas Department of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004) ; *In re Elamex* , 367 S.W.3d at 897. The court must construe the pleadings liberally in favor of the pleader and accept as true the factual allegations in the pleadings. *Miranda* , 133 S.W.3d at 226, 228 ; *City of El Paso v. Marquez* , 380 S.W.3d 335, 340 (Tex.App.—El Paso 2012, no pet.). If the pleadings affirmatively negate jurisdiction, the trial court may grant the plea to the jurisdiction or the motion to dismiss without

allowing the plaintiff an opportunity to amend. *Miranda* , 133 S.W.3d at 226 ; *In re Elamex* , 367 S.W.3d at 897. Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo. Frost National Bank* , 315 S.W.3d at 502.

Statutory Probate Court Jurisdiction

54 The Probate Court No. 2 is a statutory probate court. A statutory probate court *54 has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. TEX.ESTATES CODE ANN. § 32.005(a) (West 2014). A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court. *Id.*

A statutory probate court has the general jurisdiction of a probate court as provided by the Estates Code, and the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under certain provisions of the Health and Safety Code. *See* TEX.GOV'T CODE ANN. § 25.0021 (West Supp. 2017). It is a court of limited jurisdiction. *See Stauffer v. Nicholson* , 438 S.W.3d 205, 213 (Tex.App.—Dallas 2014, no pet.), *citing In re United Services Automobile Association* , 307 S.W.3d 299, 302-03 (Tex. 2010) (contrasting the limited jurisdiction of statutory probate courts with the general jurisdiction of district courts).

Section 32.001 of the Estates Code establishes original probate court jurisdiction:

> (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.

TEX.ESTATES CODE ANN. § 32.001(a) (West 2014).

Section 31.001 of the Estates Code defines "probate proceedings" as including:

> (1) the probate of a will, with or without administration of the estate;
>
> (2) the issuance of letters testamentary and of administration;
>
> (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
>
> (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
>
> (5) a claim arising from an estate administration and any action brought on the claim;
>
> (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and
>
> (7) a will construction suit.

TEX.ESTATES CODE ANN. § 31.001 (West 2014).

Appellants' Pleadings

Appellants contend that the trial court erred by dismissing their suit because it is not a probate proceeding nor is it a matter related to the pending probate proceeding. Phillips and Powell argued in the trial court, and argue now on appeal, that Appellants' suit cannot be maintained in the district court because their claims are a matter related to the settlement, partition, or distribution of an estate, and therefore, the suit is a probate proceeding under Section 31.001(6). Each of Appellants' causes of action must be examined to determine whether it is a probate proceeding or related to a probate proceeding.

1. Breach of Fiduciary Duty

In their first amended petition, Appellants allege that Phillips and Powell breached their fiduciary duties by:

(1) inducing the El Paso Heirs to sign contingent fee agreements for the sole

55 *55

purpose of taking money from the estate that legitimately belonged to the heirs;

(2) contracting for, charging, and receiving an unconscionable fee;

(3) preparing unconscionable fee agreements;

(4) taking a percentage of the distributions that the El Paso Heirs were entitled to receive;

(5) failing to disclose to the El Paso Heirs that they would lose 30% of their distributions to the lawyers regardless of the outcome of the will contest;

(6) contracting, charging for, and receiving fees they were not entitled to receive, including taking mineral interests, charging hourly fees in addition to the contingent fee agreements, and shifting taxes to Appellants in order to enhance their fees;

(7) representing Appellants in spite of a conflict of interest that was never disclosed;

(8) using threats, intimidation and false representations in an attempt to force Dolores Narvaez to sign a contract to sell the Karnes County ranch so Phillips and Powell could collect a $290,700 fee;

(9) falsely representing to Dolores Narvaez that the probate court had ordered her to sign the mineral deed;

(10) attempting to trick Dolores Narvaez into signing the mineral deed by including it in a stack of routine papers she was told to sign;

(11) presenting the mineral deed to the probate court with an order approving it even though the settlement agreement had not been prepared;

(12) preparing a written agreement that did not reflect the agreement made with the clients and attempting to intimidate them into signing it;

(13) preparing and filing a notice with an accounting attached that Appellants disputed and had instructed Powell not to file; and

(14) preparing and obtaining an order from the Probate Court approving the accounting after Powell had withdrawn from representation.

With respect to the breach of fiduciary duty claims, Appellants seek actual damages, punitive damages, and forfeiture of all fees received by Phillips and Powell in the past, present or future.

Appellants rely on *In re Hannah* , 431 S.W.3d 801 (Tex.App.—Houston [14th Dist.] 2014, orig. proceeding) in support of their argument that the Probate Court does not have jurisdiction of their claims. In *Hannah* , the decedent lived with the relator, Hannah, in Aransas County for twelve years prior to his death. *In re Hannah* , 431 S.W.3d at 804. She claimed that he executed wills in 2009 and 2010 and bequeathed $200,000 in cash and a vehicle. *Id.* In 2012, the decedent executed a new will that did not include any bequests to Hannah. *Id.* Under

the 2012 will, the $200,000 in cash was split between the decedent's sons and the vehicle identified in the earlier wills was left to a family friend who occasionally did work for the decedent. *Id.* Following the decedent's death, the 2012 will was admitted to probate in the County Court at Law of Aransas County as a muniment of title. *Id.* at 805. Hannah did not contest the will. *Id.* She filed suit in district court in Harris County against the sons and family friend seeking to recover damages for tortious interference with inheritance, slander, and conspiracy. *Id.* The district court entered orders transferring venue of the suit to the County Court at Law of Aransas County, and Hannah filed a mandamus petition to challenge the orders. *Id.* The Fourteenth
56 Court of Appeals held that the suit was not a "matter related to a probate proceeding" within the scope of *56 Section 31.002 of the Estates Code. *Id.* at 809-10. The Court of Appeals focused on the nature of the damages sought, and held that because the suit sought damages which would, if awarded, be satisfied from the defendant's individual asserts rather than from any property of the estate, the claims were not related to a probate proceeding. *Id.* at 809-811. Consequently, it conditionally granted mandamus relief in Hannah's favor.

We agree with *Hannah's* conclusion that the nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim, but the instant case is factually distinguishable because Appellants are not seeking only monetary damages. They are seeking to recover distributions from the estate to the attorneys and to have conveyances of mineral interests to the attorneys declared void. *Hannah* is also distinguishable because it did not involve an ongoing probate proceeding. Further, *Hannah* did not concern an argument that the suit filed in the district court is a probate proceeding as defined in Section 31.001 of Estates Code. For these reasons, we conclude that *Hannah* is not controlling or dispositive of this case.

At the heart of Appellants' breach of fiduciary duty claim is their complaint regarding the fees charged by Phillips and Powell and distributed from the Estate to them. Appellants assert that those monies and mineral interests belonged to the Estate and never should have been distributed to the attorneys. Appellants seek to be made whole by having those fees recovered from Phillips and Powell and re-distributed to them. We conclude that the breach of fiduciary duty claim stated in the first amended petition is a probate proceeding because it is a matter related to the settlement, partition, or distribution of an estate. *See* TEX.ESTATES CODE ANN. § 31.001(6). The Probate Court No. 2 has exclusive jurisdiction of the breach of fiduciary duty cause of action.

2. Barratry

The first amended petition includes a cause of action alleging that the contingency fee contracts with the El Paso Heirs were procured as a result of barratry. The El Paso Heirs request that the trial court void and rescind the fee agreements, and they seek to recover all fees and expenses paid under the contracts. As was the case with the breach of fiduciary duty claim, the barratry cause of action pertains to the legal fees distributed from the estate to Phillips and Powell. As such, it falls within the definition of a probate proceeding under Section 31.001(6) of the Estates Code, and the Probate Court No. 2 has exclusive jurisdiction of it.

3. Declaratory Relief

Appellants' first amended petition also seeks a declaration concerning the parties' rights, status, and obligations with respect to the fee agreements and the fees distributed from the Estate to Phillips and Powell. Appellants seek a declaration that:

(1) the fee agreements are unconscionable and void;

(2) that all fees, past and future, obtained by or sought by Phillips and Powell be returned to Appellants;

(3) that all mineral interests received by Phillips and Powell be returned and any conveyance of any mineral interests to Phillips and Powell be canceled and those interests distributed to Appellants; and

(4) that a constructive trust be imposed on the mineral interests and upon the assets of Phillips and Powell that were purchased with fees received from the El Paso Heirs.

57 By their declaratory judgment cause of action, Appellants seek to have those fees *57 and mineral interests, which were distributed from the Estate to Powell and Phillips, returned and distributed to Appellants. Consequently, the cause of action is a probate proceeding because it is a matter related to the settlement, partition, or distribution of an estate. *See* TEX.ESTATES CODE ANN. § 31.001(6). Further, Appellants' allegations related to the conveyance of mineral interests to Phillips and Powell and their request to have those conveyances declared void and the property returned to Appellants can be characterized as an action involving trial of title to real property that is estate property. *See* TEX.ESTATES CODE ANN. § 31.002(a)(5) (West 2014). Consequently, it is related to the pending probate proceeding. We conclude that the Probate Court No. 2 has exclusive jurisdiction of the declaratory judgment claim.

4. Negligence

Appellants allege that Phillips and Powell committed legal malpractice by failing to investigate the circumstances surrounding the execution of the 2008 and 2009 wills, failing to develop and provide viable defenses to the contest of the 2009 will, failing to develop testimony to defeat the will contest, and failing to contact the witnesses to the 2008 and 2009 wills. Appellants seek damages with respect to the legal malpractice claim. This claim cannot be characterized as a probate proceeding within the meaning of Section 31.001 or related to a probate proceeding as that term is defined by Section 31.002. *See* TEX.ESTATES CODE ANN. § 31.002 (West 2014). Further, the probate court does not have concurrent jurisdiction with the district court in a legal malpractice claim. *See* TEX.ESTATES CODE ANN. § 32.007 (West 2014) (providing that statutory probate court has concurrent jurisdiction with the district court in: (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative; (2) an action by or against a trustee; (3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code ; (4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate; (5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and (6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney).

A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX.ESTATES CODE ANN. § 32.001(b). In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court. *See Frost National Bank* , 315 S.W.3d at 506. That requisite is satisfied here. Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the non-probate claims and the claims against the estate. *See Shell Cortez Pipeline Co. v. Shores* , 127 S.W.3d 286, 294 (Tex.App.—Fort Worth 2004, no pet.), *citing Sabine Gas Trans. Co. v.Winnie Pipeline Co.* , 15 S.W.3d 199, 202 (Tex.App.—Houston [14th Dist.] 2000, no pet.) ; *Goodman v. Summit at W. Rim, Ltd.* , 952 S.W.2d 930, 933 (Tex.App.—Austin 1997, no pet.) (holding

that probate court can exercise "ancillary" or "pendent" jurisdiction over a claim only if it bears some relationship to the estate). That is, probate courts exercise their ancillary or pendent jurisdiction over non-
58 probate matters only when doing so will aid in the efficient administration *58 of an estate pending in the probate court. *Shell Cortez Pipeline* , 127 S.W.3d at 294-95.

The legal malpractice claim is interwoven with and related to Appellants' breach of fiduciary duties, barratry, and declaratory judgment causes of action. It will aid in the efficient administration of the estate to have the Probate Court resolve these related claims. We therefore find that the Probate Court No. 2 has exclusive jurisdiction of the breach of fiduciary duty, barratry, and declaratory judgment claims, and it has authority to exercise pendent or ancillary jurisdiction over the legal malpractice claim. Issue One is overruled. Having overruled Issue One, we affirm the trial court's order dismissing Appellants' suit for lack of jurisdiction.

No. 2-01-006-CV
Court of Appeals of Texas, Second District, Fort Worth

Shell Cortez Pipeline v. Shores

127 S.W.3d 286 (Tex. App. 2004)
Decided Jan 8, 2004

No. 2-01-006-CV.

Delivered: January 8, 2004.

Appeal from Probate Court of Denton County, Don R. Windle, J.

Dismissed.

287 *287

Griffin, Whitten, Jones Reib, and Michael J. Whitten, Denton, McGinnis, Lochridge Kilgore, L.L.P., Brian S. Engel, Marc O. Knisley, Richard Kelley, Akin Gump Strauss Hauer Feld, L.L.P., Shannon H. Ratliff, Austin, Exxon Mobil Corp., and Jack Balagia, Jr. and 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, and Alan B. Daughtry, Jennifer H. Davidow, Houston, for Appellants Shell.

McKool Smith, and Gary Cruciani, Charles Cunningham, Robert M. Manly, Rader Campbell, Donovan Campbell, Jr., and 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., and Frank Ikard, for Appellees.

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

288 *288

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.

[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.

II. FACTUAL BACKGROUND

In the early 1980s, Shell and Mobil possessed extensive interests in oil fields in West Texas in the Permian
289 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*
290 *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
291 review the trial court's denial of *291 Shell's and Mobil's pleas to the jurisdiction in this interlocutory class certification appeal.

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.).

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.

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); *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887
292 S.W.2d 465, 468 (Tex.App.-Dallas 1994, *292 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.

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

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:

[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).

> 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
> 293 constructive *293 trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.[5]

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.

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.

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]

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.

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
294 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.

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).

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]

> [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).

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.]
295 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.

[8] Our research has not revealed any other class litigation in a statutory 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).

No. 12-02-00174-CV
Court of Appeals of Texas, Twelfth District, Tyler

Patel v. City of Everman

179 S.W.3d 1 (Tex. App. 2004)
Decided Sep 22, 2004

No. 12-02-00174-CV.

September 22, 2004.

2 Appeal from the 352nd Judicial District Court, Tarrant County, Bonnie Sudderth, J. *2

Edward W. Sampson, Law Office of Ben C. Martin, L.L.P., Dallas, for appellant.

Elizabeth A. Elam, Timothy G. Sralla, Taylor, Olson, Adkins, Sralla Elam, L.L.P., Fort Worth, for appellees.

Panel consisted of WORTHEN, C.J., GRIFFITH, J., and DeVASTO, J.

4 *4

OPINION

DIANE DeVASTO, Justice.

Appellees City of Everman and Tom Killebrew d/b/a Metro Code Analysis filed a motion for rehearing, which is overruled. Our opinion of May 28, 2004 is withdrawn, and the following opinion is substituted in its place.

Jayanti Patel ("Patel") appeals the trial court's order granting summary judgment in favor of the City of Everman (the "City") and Tom Killebrew ("Killebrew") d/b/a Metro Code Analysis ("MCA"). Patel raises five issues on appeal. We affirm in part and reverse and remand in part.

BACKGROUND

In 1990, Patel purchased twenty apartment buildings in the Willow Woods complex in Everman, Texas. In October 1995, the City requested that Patel board up two of his buildings that were vacant. Patel complied, and further, boarded up other unrented units to exclude vagrants and prevent crime and vandalism.

In April 1997, Patel received notice that the City intended to demolish fifteen of his buildings because their
5 doors and windows had been boarded up for more than six months. Subsequently, Patel attended a *5 meeting of the Everman Planning and Zoning Commission (the "Commission") concerning the proposed demolition of his buildings and informed the Commission that he was unaware of the ordinance prohibiting boarding windows and doors for more than a six-month period. At the conclusion of the meeting, the Commission voted to recommend to the Everman City Council that fifteen of Patel's buildings be demolished.

In July 1997, Patel filed suit seeking an injunction against the City. Ultimately, the trial court entered an agreed order (the "agreed order") stating, in pertinent part, as follows:

> IT IS ORDERED that Appellant Patel will repair said property so it is in compliance with all city codes for the City of Everman.
>
> IT IS ORDERED that the City of Everman will reasonably cooperate with Patel and shall not interfere in the repair process and further that Patel shall cooperate with the City of Everman and shall permit such inspections as the City of Everman shall require. Patel shall comply with all city codes and inspections before receiving any certificates of occupancy.
>
> In the event that each and every unit is not in compliance with the City of Everman City Codes by February 9, 1998, then in that event this Order and any Temporary Injunction shall expire and the City of Everman shall be permitted to demolish all units and property listed above without further notice and without further Court action.

Patel testified that from April 1997 until February 1998, he had substantial repairs made to all of his properties located in the Willow Woods complex, and that every unit in each of his buildings was newly remodeled and undamaged. Patel testified that he removed the boards from the exterior of his buildings. Patel further testified that he had the carpet replaced in seventy-six of the eighty units within his twenty buildings, and further still, that he had pitched roofs installed on thirteen of his buildings.[1] Patel testified that he repainted the units. Patel also testified generally that he made repairs such as repairing walls, replacing cabinets, and installing new doors and fixtures. Patel testified that each unit he owned had a heating unit located inside of it and also employed either a cooling unit located outside of it or screens installed on the windows. Patel further testified that not one unit had a hole in the floor or wall or contained exposed electrical wiring. Moreover, Patel testified that he was present at the property on a daily basis for nine years and never saw a rat or rodent in any of his buildings, nor was he advised of any rat or rodent problem by any of his tenants.

[1] Patel testified that inspections were performed on all thirteen roofs by a "city official," but that he did not receive a "green tag" or written certificate of completion from the City concerning the new roofing.

Effective on or about February 5, 1998, the City enacted a new building code ordinance. On February 20, 1998, Killebrew, a City Code Enforcement Officer, inspected Patel's properties. Thereafter, Killebrew sent Patel a notice of substandard building as well as separate inspection reports on each of his properties.

Patel also testified that he received notice of a meeting of the Everman Building Board of Appeals (the "Board") to be conducted on March 5, 1998, which he and his attorney attended. Patel testified that he could not recall whether his attorney presented evidence other than oral evidence. Patel testified that his attorney
6 stated to the Board that many of the defects listed *6 in Killebrew's reports were false and requested that Patel be allowed thirty days to address the newly cited problems. Both Patel and his attorney left the meeting after the consideration of only three of Patel's properties, citing the Board's bias as their reason for leaving. Ultimately, the Board voted to demolish all twenty of Patel's properties. The City commenced the demolition process as to eighteen of Patel's buildings in April 1998.

Patel filed the instant suit against the City and Killebrew d/b/a MCA alleging that the demolition of his properties amounted to a taking without just compensation in violation of his rights pursuant to Article I, section 17 of the Texas Constitution. As to Killebrew and MCA, Patel alleged that these defendants were liable for trespass, conversion, and destruction of property. Patel also raised a procedural due process claim pursuant to Article I, section 19 of the Texas Constitution. All defendants jointly filed both traditional and no-evidence motions for summary judgment, to which Patel responded. Ultimately, the trial court granted the defendants' motions for summary judgment and ordered that Patel take nothing. This appeal followed.

STANDARD OF REVIEW

In reviewing a traditional motion for summary judgment,[2] this court must apply the standards established in *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985), which are:

[2] TEX.R. CIV. P. 166a(c).

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;

2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true;

3. Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor.

See id. at 548-49. For a party to prevail on a motion for summary judgment, he must conclusively establish the absence of any genuine question of material fact and that he is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a(c). A movant must either negate at least one essential element of the nonmovant's cause of action, or prove all essential elements of an affirmative defense. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *see also MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). Since the burden of proof is on the movant, and all doubts about the existence of a genuine issue of a material fact are resolved against the movant, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *See Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). We are not required to ascertain the credibility of affiants or to determine the weight of evidence in the affidavits, depositions, exhibits, and other summary judgment proof. *See Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 932 (1952). The only question is whether or not an issue of material fact is presented. *See* TEX.R. CIV. P. 166a(c).

Once the movant has established a right to summary judgment, the nonmovant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *See, e.g., City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex. 1979). All theories *7 in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX.R. CIV. P. 166a(c).

MALOOLY ISSUE

In his first issue, Patel argues generally that the trial court's grant of summary judgment must be reversed because Appellees failed to prove their entitlement to judgment as a matter of law. We interpret Patel's first issue as a general assignment of error. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 120 (Tex. 1970); *Reese v. Beaumont Bank, N.A.*, 790 S.W.2d 801, 804 (Tex.App.-Beaumont 1990, no writ); *see also Dubow v. Dragon*, 746 S.W.2d 857, 859 (Tex.App.-Dallas 1988, no writ) (where there is no general point of error complaining of the granting of summary judgment, if there is another possible ground, which is not attacked by point of error, on which the judgment could have been entered, the judgment must be affirmed); *King v. Texas Employers' Ins. Ass'n*, 716 S.W.2d 181, 182-83 (Tex.App.-Fort Worth 1986, no writ) (because summary judgment may have been granted, either properly or improperly, on a ground set forth in the motion for summary judgment, which ground was not challenged by point of error by the appellant, the summary judgment must be affirmed); *Rodriguez v. Morgan*, 584 S.W.2d 558, 559 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.) (although the appellant from the summary judgment stated some specific points of error, the trial court

may have based the summary judgment on a ground not specifically challenged by the appellants by assignment of error or by briefing). For the reasons set forth below, Patel's first issue is sustained in part, and overruled in part.

TAKINGS CLAIM

In his second issue, Patel contends that the trial court erred in granting summary judgment on his "takings claim" under the Texas Constitution.

Governing Law

Article I, section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ." TEX. CONST. ANN., art. I, § 17; *see Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex.App.-Fort Worth 1997, pet. denied). To recover under article I, section 17, a plaintiff must prove that (1) the government's intentional acts (2) resulted in a taking of the plaintiff's property (3) for public use. *See City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex.App.-Eastland 1986, writ ref'd n.r.e.). "Inverse condemnation" occurs when property is taken, damaged, or destroyed for public use without process or without proper condemnation proceedings, and the property owner attempts to recover compensation. *See City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971); *Allen v. City of Texas City*, 775 S.W.2d 863, 864 (Tex.App.-Houston [1st Dist.] 1989, writ denied).

"Public Use"

In general, property is taken for a public use only when there results to the public some definite right or use in the undertaking. *See Bay Ridge Util. Dist. v. 4M Laundry*, 717 S.W.2d 92, 101 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). Whether a taking of property is for public use is a judicial question. *See Housing Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 84 (1940); *see also Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 704 (1959).

8 The City argues that the properties were condemned based on their substandard *8 condition as a measure to prevent harm to its citizens. The City attempts to distinguish the facts in the instant case from a scenario wherein a city condemns property to use as a park or government facility, or from which to otherwise derive some sort of affirmative benefit.[3]

[3] The City's argument on appeal is the same as in its first amended motion for summary judgment.

Patel argues that the orders for the demolition of each of his properties evidence that the properties were taken for public use. The orders to which Patel refers state, in pertinent part,

> [T]he Board finds from evidence presented at the public hearing that the buildings are in violation of the standards set forth in Article IV of Chapter 4 of the Everman City Code and that the defects or conditions exist to the extent that the life, health, property or safety of the public are endangered.

In support of his argument, Patel cites *City of Houston v. Crabb*, 905 S.W.2d 669 (Tex.App.-Houston [14th Dist.] 1995, no writ). In *Crabb*, the court explained that the term "public use" includes matters of public health and public safety. *Id.* at 674. The City has cited no authority in its brief, nor are we aware of any such authority, that would cause us to conclude that the interpretation of the term "public use" set forth in *Crabb* is incorrect. We conclude that the language in the aforementioned orders for demolition evidences that the properties in

question were demolished for "public use." As the City's summary judgment evidence does not contradict the underlying reason for the demolition, as set forth in its orders, it has failed to negate the evidence supporting the "public use" element of Patel's takings claim.

Consent

Patel next argues that the trial court erred in finding that he consented to the demolition of his properties. Consent is an affirmative defense to Patel's takings claim, as to which the City has the burden of proof. *See Crabb*, 905 S.W.2d at 674-75.

The City argues that Patel consented to the demolition of fifteen of his properties by failing to comply with the terms of the agreed order. It is well established that "a court cannot render a valid agreed judgment absent consent at the time it is rendered. . . ." *Reppert v. Beasley*, 943 S.W.2d 172, 174 (Tex.App.-San Antonio 1997, no writ). The record does not indicate that Patel has successfully challenged the validity of the agreed order. Thus, it follows that he consented to the order.

An agreed judgment is contractual in nature; in effect it is a written agreement between parties, as well as an adjudication. *See Sanderlin v. Sanderlin*, 929 S.W.2d 121, 122 (Tex.App.-San Antonio 1996, writ denied). Here, pursuant to the agreed order, Patel was obligated to "repair [the] property so it is in compliance with all city codes for the City of Everman." The order further states as follows:

> In the event that each and every unit is not in compliance with the City of Everman City Codes by February 9, 1998, then in that event this Order and any Temporary Injunction shall expire and the City of Everman shall be permitted to demolish all units and property listed above without further notice and without further Court action.

Thus, if there exists uncontroverted summary judgment evidence supporting that Patel failed to repair each of the fifteen properties so that they were each in compliance with city codes for the City of Everman, it is
9 reasonable to conclude that *9 Patel consented to the demolition of these fifteen properties.[4]

> [4] In making this statement, we do not discount Patel's argument that the City did not fulfill its obligations pursuant to the agreed order. Patel's argument is addressed below.

Patel first argues that the only conditions identified by the City in 1997 that gave rise to the agreed order were (1) boarded doors and windows and (2) exterior graffiti damage, both of which were rectified by the designated date, and that these conditions were in the minds of the parties when the agreed order was entered. Patel further contends that his signature on the agreed order cannot constitute consent to abide by ordinances that were not in effect at the time he entered into the agreement.

When construing an agreed judgment, as with a contract, the court's primary concern is to give effect to the written expression of the parties' intentions, and the judgment should be construed to give effect to its ordinary meaning and the objective intent of the parties as expressed in the writing. *See Sanderlin*, 929 S.W.2d at 123; *Harvey v. Harvey*, 905 S.W.2d 760, 764 (Tex.App.-Austin 1995, no writ). In construing an agreed judgment, the judgment will be read as a whole, *see, e.g., Grain Dealers Mutual Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997), and if its terms are plain and unambiguous, the intent of the parties will be gathered from such terms. *See Evans v. Williams*, 194 S.W. 181, 185 (Tex.Civ.App.-Austin 1916, writ ref'd). An alleged oral agreement in conflict with the provisions of an agreed judgment is properly disregarded. *See Giraud v. Reserve Realty Co.*, 94 S.W.2d 198, 198 (Tex.Civ.App.-San Antonio 1936, writ ref'd).

The agreed order in the instant case is not ambiguous. Patel was obligated to repair the subject property so that it was in compliance with all city codes for the City of Everman. The reference to "all city codes" does not support Patel's interpretation that the parties intended to limit the repairs to the boarded up doors and windows and the graffiti on the buildings' exteriors. Furthermore, the agreed order did not except Patel from potential changes in the City's building ordinances between the date the agreed order was entered and the deadline for compliance set forth therein. It is axiomatic that our laws are ever-evolving, and the citizenry has an obligation to abide by the law even as it changes.[5] In the instant case, Patel has neither attacked the validity of the substance of the new ordinances enacted by the City, nor the process by which they were enacted. Based on our reading of the agreement, we conclude that the February 9, 1998 deadline for compliance with the Everman City Codes indicates that the standard for compliance is the applicable ordinance as it existed at the time of the February 9, 1998 deadline.

[5] As a property owner, the record reflects that Patel was subject to the building ordinances enacted by the City as such ordinance related to "dangerous and substandard" buildings. The record further reflects that the City's Home Rule Charter empowered the City to amend ordinances.

Patel next argues that the evidence does not establish that Patel's properties were not in compliance with relevant provisions of the Everman City Codes on February 9, 1998 as Killebrew's observations cited in Appellees' motion for summary judgment were controverted by Patel's own deposition testimony. However, as Patel concedes in his brief, his deposition testimony reflects that he was in violation of at least one provision of
10 the Everman City Codes. Specifically, Patel *10 agreed with regard to each of the properties subject to the agreed order that the City's substandard building declaration was accurate concerning a code violation described as a health hazard related to the properties' plumbing. Specifically, Patel acknowledged that there were vacuum breakers missing on each building's respective hose bibb. Therefore, we conclude that the summary judgment evidence establishes that Patel's buildings were not in compliance with "all city codes," on or before the February 9, 1998 deadline as required by the agreed order.

Patel further argues that the City cannot rely on the agreed order in that the City failed to comply with its obligations to "reasonably cooperate with Patel and . . . not interfere in the repair process." Specifically, Patel argues that the City failed to fulfill its obligations as follows:

1. Master electrician, Roel Garcia, went to pull electrical permits for Patel's buildings in 1998 and was told by a City Employee that he could not use the permits because the City was going to demolish Patel's buildings.

2. Patel was told by Killebrew that he could not enter his buildings or make repairs and the demolition order was made.

Where a party does not comply with his obligation under a plain provision in an agreed judgment, he is not entitled to complain of the failure of the other party to comply with his respective obligations under the agreed judgment. *See Giraud*, 94 S.W.2d at 199. Here, Patel's deposition testimony reflects that Roel Garcia attempted to secure permits from the City at some time between February 20, 1998 and April 16, 1998.[6] Similarly, it is apparent from the record that the exchange between Patel and Killebrew outlined above took place after the February 9, 1998 deadline. Therefore, since the incidents set forth above occurred subsequent to the February 9, 1998 deadline mandated by the agreed order, the City was already entitled to demolish Patel's properties subject to the order "without further notice and without further Court action."[7] Reading the provisions of the

agreed order in conjunction with one another, Patel's opportunity to repair his buildings ended on February 9, 1998. It follows that the City's obligation to reasonably cooperate with Patel and not interfere in the repair process ceased on that date as well.

6 Roel Garcia's affidavit testimony does not specify a date other than the general statement that he attempted to obtain such permits during 1998.

7 The record indicates that the City sent Patel a letter advising him of a hearing to be conducted concerning the substandard condition of his properties. However, the City stated in the letter that it was not waiving its rights under the agreed order by conducting a public hearing.

Finally, Patel argues that he was denied notice of his need to present evidence of repairs, and thus, his failure to present evidence does not constitute an affirmative act of consent to the City's demolition of his properties. Yet, as set forth above, the record reflects that Patel affirmatively consented to the terms of the agreed order. The record further reflects that Patel did not repair his buildings so that every unit was in compliance with the City of Everman City Codes by February 9, 1998. As such, pursuant to the terms of the agreed order, the City was permitted to demolish all units and property listed in the order without further notice and without further court action. The City expressly stated that it was not waiving its rights under the agreed order by conducting *11 a public hearing. Patel consented to the demolition of his properties by consenting to the terms of the agreed order and failing to meet his obligations therein by the February 9, 1998 deadline. Events that took place subsequent to the February 9, 1998 deadline are not relevant.[8]

11

8 Later in his brief, Patel argues that the trial court erred in granting summary judgment as to his claim of "bad faith taking," a form of inverse condemnation. *See, e.g., Westgate, Ltd. v. State*, 843 S.W.2d 448, 454 (Tex. 1992). Assuming that *Westgate* provides for a "bad faith takings" claim, the actions Patel cites as constituting "bad faith" are not raised in conjunction with Patel's argument that the City failed to cooperate under the agreed order. Thus, Patel has waived any argument that the "bad faith" actions of the City underlying his inverse condemnation claim amounted to a breach of the City's obligations pursuant to the agreed order. *See* TEX.R.APP. P. 38.1(h). Furthermore, the City's consent defense would serve to bar Patel's takings claims, with or without the element of bad faith.

Patel notes that if we conclude that he consented to the demolition, such consent is only effective as to the properties covered by the agreed order. We agree. As such, we conclude that the trial court properly held that Patel consented to the demolition of the fifteen properties referenced in the agreed order.[9]

9 The properties subject to the agreed order are as follows: 404 Noble Street; 302 Race Street; 306 Race Street; 308 Race Street; 310 Race Street; 312 Race Street; 402 Race Street; 406 Race Street; 408 Race Street; 412 Race Street; 414 Race Street; 404 King Street; 406 King Street; 408 King Street; and 502 Race Street. The record reflects that the property at 302 Race Street was not demolished and is not subject to the instant suit.

Nuisance

Patel further argues that the trial court erred in granting summary judgment in favor of the City based on the defense of nuisance. The City argues that Patel's takings claim fails because the summary judgment evidence demonstrates that Patel's properties constituted a nuisance as a matter of law.[10]

10 As Patel consented to the demolition of the properties detailed in note 9, our discussion of the City's nuisance defense shall concern only the properties located at 403 Lee Street, 410 Race Street, 405 King Street, and 403 King Street.

Where a plaintiff establishes that a governmental entity intentionally destroyed his property because of a real or supposed public emergency, the government entity may then defend its actions by proof of a great public necessity. *See Crabb*, 905 S.W.2d at 674-75. In other words, the governmental entity has to show that the property destroyed was a nuisance on the day it was destroyed. *Id.* at 675.

A public nuisance is maintained (1) by act, or by failure to perform a legal duty, (2) intentionally causing or permitting a condition to exist, (3) which injures or endangers the public health, safety, or welfare. *See LJD Properties, Inc. v. City of Greenville*, 753 S.W.2d 204, 207 (Tex.App.-Dallas 1988, writ denied). The government may abate public nuisances by virtue of its police powers. *See id.*

In its amended motion for summary judgment, the City appended evidence relevant to the issue of whether conditions existed on Patel's property at the time of the demolition thereof which endangered the public health, safety, or welfare. Among the evidence presented is testimony from Killebrew's affidavit, summarized as follows:

- The roofs on Patel's apartments had been substantially modified in violation of the Uniform Building Code such that they posed a threat to any occupants as the construction standards *12 used in the roofs had not been verified by a building official.

12

- Each of Killebrew's substandard building reports indicated that the respective building was, due to the violations chronicled therein, ". . . a hazard to the public heath, safety and welfare." The "violations found on Patel's properties posed a threat to the public health, safety and welfare of the citizens of Everman."

- Subsequent to the March 5, 1998 hearing, Patel did not notify Killebrew that he had cured any of the code violations or provide invoices demonstrating the correction of said violations.

In his deposition testimony, Patel denied the existence of all of the problems set forth in each of Killebrew's substandard building reports, save for missing vacuum breakers on a hose bibb, which Patel testified that he had fixed as to every building prior to its demolition.

We iterate that we must review the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *See Nixon*, 690 S.W.2d at 548-49. The City attacks Patel's deposition evidence as conclusory and points out that it objected to such testimony at the trial court. However, there is no indication that the trial court sustained the City's objection to Patel's testimony or struck Patel's deposition testimony. Moreover, the City has not properly brought an issue on appeal challenging the trial court's consideration of its objection to Patel's summary judgment evidence. We are not required to ascertain the credibility of affiants or to determine the weight of evidence in the affidavits, depositions, exhibits, and other summary judgment proof. *See Penn*, 252 S.W.2d at 932. We conclude that Patel's deposition testimony raises a fact issue with regard to the existence of the violations cited in Killebrew's substandard building reports. Inasmuch as the violations cited in Killebrew's reports form the basis of Killebrew's statement that buildings were "a hazard to the public heath, safety and welfare[,]" the trial court's grant of summary judgment on the basis of the city's defense of nuisance was improper.

Statute of Limitations

Patel next argues that the trial court erred in finding that his claim was barred by a two-year statute of limitations.[11] Patel contends that his claim is one for inverse condemnation. Where property has been "taken," a plaintiff's right to maintain a cause of action would not be barred until the expiration of the ten-year period

necessary to acquire land by adverse possession. *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 530 (Tex.App.-Houston [14th Dist.] 1991, writ denied). We initially note that the record does not reflect that the City specially excepted to Patel's pleadings. Thus, we apply a liberal construction of Patel's pleadings to determine if Patel properly pleaded a claim for inverse condemnation. *See Crabb*, 905 S.W.2d at 673. To recover under the theory of inverse condemnation, the property owner must establish that: (1) the governmental entity intentionally performed certain acts; (2) that resulted in a taking of property; (3) for public use. *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex.App.-Houston [1st Dist.] 1992, writ denied). *13

13

[11] Among the remaining properties subject to our discussion, the only property potentially barred by the City's statute of limitations defense is the property located at 410 Race Street. The record reflects that Patel brought suit concerning the remaining three properties within two years of their demolition.

In the case at hand, Patel averred as follows:

> Defendant Everman has failed to pay Patel any compensation for the destruction or foreclosure of the above-referenced buildings. Such failure constitutes a taking, damaging or destroying of Patel's property for public use and benefit without adequate compensation in violation of Article I, Secs. 17 and 19 of the Constitution of the State of Texas.

The City argues that Patel's case is one related to the "damaging" of property, and thereby, properly subject to a two-year statute of limitations. However, Patel has pleaded that the City's actions amounted to either taking, damaging, or the destruction of his property for public use. Patel further states in his petition, "To date, all but two of the above-referenced buildings have been demolished." Patel has pleaded facts that give proper notice of his claim that the City intentionally demolished his property for public use. A petition is sufficient if it gives fair notice of the facts relied upon, enabling the defendant to prepare a defense. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000) (citing *Broom v. Brookshire Bros., Inc.*, 923 S.W.2d 57, 60 (Tex.App.-Tyler 1995, writ denied)). Furthermore, the record clearly indicates that the property located at 410 Race Street was demolished. *See Crabb*, 905 S.W.2d at 672-74 (court held taking occurred where city demolished building for the public use even though the underlying property retained a value of $5,000). Thus, we conclude that Patel properly pleaded a claim for inverse condemnation. *Id.* Therefore, the trial court improperly found that Patel's claim was governed by a two-year statute of limitations.

With respect to his argument that the trial court erred in granting the City's motion for summary judgment on its affirmative defense of consent, Patel's second issue is overruled. The remainder of Patel's second issue is sustained.

DUE PROCESS

In his third issue, Patel argues that the trial court erred by granting summary judgment in the City's favor on his state due process claim. The due process provisions of the Texas Constitution do not provide for a cause of action for damages, but rather only for direct claims seeking equitable relief. *See Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 816 (Tex.App.-Texarkana 2003, no pet.); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995) (concluding with regard to speech and assembly clauses, that no historical underpinnings or text of the Texas Constitution implied a cause of action for damages for unconstitutional conduct); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 872-73 (Tex.App.-Amarillo 1993, writ denied).

Patel contends that his is a claim in equity requiring compensation.[12] Yet, where, like Patel, a party seeks monetary damages, he seeks a legal remedy, not an equitable one. *See Securtec, Inc.*, 106 S.W.3d at 816. Further, Patel argues that, in other contexts, courts have found a private cause of action to exist despite the

absence of an express provision for a private right of action. The cases cited by Patel in support of his proposition, *Nixon*, 690 S.W.2d at 549 (Tex. 1985), *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 209 (6th
14 Cir. 1961), and *Caskey v. Bradley*, 773 S.W.2d 735, 738 (Tex.App.-Fort Worth *14 1989, no writ),[13] are inapplicable to the issue before us. As such, we hold that Patel seeks relief that is unavailable for the City's alleged violation of his rights under Article I, section 19 of the Texas Constitution. Patel's third issue is overruled.

12 Patel notes that "the violation of [his] due process rights has effected a damage that cannot be remedied by the mere reinsurance of an overdue notice or rehearing on the condition of now-destroyed buildings."

13 *Nixon* and *Caskey* set forth the rule that negligence per se can arise from an unexcused violation of a statute. *See Nixon*, 690 S.W.2d at 549; *Caskey*, 773 S.W.2d at 738. *Dann* concerns the question of whether an investor may bring an action in his own behalf in lieu of waiting for the Commission to bring it for him under the Securities and Exchange Act. *See Dann*, 288 F.2d at 208.

TRESPASS AND CONVERSION CLAIMS

Patel's fourth issue concerns his claims of trespass and conversion against Killebrew and MCA.[14]

14 Patel states in his brief that he is not challenging the trial court's rendition of summary judgment with respect to his claim for destruction of property. For ease of reference, Killebrew and MCA will be referred to collectively as "Appellees."

Res Judicata

Patel first argues that the trial court erred in granting Appellees' motion for summary judgment on their affirmative defense of res judicata. Appellees argue that the United States District Court for the Northern District of Texas's order granting summary judgment in Appellees' favor in Cause No. 4:99CV982BE; *Jayanti Patel v. City of Everman, Tom Killebrew d/b/a Metro Code Analysis*, 2001 WL 11074 (N.D.Tex. Jan.3, 2001) is res judicata as to Patel's claims for trespass and conversion.

The doctrine of res judicata is an affirmative defense. *See* TEX.R. CIV. P. 94. In the case at hand, since Appellant's federal lawsuit proceeded to judgment first, we must apply federal principles of res judicata. *See Fernandez v. Mem'l Healthcare Sys., Inc.*, 896 S.W.2d 227, 230 (Tex.App.-Houston [1st Dist.] 1995, writ denied) (citing *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990)). Under federal law, res judicata will apply if (1) the parties are identical in both suits; (2) the prior judgment is rendered by a court of competent jurisdiction; (3) there is a final judgment on the merits; and (4) the same cause of action is involved in both cases. *Id.*

Here, the parties are identical in both suits. Patel argues that it is clear that no final judgment on the merits was issued on his trespass and conversion claims by any court whatsoever, let alone a court of competent jurisdiction. Patel bases his argument on the trial court's order dismissing his takings claims for want of jurisdiction. In its order, the federal court stated as follows:

> The court retains federal questions jurisdiction over Patel's substantive due process, equal protection and racial discrimination complaints. Patel's remaining complaints are dismissed as they are not yet ripe for determination.

In his response to Appellees' motion for summary judgment, Patel contended that it was clear that his claims of trespass and conversion were inherently intertwined with his takings claim, which the federal court dismissed as not yet ripe.

Court of Competent Jurisdiction

As Patel claims that the district court was not a court of competent jurisdiction, we will address this element of res judicata first. Res judicata, or claim preclusion, bars all claims that were brought, or could have been
15 brought, in a previous action. *Fernandez*, 896 S.W.2d at 232 (citing *Langston v. Insurance Co. of* *15 *N. Am.*, 827 F.2d 1044, 1047 (5th Cir. 1987)). When a lawsuit is brought in federal court, and there is no jurisdictional obstacle to advancing state law claims, res judicata bars any effort to assert the state law claims in a separately filed lawsuit. *Fernandez*, 896 S.W.2d at 232 (citing *Eagle Properties, Ltd.*, 807 S.W.2d at 718). When a federal claim and a state claim are combined in one lawsuit, and derive from a common nucleus of operative facts, a federal court has the power to adjudicate the state court claim, under the doctrine of pendent jurisdiction. *Fernandez*, 896 S.W.2d at 232 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)). To determine whether the omitted state claims could have been brought in the federal action, we must (1) determine whether the federal court possessed jurisdiction over the omitted claim; and (2) whether the federal court would have clearly declined to exercise that jurisdiction. *Fernandez*, 896 S.W.2d at 232 (citing *Jeanes v. Henderson*, 688 S.W.2d 100, 104 (Tex. 1985)).

A comparison of Patel's state court petition and his federal complaint demonstrates that the facts alleged are virtually the same. More specifically, with respect to his allegations against Killebrew and MCA, in his federal complaint, Patel alleged as follows:

> Shortly after the injunction was denied, the City of Everman proceeded to demolish each building owned by Patel. During this process, Adam Killebrew, acting on behalf of Tom Killebrew, went through Patel's buildings knocking holes in Patel's walls and vandalizing Patel's buildings.

Similarly, in his petition in the case at hand, with respect to Appellees Killebrew and MCA, Patel pleaded as follows:

> In May of 1998, Defendant Metro Code Analysis, L.L.P., by and through Defendant Tom Killebrew, directed its agents and/or employees to loot and vandalize Patel's fourplexes which included breaking light fixtures, windows, and thermostats, and taking doors and electrical boxes.

Based on our reading of Patel's pleadings in both his federal and state lawsuits, we conclude that both lawsuits are derived from a common nucleus of operative facts.

Patel's argument relates more closely to the question of whether the federal court would have clearly declined to exercise jurisdiction over his trespass and conversion claims. In its memorandum opinion dismissing Patel's takings claims, the court stated as follows:

> Patel's claims of an unlawful taking without just compensation are premature. His claims under the Takings Clauses of the state and federal constitutions must be dismissed for lack of jurisdiction. His claim of denial of procedural due process, being dependent on the factual development of his takings claims, is also unripe. Similarly, his complaints regarding Section 214.001 of the Texas Local Government Code and the Everman City Ordinance governing demolition of substandard properties are intertwined with his allegations that his property was taken without just compensation and thus not ripe until his Takings Clause claims are resolved.

> Dismissal of the foregoing claims, however, does not render federal question jurisdiction nonexistent. Patel has raised claims involving federal substantive due process, equal protection, and race discrimination that exist independent of the Takings Clause. These complaints stem from the City
> 16 Council's vote to raze his property and will remain even if he seeks or recovers just compensation *16
> for the demolition of his buildings. The court retains federal question jurisdiction over Patel's substantive due process, equal protection, and racial discrimination complaints.

Thus, Patel contends that his trespass and conversion claims were inherently intertwined with his takings claim and would have, had he asserted them, been dismissed as well.

As set forth in the federal court's opinion, the claims it retained would remain even if Patel sought or recovered just compensation for the demolition of his buildings. To recover for conversion, a plaintiff must prove that (1) the plaintiff owned, possessed, or had the right of immediate possession of the property, (2) the property was personal property, (3) the defendant wrongfully exercised dominion or control over the property; and (4) the plaintiff suffered injury. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997); *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147-48 (Tex. 1997). To recover for trespass to real property, a plaintiff must prove that (1) the plaintiff owns or has a lawful right to possess real property, (2) the defendant entered the plaintiff's land and the entry was (a) physical, (b) intentional, and (c) voluntary, and (3) the defendant's trespass caused injury to the plaintiff. *See Pentagon Enters. v. Southwestern Bell Tel. Co.*, 540 S.W.2d 477, 478 (Tex.App.-Houston [14th Dist.] 1976, writ ref'd. n.r.e.). While Killebrew's acts as alleged by Patel arose from the same nucleus of operative facts — the City's destruction of Patel's properties — such acts are not intertwined with Patel's takings claim. Indeed, Patel has not pleaded in the instant case that Killebrew or MCA are somehow liable under Article I, section 17. We conclude that the specific allegations giving rise to Patel's trespass and conversion claims are not so inextricably intertwined with the allegations giving rise to his inverse condemnation suit so as to cause us to further conclude that the federal court would have clearly declined to exercise its jurisdiction thereon.

Remaining Elements

The federal courts have adopted the "transactional test" for determining whether two complaints involve the same cause of action for purposes of res judicata. *Fernandez*, 896 S.W.2d at 231 (citing *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994)). Under this approach, the critical issue is not the relief requested or the theory asserted, but whether the plaintiff bases the two actions on the same nucleus of operative facts. *Id.* As set forth above, based on a comparison of Patel's pleadings in his federal suit with his pleadings in the case at hand, we have concluded that the two actions arise from the same nucleus of operative facts.

Furthermore, the record indicates that subsequent to its dismissal of Patel's takings claims and related claims, the trial court entered a final summary judgment as to Patel's claims for equal protection, substantive due process, and race discrimination. We hold that the trial court did not err in granting Appellees' motion for summary judgment on its affirmative defense of res judicata. Patel's fourth issue is overruled.

NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

In his fifth issue, Patel argues that the trial court erred in granting Appellees' no-evidence motion for summary judgment. After adequate time for discovery, a party without presenting summary judgment evidence may
17 move for summary judgment on the ground that there is no evidence of *17 one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX.R. CIV. P. 166a(i).

The motion must state the elements as to which there is no evidence. *Id.* The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. *Id.* The movant need not produce any proof in support of its no-evidence claim. *See id.; see also* Judge David Hittner and Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L.REV. 1303, 1356 (1998). The motion must be specific in alleging a lack of evidence on an essential element of a cause of action, but need not specifically attack the evidentiary components that may prove an element of the cause of action. *See Denton v. Big Spring Hosp. Corp.*, 998 S.W.2d 294, 298 (Tex.App.-Eastland 1999, no pet.). Once a no-evidence motion has been filed in accordance with Rule 166a(i), the burden shifts to the nonmovant to bring forth evidence that raises a fact issue on the challenged evidence. *See Macias v. Fiesta Mart, Inc.*, 988 S.W.2d 316, 316-17 (Tex.App.-Houston [14th Dist.] 1999, no pet.). A no-evidence motion is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *See Havner*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

On appeal, we will uphold a no-evidence summary judgment only if the summary judgment record reveals no evidence of the challenged element, i.e., (a) a complete absence of evidence as to the challenged element; (b) the evidence offered to prove the challenged element is no more than a mere scintilla; (c) the evidence establishes conclusively the opposite of the challenged element; or (d) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove the challenged element. *See Taylor-Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 488 (Tex.App.-San Antonio 2000, pet. denied) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L.REV. 361, 362-63 (1960)).

In the case at hand, we need not reach the issue of the propriety of the trial court's order granting Appellees' no-evidence motion for summary judgment as to Patel's claims of trespass, conversion, or due process as we have concluded that the trial court properly granted Appellees' traditional motion for summary judgment with regard to such claims. In its brief, the City argues that the trial court properly granted its no-evidence motion for summary judgment with regard to Patel's takings claim as well. Specifically, the City argues that Patel can provide no evidence that (1) his properties were taken for "public use" and/or (2) the City acted beyond its reasonable exercise of police power.

To iterate, in order to recover under article I, section 17, a plaintiff must show that (1) the government's intentional acts (2) resulted in a taking of the plaintiff's property (3) for public use. *See Smithwick*, 721 S.W.2d at 951. As set forth above, there is some evidence supporting *18 that Patel's properties were taken for "public use." As to whether the City acted beyond its reasonable exercise of police power, the City contends that since, as it alleged, Patel's properties constituted a nuisance as a matter of law, it "lawfully exercised its police powers by ordering the repair and then demolition" of the properties. However, since the City had the burden of proving that Patel's properties constituted a nuisance as a matter of law, *see Crabb*, 905 S.W.2d at 674-75, it was not entitled to move for a no-evidence motion for summary judgment on such a ground. *See* TEX.R. CIV. P. 166a(i). Even so, as set forth above, we concluded that the trial court's grant of summary judgment on the basis of the city's defense of nuisance was improper because Patel's deposition testimony raised a fact issue as to nuisance. We hold that the trial court incorrectly granted the City's no-evidence motion for summary

judgment as to Patel's takings claims inasmuch as such claims are not otherwise barred by the trial court's grant of summary judgment in the City's favor on its affirmative defense of consent. Patel's fifth issue is sustained in part.

CONCLUSION

We conclude that the trial court incorrectly granted summary judgment on Patel's takings claim other than as to the City's affirmative defense of consent, as to which summary judgment was appropriate. Therefore, we have sustained in part, and overruled in part, Patel's issues one, two, and five. We have also overruled Patel's issues three and four. Accordingly, we ***reverse*** the trial court's order granting summary judgment in favor of the City and ***remand*** the cause for further proceedings consistent with this opinion with regard to Patel's takings claims as to the following properties, which are not subject to the City's affirmative defense of consent: 403 Lee Street, 410 Race Street, 405 King Street, and 403 King Street. In all other respects, we ***affirm*** the trial court's order granting summary judgment.

No. 14-99-00148-CV
Court of Appeals of Texas, Fourteenth District, Houston

Sabine Gas Transmission Co. v. Winnie Pipeline Co.

15 S.W.3d 199 (Tex. App. 2000)
Decided Mar 2, 2000

No. 14-99-00148-CV

Filed March 2, 2000

Appeal from the Probate Court #2, Harris County, Texas, Mike Wood, J., Trial Court Cause No. 282,646-401.

Affirmed.

Raymond J. Blackwood, Eric Lipper, Houston, for appellants.

Don A. Wetzel, Douglas R. Drucker, Houston, for appellees.

Panel consists of Chief Justice MURPHY and Justices HUDSON and WITTIG.

OPINION

PAUL C. MURPHY, Chief Justice.

This appeal arises from the probate court's dismissal of the claims of Winnie Pipeline Company and Southeastern Marketing Company (collectively "Winnie") against Sabine Gas Transmission Company and other defendants (collectively "Sabine") for lack of jurisdiction. Alleging that the probate court erred in finding it lost jurisdiction over Winnie's claims, Sabine asks us to reverse the probate court's dismissal of the claims and reinstate the case in the probate court. Though we agree with Sabine that the court's decision was
200 erroneous, we find any error in the court's finding was harmless and affirm its dismissal. *200

This case arose when Winnie filed assorted claims against Sabine and several others in a Montgomery County District Court arising from alleged bribes and kickbacks taken under a percentage gas sales contract. Two of the named defendants were the independent co-executors of the Walter Fawcett estate (the Executors), which was being probated in Harris County Probate Court No. 2. The Executors moved to transfer Winnie's claims to Harris County, based on the assertion that the probate court had dominant, concurrent, or pendent jurisdiction over the claims since the Executors were parties to the suit. The probate court granted the Executors' motion and consolidated these claims with the probate proceeding. Eventually, Winnie settled with the Executors, non-suited its claims against them, and moved to have its remaining claims against Sabine dismissed for lack of jurisdiction. The probate court granted Winnie's motion and dismissed its claims without prejudice, making an express finding that it lost jurisdiction over the claims. Sabine appealed.

In support of its position, Sabine points to the general rule that once a court obtains jurisdiction over a case, it retains jurisdiction throughout the case. Sabine argues for the application of this rule to probate courts, making the probate court's dismissal of Winnie's claims an abuse of discretion. Sabine cites many cases in support of

this proposition, though none of them squarely address the issue before the court. *See, e.g., Bell v. Mores*, 832 S.W.2d 749, 754 (Tex.App.-Houston [14th Dist.] 1992, writ denied) (finding that a trial court cannot acquire jurisdiction over claims while a suit is pending); *but see* Tex. Prob. Code Ann. § 5A(d) (allowing a probate court to exercise ancillary or pendent jurisdiction over claims after the probate proceeding has begun). Winnie, however, relies heavily on a case from the Austin Court of Appeals, *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex.App.-Austin 1997, no pet.), which it believes is directly on point.

In *Goodman*, the court addressed an issue similar to the one we must address today: Does a probate court abuse its discretion finding it lost jurisdiction over ancillary and pendent claims once the estate is dismissed from the probate proceeding? *See id*. There, Frances Ledbetter entered into a contract for the sale of land with Weaver. *See id.* at 932. The sale was conditioned upon Weaver taking steps to develop the property. *See id.* Sometime after this contract was entered into, Ledbetter died and his estate was admitted to probate. *See id.* His estate sued Weaver to clear title to the property. *See id.* Weaver countersued the estate for specific performance and filed a third party claim against the City of Austin, alleging that the City had prevented him from obtaining approvals necessary to allow the property to be developed and from meeting the conditions of the contract. *See id.*

Pursuant to the estate's motion to consolidate, the probate court exercised its ancillary and pendent jurisdiction under Section 5A of the Probate Code and consolidated the third-party and counterclaims with the probate proceeding. *See id.* After Weaver settled with the estate and the estate administration was completed, the City moved to dismiss the remaining claims on the ground that the probate court lacked subject matter jurisdiction. *See id.* The probate court granted the dismissal and Weaver appealed. *See id.*

The court of appeals upheld the dismissal, holding that "the probate court had no discretion to continue to exercise ancillary jurisdiction over the [City] after it dismissed the estate from the proceeding." *Id.* at 934. The court explained its holding by noting that a probate court's ancillary jurisdiction arises only over a claim that bears some relationship to the estate. *See id.* at 933. If the estate is dismissed from the probate proceeding, the
201 claim loses its ancillary nature since there is no claim within the court's jurisdiction to which the ancillary *201
or pendent claim relates. *See id.* Because it found the claims against the City to be ancillary or pendent to nothing, the court held the probate court lost jurisdiction. *See id.*

Here, unlike the situation in *Goodman*, the estate was still a party to the probate proceeding when the trial court dismissed the ancillary and pendent claims.[1] Thus, the probate court's reliance on this case in finding that it lost jurisdiction was misplaced. Rather, this case involves an issue not before the *Goodman* court — Does a probate court abuse its discretion by holding that it loses jurisdiction over claims which it has ancillary or pendent jurisdiction when no other claims before the court have any relationship to those claims even though the estate administration is still pending?

[1] The *Goodman* court addressed in dicta whether the probate court loses jurisdiction when claims against the estate are settled and the estate is dismissed but before the completion of the estate administration proceeding. It stated that the dismissal of the claim giving the probate court original jurisdiction "arguably" deprived the court of jurisdiction over the pendent and ancillary claims. *See Goodman*, 952 S.W.2d at 934.

Before analyzing the probate court's actions, it is important to determine how it acquired jurisdiction over the claims before it. The probate court acquired jurisdiction over the claims against the Executors under § 5A(c) of the Probate Code which states "[a] statutory probate court[2] has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as a personal representative."[3] Tex. Prob. Code Ann. § 5A(c)(1) (Vernon Supp. 2000). The court acquired jurisdiction over the claims against Sabine under § 5A(d),

which provides that "[a] statutory probate court may exercise the pendent and ancillary jurisdiction[4] necessary to promote judicial efficiency and economy." *Id.* § 5A(d) (Vernon Supp. 2000). Further, the Code allows probate courts to exercise concurrent, pendent, or ancillary jurisdiction over claims regardless of whether the claims are appertaining or incident to the estate. *See* Acts 1989, 71st Leg., ch 1035, § 3, eff. Sept. 1, 1989, *amended by* Acts 1999, 76th Leg., ch. 64, § 1, eff. Sept. 1, 1999.[5]

2 This provision applies to the court below. *See* Tex. Govt. Code Ann. § 25.1031(c)(2) (Vernon 1988 Supp. 2000) (naming Harris County Probate Court No. 2 as a statutory probate court).

3 Independent executors are included within the Probate Code's definition of "personal representative," allowing the court to exercise jurisdiction over the Executors. *See* Tex. Prob. Code Ann. § 3(aa) (Vernon Supp. 2000).

4 The Texas Supreme Court has defined pendent and ancillary jurisdiction. Ancillary jurisdiction generally involves claims that are asserted defensively, such as counterclaims. *See Eagle Properties Ltd. v. Scharbauer,* 807 S.W.2d 714, 719 n. 3 (Tex. 1990). Pendent jurisdiction is defined as jurisdiction over parties not named in claims properly before the court when there is no independent basis for the court's jurisdiction. *See id.*

5 The newest version of this subsection omits claims by or against a person in that person's capacity as a personal representative from its coverage. *See* Tex. Prob. Code Ann. § 5A(e) (Vernon Supp. 2000). Apparently, such claims must now be appertaining to or incident to an estate for a probate court to exercise jurisdiction over them.

Based on the plain meaning of Section 5A, we find that, while the court acted within its discretion by dismissing Winnie's claims against Sabine, it abused its discretion by finding that it lost jurisdiction over those claims while the estate was still pending. While the probate court's exercise over Winnie's claims against Sabine was permissive, there is no basis in the statute itself for holding that the court lost jurisdiction over those claims once the claims against the Executors were settled. Should the court have desired, it could have dismissed the claims based on a finding that its continued entertainment of them would not promote "judicial
202 efficiency *202 and economy." However, the probate court did not lose jurisdiction; its jurisdiction over the claims would still run concurrently with the district court.

Having found that the court abused its discretion, we must determine if the error was harmless. *See* Tex. R. app. p. 44.1. Here, it is clear that the court had the discretionary power to dismiss the claims. Probate courts exercise their ancillary or pendent jurisdiction over non-probate claims only when doing so aids the efficient administration of the estate. *See* Tex. Prob. Code Ann. § 5A(d). The impetus behind the court's decision is usually, as it was in this case, the close relationship between the non-probate claims and the claims against the estate. Once that relationship ceases to exist due to the settlement or dismissal of the claim against the estate, the court may find its resolution of the non-probate claims no longer efficient.

Here, since the court could have dismissed the claims without finding that it lost jurisdiction, we find the error in dismissing the claims for lack of jurisdiction harmless. Accordingly, we affirm the judgment of the trial court.

Judgment rendered.

No. 3-90-092-CV
Court of Appeals of Texas, Austin

Vale v. Ryan

809 S.W.2d 324 (Tex. App. 1991)
Decided May 8, 1991

No. 3-90-092-CV.

May 8, 1991.

325 Appeal from 200th Judicial District Court, Travis County, Jerry Dellana, J. *325

Marceline Lasater, Austin, for appellant.

James Ludlum, Jr., Ludlum Ludlum, Austin, for appellees.

Before CARROLL, C.J., and JONES and SMITH, JJ.

JONES, Justice.

Margaret Portz Vale sued Vernon McKenzie, Lanny Ryan, and others for false arrest, false imprisonment, and malicious prosecution. The trial court rendered a take-nothing summary judgment on the ground that the limitations period for Vale's cause of action had expired before she filed suit. Vale appeals, asserting that the trial court erred in granting summary judgment because sixty days had not passed between the dismissal of her identical federal action and the filing of this suit in state court. The issues in this appeal are whether: (1) a federal court's refusal to exercise jurisdiction over pendent state claims constitutes a dismissal for lack of jurisdiction under the Texas "saving statute," Tex.Civ.Prac. Rem. Code Ann. § 16.064 (1986); and (2) the dismissal here was final for purposes of the same statute on the date of the federal district court's dismissal order. We will reverse the summary judgment and remand the cause.

The facts are undisputed. McKenzie, a Temple police sergeant, had participated in a drug "sting" operation.[1] Apparently as the result of a name error, McKenzie incorrectly testified to a Bell County grand jury that Vale was a known drug offender and had received delivery of controlled substances. After hearing only McKenzie's testimony, the grand jury indicted Vale. She was arrested and jailed on November 17, 1982. The following day McKenzie's misidentification was discovered, and Vale was released.

[1] Officer Lanny Ryan is also named as an appellee; however, none of Vale's complaints claim error as to him. Therefore, without further reference to Ryan, we will affirm that portion of the trial court's judgment directing that Vale take nothing against him.

On June 28, 1984, Vale brought suit in federal court against various defendants, including McKenzie, alleging violations of federal civil rights statutes. Vale also alleged, under the doctrine of federal courts'"pendent jurisdiction," state-law causes of action arising from the same facts. McKenzie was not initially a defendant in the federal suit; Vale filed a motion for leave to add him on November 20, 1984.[2] On August 15, 1985, the federal district court granted McKenzie's motion to dismiss her action as to him on the basis of limitations.

However, the court refused to sever Vale's cause against McKenzie from those against the other defendants, effectively preventing the summary judgment in McKenzie's favor from becoming final and appealable. As a result, Vale did not obtain appellate review of the dismissal until 1989, when the United States Court of Appeals for the Fifth Circuit held that the district court should have preserved her pendent state claims for prosecution in state court. *Vale v. Adams,* 885 F.2d 869 (5th Cir. 1989). The Fifth Circuit modified the district court's judgment to reflect that, as to McKenzie, the dismissal was "without prejudice." On April 16, 1990, the United States Supreme Court denied certiorari. *Vale v. Cooke,* ___ U.S. ___ , 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

[2] Vale contends that, under federal law, once her motion for leave to add McKenzie was granted, his addition to the suit related back to the date she filed the motion, November 20, 1984. We agree. *See Canion v. Randall Blake,* 817 F.2d 1188 (5th Cir. 1987).

While the federal cause was still wending its way through the federal appellate system, Vale began to seek relief in state court. On October 18, 1985, following the federal district court dismissal but before its
326 disposition on appeal, Vale filed the present state-court suit, asserting the same *326 state claim she had previously alleged as pendent to her federal action. On August 21, 1986, the state district court granted McKenzie's motion for partial summary judgment on the ground that limitations had run on Vale's state claim. The parties agreed to continue the matter without a final judgment until the Fifth Circuit's disposition of the federal appeal.

Despite the Fifth Circuit's holding that Vale's pendent state claim should have been dismissed as a matter of judicial discretion, and without prejudice to its being refiled in state court, the state court refused to reconsider its earlier summary-judgment ruling. On February 23, 1990, the state district court severed the summary judgment in McKenzie's favor from the remainder of the state suit, allowing it to become final. Vale appeals from this judgment.

McKenzie obtained his summary judgment in state court by asserting the defense of limitations, arguing that Vale had filed her suit more than two years after the events giving rise to her cause of action. *See* Tex.Civ.Prac. Rem. Code Ann. § 16.003 (1986). In response, Vale invoked a state tolling statute. *See* Tex.Civ.Prac. Rem. Code Ann. § 16.063 (1986). McKenzie had been out of the state for at least three days during the limitations period. Therefore, Vale contended, the statute of limitations was tolled for the days of his absence. Consequently, her state-court lawsuit, which "related back" to the date she filed her motion for leave to add McKenzie in the federal suit, was timely filed.[3]

[3] At oral argument, counsel for McKenzie conceded that the record raised a fact issue that his client had been absent from the state for the three days in question; therefore, we consider the matter to have been admitted for purposes of this decision.

A summary-judgment movant has the burden to show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548-49 (Tex. 1985). A defendant claiming entitlement to summary judgment on limitations grounds must, therefore, show that there is no genuine issue of material fact on his defense of limitations in order to obtain a summary judgment. Once a plaintiff has asserted the applicability of a tolling provision, the moving defendant bears the burden of showing its inapplicability as a matter of law. *Zale Corp. v. Rosenbaum,* 520 S.W.2d 889, 891 (Tex. 1975); *Hill v. Milani,* 678 S.W.2d 203, 204 (Tex.App. 1984), aff'd, 686 S.W.2d 610 (Tex. 1985).

Vale asserts that the trial court incorrectly interpreted a portion of the saving statute, section 16.064, and erroneously concluded that her limitations period had expired before she filed suit. Section 16.064 and its predecessor statute, 1931 Tex.Gen.Laws, ch. 81, § 1, at 124 [Tex.Rev.Civ.Stat. art. 5539a, since amended and codified], were designed to protect litigants from the running of limitations in certain circumstances. Section 16.064 provides:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of *lack of jurisdiction* in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition *becomes final,* the action is commenced in a court of proper jurisdiction.

(Emphasis added.) These tolling provisions are remedial in nature and are to be liberally construed. *Republic Nat'l Bank v. Rogers,* 575 S.W.2d 643, 647 (Tex.Civ.App. 1978, writ ref'd n.r.e.).

First, McKenzie asserts that section 16.064 does not apply because the federal court dismissed appellant's state claims "as a matter of judicial discretion," rather than for "lack of jurisdiction" as required by the statute. This distinction, he argues, removes Vale's state claims from the umbrella of the saving statute's protection. We
327 disagree. *327

When state and federal claims arise from a common nucleus of operative facts, a federal court may hear and determine the state claims as well as the federal ones by exercising its pendent jurisdiction. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). However, the federal court's *power* to hear a pendent state claim does not create for the plaintiff a *right* to federal-court disposition of such state-law claims. The federal court, in its discretion, may decline to hear pendent state claims based on "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726, 86 S.Ct. at 1139. The first question, then, is whether such a dismissal constitutes a dismissal for "lack of jurisdiction" within the meaning of section 16.064.

One commentator has observed that the saving statute "applies whether the dismissed action was filed in the state or the federal court, and whether the dismissal is one for want of jurisdiction of the subject matter or one based upon the *impropriety of exercising jurisdiction in a particular action.*" 4 McDonald, *Texas Civil Practice* § 17.20, at 123 (rev. ed. 1984) (emphasis added); *see also* Annotation, *Statute Permitting New Action after Failure of Original Action Commenced within Period of Limitation, as Applicable in Cases Where Original Action Failed for Lack of Jurisdiction,* 6 A.L.R.3d 1043 (1966).

This Court has previously held the tolling provision to apply in cases like the present one. In *Burford v. Sun Oil Co.,* 186 S.W.2d 306 (Tex.Civ.App. 1944, writ ref'd w.o.m.), this Court considered whether the predecessor to section 16.064 applied to toll limitations in circumstances almost identical to those in the present cause. In concluding that the saving statute applied, this Court stated in *Burford* that

> the governing factor in determining whether [the saving statute] applies, is the same in any event — appellees were denied the right to litigate their suit as to state law issues in the federal court because the state courts afforded the appropriate remedy. The effect of the order as one of dismissal for want of jurisdiction cannot be obviated by means of nomenclature. And this is true in the instant case regardless of the distinction in a proper case between want of jurisdiction and refusal to exercise it.

186 S.W.2d at 318. We believe, as did the court in *Burford,* that a litigant who chooses the federal forum in good faith should not suffer a penalty merely for having made that selection. *Id.* at 309. We conclude that, for purposes of the applicability of section 16.064, a federal court's refusal to exercise jurisdiction over a pendent state claim is tantamount to a dismissal for lack of jurisdiction.

McKenzie also contends that Vale did not file her state court action within sixty days of the federal district court's dismissal. Therefore, he argues, she cannot avail herself of the saving statute because she has not satisfied the second requirement of section 16.064. We disagree.

Until September 6, 1989, when the Fifth Circuit ruled that the federal district court's dismissal of the pendent state claims should have been discretionary rather than on the merits, Vale did not have a cause to which the saving statute could apply. Therefore, the earliest date from which the sixty-day period could begin to run was September 6, 1989. Vale filed her cause in state district court on October 18, 1985, well before the date of the Fifth Circuit's opinion. Therefore, she has met the saving statute's second requirement.[4]

> 4 We do not address the question of when a disposition becomes final for purposes of section 16.064 where, for example, a district-court dismissal for lack of jurisdiction is later *affirmed* on appeal.

We conclude that the saving statute applied to toll limitations during the pendency of Vale's federal suit. Consequently, we sustain her first point of error. Because of our disposition of Vale's first point, it is unnecessary for us to address her remaining points. That portion of the cause relating to appellee Lanny Ryan is severed, and the judgment is affirmed as to him. We reverse the summary judgment in McKenzie's favor and
328 remand that portion of the *328 cause to the trial court for further proceedings.

No. C14-89-00886-CV
Court of Appeals of Texas, Houston, Fourteenth District

Mohamed v. Exxon Corp.

796 S.W.2d 751 (Tex. App. 1990)
Decided Aug 2, 1990

No. C14-89-00886-CV.

June 7, 1990. Rehearing Denied August 2, 1990.

752 Appeal from the 55th District Court, Harris County, Reagan Cartwright, J. *752

Carol Nelkin, Joan Marie Lucci Bain, Houston, for appellants.

Reagan Burch, Paul L. Mitchell, Ingrid J. Blackwelder, Houston, for appellees.

Before J. CURTISS BROWN, C.J., and MURPHY and DRAUGHN, JJ.

OPINION

J. CURTISS BROWN, Chief Justice.

In this civil rights case the trial court ruled that res judicata barred the plaintiffs from litigating state law claims, after a federal court had dismissed an earlier suit grounded on federal law. We must determine the prior judgment's preclusive effect under federal law. The complexity of the inquiry makes us wish there were a state-to-federal counterpart to TEX.R.APP.P. 114, which provides for certification of state law questions from federal appellate courts to the Texas supreme court; such a reverse *Erie* rule would let us ask the Fifth Circuit about its caselaw. Because there is no such rule, we turn to the facts.

I

In their first lawsuit plaintiffs alleged employment discrimination. They sued Exxon Corp. and Exxon Minerals Co. (Exxon) in state court under 42 U.S.C. § 1981. Exxon removed the case to federal court, and it ended up on the docket of United States District Judge Ross Sterling.

Soon thereafter the plaintiffs exhausted their state administrative remedies and procured a right-to-sue letter from the Texas Commission on Human Rights. They went once again to state court, but in the second suit the plaintiffs alleged violation of *state* civil rights law. *See* TEX.REV.CIV.STAT.ANN. art. 5221k. The factual allegations remained essentially the same. In the second suit the plaintiffs also added a new defendant, their supervisor Roger Kust. Although the complaint in the § 1981 case had referred to Kust by name as an alleged wrongdoer, Kust was never officially a party to that proceeding. (This variation comes into play during the analysis whether preclusive effects of the § 1981 case extend to Kust in the art. 5221k case.)

Exxon again sought removal to federal court, and the art. 5221k case was assigned to United States District Judge Carl O. Bue. At this point there existed two separate suits in federal court, each having arrived via removal from state court, each arising out of the same transaction, one stating a § 1981 claim and the other

stating an art. 5221k claim. Plaintiffs filed a motion to remand in each case. Defendants went to Judge Sterling and filed a motion to consolidate the two actions into a single proceeding before him. Judge Sterling denied the motion to remand, and he refused to rule on the consolidation request. Judge Bue ultimately granted the motion to remand the art. 5221k case, but not before a complication had arisen in the § 1981 case.

753 *753 It seems Judge Sterling had ordered an outright *dismissal* of the § 1981 case for want of prosecution. In all fairness, plaintiffs hardly lacked diligence; they were, after all, prosecuting two lawsuits at once. Instead, it was the defendants who had inadvertently failed to follow Judge Sterling's docket control procedures. Those procedures required the defendants to deliver a docket control order advising plaintiffs of a docket call date. When the plaintiffs did not appear, Judge Sterling dismissed the action. Plainly, due process considerations would not have allowed such an outcome to stand, and the Fifth Circuit would assuredly have found an abuse of discretion if there had not been a change. *See Callip v. Harris Cty. Child Welfare Dept.,* 757 F.2d 1513, 1519 (5th Cir. 1985) (recognizing dismissal with prejudice as an extreme sanction, available only in the most egregious cases).

Interestingly, however, plaintiffs decided not to seek reinstatement of the § 1981 case, an avenue they could have taken to remedy the due process problem. They opted instead to accept the dismissal — with one proviso. In their consent to dismissal they asked Judge Sterling to recognize their lack of fault respecting the failure to appear, requesting him to label the dismissal as one *without prejudice.* If Judge Sterling had granted that motion to modify, this case would not be here today. Alternatively, if he had expressly designated the dismissal as one *with prejudice,* this case would at least be far simpler. Unfortunately, he did neither. He simply denied the motion.

At the core of the dispute before us is the question whether Judge Sterling's dismissal of the § 1981 case was with prejudice. If it was, then the state district court in the art. 5221k case correctly regarded that prior judgment as a predicate for invocation of res judicata. On the other hand, if Judge Sterling's dismissal was without prejudice, then there was no judgment on the merits upon which to base a finding of res judicata, and we would have to reverse.

II A

Characterization of the dismissal in the § 1981 case is a matter of federal civil procedure. The governing rule is FED.R.CIV.P. 41, which supplies gap-filling instructions to deal with a dismissal order that fails to specify whether the dismissal was without prejudice. Rule 41 recognizes two types of dismissals, voluntary and involuntary. Generally speaking, under rule 41(a) the plaintiff may voluntarily dismiss his action as of right, and "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice." Rule 41(b) addresses the question of involuntary dismissal, including a dismissal for want of prosecution: "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication on the merits." The salient issue is therefore whether the dismissal was voluntary, within the meaning of federal law. *Cf. Rizk v. Mayad,* 603 S.W.2d 773, 775 (Tex. 1980) (dismissal for want of prosecution is not considered on the merits under *Texas* law); *Gracey v. West,* 422 S.W.2d 913, 917 (Tex. 1968) (same); *Texas Atty. Gen. v. Daurbigny,* 702 S.W.2d 298, 300 (Tex.App. — Houston [1st Dist.] 1985, no writ) (same).

The parties have cited a considerable number of relevant decisions, virtually all of them coming from the Fifth Circuit. We are quite content to confine our analysis within the boundaries drawn by the litigants in this case, because Fifth Circuit jurisprudence is sufficiently well-developed and coherent to inform our decision today. Moreover, there is every reason to regard that jurisprudence as a reliable guide for interpretation of a decree

from one of the District Courts within the Fifth Circuit. Nevertheless we note that Fifth Circuit precedent as such does not bind us. What binds us is federal law — here, a federal judgment whose scope depends on federal rule 41 — because the Supremacy Clause says so. *See* U.S. CONST. art. VI. As has long been
754 recognized, "The laws of the United States are laws in the several *754 States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the State; and the courts of the two jurisdictions are not foreign to each other. . . . " *Claflin v. Houseman,* 93 U.S. 130, 136-37, 23 L.Ed 833 (1876); *see Tafflin v. Levitt,* ___ U.S. ___ , 110 S.Ct. 792, 800-01, 107 L.Ed.2d 887 (1990) (Scalia, J., concurring) (on the authority of federal law in state courts). Our reading of federal law could diverge from that of the Fifth Circuit in a given case; today it does not.

At first glance one might conclude that rule 41(b) obviously applies, since that section classifies dismissals for want of prosecution as involuntary. We believe such an approach unduly facile. In this age of expanded discovery and more or less unsupervised pretrial processes, it is not always clear when it is the court taking the initiative and when it is a litigant. For example, in *Plumberman, Inc. v. Urban Sys. Dev.,* 605 F.2d 161 (5th Cir. 1979) an intervenor asked to restructure its pleadings so as to take on plaintiff status, after all other parties had dropped their claims and sought dismissal with prejudice. The trial court granted the intervenor's motion and gave it 10 days to file an amended complaint, lest the intervention be dismissed. The intervenor never filed an amended complaint, and dismissal followed. Two years later litigation resumed but the second trial court found the former intervenor's suit barred by res judicata, in light of the earlier dismissal. The Fifth Circuit reversed. Reasoning that the stipulation to a dismissal if an amended complaint were not filed was voluntary, the court of appeals applied rule 41(a) and held res judicata unavailable.

A contrary result occurred in *Dillard v. Security Pac. Brokers, Inc.,* 835 F.2d 607 (5th Cir. 1988). There the trial court had dismissed a litigant's counterclaim as a sanction for failure to appear at a deposition. On appeal the court distinguished *Plumberman* and squarely held the dismissal to be on the merits under rule 41(b).

Appellants rely on *Plumberman* as authority for their argument that by consenting to the dismissal, they successfully persuaded Judge Sterling to "transform[ ] the federal court's initial judgment of dismissal from an involuntary dismissal to a voluntary dismissal." This conclusion they derive from his dismissal order, which expressly recognized their refusal to seek reinstatement. That assertion seems to us a non sequitur. True, Judge Sterling recited the positions of the parties; but he never grounded his refusal to modify the order on the offer of plaintiffs' consent. Had he said, "The motion is denied because plaintiffs' consent makes this dismissal voluntary and therefore without prejudice," we would agree with plaintiffs now. He did not say that, and the reason is evident. If Judge Sterling had felt that way, he needed only to *grant* the motion for clarification. It seems far more plausible that he took the view espoused in defendants' opposition to the motion, namely that plaintiffs should have to prosecute the § 1981 case in federal court or suffer its dismissal on the merits, since plaintiffs had filed separate suits in the first place. This position better explains denial of the motion.

In any event, we need not get mired in a slough of speculation, because there is an independent reason for regarding the order as on the merits. We simply cannot accept appellants' contention that their post facto consent alters the involuntary character of an existing order. If rule 41 permits a you-can't-fire-me,-I-quit argument, the pages of the Federal Reporter do not reflect that fact. It would be a strange rule indeed that allowed avoidance of sanctions by belated acquiescence. Perhaps Judge Sterling abused his discretion in refusing to modify the order, or in refusing to spell out its intended effect. But the remedy for such error was to appeal his ruling. *See Nagle v. Lee,* 807 F.2d 435, 443 (5th Cir. 1987) ("[Plaintiff] forfeited review of that decision by not appealing the dismissal in a timely manner.") We therefore apply rule 41(b) and find the order
755 to be with prejudice. Accordingly, we must consider its preclusive effect under federal law. *755

Texas courts follow federal principles of res judicata for determining the effect of a prior federal judgment. *Jeanes v. Henderson,* 688 S.W.2d 100, 103 (Tex. 1985). The Fifth Circuit requires four conditions for the invocation of res judicata:

(1) the prior judgment must have been rendered by a court of competent jurisdiction,

(2) there must have been a final judgment on the merits,

(3) the parties must be identical in both suits, and

(4) the same cause of action must be involved in both suits.

See, e.g., Dillard v. Security Pac. Brokers, Inc., 835 F.2d 607, 608 (5th Cir. 1988); *Nagle v. Lee,* 807 F.2d 435, 439 (5th Cir. 1987); *Nilsen v. City of Point Moss,* 701 F.2d 556, 559 (5th Cir. 1983) (en banc). Before applying this test, we pause to observe that federal res judicata is an equitable doctrine, the employment of which is within the trial court's broad discretion. *United States v. Thomas,* 709 F.2d 968 (5th Cir. 1983); *Nations v. Sun Oil Co.,* 705 F.2d 742 (1983); *see also In re Braniff Airways,* 783 F.2d 1283, 1289 (5th Cir. 1986) (when "reasonable doubt exists as to what was decided in the first action, the doctrine of res judicata should not be applied."); *Kauffman v. Moss,* 420 F.2d 1270, 1274 (3d Cir. 1970) (same).

Moving to the merits of the preclusion argument, we find no dispute over Judge Sterling's jurisdiction. And although there exists a dispute over whether he intended to dismiss the case with prejudice, we have already answered that question in the affirmative. The first two elements are therefore satisfied. As to identity of parties and identity of causes of action, the analysis becomes more complicated. Where the Fifth Circuit's formulation says res judicata requires *identity* of parties, that does not mean identity in the usual sense. It means rather a relationship so close that a court may justifiably deny the plaintiff a second bite at the apple. In a case remarkably similar to this one, the Fifth Circuit grounded claim preclusion on a finding of sufficient identity between a corporate defendant — Exxon, as it happened — and two of its employees. *Lubrizol Corp. v. Exxon Corp.,* 871 F.2d 1279, 1289 (5th Cir. 1989). The court reasoned that Exxon's vicarious liability derived precisely from the alleged acts of its agents, and that res judicata ought to apply. This view is the majority position among federal courts. *See id.* at 1288 (collecting cases); *see also Pollard v. Cockrell,* 578 F.2d 1002 (5th Cir. 1978) (suggesting other relationships which might supply sufficient reason for finding identity: beneficiary and trustee, parent corporation and subsidiary, etc.). Furthermore, this result follows logically from *Jeanes v. Henderson,* where the Texas supreme court noted and relied on the federal abandonment of strict privity: "As a leading authority states, `[o]nce it is concluded that [res judicata] is asserted against a person who properly may be bound by the judgment, the inquiry shifts to ask whether there is some special reason for denying its benefits to a non-party.'" 688 S.W.2d at 105 (*quoting* 18 C. WRIGHT, A. MILLER E. COOPER, FEDERAL PRACTICE PROCEDURE § 4488, at 410 (1981)). What our supreme court correctly perceived in 1985 as a forceful development is all the stronger in the wake of *Lubrizol.* We therefore find identity of parties.

Nor is *Nagle v. Lee,* 807 F.2d 435 (5th Cir. 1987), to the contrary. There the court denied a res judicata claim by two police officers after an initial suit against a named sheriff and two unknown actors, "John Doe" and "John Smith." Because the two officers were never served in the first lawsuit, the court held they never became parties to it. Accordingly, the remaining question was whether the defendants could enjoy the effects of the prior dismissal as persons whose acts would have made the sheriff vicariously liable. To that question the court said no. *Id.* at 440 n. 4.

Likewise, where caselaw purports to require *identity* of causes of action, the scope of res judicata actually
756 extends to all claims which "might have been presented" *756 in the original suit. *In re Reed,* 861 F.2d 1381, 1382 (5th Cir. 1988); *In re Air Crash,* 861 F.2d 814, 816 (5th Cir. 1988). For example, in *Langston v. Insurance Co. of N. Am.,* 827 F.2d 1044 (5th Cir. 1987) the dispute centered around alleged employment discrimination, just as this case does. The plaintiff first filed a common law tort action for wrongful discharge. During this time he had an age discrimination complaint lodged with the EEOC. Later he received a right-to-sue letter from the EEOC but neglected to raise the age discrimination matter in the pending case. Instead he brought a second suit, alleging only age discrimination. When the first court dismissed his tort action on the merits, the second court found his discrimination claim barred by res judicata:

> Plaintiff contends that he could not have brought his age discrimination suit in *Langston I* because he had not completed the requisite filings with the EEOC at the time the suit was filed. . . .
>
> . . . After removal of *Langston I* and receipt of the right-to-sue letter, plaintiff had a fair opportunity to raise the age discrimination claim in the already pending cause of action. Instead, plaintiff filed the case *sub judice* resulting in two separate suits arising out of substantially the same set of facts, yet awaiting resolution by two different judges. Clearly, it is the prevention of this kind of claim splitting and "dilatoriness" which the doctrine of res judicata contemplates.

827 F.2d at 1048; *see also Miller v. United States Postal Serv.,* 825 F.2d 62 (5th Cir. 1987) (same result where the causes of action alleged sex discrimination in one case and discrimination on the basis of handicap in the other); *Fleming v. Travenol Labs.,* 707 F.2d 829 (5th Cir. 1983) (same result where the causes of action arose under Title VII in one case and 42 U.S.C. § 1983 in the other).

Lubrizol, Langston, and *Fleming* all make clear that failure to amend one's complaint can be held against a claimant in a court of law. For this reason we reject plaintiffs' suggestion that res judicata cannot include claims arising after the filing of their original petition. Nevertheless we must inquire what would have happened *if* they had sought to prosecute the art. 5221k claim in the § 1981 case. One could argue Judge Sterling would have disallowed such amendment, refusing to exercise his discretion to hear a pendent state claim; if that is so, then the art. 5221k claim fails to satisfy the requirement that it "might have been presented." In order to decide whether that requirement is met, we must examine the doctrine of pendent jurisdiction. Under that doctrine a court of the United States may exercise its judicial power over a claim which would not, on its own jurisdictional feet, support the invocation of federal authority pursuant to Article III. Pendent jurisdiction as a concept has fairly fuzzy boundaries, so the inquiry whether a prior judgment can cast its shadow over what would have been a pendent claim is a difficult one. The Texas supreme court laid out the pertinent standard in *Jeanes v. Henderson.*

There the court unanimously adopted as the rationale for its decision comment e to § 25 of the Restatement (Second) of Judgments (1982). 688 S.W.2d at 104 n. 4. Comment e provides for an exception to the rule of preclusion in one circumstance:

> If, however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should not be held precluded.

What is notable about this formulation is its placement of the burden to establish whether or not the federal court would have exercised pendent jurisdiction. It starts from the premise that the federal judge *would have* adjudicated the state law claims. Only if the federal judge would "clearly" have declined to exercise pendent jurisdiction is preclusion inappropriate. Accordingly, in cases of total silence, the state court is left to presume
757 res judicata *757 applies. This rule might not be intuitively obvious, but it is supported by the overwhelming weight of authority. *See Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164, 1168-69 (1982); *Merry v. Coast Comm. Coll. Dist.,* 97 Cal.App.3d 214, 158 Cal.Rptr. 603, 613 (1979); *Maldonado v. Flynn,* 417 A.2d 378, 383-84 (Del.Ch. 1980); *see also McLearn v. Cowen Co.,* 48 N.Y.2d 696, 422 N.Y.S.2d 60, 61-62, 397 N.E.2d 750, 751-52 (1979) (discussing the rule), *rev'd on other grounds,* 60 N.Y.2d 686, 468 N.Y.S.2d 461, 455 N.E.2d 1256 (1983).

Applying this standard, we look to the procedural history of the § 1981 case in Judge Sterling's court. To be sure, this is not an instance of total silence. Plaintiffs point out Judge Sterling's refusal to rule on a motion to consolidate. They regard his refusal as tantamount to declining pendent jurisdiction over the state law claims. In addition, they say *Judge Bue* declined pendent jurisdiction by remanding those claims to state court. Thus it is argued that both federal courts clearly turned down the opportunity to entertain the art. 5221k case, and that we should not now find it barred by res judicata. We disagree.

When Judge Bue found removal improvident and ordered a remand, he did so not because he wanted to, but because he had no choice. Far from declining to exercise pendent jurisdiction, he had absolutely no jurisdiction to decide the matter at all: there was no controversy which would support *federal* jurisdiction in the first place, and therefore there was no core claim from which a state law claim could "pend." And when Judge Sterling would not consolidate the cases into his court, he was hardly drawing a clear line so as to reserve some issues for the state judiciary. He was simply doing nothing. Furthermore, plaintiffs were not the ones who sought consolidation; it was the defendants who asked Judge Sterling to consolidate, over the vigorous objections of the plaintiffs. We would have a different case if the plaintiffs had sought to amend their complaint in the § 1981 case and add the art. 5221k theory. That did not occur. We cannot say it is clear, then, that Judge Sterling would have refused to hear the state law claims. For this reason we must consider the art. 5221k case as one which "might have been presented" in the § 1981 proceeding, and res judicata applies.

III

At this juncture we should distinguish between two types of uncertainty which haunt cases like this one — where a state court must determine the effect of a prior judgment from federal court, and where a state law theory was omitted from the federal case. The first type of uncertainty is the sort we have encountered just above, in deciding whether a federal court "would clearly have declined to exercise" pendent jurisdiction. That is plainly a matter of judgment for the United States district court, a matter which affords the federal judge a zone of discretion, so our job becomes somewhat more difficult. Nevertheless it is our duty to find preclusion unless the federal judge would clearly have declined the pendent claim, as is explained by comment e of the Second Restatement's § 25 and *Jeanes v. Henderson.* The second type of uncertainty relates to the scope of the prior judgment. This uncertainty grows out of the ever-present problem of interpreting words within their context. Whereas the first variety comes from the peculiar nature of pendent jurisdiction (and can come up only when a *federal* court rendered the initial judgment), the second derives from the ordinary difficulty of construing a written instrument. This latter kind of uncertainty is far less problematic. It poses a problem only in the rare case where a reasonable person has genuine cause for doubt over what the first court decided. It is *this* sort of uncertainty that leads to language such as "if reasonable doubt exists as to what was decided in the

first action, the doctrine of res judicata should not be applied." *In re Braniff Airways, Inc.,* 783 F.2d 1283, 1289 (5th Cir. 1986). The "reasonable doubt" standard has nothing whatsoever to do with the problem of pendent jurisdiction.

758 *758 As we have explained, the types of uncertainty differ, both in source and in effect. The only uncertainty today is the type involving pendent jurisdiction, and the rule of *Jeanes v. Henderson* requires us to resolve that issue against the plaintiffs. With this background we can consider plaintiffs' penultimate argument that application of res judicata would be inequitable and unfair. *See, e.g., United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983). And to that argument we cannot improve upon the words of the United States Supreme Court:

> we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is even handedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case.

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981). The result today comes as a direct outcome of calculated procedural machinations at the trial level, machinations which contravened no ethical canon but which render hollow any complaint that equity ought to forbid the reaping of what has been sown.

The final point of error challenges the trial court's action in ruling on the motion for summary judgment without the benefit of oral argument. We find no error in the court's action; but even if we did, we perceive no harm. Summary judgment practice is decidedly a textual affair rather than a matter of oral advocacy. *See City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 677 (Tex. 1979) ("To permit `issues' to be presented would encourage parties to request that a court reporter record summary judgment hearings, a practice neither necessary nor appropriate to the purposes of such a hearing."). We overrule all points of error.

Affirmed.

OPINION ON REHEARING

We append this brief statement in order to clarify a factual assertion in our earlier opinion. In that opinion's fourth paragraph we suggested Judge Bue's remand order came after Judge Sterling's dismissal order. It did not. We should have said Judge Bue ordered a remand *before* the dismissal. The sequence makes no difference and played no part in our reasoning, but we wish to be punctilious about the facts.

Ordinarily we would simply withdraw our initial opinion and reissue it with the pertinent modification. In this case we take a slightly different course so that we may stress the irrelevance of the change. Appellants make much of the factual background in their motion for rehearing, alleging that the mistake was a cornerstone in our analysis. That is not so. Appellants further impute to us a variety of improper motives, including a predisposition to twist matters in favor of appellees at any cost. We realize the disappointment an unsuccessful litigant must feel, and we strive not to take offense at intemperate language — especially in motions for rehearing. But the accusation is unjustified in this case because the law is simply with the appellees. The motion for rehearing is therefore denied.

Nos. 03-96-00306-CV, 03-96-00307-CV
Court of Appeals of Texas, Austin

Goodman v. Summit at West Rim, Ltd.

952 S.W.2d 930 (Tex. App. 1997)
Decided Sep 11, 1997

Nos. 03-96-00306-CV, 03-96-00307-CV.

September 11, 1997.

931 Appeal from the Probate Court No. 1, Travis County, Guy Herman, J. *931

James E. Cousar, Thompson Knight, P.C., Austin, for Walter Brown.

Jeffrey M. Friedman, Friedman Weddington, Austin, for Gail Gemberling.

Wayne Gronquist, Austin, for Jacquelyn Goodman.

W. Routt Thornhill, Joseph Thornhill, P.C., Austin, for Scott Roberts.

Stephen I. Adler, Barron Adler, L.L.P., Austin, for The Summit at West Rim, Ltd, Weaver Interests, Inc. Evans P. Weaver, Individually.

Andrew F. Martin, City Atty., Frederick A. Hawkins, Asst. City Atty., Austin, for City of Austin and Planning Commission.

Before CARROLL, C.J., and POWERS and JONES, JJ.

CARROLL, Chief Justice.

These associated appeals arise out of claims filed by The Summit at West Rim, Ltd., Weaver Interests, Inc., and Evans P. Weaver against the City of Austin, the Planning Commission of the City of Austin, and Planning Commission members Walter Brown, Gail Gemberling, Scott Roberts, Jacquelyn Goodman, Don Bosse, Bob Cline, Richard Huffman, Brooks Kasson, Darrell W. Pierce, and Cathy Vasquez-Revilla. On April 1, 1996, the probate court signed an order dismissing the cause for want of subject matter jurisdiction and transferring it to district court. The City of Austin, the Planning Commission of the City of Austin, Walter Brown, Gail Gemberling, Scott Roberts, and Jacquelyn Goodman (collectively "the third-party defendants") and The
932 Summit at *932 West Rim, Ltd., Weaver Interests, Inc., and Evans P. Weaver (collectively "Weaver") perfected appeals from that order. The third-party defendants challenge the portion of the order transferring the cause to district court. Weaver challenges the portion of the order dismissing the cause for want of subject matter jurisdiction. We will modify the probate court's order and affirm it as modified.

THE CONFLICT

This litigation began as a probate matter in 1992 when the executrix of the estate of Frances Larson Ledbetter sued Weaver to clear title to property it claimed to own. Ownership was disputed because Weaver had entered into a contract to purchase the property from Ledbetter. The purchase was conditioned on Weaver taking certain

steps towards developing the property and receiving certain development approvals from the City of Austin. The estate alleged that Weaver had not done so.

Weaver countersued the estate and a co-owner of the property for specific performance because he claimed to have substantially performed under the contract. He also filed a third-party action against the City, claiming that it had hindered him from obtaining necessary development approvals. Weaver prayed for a mandamus directing the City to approve the revised preliminary plan, and, since he had performed under the contract, he prayed that the court require the sellers to convey the property to him in accordance with their contract. He also sued the third-party defendants for money damages, alleging that they were liable to him for wrongfully hindering issuance of the permits.

The probate court chose to exercise ancillary jurisdiction over the third-party claims, pursuant to Texas Probate Code section 5A(d).[1] Tex. Prob. Code Ann. § 5A(d) (West Supp. 1997). By December 21, 1995, the probate court had dismissed all claims by and against the estate. At that point, the only unresolved claims in the probate court were Weaver's third-party claims against the City, the Planning Commission, and the individual commission members.

[1] Section 5A provides in relevant part:

> (b) In proceedings in the statutory probate courts and district courts, the phrase "appertaining to estates" and "incident to an estate" in this Code include 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 trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons. All statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions and applications filed against or on behalf of any heirship proceeding or decedent's estate, including estates administered by an independent executor. This subsection shall be construed in conjunction with and in harmony with Section 145 and all other sections of this Code dealing with independent executors, but shall not be construed so as to increase permissible judicial control over independent executors. All statutory probate courts shall have the same powers over independent executors that are exercisable by the district courts. In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in district court.
>
> (c) A statutory probate court has concurrent jurisdiction with the district court in all actions:
>
> (1) by or against a person in the person's capacity as a personal representative;
>
> (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) and (d) apply whether or not the matter is appertaining to or incident to an estate.
>
> Tex. Prob. Code Ann. § 5A(d) (West Supp. 1997).

The third-party defendants then moved to dismiss the claims without prejudice on the ground that the probate court lacked subject matter jurisdiction to consider an ancillary claim after the underlying claim involving the estate had been settled. The probate court, agreeing, dismissed the claims but ordered them transferred to the district court.

ANALYSIS

I. Loss of Jurisdiction

933 The third-party defendants argue that regardless whether the probate court properly *933 exercised jurisdiction over Weaver's third-party actions, the probate court lost whatever jurisdiction it may have had when the estate settled. We agree. And, because we determine that the probate court lost jurisdiction over the ancillary causes when the estate settled, we need not determine whether the probate court properly exercised ancillary or pendent jurisdiction over the third-party defendants.

A court may exercise only the jurisdiction accorded it by the constitution or by statute. *City of Beaumont v. West,* 484 S.W.2d 789, 791 (Tex.Civ.App. — Beaumont 1972, writ ref'd n.r.e.). Subject matter jurisdiction may not be enlarged by an agreement between the parties or by a request that the court exceed its powers. *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 445 (Tex. 1993); *Burke v. Satterfield,* 525 S.W.2d 950, 953 (Tex. 1975). A probate court is a specialized court that exists primarily for the limited purpose of administering decedents' estates. *See generally* Tex. Prob. Code §§ 5, 5A (West Supp. 1997).

Weaver cites a line of cases for the proposition that a court does not lose subject matter jurisdiction once it attaches. Although that may be generally true, we believe the general rule does not apply in this situation. Loss of jurisdiction is characteristic of specialized courts. *See In re Estate of Hanau,* 806 S.W.2d 900, 904 (Tex.App. — Corpus Christi 1991, writ denied) (court lost jurisdiction to remove independent executrix after estate was closed). Likewise, federal district courts routinely lose jurisdiction over ancillary state claims if the federal claim conferring jurisdiction is dismissed before trial. *See Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

In Texas, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it. In *Bailey v. Cherokee County Appraisal District,* 862 S.W.2d 581 (Tex. 1993), the Texas Supreme Court stated that a trial court must have a probate case pending to exercise its jurisdiction over matters "incident to an estate." *See also In re Estate of Hanau,* 806 S.W.2d at 904 (court lost jurisdiction to remove independent executrix after estate was closed). We hold that the probate court may only exercise "ancillary" or "pendent" jurisdiction over a claim that bears some relationship to the estate. Once the estate settles, the claim is "ancillary" or "pendent" to nothing, and the court is without jurisdiction.

An analogous situation occurs in cases in which a court loses jurisdiction over an indispensable party. The court in which the proceeding was pending loses subject matter jurisdiction over the cause when an indispensable party is nonsuited. *Travis Heights Improvement Ass'n v. Small,* 662 S.W.2d 406, 413 (Tex.App. — Austin 1983, no writ); *see also Royal Petroleum Corp. v. McCallum,* 134 Tex. 543, 135 S.W.2d 958 (1940). Similarly, we hold that the estate is an "indispensable party" to any proceeding in the probate court. The estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate.

Most of the cases Weaver cites for the proposition that subject matter jurisdiction cannot be lost involve amount-in-controversy requirements. *See, e.g., Mr. W. Fireworks, Inc. v. Mitchell,* 622 S.W.2d 576, 577 (Tex. 1981) (trial court had jurisdiction to render judgment greater than jurisdictional limits since attorney's fees increased during trial of case); *Flynt v. Garcia,* 587 S.W.2d 109, 109-110 (Tex. 1979) (trial court did not lose jurisdiction over case despite fact that amount in controversy grew beyond the court's jurisdictional limits). We distinguish these cases on the basis that they involved original, rather than ancillary, jurisdiction. The courts in question undoubtedly had jurisdiction over the *type* of proceeding involved; the fact that the amount in controversy increased over time would not complicate or extend the proceeding. Conversely, the probate court's consideration of tort and civil rights actions would complicate the probate proceeding and could interfere with
934 the probate court's primary responsibility to administer estates. *934

The probate court had discretion to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction. Any such discretion arguably vanished with the settlement and dismissal of the claim conferring original jurisdiction, which was the estate's original claim against Weaver. The court's discretion undoubtedly vanished with the dismissal of the estate from the probate court proceeding.

We conclude that the probate court had no discretion to continue to exercise ancillary jurisdiction over the third-party defendants after it dismissed the estate from the proceeding. We overrule Weaver's single point of error in cause number 03-96-00307-CV and two cross-points of error in cause number 03-96-00306-CV.

II. Transfer to District Court

We next decide whether the probate court may transfer a cause that it has dismissed for want of subject matter jurisdiction to a district court. We hold that the portion of the order purporting to transfer the cause to district court is void for two reasons: first, because the probate court has no statutory authority to transfer a cause to district court, and second, because the probate court cannot transfer a cause that it has dismissed for want of subject matter jurisdiction.

A. Statutory Authority to Transfer Cause

No statute authorizes the probate court to transfer this cause to district court. Travis County Probate Court No. 1 is a "statutory probate court." *See* Texas Gov't Code Ann. § 25.2291(c) (West Supp. 1997).[2] It exercises the powers accorded it in Texas Probate Code sections 5 and 5A, and in Texas Government Code section 25.2293. Tex. Prob. Code Ann. §§ 5, 5A; Tex. Gov't Code Ann. § 25.2293. Although several statutes give different courts power to transfer to other courts, none of the sections give a *statutory probate court* a general power to transfer a cause to the district court, much less to transfer a cause no longer pending in the probate court.

[2] Section 25.2293 provides that the statutory probate court in Travis County has the powers accorded a probate court by section 25.0021 (which includes the powers in sections 5 and 5A over matters incident to an estate, causes by or against a personal representative, and pendent and ancillary jurisdiction), jurisdiction concurrent with the county court to hear

certain mental health proceedings, eminent domain jurisdiction, and pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy. Tex. Gov't Code Ann. § 25.2293 (West Supp. 1997).

Texas Probate Code section 5(b) provides that where there is no statutory court exercising the jurisdiction of a probate court, the *county court* may transfer a probate proceeding to district court, with that judge's permission. Tex. Prob. Code Ann. § 5(b) (West Supp. 1997). Also, Texas Probate Code section 5(c) provides that a *constitutional county court* may transfer a proceeding to the statutory court exercising the jurisdiction of a probate court. *Id.* § 5(c). But neither section 5(b) nor section 5(c) authorize a *statutory probate court* to transfer a proceeding to district court. *See Meek v. Mitchusson,* 588 S.W.2d 665, 666 (Tex.Civ.App. — Eastland 1979, writ ref'd n.r.e.) (county court order transferring contested probate matter to district court void because Texas Probate Code section 5(b) provides that transfer can be made only where no statutory court exercises jurisdiction of probate court, and in that case county court was statutory court exercising jurisdiction of probate court).

Finally, Texas Government Code section 74.121 provides that the "judge of a *statutory county court* may transfer a case to the docket of the district court, except that a case may not be transferred without the consent of the judge of the court to which it is being transferred and may not be transferred unless it is within the jurisdiction of the court to which it is transferred." Tex. Gov't Code Ann. § 74.121 (West Supp. 1997). But Texas Government Code section 21.009(2) excludes a statutory probate court from the definition of "statutory
935 county court."[3] *Id.* § 21.009(2); *see also* Tex. Gov't *935 Code Ann. § 25.2291 (West Supp. 1997) (distinguishing a "statutory probate court" from a "statutory county court"). Therefore, section 74.121 does not authorize Probate Court No. 1 to transfer a cause to a district court.

[3] Section 74.121, which provides that the statutory county court may transfer a case to the docket of the district court, was added in 1989. Act of May 29, 1989, 71st Leg. R.S., ch. 646, § 16, 1989 Tex. Gen. Law 2134, 2138. At the time it was added, section 21.009(2) *included* a statutory probate court in the definition of "statutory county court." However, section 21.009(2) was amended in 1991 to specifically *exclude* a statutory probate court from the definition of statutory county court. Act of May 19, 1991, 72d Leg. R.S., ch. 394, § 1, 1991 Tex. Gen. Law 1506, 1507.

Although section 21.009(a) limits application of its definitions to that chapter, no other definition of a "statutory county court" appears in the code nor is there any indication that the legislature is using the word in another sense. We believe it is proper to cite section 21.009(2) for the proposition that a statutory probate court is not included in the definition of a county court. *L M Surco Mfg., Inc. v. Winn Tile Co.,* 580 S.W.2d 920, 926 (Tex.Civ.App. — Tyler 1979, writ dism'd) (court may take into consideration meaning of same language used elsewhere in act unless there is indication that different meaning was intended); *see also Palmer v. Coble Wall Trust Co.,* 851 S.W.2d 178, 180 n. 3 (Tex. 1992).

Weaver argues that the court has implied or inherent power to transfer. He cites Texas Government Code section 21.001(a) and *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 398 (Tex. 1979), both of which state that a court may take acts necessary to preserve its jurisdiction.[4] We have found no Texas case holding that a court has an inherent right to make decisions determining the rights of the litigants, and then to transfer the cause to another court, which presumably would be bound by the earlier decisions. Conversely, several Texas courts, including this one, have held that a court may not transfer a cause in the absence of a statute so authorizing. *See Milton v. Herman,* 947 S.W.2d 737 (Tex.App. — Austin 1997, orig. proceeding) (conditionally issuing mandamus because probate court's order transferring cause to itself was void); *DB Entertainment, Inc. v. Windle,* 927 S.W.2d 283 (Tex.App. — Fort Worth 1996, orig. proceeding) (conditionally issuing mandamus because probate court's order transferring cause to itself was void); *In re L.L.,* 821 S.W.2d 247, 250 (Tex.App. — San Antonio 1991, writ denied) (district court lacked jurisdiction over cause transferred to it from county court after jury trial had been completed because no statute authorized transfer); *Meek,* 588 S.W.2d at 666

(county court order transferring contested probate matter to district court void because Texas Probate Code section 5(b) provides that the transfer can be made only where there is no statutory court exercising jurisdiction of probate court).

[4] Section 21.001(a) provides, "A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction." Tex. Gov't Code Ann. § 21.001(a) (West 1988).

B. Probate Court's Authority to Transfer After a Dismissal for Want of Subject Matter Jurisdiction

Further, a court has no authority to act on a matter it has dismissed for want of subject matter jurisdiction. Because the probate court did not have jurisdiction over the claims against the third-party defendants, the probate court had no power to take any act with respect to those claims other than to dismiss. *See Attorney Gen. of Tex. v. Sailer,* 871 S.W.2d 257, 258 (Tex.App. — Houston [14th Dist.] 1994, writ denied) (once court determines it does not have jurisdiction, it can only dismiss and has no power to dismiss with prejudice); *Lopez v. Public Util. Comm'n,* 816 S.W.2d 776, 783-784 (Tex.App. — Austin 1991, writ denied) (if court has no jurisdiction, court can only dismiss and cannot order that plaintiff take nothing); *Brown v. Prairie View A M Univ.,* 630 S.W.2d 405, 410 (Tex.App. — Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Berger v. Berger,* 497 S.W.2d 453, 454 (Tex.Civ.App. — El Paso 1973, no writ) (if court has no jurisdiction it has no ability to pass on merits of case); *see also Qwest Microwave, Inc. v. Bedard,* 756 S.W.2d 426 (Tex.App. — Dallas 1988, orig. proceeding) (probate court has no jurisdiction to transfer when it does not have jurisdiction over proceeding). We conclude that the probate court did not have the power to transfer the cause to district court.

We sustain Walter Brown's, Gail Gemberling's, Scott Roberts's, and Jacquelyn Goodman's cross-point of error
936 in cause number *936 CV-96-00307 and single point of error in cause number CV-96-00306, both of which challenge the probate court's transfer of the cause to district court. We also sustain the City's and the Planning Commission's cross-point of error in cause number CV-96-00307.

CONCLUSION

We strike as void the portion of the probate court's judgment that purports to transfer the cause to district court and affirm the order as modified. Because of our disposition on the merits, we dismiss the commission members' motion to strike Weaver's cross appeal in cause number 03-96-00306-CV.