NUMBER 01-23-00008-CV

GEORGE M. BISHOP	§	**IN THE COURT OF APPEALS**
Appellant,	§	
	§	
v.	§	**FOR THE FIRST SUPREME**
	§	
ROBERT G. PATE, AND	§	
JUDY L. PATE	§	
Appellees.	§	**JUDICIAL DISTRICT OF TEXAS**

REPLY BRIEF

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COMES NOW, the Appellant with this his Brief in Reply to the Brief for Appellee filed by Robert and Judy Pate, Appellees and would show the Court as follows:

I. POINT ONE IN REPLY:
APPELLEES RELY ON A TRADITIONAL MOTION FOR SUMMARY JUDGMENT THAT DOES NOT EVEN ADDRESS PLEADINGS FILED AFTER THE FILING OF THEIR SUMMARY JUDGMENT MOTION

A traditional motion for summary judgment seeking summary judgment of the affirmative claims of a Plaintiff must negate at least a single essential element of the Plaintiffs' causes of action. See Tex. R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*; 988 S.W. 2d 746, 748 (Tex. 1999) The Appellees had the burden of proof and all doubts are resolved against their motion. *Roskey v. Tex. Health Facilities Comm'n.* 639 S.W. 2d 302,303 (Tex. 1982)(per curium)

A review of the motion filed by the Appellees on the same day (February 8, 2021) they filed their Cross Claim against Appellant and David Hamilton (CR-216) shows that Appellees did not even attempt to meet their burden. In spite of this failure, the Associate Judge ruled that the substitute trustee's deed recorded on October 2, 2017 was "null, void and of no further effect". (CR 369) The Associate Judge also ruled at the same time that all of Appellant's Counterclaims and Cross Claims were denied, even those filed after the Motion for Summary Judgment was filed on February 8, 2021.

There was no evidence contained in their Motion for Summary Judgment that would show conclusively that the Substitute Trustee's Deed was null and void. If it was void, Coastal

Sun would still own the property in question, not the Appellees. See *West Trinity v. Chase Manhattan Mtge. Corp.*, 92 S.W. 3d 866, 870 (Tex. App. – Texarkana 2002, no pet.)

The Associate Judge also ruled that Appellees now were the rightful owners of the property in question because neither T.H. Trust nor Appellant could prove their title. (CR 369) This ruling ignores the Abstract filed of record in this case. (CR 137-215)

This last finding was based on Appellees receiving a quitclaim deed from a tax sale with no warranties of title. A quitclaim deed does not convey title to property, only whatever the IRS owned. *Porter v. Wilson*, 389 S.W. 2d 650, 657 (Tex. 1965) There was no summary judgment evidence that the IRS ever owned any interest in the property in question.

II. POINT TWO IN REPLY

THE TRIAL COURT ERRED IN FAILING TO HOLD A DE NOVO HEARING REGARDING THE ASSOCIATE JUDGE'S RULING ON THE APPELLEES' FIRST SUMMARY JUDGMENT MOTION AS REQUIRED BY LAW

After the Associate Judge made her ruling granting the Appellees' Motion for Summary Judgment on the Claims of Appellant and David Hamilton, the Appellant filed an appeal on August 8, 2022 pursuant to Tex. Gov't. Code 54A 111. (CR 384) A Supplement was filed on August 15, 2022. (CR 398) The elected judge "dismissed" the Supplemental Notice of Appeal on September 16, 2022. (CR 404) No ruling was ever made concerning the Original Notice of Appeal. (CR 384) A "dismissal" is not a de novo hearing.

Contrary to the assertion on page 29 of the Brief for Appellees, there was no record of any de novo hearing by the trial judge. A de novo hearing is a new and independent action on those issues raised in the request for a hearing. *In re R.R.,* 531 S.W. 3d 621, 622-23 (Tex. App.-Austin 2017, no pet.)

There was no de novo hearing and the failure to hold such a hearing is presumed to be harmful error. *Atty. Gen. of Texas v. Orr*, 989 S.W. 2d 464, 467 (Tex. App. -Dallas 1999, no pet.)

III. POINT THREE IN REPLY

THE CLAIM IN THE APPELLEES' MOTION FOR SUMMARY JUDGMENT DECIDED FEBRUARY 4, 2022 THAT THERE WAS NO FORECLOSURE SALE ON NOVEMBER 7, 2007 WAS REFUTED AT LEAST BY THE GOLDBERG AFFIDAVIT THAT HE ATTENDED THE SALE WHICH SHOULD HAVE PREVENTED SUMMARY JUDGMENT

Daniel Goldberg presented an affidavit filed with Appellant's Response to the Motion for Summary judgment stating that he attended the foreclosure sale and was the high bidder at least raises a fact issue that such a sale occurred. (CR 333) It is immaterial whether or not he remembers that his bid of $103,000. Was a "cash" or a "credit" bid. What is material is that he recalled attending the sale and being the "high bidder".

The Substitute Trustee's Deed introduced into the summary judgment evidence by the Appellees has been held by this court to be prima facie evidence that the sale took place. *Deposit Ins. Bridge Bank, N.A., Dallas v. Mc Queen*, 804 S.W. 2d 264, 266 (Tex. App.-Houston [1st Dist.]1991, no writ)

The Associate Judge erred in granting the untimely Motion for Summary Judgment.

IV. POINT FOUR IN REPLY

APPELLEES FILED A SECOND MOTION FOR SUMMARY JUDGMENT SEEKING TO NULLIFY A DEED OF TRUST THEY WERE NOT PARTIES TO SUPPORTED ONLY BY THE PRIOR SUMMARY JUDGMENT ORDER, THE ORDER DISMISSING THE APPEAL FROM THE ASSOCIATE JUDGE'S GRANTING OF THE PREVIOUS SUMMARY JUDGMENT AND THE TWO DOCUMENTS

Over Appellant's objection to the Associate Judge hearing this additional Motion for Summary Judgment, (CR 410) Associate Judge Brame heard and granted summary judgment

again, holding this time that another deed of trust and trustee's deed were "null, void and of no further effect".

Appellees were not parties to the deed of trust and had no pleadings seeking to declare the deed of trust (CR 430) and trustee's deed (CR 439) null and void. Even though there was no summary judgment evidence supporting this ruling, the Associate Judge declared both null and void. (CR 460)

The second Motion for Summary Judgment was also a traditional motion in which at least one of the essential elements of the Appellant's claims had to have been shown conclusively to not exist. *Cathey v. Booth*, 900 S.W. 2d 339, 341-42 (Tex. 1995)(per curium) There was no element of the Appellant's case that was shown conclusively to have been proven against Appellant.

V. POINT FIVE IN REPLY

THE APPELLEES' TRADITIONAL MOTION FOR SUMMARY JUDGMENT RAISES FACT ISSUES IN THE EXHIBITS TO ITS OWN MOTION PREVENTING SUMMARY JUDGMENT

The first Motion for Summary Judgment filed by Appellees on the same day Appellees sued Appellant and David Hamilton contended that Appellees received title from the IRS because Appellant had deeded the property in question to JAB Development Company in Florida. Appellees contended that their title came from the Appellant. However, their Motion for Summary Judgment contained the transcript of a call from Appellant to the office of Appellees' trial counsel, Russell Jones on September 29, 2017, denying that Appellant ever owned the property in question or that JAB Development Company ever owed any money to the IRS. Exhibit D to Motion for Summary Judgment. (CR 231, 248)

Not only was there no record in the Abstract filed of record in this case that Appellant ever owned the 4.7695 acres before he foreclosed on T.H. Trust, but Appellant denied owning the property in his response to the first Traditional Motion for Summary Judgment (CR 322) filed April 5, 2021. A sworn denial of ownership was also made in the Appellant's First Amended Original Answer attached as Exhibit A to the Response. (CR 326)

In spite of these filings, the Associate Judge granted this Motion for Summary Judgment over the objection of the Appellant.

WHEREFORE, the Appellant respectfully requests that the case be reversed and rendered for lack of standing or that it be reversed and remanded for trial on any issues remaining to be decided.

Respectfully submitted,

George M. Bishop

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CERTIFICATE OF SERVICE

On August 26, 2023, this document was served on all counsel, via the e-file system.

George M. Bishop

George M. Bishop

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 1,548 words.

George M. Bishop

George M. Bishop

Tex. Gov't Code § 54A.111

Section 54A.111 - Notice of Decision; Appeal

(a) After hearing a matter, an associate judge shall notify each attorney participating in the hearing of the associate judge's decision. An associate judge's decision has the same force and effect as an order of the referring court unless a party appeals the decision as provided by Subsection (b).
(b) To appeal an associate judge's decision, other than the issuance of a temporary restraining order or temporary injunction, a party must file an appeal in the referring court not later than the seventh day after the date the party receives notice of the decision under Subsection (a).
(c) A temporary restraining order issued by an associate judge is effective immediately and expires on the 15th day after the date of issuance unless, after a hearing, the order is modified or extended by the associate judge or referring judge.
(d) A temporary injunction issued by an associate judge is effective immediately and continues during the pendency of a trial unless, after a hearing, the order is modified by a referring judge.
(e) A matter appealed to the referring court shall be tried de novo and is limited to only those matters specified in the appeal. Except on leave of court, a party may not submit on appeal any additional evidence or pleadings.

Tex. Gov't. Code § 54A.111

Added by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 6.01, eff. 1/1/2012.

Tex. R. Civ. P. 166a

Rule 166a - Summary Judgment

(a)For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b)For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c)Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d)Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e)Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material

fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g)When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h)Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Tex. R. Civ. P. 166a

No. 03-97-00618-CV
Court of Appeals of Texas, Austin

Attorney General v. Orr

989 S.W.2d 464 (Tex. App. 1999)
Decided Apr 8, 1999

No. 03-97-00618-CV.

April 8, 1999.

Appeal from the 126th Judicial District Court, 465 Travis County, Suzanne Covington, J. *465

John B. Worley, Office of Atty. Gen., Austin, for appellant.

Lawrence B. Schaubhut, Schaubhut Gill, Austin, for appellee.

Before Justices JONES, B. A. SMITH and YEAKEL.

466 *466

J. WOODFIN JONES, Justice.

The Attorney General of Texas, appellant, initiated proceedings against appellee Dennis Dale Orr to enforce the child-support provisions of a modified divorce decree. In 1994 the district court issued enforcement and wage-withholding orders against Orr and committed him to jail for contempt in failing to pay support. The district court subsequently suspended Orr's commitment and placed him on probation. In 1996 the Attorney General moved to revoke Orr's probation, alleging that he had failed to timely pay child support. Orr answered and moved to set aside the enforcement and withholding orders. Following hearings before an associate judge (formerly called a master), the district court rendered judgment denying the Attorney General's motion to revoke probation and rescinding the withholding order. The Attorney General brings this restricted appeal under Rule 30 of the Texas Rules of Appellate Procedure. We will reverse and remand.

MOTION TO DISMISS FOR WANT OF JURISDICTION

Orr contends at the outset that this Court should dismiss the appeal for want of jurisdiction because the Attorney General participated in the hearing that resulted in the judgment. To be entitled to pursue a restricted appeal, the party seeking to appeal must show that it did not participate in the "hearing that resulted in the judgment complained of."[1] Tex. R. App. P. 30. Thus, if the Attorney General participated in the hearing, this Court lacks jurisdiction and must dismiss the appeal. *See Diferrante v. Keraga*, 976 S.W.2d 683, 685 (Tex. App. — Houston [1st Dist.] 1997, no pet.).

[1] A party who did not participate — either in person or through counsel — in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal, may file a restricted appeal within six months after the judgment was signed. Tex. R. App. P. 30. The scope of review in a restricted appeal is the same as in an ordinary appeal, except that the error must appear on the face of the record. *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997).

As a preliminary matter, we note that Rule 30 should be construed liberally in favor of the right to appeal. Rule 1 of the Texas Rules of Civil

Procedure states that the objective of rules of civil procedure "is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law" and, to that end, "these rules shall be given a liberal construction." Tex. R. Civ. P. 1. As originally promulgated, the rules of procedure governing appeals were part of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P., 136 Tex. 442 (1940). While so unified, the rules governing
467 appeals were interpreted to further *467 the objective of Rule 1. *E.g., Smirl v. Globe Labs., Inc.* 188 S.W.2d 676, 678 (Tex. 1945) (construing rule governing appeals by indigents in favor of reaching the merits).

In 1986 the supreme court created the Texas Rules of Appellate Procedure by removing from the Rules of Civil Procedure those rules pertaining to appeals. *See* Tex. R. App. P., 49 Tex. B.J. 556 (Tex. 1986). We believe the mere act of carving the rules governing appeals out of the general body of procedural rules and establishing them separately should not change the objective they serve. Following the creation of the appellate rules, the supreme court has pursued the objective of construing them liberally so as not to forfeit the right to appeal on procedural grounds. *See Maxfield v. Terry*, 888 S.W.2d 809, 811 (Tex. 1994); *Fredonia State Bank v. General Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994).

Similarly, in construing the statutory predecessor to Rule 30, the supreme court stated that statutes giving and regulating the right of appeal are remedial and, in cases of doubtful construction, should be liberally construed in favor of the right to appeal. *Lawyers Lloyds v. Webb*, 152 S.W.2d 1096, 1098 (Tex. 1941); *see also Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985) (citing *Lawyers Lloyds* with approval). Even after the regulation of writ-of-error appeals passed from statute to procedural rule, the policy of liberal construction has continued. *E.g., Robertson v. Hide-A-Way Lake Club*, 856 S.W.2d 841, 844 (Tex. App. — Tyler 1993, no writ). We therefore construe Rule 30 liberally in favor of the right to appeal.

In the present case, an associate judge held an evidentiary hearing on the parties' motions and issued a report. *See* Tex. Fam. Code Ann. (hereinafter "Code") §§ 201.007, .011 (West 1996). All parties participated in that hearing. Although the Attorney General filed a notice of appeal requesting a de novo hearing before the district court, also called the referring court, that court adopted the associate judge's report without change and without holding a de novo hearing. *See* Code §§ 201.014, .015. The referring court adopted the associate judge's report without any participation by the Attorney General in that court. The question raised is whether the "hearing that resulted in the judgment" occurred when the associate judge heard the parties' evidence or when the judge of the referring court undertook consideration of the associate judge's report and the papers relating to the case. *See* Code § 201.011(e).

The Family Code authorizes trial courts to refer certain family law matters to associate judges. *See generally* Code §§ 201.001-.017. When a matter is referred, the associate judge is authorized to conduct a hearing at which evidence is presented, to make findings of fact based on the evidence, to formulate conclusions of law, and to recommend an order to be rendered in a case. Code § 201.007. The associate judge makes her findings, conclusions, and recommendations in the form of a written report. Code § 201.011. Any party may appeal the associate judge's report to the referring court by timely filing a notice of appeal specifying the findings and conclusions to which the party objects. Code § 201.015(a), (b). On appeal to the referring court, the parties may present witnesses as in a hearing de novo on the issues raised in the appeal. Code § 201.015(c).

A party who files a notice of appeal to the referring court in compliance with the Family Code is entitled to a de novo hearing before that court. Code § 201.015(f). Judicial review by trial de novo is not a traditional appeal, but a new and independent action characterized by all the attributes of an original civil action. *Key W. Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839, 846 (Tex. 1961); *Godwin v. Aldine Indep. Sch. Dist.*, 961 S.W.2d 219, 221 (Tex. App. — Houston [1st Dist.] 1997, pet. denied). For instance, if the party with the burden of proof prevails before the associate judge, that party must still carry its burden in a de novo hearing before the referring court. *Godwin*, 961 S.W.2d at 221. For purposes of the final determination of the merits of the case, therefore, filing a notice of appeal to the referring court cuts off the earlier proceedings, and evidence is presented anew to the referring court; in making its decision, the referring court may not
468 rely on what occurred before the associate *468 judge.[2] Although in the absence of a notice of appeal the referring court's action continues a process begun before the associate judge, filing a notice of appeal breaks that continuity and begins an entirely new process.

[2] We do not view this holding as inconsistent with section 201.013(a) of the Code, which provides that, pending appeal of the associate judge's report to the referring court, the associate judge's recommendations are in full force and are enforceable as an order of the referring court. Code § 201.013(a). We view the purpose of section 201.013(a) to be allowing temporary orders to be in effect pending trial before the referring court. Despite the continuing validity of the associate judge's recommendations for that limited purpose, the judgment of the referring court on the issues appealed will be based solely on evidence presented at the de novo hearing.

Because the appeal to the referring court is limited to the findings and conclusions specified in the notice of appeal, filing the notice restarts the process only to the extent of the challenged findings. *See* Code § 201.015(b). Although the scope of the appeal may be thus limited, the effect of taking even a limited appeal is to begin again as to the issues appealed.

A restricted appeal is typically taken from a default judgment that has been rendered after a party fails to attend trial. *See Texaco, Inc. v. Central Power Light Co.*, 925 S.W.2d 586, 589 (Tex. 1996). A default judgment can be rendered either before or after the defendant files an answer, with a restricted appeal being available in either case. Similarly, a party whose case is heard by an associate judge and who files a notice of appeal from the report could fail to attend the de novo hearing before the referring court. Given that filing a notice of appeal initiates a new process before the referring court, such a defaulting party stands in the same position as one who fails to attend an ordinary trial on the merits after answering the petition.

A variation on these facts could occur if a party files a notice of appeal in compliance with the Family Code, but the referring court signs a judgment without holding a de novo hearing. Because filing the notice effectively nullifies previous proceedings and initiates the process of obtaining a de novo hearing, the party filing it has a reasonable expectation that a de novo hearing before the referring court will occur. Thus, for purposes of a restricted appeal, we treat this situation the same as one in which a de novo hearing is held but not attended by the appealing party: if, notwithstanding the timely filing of a notice of appeal, the referring court renders judgment without holding a de novo hearing, the "hearing" that leads to the judgment occurs when the referring court considers the matter.[3]

[3] Unless required by the express language or the context of the particular rule, the word "hearing" does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court.

See Martin v. Martin, Richards, Inc., 989 S.W.2d 357, 359 (Oct. 8, 1998); *Gulf Coast Inv. Corp. v. NASA 1 Business Ctr.*, 754 S.W.2d 152, 153 (Tex. 1988); *Classic Promotions, Inc. v. Shafer*, 846 S.W.2d 948, 950 (Tex. App. — Houston [14th Dist.] 1993, no writ).

In the present case, the Attorney General filed a notice of appeal that was timely and that complied with the Family Code's requirements. By this notice, the Attorney General invoked his right to a de novo hearing and set in motion a new process before the referring court. The referring court nevertheless signed the judgment without holding a de novo hearing. We conclude that the hearing that led to the judgment occurred when the judge of the referring court considered the proposed judgment. The Attorney General did not participate in the hearing before the referring court and may therefore bring this restricted appeal. We overrule Orr's amended motion to dismiss the appeal.

MERITS OF APPEAL: FAILURE TO HOLD DE NOVO HEARING

In his first issue on appeal, the Attorney General contends that the district court erred in rendering judgment without holding a de novo hearing on his appeal of the associate judge's report. A party may appeal an associate judge's report by filing a notice of appeal not later than the third day after the date he receives notice of the substance of the report. Code § 201.015(a). A notice of appeal must be in writing specifying the associate
469 judges's findings and conclusions *469 to which the party objects. Code § 201.015(b). The referring court, after notice to the parties, "shall hold a hearing on all appeals" not later than thirty days after the notice is filed with the referring court. Code § 201.015(f).

The associate judge held two hearings in this cause, at the second of which she announced her recommended ruling. The Attorney General filed a written notice of appeal three days later. In this notice, the Attorney General specified the findings and conclusions to which he objected and asked three times for a hearing before the referring court. The Attorney General thus complied with each statutory requirement for obtaining a de novo hearing before the referring court.

The Family Code's requirement that the referring court "shall hold a hearing" on all appeals has been held to be mandatory. *See Ex parte Brown*, 875 S.W.2d 756, 760 (Tex. App. Fort Worth 1994, orig. proceeding) (construing same language in predecessor to section 201.015); *Ex parte Haskin*, 801 S.W.2d 12, 13 (Tex. App. — Corpus Christi 1990, orig. proceeding) (referring court must hear evidence on issues appealed); *see also Simms v. Lakewood Village Property Owners Ass'n, Inc.*, 895 S.W.2d 779, 783 (Tex. App. — Corpus Christi 1995, no writ) ("shall" generally denotes imperative or mandatory requirement). We observe that the power to seat a jury to try factual issues is not among the powers the Family Code confers on an associate judge. *See* Code § 201.007. To allow a referring court to deny parties a jury trial by refusing to hold a de novo hearing after a notice of appeal is filed would raise serious questions. *See Young v. Young*, 854 S.W.2d 698, 701 (Tex. App. — Dallas 1993, writ denied) (facts objected to in master's report are to be tried de novo before jury if one is timely requested).

Considering the language of the statute in view of the statutory scheme of referring matters to associate judges, we conclude that, when a notice of appeal is properly filed, the requirement that the referring court hold a de novo hearing is mandatory. Because the Attorney General properly appealed the associate judge's report, the referring court erred in rendering judgment without holding a de novo hearing. We presume that the failure to hold such a hearing is harmful. *See id*. at 703.

Orr nevertheless argues that the Attorney General forfeited his right to a de novo hearing by failing to comply with Travis County Local Rule 6.13, which requires a party requesting a de novo

hearing before a referring court to deliver a copy of the request to the court administrator on the same day the request is filed with the district court. In response, the Attorney General argues that Local Rule 6.13 is invalid because it adds a requirement not contained in the statute. We need not address whether Local Rule 6.13 is ineffectual in all circumstances. We simply hold that when a notice of appeal has been filed from the associate judge's report in compliance with statutory requirements, a decision on the merits must be made as if no proceedings had occurred before the associate judge; thus, if the appealing party defaults, the referring court should hear evidence to the extent evidence would be required in a post-answer default.

Orr also argues that the Attorney General participated in the hearing before the referring court by approving as to form the associate judge's recommended judgment. Because the record shows that the Attorney General approved only the form — not the substance — of the recommended order submitted to the associate judge, we reject this argument.

We conclude that the district court erred in failing to holding a de novo hearing, and we therefore sustain the first issue. In light of this determination, we need not address the second and third issues. We also decline to render an advisory opinion on the fourth issue, in which the Attorney General seeks guidance on certain issues that he says may arise on remand.

CONCLUSION

Having determined that we possess jurisdiction over the appeal and having sustained the Attorney General's first issue, we reverse the judgment of
470 the district court and *470 remand the cause to that court for further proceedings.

No. 01-89-01095-CV
Court of Appeals of Texas, Houston, First District

Bridge Bank v. McQueen

804 S.W.2d 264 (Tex. App. 1991)
Decided Jan 31, 1991

No. 01-89-01095-CV.

January 31, 1991.

Appeal from the 189th District Court, Harris
265 County, Juan Gallaedo, J. *265

George R. Diaz-Arrastia, Terry Adams, Jr., Houston, for appellant.

Frank G. Harmon, III, Jeffery Horowitz, Houston, for appellees.

Before EVANS, C.J., and MIRABAL and DUGGAN, JJ.

OPINION

DUGGAN, Justice.

This is an appeal from a take-nothing judgment following a bench trial. The underlying suit is a promissory noteholder's action to recover from the note's maker the deficiency remaining after default and foreclosure under a deed of trust.

On November 1, 1982, appellees, Mike McQueen and Terry H. McQueen ("the McQueens"), executed and delivered to appellant's predecessor, MBank San Felipe ("the Bank"),[1] a promissory note in the original principal sum of $550,000, payable November 1, 1983. Simultaneously, the McQueens executed and delivered a deed of trust conveying certain real property to a trustee for the benefit of the noteholder.

[1] MBank San Felipe, the original payee, was merged into MBank Houston, N.A. On March 28, 1989, the Federal Deposit Insurance Corporation ("FDIC") took receivership of MBank Houston, N.A., and assigned the note and its extension to appellant, Deposit Insurance Bridge Bank, N.A., Dallas, Texas ("DIBB"). In this opinion, "appellant" or "the Bank" refers to either DIBB or its predecessors, depending on the time period being discussed.

The note was extended three times over the next three years, and interest only was paid on it. After the third extension, the McQueens paid neither interest nor principal, and defaulted when the note matured on November 1, 1985.

The deed of trust gave the noteholder the right to appoint a substitute trustee and, in the event of default, to request the trustee, or his substitute, to sell the property at a public auction for cash and pay from the proceeds all expenses of the sale, reasonable attorney's fees, and charges due and unpaid under the note.

As a result of the default, the Bank appointed a substitute trustee, whom it instructed to post the real property securing the note for foreclosure sale. The substitute trustee sold the property at a public auction at the Harris County courthouse door on March 4, 1986, received a sale price of $391,000 from the highest bidder, the Bank, and paid $893.25 in fees and expenses

266 *266 of the sale to the Bank's attorneys. The Bank credited $390,106.75 to the McQueens' balance of accrued interest and unpaid principal.

The Bank then filed this suit against the McQueens to recover the deficiency balance of $297,240.42, including interest to date of trial, plus attorney's fees in the amount of $15,000. The McQueens answered with, and went to trial on, a general denial. At trial, the Bank introduced: (1) the original note; (2) the three extensions of the note and lien; (3) evidence that the McQueens did not pay the amounts owed under the final extension of the note when it matured; (4) the deed of trust; (5) a certified copy of the substitute trustee's deed; and (6) evidence of the amount that was credited to the McQueens' debt and the amount of the deficiency.

The trial court filed findings of fact and conclusions of law indicating that the Bank failed to "make a sufficient evidentiary showing on each of the elements of its case" by failing to prove that either debtor, Mike McQueen or Terry H. McQueen, was given notice of acceleration of the note and notice of the foreclosure sale according to law and the deed of trust.

In three points of error, the Bank asserts that the trial court erred: (1) in imposing upon the Bank the burden to establish the sufficiency of notice of acceleration and notice of foreclosure; (2) in entering a take-nothing judgment when the Bank established the validity of the foreclosure sale by prima facie evidence, which the McQueens wholly failed to rebut; and (3) in ruling that, under the rules of professional responsibility, the Bank's counsel could not testify regarding the timely sending of notice of foreclosure.

The second of appellant's three points of error is dispositive of the appeal, and we therefore consider it first. In its second point of error, the Bank asserts that the trial court erred in entering a take-nothing judgment because the Bank established the validity of the foreclosure sale by prima facie evidence which the McQueens wholly failed to rebut. Pertinent to this point of error are the trial court's conclusions of law 3 and 4, which state that "[the Bank] failed to prove . . . that timely personal notice of foreclosure sale was ever given to [both of the McQueens]." The Bank urges that proper notice was given as a matter of law.

A foreclosure is to be reviewed with a presumption that all prerequisites to the sale have been performed and that provisions for waiver of notice are valid. *Chapa v. Herbster,* 653 S.W.2d 594, 600 (Tex.App. — Tyler 1983, no writ); *Phillips v. Whiteside,* 426 S.W.2d 350, 352 (Tex.Civ.App. — Houston [14th Dist.] 1968, no writ).

The substitute trustee's deed, which was admitted in evidence, recites compliance with all conditions of the deed of trust. Those deed recitals constitute prima facie evidence of the validity of the foreclosure sale, including the prerequisite of timely service of notice of sale on the debtor(s). *Houston First Am. Sav. v. Musick,* 650 S.W.2d 764, 767 (Tex. 1983); *Kirkman v. Amarillo Sav. Ass'n,* 483 S.W.2d 302, 306 (Tex.Civ.App. — Amarillo 1972, writ ref'd n.r.e.) (such recitals are presumed to be correct, unless rebutted by competent evidence).

Section 13(a) of the deed of trust executed by the McQueens required that notice of the foreclosure sale be served on each debtor obligated to pay the note indebtedness, and section 13(f) of the deed of trust stated that:

> The recitals and statements of fact contained in any notice or in any conveyance to the purchaser or purchasers at any such sale shall be prima facie evidence of the truth of such facts, and all prerequisites and requirements necessary to the validity of any such sale shall be presumed to have been performed.

This provision in the deed of trust establishes the recitations in the substitute trustee's deed as prima facie evidence that the foreclosure sale by the substitute trustee met all requirements of law, including timely service of notice of sale on each

debtor. *Sullivan v. National Western Life Ins. Co.,* 417 S.W.2d 896, 898 (Tex.Civ.App. — Houston 1967, no writ).

267 *267 The presumption of the validity of a foreclosure sale is not conclusive and may be rebutted. *Musick,* 650 S.W.2d at 767. However, the McQueens presented no evidence at trial to refute the recitals of timely notice of sale in the substitute trustee's deed. To the contrary, the only testimony elicited by the McQueens in this regard was cross-examination of Lori Hagar, the Bank's vice-president, which bolstered the Bank's prima facie case. Hagar's cross-examination testimony showed that: (1) the Bank sent *at least* one notice of the foreclosure sale by certified mail; (2) the notice was sent to *Ms.* Terry H. McQueen; (3) the notice was addressed and mailed to the address where the McQueens resided together; (4) the notice was addressed and mailed to the McQueens' most recent address as reflected by the Bank's files; and (5) the notice to Ms. Terry H. McQueen was actually received by *Mr.* Mike McQueen, who signed the postal service return receipt ("the green card").

Hagar's testimony did not show that notice of the foreclosure was not timely *sent* to each of the McQueens; it did show, however, that one copy was clearly *received.* In *Martinez v. Beasley,* 616 S.W.2d 689, 690 (Tex.App. — Corpus Christi 1981, no writ), the court held that one certified letter, addressed and mailed to the debtors at the address where they actually resided as husband and wife, constituted a sufficient notice of sale, and a separate notice was not required to be sent to each spouse at the same address. Further, in *Forestier v. San Antonio Savings Association,* 564 S.W.2d 160, 163 (Tex.Civ.App. — El Paso 1978, writ ref'd n.r.e.), the court held that although the husband and wife both executed the note in question, which was secured by a deed of trust, the foreclosure sale was not rendered voidable merely because two separate notices of sale were not mailed to the spouses at the same address.[2]

2 The Bank's exhibits 10 and 11 on its bill of exceptions show that notice letters were in fact sent to each of the debtors here.

The McQueens did not rebut the prima facie evidence contained in the recitals of the substitute trustee's deed that the foreclosure sale met all requirements of law and of the deed of trust. The trial court therefore erred in rendering a take-nothing judgment in the face of the Bank's unrebutted prima facie case.

The Bank's second point of error is sustained.

Point of error three in its entirety, and part of point of error one, further complain of error concerning proof of notice to the McQueens of the foreclosure sale. Having determined in point of error two that the Bank established an unrebutted prima facie case, including notice of foreclosure sale, we need not consider point of error three at all, or that part of point of error one that complains of notice of the foreclosure sale.

The Bank's first point of error additionally asserts that the trial court erred in imposing on the Bank the burden to establish the sufficiency of the notice of acceleration of the note.

The trial court found that the Bank did not timely send the McQueens notice of acceleration of the note, and concluded that the sale was therefore invalid. The trial court erred in this determination. The McQueens never asserted at trial that notice of acceleration was not given. Even if they had complained that notice of acceleration was not given, such notice was not required for two reasons. First, the note was not accelerated, but matured by the terms of the last extension on November 1, 1985. Second, the terms of the note and of the deed of trust both clearly provide that the McQueens waived any notice of acceleration.

The Bank's first point of error is sustained.

The judgment of the trial court is reversed and rendered in favor of the Bank for the full amount of the deficiency. The cause is remanded to the

trial court for computation of interest and determination of the Bank's attorney's fees.

268 *268

No. 95-0398
Supreme Court of Texas

Cathey v. Booth

900 S.W.2d 339 (Tex. 1995) · 38 Tex. Sup. Ct. J. 927
Decided Jun 22, 1995

No. 95-0398.

June 22, 1995.

Appeal from the 294th District Court, Wood
340 County, Tommy Wallace, J. *340

Michael E. Starr, Douglas R. McSwane, Jr., Tyler, Monte F. James, and J. Kevin Oncken, Austin, for petitioners.

David B. Griffith and Robert D. Bennett, Gilmer, for respondents.

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

PER CURIAM.

The Texas Tort Claims Act requires a claimant to provide a governmental unit with formal, written notice of a claim against it within six months of the incident giving rise to the claim; however, the formal notice requirements do not apply if the governmental unit has actual notice of the claim. TEX.CIV.PRAC. REM. CODE § 101.101. In this cause, we consider whether a hospital may receive actual notice of a claim against it from its own medical records. We conclude that, for a hospital to have actual notice, it must have knowledge of (1) a death or injury; (2) its alleged fault producing or contributing to the death or injury; and (3) the identity of the parties involved. Because the records at issue in this case do not convey to the hospital its possible culpability, we reverse the judgment of the court of appeals as to any remaining claims against Wood County Central Hospital and render judgment that the Booths take nothing from the Hospital.

Glenda Booth was admitted to Wood County Central Hospital with labor pains on August 1, 1990, following a course of prenatal care by Dr. George Cathey. Glenda and Jerry Booth's child was delivered stillborn on that day.

The Booths sued Dr. Cathey and the Hospital, alleging that their negligence resulted in the stillbirth of the Booths' child and in physical pain and mental anguish to the Booths. The Booths
341 allege that the doctor *341 and the Hospital were negligent in failing to diagnose and treat Glenda Booth's condition as a high risk pregnancy and in failing to diagnose and treat Glenda Booth for gestational diabetes.

The trial court granted summary judgment in favor of Dr. Cathey and the Hospital on all claims. The court of appeals affirmed as to the Booths' claims for the mental anguish that they suffered as a result of the negligent treatment of the fetus. Otherwise, the court of appeals reversed and remanded for a new trial. 893 S.W.2d 715, 720.

To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all of the elements

of an affirmative defense is entitled to summary judgment. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). In reviewing a summary judgment, we must accept as true evidence in favor of the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Section 101.101(c) of the Tort Claims Act provides that the formal notice requirements of section 101.101(a) "do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX.CIV.PRAC. REM. CODE § 101.101(c). It is undisputed that the Booths failed to provide the Hospital with formal, written notice of their claims against it pursuant to section 101.101(a). The Booths assert, however, that the Hospital received actual notice of their claims. The Booths argue that section 101.101(c) requires only that a governmental unit have knowledge that a death, an injury, or property damage has occurred. We disagree.

The purpose of the notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *See City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981). The interpretation of section 101.101(c) urged by the Booths would eviscerate the purpose of the statute, as it would impute actual notice to a hospital from the knowledge that a patient received treatment at its facility or died after receiving treatment. For a hospital, such an interpretation would be the equivalent of having no notice requirement at all because the hospital would be required to investigate the standard of care provided to each and every patient that received treatment.

We hold that actual notice to a governmental unit requires knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. Our holding preserves the purpose of the notice statute, and is consistent with the holdings of the majority of the courts of appeals. *See Parrish v. Brooks*, 856 S.W.2d 522, 525 (Tex.App.-Texarkana 1993, writ denied); *Bourne v. Nueces County Hosp. Dist.*, 749 S.W.2d 630, 632-33 (Tex.App. — Corpus Christi 1988, writ denied); *Tarrant County Hosp. Dist. v. Ray*, 712 S.W.2d 271, 274 (Tex.App.-Fort Worth 1986, writ ref'd n.r.e.). To the extent that *Texas Dep't of Mental Health Mental Retardation v. Petty*, 817 S.W.2d 707, 717 (Tex.App.-Austin 1991), *aff'd on other grounds*, 848 S.W.2d 680 (Tex. 1992), is inconsistent with this opinion, we disapprove it.

As summary judgment proof, Wood County Central Hospital presented the affidavit of its administrator, Marion Stanberry, who stated that prior to its receipt of a letter dated July 7, 1992, the Hospital had no knowledge of any alleged injuries of Glenda or Jerry Booth or of any alleged fault of the Hospital with respect to such injuries.

The summary judgment evidence provided by the Booths does not raise a fact issue that Wood County Central Hospital had actual notice of any alleged culpability on its part producing or contributing to any injury to Glenda or Jerry
342 Booth. The only evidence *342 presented by the Booths concerning the Hospital's knowledge of its culpability is an affidavit from Dean Cromartie, an obstetrician who reviewed Glenda Booth's medical records and determined that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth. Dr. Cromartie explained that the Cesarean section was not performed on Glenda Booth until more than half an hour after the time that it was called for. Even if the Hospital was aware of the information in its medical records relied upon by Dr. Cromartie in forming his

opinion, we hold that, as a matter of law, this information failed to adequately convey to the Hospital its possible culpability for mental and physical injuries to Glenda and Jerry Booth. *Cf. Dinh v. Harris County Hosp. Dist.*, 896 S.W.2d 248, 252-53 (Tex.App.-Houston [1st Dist.] 1995, writ dism'd w.o.j.).

Wood County Central Hospital and Dr. Cathey also argue that the judgment of the court of appeals should be reversed because the Booths failed to plead a cause of action for damages independent of the stillbirth. The Booths' pleadings contain allegations that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth and allegations that such treatment resulted in physical and mental injuries to Glenda and Jerry Booth. A mother "may recover mental anguish damages suffered as a result of her injury which was proximately caused by [a doctor's or a hospital's negligence] and which includes the loss of her fetus." *Krishnan v. Sepulveda*, ___ S.W.2d ___, ___ [1995 WL 358844] (Tex. 1995).[1] However, a father may not recover mental anguish damages from either the treating physician or the hospital because neither owes a duty to him. *Id.* at ___.

[1] Neither parent, however, may recover damages for the loss of society, companionship, and affection suffered as a result of the loss of a fetus. *Krishnan*, ___ S.W.2d at ___.

Accordingly, a majority of the Court grants the applications for writ of error, and, without hearing oral argument, affirms in part and reverses in part the judgment of the court of appeals. TEX.R.APP.P. 170. The Court renders judgment that the Booths take nothing from Wood County Central Hospital and that Jerry Booth take nothing from Dr. George Cathey. With regard to the claims asserted by Glenda Booth against Dr. George Cathey, the Court affirms the judgment of the court of appeals, which remanded those claims for trial.

NO. 03-17-00692-CV
Court of Appeals of Texas, Austin.

In re R. R.

537 S.W.3d 621 (Tex. App. 2017)
Decided Nov 17, 2017

NO. 03-17-00692-CV

11-17-2017

IN RE R. R.

Mr. Kory S. Booth, Booth Law, PLLC, 3720 Gattis School Rd, Ste. 800-287, Round Rock, TX 78664-4652, for Relator. Ms. Shelby Beyer, 150 North Seguin, Suite 307, New Braunfels, TX 78130, for Real Party in Interest.

David Puryear, Justice

Mr. Kory S. Booth, Booth Law, PLLC, 3720 Gattis School Rd, Ste. 800-287, Round Rock, TX 78664-4652, for Relator.

Ms. Shelby Beyer, 150 North Seguin, Suite 307, New Braunfels, TX 78130, for Real Party in Interest.

Before Justices Puryear, Field, and Bourland

OPINION

David Puryear, Justice

Relator has filed a petition for writ of mandamus complaining of an order signed by the district court stating that it will only review the record from a hearing held before an associate judge, rather than hearing live testimony. *See* Tex. R. App. P. 52; *see also* Tex. Fam. Code §§ 201.015, .2042. Having reviewed the petition, the record, and the response provided by the real party in interest, the Texas Department of Family and Protective Services, we conditionally grant the petition for writ of mandamus. *See* Tex. R. App. P. 52.8(c).

Factual and Procedural Summary

In February 2017, the Department sought emergency custody over relator's son, "Dustin,"[1] who was about seven months old at the time. The Department alleged that relator brought Dustin to an emergency room because she noticed his leg was swollen and that the doctors determined that the child had fractures in his right femur and left tibia, as well as "numerous other fractures in various stages of healing," including rib fractures and fractures in his shoulder blade and clavicle. 622 *622 The doctors contacted the Department because they suspected physical abuse, and relator gave several possible explanations for the child's injuries, including having his legs caught between the slats of his crib, falling from the bed to the floor, or having his leg caught in a walker. The cause was referred to the associate judge for a hearing on aggravated circumstances, which allows a trial court to waive the requirement of a service plan or to attempt to reunify the family and to accelerate the trial schedule. *See* Tex. Fam. Code § 262.2015(a). The associate judge held a hearing, at which several witnesses testified, and on August 11, she issued an order determining that relator had subjected Dustin to aggravated circumstances, stopping all visitation between relator and her child immediately, and waiving the requirement of a service plan or reasonable reunification efforts. Relator filed a request for a de novo hearing as to (1) the finding of aggravated circumstances, (2) whether relator's expert witness should be allowed to provide expert testimony,[2] (3) whether Dustin should be allowed to travel for medical testing, and (4) whether he should be

placed with his maternal grandparents while the cause was pending. The Department objected, arguing among other things that the district court should only consider the transcript from the associate judge's hearing. The district court held a hearing on the issue and signed an order stating that it would limit its consideration to the transcript from the associate judge's hearing. Relator then filed her petition for writ of mandamus.

[1] We have changed the style of the case to refer to relator by her initials, and in this opinion, we will refer to the child by an alias. *See* Tex. R. App. P. 9.8.

[2] The associate judge granted the Department's motion to exclude testimony by Dr. Michael Holick, a doctor based in Boston who testified about his credentials and theories via Skype.

Discussion

The family code provides that a trial court may refer to an associate judge "any aspect of a suit over which the court has jurisdiction" under the family code. *Id.* § 201.005. When a matter is referred to an associate judge, the associate judge may conduct a hearing, hear evidence, make findings of fact, and recommend an order to be rendered. *Id.* § 201.007; *see also id.* § 201.204 (addressing powers of associate judge in child-protection case). When an associate judge makes a recommendation or temporary order, any party may request a "de novo hearing before the referring court," specifying the issues that will be presented to the referring court. *Id.* § 201.015(a), (b). In the de novo hearing, which is mandatory when properly requested, "the parties may present witnesses on the issues specified in the request for hearing," and the referring court "may also consider the record from the hearing before the associate judge." *Id.* § 201.015(c).

Relator argues that the district court improperly refused to hold a de novo hearing in which she was permitted to call witnesses to testify, instead confining its review to only the evidence presented before the associate judge. Before the district court and in its response in this proceeding, the Department argues that the district court was not required to "force the State to recall the same witnesses to elicit testimony and face cross-examination" and instead could simply review the record from the hearing before the associate judge and consider the issues raised by relator in light of that evidence alone. We agree with relator that the district court's decision to consider only the transcript from the earlier hearing was an abuse of discretion.

We have explained that a de novo hearing "is a new and independent action *623 on those issues raised" in the request for a hearing. *Attorney General v. Orr* , 989 S.W.2d 464, 467-68 (Tex. App.—Austin 1999, no pet.) (also stating that request for de novo hearing breaks continuity in process begun before associate judge "and begins an entirely new process");[3] *see In re A.A.T.* , No. 13-16-00269-CV, 2016 WL 8188946, at *2 (Tex. App.—Corpus Christi Aug. 25, 2016, no pet.) (mem. op.) ("judicial review by trial de novo is not a traditional appeal, but a new and independent action characterized by all the attributes of an original civil action, only to the extent of the challenged finding—that is, the effect of the appeal is to begin again only as to the issues appealed"); *In re A.B.* , No. 04-11-00741-CV, 2012 WL 2126887, at *1 (Tex. App.—San Antonio June 13, 2012, no pet.) (mem. op.) ("trial *de novo* is a new and independent action on those issues raised"); *In re N.T.* , 335 S.W.3d 660, 669 (Tex. App.—El Paso 2011, no pet.) (same); *Chacon v. Chacon* , 222 S.W.3d 909, 914 (Tex. App.—El Paso 2007, no pet.) (same); *In re E.M.* , 54 S.W.3d 849, 852 (Tex. App.—Corpus Christi 2001, no pet.) (quoting *Orr*). Because a de novo hearing is a new and independent action, "the party with the burden of proof, having prevailed before the associate judge, must still carry [its]

burden in a de novo hearing before the referring court." *In re N.T.* , 335 S.W.3d at 669 ; *Orr* , 989 S.W.2d at 467.

[3] In *Key Western Life Insurance Co. v. State Board of Insurance* , the supreme court discussed the meaning of the phrase "trial de novo" in the context of the review of an administrative decision. 163 Tex. 11, 350 S.W.2d 839, 846 (1961). The court explained:

> Review by trial de novo has all the attributes of an original action in the reviewing court. The trial court must weigh the evidence by the "preponderance of the evidence" standard. Trial de novo has been defined as "A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." Trial de novo is not an "appeal", but is a new and independent action.

Id. (citations omitted). This Court cited to that language to describe a de novo hearing under the family code in *Attorney General of Texas v. Orr* , 989 S.W.2d 464, 467 (Tex. App.—Austin 1999, no pet.), and several other courts of appeals have cited *Orr* and its reliance on *Key Western* in their cases involving de novo hearings under the family code. *See, e.g.* , *In re J.L.S.* , No. 04-12-00011-CV, 2012 WL 5354796, at *6 (Tex. App.—San Antonio Oct. 31, 2012, no pet.) (mem. op.); *Woodard v. Office of Att'y Gen.* , No. 01-07-00954-CV, 2009 WL 793764, at *2 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.) (mem. op.); *Chacon v. Chacon* , 222 S.W.3d 909, 914 (Tex. App.—El Paso 2007, no pet.) ; *In re E.M.* , 54 S.W.3d 849, 852 (Tex. App.—Corpus Christi 2001, no pet.) ; *see also In re K.C.B.* , No. 07-06-00172-CV, 2006 WL 2588712, at *1 (Tex. App.—Amarillo Sept. 8, 2006, no pet.) (mem. op.) (citing *Key Western* for proposition that "de novo review is not an appeal, but an independent action").

The statute further provides that in the de novo hearing, the referring court may consider the transcript from the hearing before the associate judge, but also that "the parties *may present witnesses* on the issues specified in the request for hearing." Tex. Fam. Code § 201.015(c) (emphasis added). In our review of cases relating to de novo hearings from determinations by associate judges, we have found no cases in which a referring court was permitted to refuse to allow the parties to present witnesses in the de novo hearing.

In *In re R.S.-T.* , cited by the Department, the referring court seems to have limited some of the testimony at the de novo hearing, stating that "pursuant to standard protocol, testimony contained within the statement of facts would not be repeated during the de novo hearing." 522 S.W.3d 92, 106 (Tex. App.—San Antonio 2017, no pet.). However, several witnesses who testified before the associate judge were recalled to testify in the de novo hearing, both by the Department and by 624 *624 the father. *Id.* at 106-08. Further, the extent and propriety of any limitations was not discussed by our sister court, which was asked only whether the trial court had " 'cut off' earlier proceedings and prevented consideration of testimony heard before the associate judge." *Id.* at 108. Our sister court noted that "[g]enerally, when a matter is heard de novo, the trial court is limited to the evidence presented during the de novo hearing" but that the family code also permitted a referring court to consider the record from the earlier hearing, and that the father had not objected to the introduction of the transcript, concluding that section 201.015 gave the referring court "the authority to consider the record of the hearing before the associate judge." *Id.* Thus, *R.S.-T.* is not particularly helpful in our analysis.

Our review reflects that, as a rule, our courts treat the de novo hearing as a new trial, in which the parties are permitted to present witnesses to testify as to the issues raised in the hearing request. *See, e.g.* , *Mayorga v. Mayorga* , No. 03-13-00783-CV, 2015 WL 2214593, at *1-2 (Tex. App.—Austin May 8, 2015, no pet.) (mem. op.); *In re Young* , No. 05-15-00024-CV, 2015 WL 1568835, at *2-3 (Tex. App.—Dallas Apr. 7, 2015, orig. proceeding) (mem. op.); *In re J.L.S.* , No. 04-12-00011-CV, 2012 WL 5354796, at *1 (Tex. App.—San Antonio Oct. 31, 2012, no pet.) (mem. op.); *In re A.B.* , 2012 WL 2126887, at *1-2. Occasionally, the parties decide not to call witnesses to testify at the de novo hearing, relying on the evidence produced in the hearing before the associate judge alone. *See, e.g.* , *In re N.M.* , No. 07-16-00439-CV, 2017 WL 1908588, at *2 (Tex. App.—Amarillo May 9, 2017, pet. denied) (mem. op.).

Under the clear language of section 201.015, the referring court must hold a hearing in which the parties may present witnesses, should they choose to do so.[4] *See* Tex. Fam. Code § 201.015(c). We have found no cases that could support a conclusion that a referring court may bar the parties from calling witnesses at the de novo hearing, and we hold today that a referring court does not have the discretion to do so. *See id.*

[4] Currently pending before the Texas Supreme Court is a case asking whether a referring court must hold a "full hearing," including requiring the Department to put on evidence at the de novo hearing rather than allowing it to rely on the transcript from the hearing before the associate judge. *See* Petition for Review, *In re X.H.* , No. 17-0480 (pet. filed June 16, 2017). We note that in its response filed in that case, the Department argues that the referring court "complied with the express language of section 201.015(c) by both *allowing the parties the opportunity to present additional evidence* and by considering the record from the trial before the associate judge in determining" the issues presented. Response to Petition for Review at 3, *In re X.H.* (filed Aug. 7, 2017) (emphasis added).

Conclusion

To be sure, the district court was authorized to consider the transcript from the hearing before the associate judge when conducting the de novo hearing. *See id.* However, it was not authorized to bar relator from calling witnesses to testify and, if necessary, from addressing the admissibility of the proffered evidence. The district court abused its discretion in doing so.[5] We therefore conditionally grant relator's *625 petition for writ of mandamus. Writ will issue only in the unlikely event that the district court does not act in accordance with this opinion.

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[5] The Department further argues that relator has an adequate remedy by appeal from an order finding aggravated circumstances, asserting that it is merely "an incidental, temporary ruling in the overall parental termination proceedings." However, that determination has the effect of relieving the Department from attempting to reunify the family or providing relator with a safety plan, thus stripping relator of the opportunity to work services in an attempt to avoid termination of her parental rights. We cannot hold in this context that relator would have an adequate remedy by appeal. Indeed, in *M.Z. v. Texas Department of Family and Protective Services* , cited by the Department for support in this argument, we stated that any complaints related to the finding of aggravated circumstances were moot and could not be raised on appeal from the termination order. No. 03-13-00858-CV, 2014 WL 2191978, at *6 n.8 (Tex. App.—Austin May 22, 2014, no pet.) (mem. op.).

No. 97-0729
Supreme Court of Texas

KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.

988 S.W.2d 746 (Tex. 1999)
Decided Mar 25, 1999

No. 97-0729.

Argued on October 20, 1998.

Decided March 25, 1999.

Appeal from the 71st Judicial District Court, Harrison County, Bonnie Leggat, J. *747

Timothy W. Mountz, Dallas, Jane A. Nenniger, Macey Reasoner Stokes, Houston, for Petitioner.

Gregory P. Grajczyk, Milbank, SD, James W. Hill, Longview, for Respondent.

Justice ENOCH delivered the opinion of the Court.

We are asked to decide whether Harrison County Housing Finance Corporation's (HCH) claims against KPMG Peat Marwick, LLP for violations of the Deceptive Trade Practices Act and negligence are barred by the two-year statute of limitations. The trial court granted summary judgment for Peat Marwick on all of HCH's claims. But the court of appeals reversed the trial court's summary judgment on the DTPA and negligence claims and remanded these for trial.[1]

[1] 948 S.W.2d 941.

Applying the discovery rule, the court of appeals held that neither claim was time-barred. It reasoned that Peat Marwick had not presented conclusive evidence that HCH discovered or in the exercise of reasonable diligence should have discovered the wrongful act which allegedly caused its injury more than two years before HCH filed suit.[2]

[2] *Id.* at 947.

To the contrary, we conclude that Peat Marwick has conclusively established that HCH's claims against Peat Marwick accrued more than two years before suit was filed. Accordingly, we reverse the court of appeals' judgment on both the DTPA and negligence claims and render judgment that HCH take nothing.

From 1980 to 1990, Peat Marwick provided accounting and auditing services to HCH for a series of bonds HCH had issued. In addition, Peat Marwick was to ensure that the trustee for the bonds, First Interstate Bank of California, complied with the trust indenture.

Under the trust indenture, one of First Interstate's duties as trustee was overseeing a capital reserve fund established to pay principal or to redeem bonds. And during the period of the auditing services, specifically in 1985, First Interstate hired, on its own behalf, a partner from Peat Marwick to prepare a special procedures report about the trust assets. But Peat Marwick did not tell HCH about this dual representation.

On February 1, 1993, HCH filed suit against First Interstate and one of its shareholders, alleging breach of fiduciary duty, breach of contract, negligence, and gross negligence. HCH alleged that in February 1989, First Interstate prematurely sold assets in the capital reserve fund, resulting in a loss in excess of $621,000 when the bonds were refunded in December 1991. First Interstate and its shareholder moved for summary judgment on several grounds, including that the bank had not

mismanaged the trust funds, that HCH was well informed of the bank's actions through monthly reports, and that HCH's claims were barred by the
748 *748 applicable statutes of limitations. Without specifying the grounds, the trial court granted First Interstate's motion for summary judgment. HCH did not appeal.

On October 1, 1993, while the First Interstate lawsuit was still pending, HCH learned about Peat Marwick's 1985 agreement with First Interstate and that Peat Marwick's 1985 audit of First Interstate's records had revealed irregularities in First Interstate's accounting of the trust assets. According to HCH, Peat Marwick informed First Interstate but not HCH of the irregularities. HCH further claims it then discovered that Peat Marwick had advised First Interstate that the capital reserve fund could be set at an amount lower than what the trust indenture required. And HCH asserts that Peat Marwick did not report that advice to HCH.

HCH sued Peat Marwick in federal court on July 14, 1995, but the case was dismissed for lack of subject matter jurisdiction. HCH then filed suit in state court. For this appeal, Peat Marwick concedes that July 14, 1995, is the applicable date to determine whether HCH's claims were barred when filed.[3]

[3] *See* Tex. Civ. Prac. Rem. Code § 16.064(a).

In this case, HCH alleged that Peat Marwick, as the trust's auditor, either negligently or intentionally failed to disclose First Interstate's mismanagement of the trust. HCH further alleged causes of action for breach of warranty (which is not part of this appeal) and violations of the DTPA.

In support of its motion for summary judgment on limitations grounds, Peat Marwick attached HCH's original petition in the suit against First Interstate. That petition sought recovery for the same injury — the premature selling of the fund assets in 1989 resulting in a loss in excess of $621,000 — that HCH alleges in this suit was caused by Peat Marwick's wrongful conduct. Peat Marwick contends that the petition against First Interstate demonstrates that HCH knew of its claim no later than February 1, 1993. Apparently in response, HCH amended its petition to allege that not until October 1, 1993, did it learn of Peat Marwick's role in the disputed financial irregularities. But it does not appear that HCH filed a formal response to Peat Marwick's motion for summary judgment or produced any evidence to defeat the motion. As mentioned, the trial court granted summary judgment.

I. Summary Judgment Standard of Review

The standard for reviewing a summary judgment under Texas Rule of Civil Procedure 166a(c) is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law.[4] In conducting our review, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.[5]

[4] *See, e.g., Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

[5] *See Nixon*, 690 S.W.2d at 548-49.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.[6] Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.[7] If the movant establishes that the statute of limitations bars the

action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations.[8] *749

[6] *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

[7] *See Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex. 1988).

[8] *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

II. Accrual of HCH's DTPA Claim

A DTPA claim is subject to a two-year statute of limitations. The claim accrues when "the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[9] Thus, the discovery rule applies to HCH's DTPA claim.[10] We note that effective September 1, 1995, the Legislature amended the DTPA to exempt professional services with some exceptions. But because this suit was originally filed before that date, the 1995 amendments do not apply.[11]

[9] Tex. Bus. Com. Code § 17.565.

[10] *See Burns*, 786 S.W.2d at 267; *see also Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997).

[11] *See* Tex. Bus. Com. Code § 17.49(c).

Contending that during the relevant time period Peat Marwick had worked for First Interstate independently as well as for HCH, HCH argues that its claims against Peat Marwick did not accrue until October 1, 1993, when it learned through discovery in the First Interstate suit that Peat Marwick knew of financial irregularities in the bond issue but failed to report them to HCH. In agreeing with HCH, the court of appeals erroneously concluded that in recent decisions this Court employed a "new formulation" of the discovery rule.[12] The court of appeals held that under this "new formulation," a claim does not accrue until plaintiff knows not only of the injury, but the specific nature of each wrongful act that may have caused the injury.[13] This is incorrect. The rule in those cases was, as it is in this one, that accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury.[14]

[12] *See* 948 S.W.2d at 946 (citing *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)).

[13] *See id.* at 947.

[14] *See Murphy*, 964 S.W.2d at 271; *Diaz*, 941 S.W.2d at 99; *S.V.*, 933 S.W.2d at 4; *see also Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998); *Russell v. Ingersoll Rand Co.*, 841 S.W.2d 343, 344 n. 3 (Tex. 1992); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990).

The summary judgment evidence established that the wrongful injury HCH alleges it suffered is the loss of over $621,000 in December 1991 when it refunded the bonds following the premature sale in 1989 of the reserve fund assets. Significantly, HCH sued First Interstate over this precise injury in early 1993, less than two years later. Indisputably, HCH was aware by then of its injury and that its injury was caused by the wrongful conduct of another.

The loss from the premature sale of the fund assets should have caused HCH to investigate not only the possibility that First Interstate had mismanaged the fund assets, as HCH apparently did because it sued First Interstate, but also Peat Marwick's possible involvement in the mismanagement and loss. HCH had hired Peat Marwick to do annual trust asset audits, including the reserve fund, to ensure compliance with the trust indenture. Therefore, the loss should have caused HCH to also investigate why its auditor, Peat Marwick, did not discover or report the mismanagement.

As an independent ground to defeat summary judgment, HCH asserts that Peat Marwick fraudulently concealed its wrongful conduct, and limitations did not begin to run until HCH knew or should have known of its injury. HCH also asserts that its pleading is sufficient summary judgment evidence of the affirmative defense of fraudulent concealment to defeat Peat Marwick's summary judgment motion. In both respects, HCH is incorrect.

First, a party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion[15] and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.[16] A mere pleading does not
750 satisfy *750 either burden.[17] Thus, even assuming that HCH pled fraudulent concealment as an affirmative defense to Peat Marwick's answer pleading limitations, HCH still had to respond to Peat Marwick's summary judgment motion. There is no such response in the record. Therefore, HCH did not carry its burden to both plead the defense and support it with summary judgment evidence.

15 *See* Tex. R. Civ. P. 166a(c); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 n. 1 (Tex. 1986); *City of Houston*, 589 S.W.2d at 679.

16 *See American Petrofina, Inc. v. Allen* 887 S.W.2d 829, 830 (Tex. 1994); *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974).

17 *See City of Houston*, 589 S.W.2d at 678.

Second, when a defendant has fraudulently concealed the facts forming the basis of the plaintiff's claim, limitations does not begin to run until the claimant, using reasonable diligence, discovered or should have discovered the injury.[18] Because Peat Marwick's summary judgment evidence conclusively established that HCH discovered its injury more than two years before it sued Peat Marwick, Peat Marwick is entitled to summary judgment. As with the discovery rule, once HCH knew that it had been injured by fund mismanagement, it should have investigated why its auditor, Peat Marwick, had failed to discover or report the mismanagement to HCH. Accordingly, fraudulent concealment pleadings do not rescue HCH's DTPA claim.

18 *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1995); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex. 1979).

III. Accrual of HCH's Negligence Claim

Under Section 16.003 of the Civil Practice and Remedies Code, negligence claims, including accounting malpractice, must be brought "not later than two years after the day the cause of action accrues."[19] Because the statute does not define or specify when accrual occurs, we look to the common law to determine when a cause of action accrues.[20]

19 Tex. Civ. Prac. Rem. Code § 16.003(a); *see also Murphy*, 964 S.W.2d at 270.

20 *See Childs*, 974 S.W.2d at 36; *Murphy*, 964 S.W.2d at 270.

HCH argues that its negligence claim against Peat Marwick did not accrue until it learned through discovery in the First Interstate suit of Peat Marwick's wrongful conduct. We disagree.

This Court has never considered whether the discovery rule applies to auditing malpractice claims. Assuming without deciding that it does, however, the summary judgment evidence establishes that HCH knew or should have known of its negligence claim more than two years before it filed suit. HCH relies on the same wrongfully caused injury asserted in the DTPA cause of action to claim that Peat Marwick was negligent. And as we have mentioned, the evidence conclusively establishes that HCH knew of the reserve fund's mismanagement, at least, no later than when it filed the first suit against First Interstate, February 1, 1993. Consequently, HCH's negligence claim is

also time-barred. Furthermore, as with HCH's DTPA claims, its fraudulent concealment pleadings do not rescue the negligence claim.

Peat Marwick has established the affirmative defense of limitations by conclusively showing that HCH's causes of action accrued more than two years before HCH filed suit. As a result, limitations bars HCH's claims for DTPA violations and negligence and Peat Marwick is entitled to summary judgment. Therefore, we reverse the court of appeals' judgment and render judgment that HCH take nothing.

No. A-9867
Supreme Court of Texas

Porter v. Wilson

389 S.W.2d 650 (Tex. 1965)
Decided Apr 7, 1965

No. A-9867.

April 7, 1965.

Appeal from District Court, Randall County, E. E. Jordan, J. *651

Clayton, Martin Harris, Amarillo, for petitioner.

Stone Stone, John C. Chambers, Amarillo, for respondents.

*652

SMITH, Justice.

The opinion heretofore delivered in this cause on December 2, 1964, is withdrawn and the following opinion is substituted therefor.

This trespass to try title suit was brought on April 17, 1962, by the Respondents, the Wilsons, against Thomas W. Porter and others to recover title and possession to 11.37 acres of land out of the west part of Section 11, Block 6, I GN RR Company survey, situated in Randall County, Texas. However, the controversy presented in the Court of Civil Appeals and in this Court is solely between the Wilsons and Porter, and only involves the title to lots numbered twenty-one (21), and twenty-four (24) in Block Numbered Thirty-six (36) of the Palisades in Randall County, Texas. Both lots lie within the boundaries of the 11.37 acres described in the Wilsons' petition.

The Wilsons pleaded both the Five[1] and Ten[2] Year Statutes of Limitations, and issues as to both statutes were submitted to a jury for determination. The judgment of the trial court for the Wilsons, allowing a recovery of title to the entire 11.37 acres, including Lots 21 and 24, is based on affirmative answers in favor of the Wilsons on both Limitation issues. Prior to the submission of these issues pertaining to Lots 21 and 24, Porter filed and presented a Motion for Instructed Verdict which was overruled. Subsequently, Porter filed a motion for judgment non obstante veredicto, and a motion for a new trial. These motions were both overruled. *653

1 Art. 5509, Vernon's Ann.Civ.St.Tex. 'Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article.'

2

> Art. 5510, V.A.T.S. 'Any person who has the right of action for the recovery of lands, tenements or hereditaments against another baving peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.'

On appeal to the Court of Civil Appeals Porter, as Appellant, presented points asserting that the trial court erred in overruling the above-enumerated motions. Porter's principal contention throughout was that there was no evidence of probative force to support the findings of the jury that the Wilsons held title under and by virtue of either statute. The Court of Civil Appeals, 371 S.W.2d 611, affirmed the judgment of the trial court on the ground that the Wilsons had established title under the Five Year Statute of Limitations. Therefore, the court did not consider the points before it attacking the trial court judgment insofar as it was based upon the Ten Year Statute of Limitations.

Porter did not assign as error in his motion for rehearing the failure of the Court of Civil Appeals to pass upon these points, and his application for writ of error fails to present such points.

We have concluded to sustain Porter's contention that the Wilsons have failed to establish title under the Five Year Statute of Limitations, but the Wilsons contend that the judgment of the trial court must be affirmed because Porter did not assign as error the failrue of the intermediate court to pass upon the points attacking the judgment of the trial court based upon the finding of the jury that the Wilsons had established title under the Ten Year Statute of Limitations. With this latter contention we do not agree. Since we have concluded to reverse the judgment of the Court of Civil Appeals, holding that the Wilsons have title under the Five Year Statute of Limitations, we will dispose of the law questions presented in the application for writ of error, and the pertinent law questions presented on appeal to the Court of Civil Appeals which were not considered by that court. See McKelvy v. Barber, opinion by this Court, delivered July 8, 1964, 381 S.W.2d 59.

For the reasons now to be stated, we reverse the judgments of both the trial court and the Court of Civil Appeals, and render judgment that the Wilsons take nothing by their suit so far as Lots 21 and 24 are concerned.

FIVE YEAR STATUTE OF LIMITATIONS

The principal basis for the Wilsons' contention that the judgments of the courts below should be affirmed is the holding announced in Rosborough v. Cook, 108 Tex. 364, 194 S.W. 131 (1917), which is to the effect that in order to support a limitation title under the Five Year Statute of Limitations, it is not necessary that the deed, under which the claim is made, convey any title. The contention is that the grantor may be wholly barren of any vestige of title, and, therefore, the deed pass no semblance of title; yet, if it describes and purports to convey the land and is on its face a

good deed, it meets the requirements of the statute, and the claimant under the deed would prevail, provided, of course, that all other requirements of the statute have been met.

The Wilsons also cite in support of their contention the case of Benskin v. Barksdale, Tex.Com.App., 246 S.W. 360 (1923), wherein it was held, in part:

> "The deed is sufficient to support adverse possession and to set in motion the five-year statute of limitation. Parker v. Newberry, 83 Tex. 428, 18 S.W. 815 * * *. The statute, in so far as a deed is concerned, demands only that the person having peaceable and adverse possession of real estate be 'claiming under a deed or deeds duly registered.' Rev.St. Art. 5674. Of course such deed must describe the land. We think the instrument * * * falls within the class designated as deeds.'

We cannot agree that the judgments reached in these cases are controlling. The *654 deed,[3] under which the Wilsons seek to perfect title under the Five Year Statute of Limitations, was executed by J. H. Bright and wife on May 28, 1956. This deed recites that the Brights 'bargain, sell, release and forever quit claim unto the said Frank P. Wilson, Sr., and wife, Iris Kirk Wilson, their heirs and assigns, all our right, title and interest in and to that certain tract or parcel of land. * * *' The habendum clause reads as follows:

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> "Lots Numbers Twenty-one (21) and Twenty-four (24) in Block Number Thirty-six (36) of The Palisades, a Subdivision of a part of Section No. 11, Block No. 6, I GN RR Co. in Randall County, Texas, as shown by the map or plat thereof of record in the Deed Records of Randall County, Texas."

> "TO HAVE AND TO HOLD the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said Frank P. Wilson and wife, Iris Kirk Wilson, their heirs and assigns forever, so that neither we, the said grantors, nor our heirs, nor any person or persons claiming under us shall, at any time hereafter, have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part thereof.'

The controlling question in this case is whether the instrument here involved is sufficient to give notice of the nature and extent of the claim asserted thereunder so as to qualify under the five-year statute. This question does not depend upon whether the grantors actually owned an interest in the property described in the instrument or not, but we must ascertain from an examination of the instrument whether it purports to convey the land itself or merely some wholly undefined and uncertain interest therein and in effect is a mrer release of an invalid or doubtful claim.

It seems well settled that a deed purporting to convey an undivided interest in land will not support a claim to the entire tract under the five-year statute but will only operate as a claim to the interest which the instrument on its face purports to convey. Martinez v. Bruni, Tex.Com.App. (1921), 235 S.W. 549, holdings approved by the Supreme Court, 2 Tex.Jur.2d 244, Adverse Possession, § 128. An instrument which purports to convey such right, title and interest as a grantor

3 '* * * do-, by these presents BARGAIN, SELL, RELEASE, AND FOREVER QUIT CLAIM unto the said Frank P. Wilson and wife, Iris Kirk Wilson, their heirs and assigns, all our right, title and interest in and to that certain tract or parcel of land lying in the County of Randall, State of Texas, described as follows, to-wit:

may have and no more will not qualify as a deed under the statute as it does not purport to convey the land itself nor does it specify any particular interest which is purportedly conveyed. Here the limitation claimants contend that the instrument under which they hold affords a basis for a limitation claim to all of Lots 21 and 24 under the five-year statute. The circumstance that the instrument employs the words, 'all our right, title and interest' or the word 'quitclaim' is not fatal to their contention as it must be determined from the instrument as a whole whether it purports to convey the land itself or merely such interest as the grantor may have therein.

For example, in Jackson v. Heath, Tex.Civ.App. (1959), 325 S.W.2d 453, no wr. hist., it was held that an instrument which quitclaimed all the right, title and interest of the grantor did not qualify under the five-year statute. The habendum clause contained in such instrument was as follows: 'to have and to hold the above released rights, titles, interests, claims and demands, to the said (grantors) their assigns, forever.' This decision is correct. From the face of the instrument it cannot be said that the grantors purported to convey the land or a specified interest therein. Instruments
655 purporting to convey or *655 release one's right, title or interest are commonly used to convey undivided interests of an unknown extent or claims having a dubious basis. It would be anomalous to say that a deed to an undivided one-third interest would support a claim to no more than an undivided one-third interest while a release or quitclaim of an unspecified right, title or interest would give notice and hence support a claim to the entire tract of land. In cases wherein the courts have construed an instrument employing the words, 'all my right, title and interest' as one purporting to convey the land itself, they have found some wording in the instrument which evidenced an intention to convey the land itself rather than the right, title and interest of the grantor.

In Cook v. Smith, 107 Tex. 119, 174 S.W. 1094, 3 A.L.R. 940 (1915), this Court construed an instrument which contained the following clauses:

> Granting Clause: "* * * have bargained, sold, released and forever quitclaimed, and by these presents do hereby bargain, sell, release and forever quitclaim, * * * all my right, title and interest in and to that certain tracts of parcels of land * * *."
>
> Habendum Clause: "To have and to hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging to the said A. A. Neff and his heirs and assigns forever, so that neither I, the said R. Potts, nor my heirs nor any person or persons claiming under me, shall at any time hereafter have, claim or demand any right or title to the aforesaid premises or appurtenances or any part thereof."

Intention Clause: This clause follows a description by block and number of a large number of lots including the lot in controversy and also several small tracts by metes and bounds. The clause reads as follows:

> "* * * and all other real estate that I now own and am possessed of in the town of Paducah, in Cottle county, Texas. All of the above town property is situated in the town of Paducah, in Cottle county, Texas, as shown by the original recorded plat of said town, of record in vol. 5, page 81, in the deed records of Cottle county, Texas; and it is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah in Cottle county, Texas, whether it is set out above or not."

The Court then said:

> "The character of an instrument, as constituting a deed to land or merely a quitclaim deed, is to be determined according to whether it assumes to convey the property described and upon its face has that effect, or merely professes to convey the grantor's title to the property. If, according to the face of the instrument, its operation is to convey the property itself, it is a deed. If, on the other hand, it purports to convey no more than the title of the grantor, it is only a quitclaim deed. Richardson v. Levi, 67 Tex. (359), 364, 3 S.W. 444; Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757.'

The Court then made special reference to the granting clause and the habendum clause of the conveyance involved, which clauses have been heretofore set out and said:

> "If the character of the instrument were dependent, alone, upon the construction of (the granting and habendum clauses) * * * there could be no doubt * * * of its being simply a quitclaim deed, * * *.'

It should be noted that the granting clause contained the words, 'all my right, title and interest,' and that the words of the habendum-'to have and to hold the said premises,' were not construed to make the instrument operate 'to
656 convey the *656 property described,' but the instrument remained one 'merely professing to convey the grantor's interest to the property.' In other words, the word 'premises' was construed as applying to the right, title and interest of the grantor rather than to the tracts of land described in the deed.

It was held, however, that when the instrument was construed as a whole and the 'Intention Clause' given due weight and consideration, the instrument was properly construed as one purporting to convey the land rather than such interest the grantor might have therein. It was held that one holding under the instrument in question would be protected as an innocent purchaser for value. While the five-year statute of limitations was not involved in Cook v. Smith, supra, the proper construction of the instrument of conveyance was at issue, i. e., did the deed purport to convey the land itself or merely the grantor's interest therein, if any?

It should be pointed out that the Court used the word 'quitclaim deed' to describe on instrument which does no more than purport to convey the right, title and interest of a grantor. The Court held that the instrument involved in Cook v. Smith purported to convey the land and was not a quitclaim, despite the use of the words, "release and forever quitclaim * * * all my right, title and interest in and to" the land involved.

It was similarly held in Parker v. Newberry, 83 Tex. 428, 18 S.W. 815 (1892), that an instrument which used the word 'quitclaim' in a clause releasing a 320-acre tract from the warranty clause did not render the instrument of conveyance ineligible under the five-year statute. The words 'right, title and interest' did not appear in the deed involved in Parker v. Newberry.

Perhaps the case which lends most support to respondent's position is Benskin v. Barksdale, Tex.Com.App. (1923), 246 S.W. 360, heretofore mentioned. Benskin recognizes as does Rosborough v. Cook, supra, that for an instrument to qualify under the five-year statute it must purport to convey the land and not merely the grantor's interest in the land. The granting clause in Benskin v. Barksdale used the words 'bargain, sell, release and forever quitclaim * * * all of my right, title and interest in and to (the described property).'

The habendum clause read as follows:

> "To have and to hold the said premises together with all and singular the rights, privileges and appurtenances thereto in any manner belonging, unto the said J. M. Benskin, his heirs and assigns, forever, so that neigher I, the said J. J. Ellis nor my heirs, nor any person or persons claiming under me, shall, at any time hereafter, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof. But it is expressly agreed, understood and stipulated that a vendor's lien is retained on the aforesaid described premises until the aforementioned and described note and all interest thereon has been fully paid when this deed shall become absolute as a quitclaim deed."

The Commission held that the wording of the habendum clause converted the instrument into one which purported to convey the land itself and not merely the interest which the grantor actually had therein. It was said that:

> "The granting clause in the above deed (which employs the words 'all my right, title and interest') is indefinite and uncertain as to the extent of the estate granted in the lands described.
>
> "* * * The habendum of the above deed is not so flexible, pliant, and adaptable in its revelation of the extent of estate, in the land, intended by the parties to be passed. By its terms Benskin, his heirs and assigns, are to have and to hold the premises, together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging, forever.

657 *657

> "We do not think the language of the instrument shows an intent merely to quitclaim the leasehold interest of Ellis.'

We have heretofore set out the clauses under consideration in Cook v. Smith, supra, wherein it was said that the habendum clause would not convert a 'right, title and interest' instrument into one purporting to convey the land itself, although it was held that the 'Intention Clause' would have that effect. In our opinion Cook v. Smith sets forth the better rule insofar as the construction and effect of the habendum clause is concerned. It seems that a grantor who deliberately chooses the words, 'right, title and interest' would not intend to destroy the effect of such words by using an habendum clause using the common phrase, 'To have and to hold the above described premises.'

TAX DEEDS

Commonly the phrase 'right, titel and interest' is used in sheriffs' deeds, particularly those which take place as a result of a tax lien foreclosure. The sheriff obviously does not own the property. He is necessarily conveying another's interest therein, but if the taxing authorities have performed their respective duties as to the levy and assessment of taxes (and the law presumes that they have) the deed will operate to convey the interest of the true owner of the property, hence the sheriff's deed following a tax lien foreclosure will qualify as notice under the statute as it purports to convey the interest of the true owner of the property. In the ordinary 'release of all my right, title and interest's instrument, the grantor does not purport to be the owner of the land or any particular interest therein. The Court in the early case of Wofford v. McKinna, 23 Tex. 36 (1859), had under consideration the question of whether a tax deed would afford the basis for establishing title under the five-year statute. The Court, in answering this question in the affirmative, said:

> "* * * (T)he statute intends an instrument which is really and in fact a deed, possessing all the essential legal requisites to constitute it such in law: * * * 'an instrument, by its own terms, or with such aid as the law requires, assuming and purporting to operate as a conveyance: not that it shall proceed from a party havng title, or must actually convey title to the land; but it must have all the constituent parts, tested by itself, of a good and perfect deed." (Emphasis added.)

In the case of Seemuller v. Thornton, 77 Tex. 156, 13 S.W. 846 (1890), involving a tax deed, after quoting the above from Wofford v. McKinna, the Court held that the instrument was in the form of a deed 'professing' to convey the land in controversy. Where the instrument purports to convey the land itself, even though the instrument uses the quitclaim terms of 'right, title and interest,' the instrument qualifies to support a claim under the Five Year Statute of Limitations. See Niday v. Cochran (1906), 42 Tex. Civ. App. 292 [42 Tex. Civ. App. 292], 93 S.W. 1027, no writ history.

We conclude that since the Bright-Wilson deed to Lots 21 and 24 did not purport to convey the land, Rosborough v. Cook, supra, but only conveyed the Brights' right, title and interest in said lots of land, the Wilsons could perfect no title to the two lots under the Five Year Statute of Limitations.

TEN YEAR STATUTE OF LIMITATIONS

There is no evdence of probative force in the record to support the finding of the jury that the Wilsons perfected title under the provisions of Article 5510, supra. The trial court erred in failing to grant Porter's motions for an instructed verdict and for judgment non obstante veredicto. Our disposition of the Wilsons' claim of title under the Five Year Statute of Limitations makes it clear that the Brights recognized the title to Lots 21 and 24 as having been excluded from their deed. *658

Clearly, the Brights entered into possession under a deed which expressly excepted Lots 21 and 24. Therefore, Bright's possession, if any, is referable to the deed, and it is presumed that possession conforms to the deed and is confined to the limits thereof. Southern Pine Lumber Company v. Hart, 161 Tex. 357, 340 S.W.2d 775 (1960).

In 1948 or 1949, the Brights entered into possession of the 11.37 acres; they lived in a house situated upon Lot 14 within the boundaries of the 11.37 acres. On May 28, 1956, Bright conveyed Lots 21 and 24 to the Wilsons. On April 17, 1962, this suit was filed. Thus, it is seen that if the Wilsons are to recover title under the Ten Year Statute of Limitations, Article 5510, supra, they must rely upon the adverse possession, if any, by Bright and themselves.

The Wilsons must prove that they have had actual possession of such lots, and that the possession is of 'such a character as of itself will give notice of an exclusive adverse possession, and mature into title after the statutory period,' in this case ten years. Southern Pine Lumber Company v. Hart, supra. See McCall v. Grogan-Cochran Lumber Co., 143 Tex. 490, 186 S.W.2d 677 (1945). We have examined the statement of facts, including the testimony of the witnesses, and find no evidence to support the finding of the jury that the Wilsons have title under the Ten Year Statute of Limitations. The evidence shows that a fence was 'around' the 11.37 acres, and that Lots 21 and 24 were within the fence. Some of the witnesses testified that the fence was around the land be (Bright) bought. One of the witnesses testified that he was under he impression that 'Mr. Bright bought all the land lying within the fences.' The record is not clear, but some part of the 11.37 acres was not within the fence. Mr. Bright 'strengthened' the fences after moving into the house on Lot 14. As one witness said: '* * * that fence wasn't changed any at all, except maybe where it was nailed on to a tree or something, and he (Bright) moved it straight, and put in some posts.' One witness testified that 'He (Bright) had

some ponies in there, and he lived on it.' Some of the witnesses testified that Bright made no distinction in the character of the use of the land within the enclosure. Mr. Bright did not testify, and we find no evidence that Bright adversely claimed the Lots 21 and 24. Therefore, it is conclusive that no adverse possession has been established that would constitute compliance with the porvisions of Article 5510, the Ten Year Statute of Limitations. Wilson testified that he claimed the land he bought and went into possession immediately after June 1, 1956; that he lived on Lot 14. However, he admitted that he 'offered to accept' Mrs. Porter's proposition to seel Lots 21 and 24. Wilson testified that Porter offered to 'get title' from Mr. Simmons and convey the title to Wilson for $50.00. The Tax Assessor and Collector of Canyon Independent School District testified that Wilson paid taxes on Lots 21 and 24 beginning with the year 1956, but that his records showed the ownerto be W. B. Simmons.

The judgments of the trial court and of the Court of Civil Appeals awarding title to the Wilsons to Lots 21 and 24 are both reversed, and judgment is here rendered that the Wilsons take nothing by their suit in so far as Lots 21 and 24 are concerned. In all other respects, the judgments of both courts are affirmed. Affirmed in part, and reversed and rendered in part. All costs are adjudged against the respondents, the Wilsons. Respondents' motion for rehearing is overruled.

CALVERT, C. J., and GRIFFIN and WALKER, JJ., dissenting.

CALVERT, Chief Justice (dissenting).

The only issue in this case is a narrow one which the majority opinion tends to obfuscate. So that the only issue before us may be clearly stated, it is well at the outset to disassociate it from irrelevant
659 *659 and immaterial matters by stating what is not[1] in issue.

[1] Emphasis mine unless otherwise indicated.

The proper designation of an instrument which, considering all of its parts, purports to convey only the grantor's 'right, title and interest' in land is not in issue. Admittedly, it is a quitclaim deed. Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915).

Whether a quitclaim deed purports to 'convey the land' is not in issue. Admittedly, it does not. Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915); Richardson v. Levi, 67 Tex. 359, 3 S.W. 444 (1887); Harrison Co. v. Boring, 44 Tex. 255 (1875).

Whether use of the word 'quitclaim' in the granting clause will convert an instrument otherwise purporting to convey the land into a quitclaim deed is not in issue. Admittedly, it will not. Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915); Richardson v. Levi, 67 Tex. 359, 3 S.W. 444 (1887).

Whether use of the general habendum clause, 'to have and to hold the above described premises, etc.' will convert a quitclaim deed into a deed purporting to convey the land is not in issue. Admittedly, it will not. Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915); Hunter v. Eastham, 95 Tex. 648, 69 S.W. 66 (1902); Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757 (1895).

Whether a deed purporting to convey an undivided interest in land can predicate a claim to the whole of the land under the five-year statute is not in issue. Admittedly, it cannot. Acklin v. Paschal, 48 Tex. 147, 175-177 (1877); Martinez v. Bruni, Tex.Com.App., 235 S.W. 549 (1921).

Whether the deed from the Brights to the Wilsons, under which claim is made in this case, 'is sufficient to give notice of the nature and extent of the claim asserted thereunder' is not the issue in the case, as stated by the majority, if by the statement the majority means the exact nature and extent of the claim asserted. Admittedly, the deed does not give notice of the exact nature and extent of the claim asserted.

If the foregoing matters and not in issue here, what is the issue? The true issue is this simple: Does a quitclaim deed qualify as a deed within the contemplation and meaning of Article 5509, Vernon's Texas Civil Statutes?

STARE DECISIS

If the rule of state decisis is to be given controlling weight in seeking an answer to the issue, the answer must be that a quitclaim deed does qualify. That answer is compelled by our decisions in Parker v. Newberry, 83 Tex. 428, 18 S.W. 815 (1892), and Benskin v. Barksdale, Tex.Com.App., 246 S.W. 360 (1923, holdings approved); and it is reinforced by our decisions in Moseley v. Lee, 37 Tex. 479 (1872-73), McDonough v. Jefferson County, 79 Tex. 535, 15 S.W. 490 (1891) and Carleton v. Lombardi, 81 Tex. 355, 16 S.W. 1081 (1891).

Parker v. Newberry involved a plea of limitation under the five-year statute and was decided in 1892. It was the first case in which this Court met squarely the issue of whether a volunary quitclaim deed would qualify as a deed within the contemplation of the five-year statute. There had been prior cases in which the Court had said or indicated that such a deed would qualify. In Moseley v. Lee, 37 Tex. 479 (1872-73), the defendant in a trespass to try title case held under a quitclaim deed. The Court held that he could not assert rights as a purchaser in good faith, but that had the limitation statute not been suspended during the War between the States, 'abundant time (elapsed) to give appellee a perfect title under the five years' limitation, by virtue of his deed and continuous possession.' In McDonough v. Jefferson County, 79 Tex. 535,

660 *660 15 S.W. 490 (1891), certain of the defendants in a trespass to try title suit who held under a quitclaim deed pleaded the five-year statute of limitation and made proof of possession and payment of taxes for five years. The trial court's judgment ran in their favor. The plaintiffs sought a reversal of the judgment on the ground that admission of the deed in evidence was error. In ruling on the question, the Court said: 'That deed is in form a quitclaim deed, and it is contended that it is not for that reason a deed under which title can be acquired by limitation. We think that under the facts of this case the objection to its introduction in evidence was properly overruled.' In making the ruling the Court must have regarded the quitclaim deed as qualifying as a deed under the statute, else it would not have held it admissible in evidence to establish the defendants' title. The same holding is implicit in Carleton v. Lombardi, 81 Tex. 355, 16 S.W. 1081 (1891), in which one holding under a quitclaim deed urged defenses of innocent purchaser and the five-years' statute of limitation. The Court dealt with the defenses separately. It held that the quitclaim character of the deed was not changed by the recitation of a valuable cash consideration and that, therefore, the defense of innocent purchaser must fail. The same holding would have been sufficient to defeat the limitation plea if the Court had believed that a quitclaim deed did not qualify under the statute. But the Court rested its conclusion that the limitation defense could not be sustained on the ground that the deed had not been registered as required by the five-year statute.

In Parker v. Newberry the instrument under which claim was made purported to convey several tracts of land, including a 320-acre tract, and contained the usual habendum clause. The warranty clause read as follows:

> "And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said D. L. Newberry-save and except as to the J. P. Smith 320 acre survey to which I only make a quitclaim deed, and for the consideration of $1 per acre-his heirs and assigns against any person whomsoever lawfully claiming or to claim the same or any part thereof.'

Parker, the appellant, asserted in this Court that the parenthetical statement in the warranty clause converted the instrument into a mere quitclaim deed to the 320 acre tract, and that a quitclaim deed would not support Newberry's claim under the five-year statute. Newberry, the appellee, argued that the statement only modified the warranty, and that it was unnecessary to decide whether a quitclaim deed would support his limitation claim. The Court did not resolve the controversy over whether the parenthetical statement modified the entire instrument as to the 320-acre tract, converting it into a quitclaim deed, or modified only the warranty. Instead, the Court dealt with the problem in the following manner:

> "The first question raised has reference to the sufficiency of the conveyance under which Newberry claims to support his plea of limitation, and the sufficiency also of his possession. There are other questions raised which will be considered in the order presented. Recurring to the first mentioned, we think that the rule that a purchaser, who takes only such interest as is conveyed by a quitclaim deed technically, cannot, under that character of conveyance, be protected as a purchaser in good faith, etc., has no application where such deed is made the basis of the five-years plea of limitation. * * * The character of the instrument would be unimportant if it be valid, and not void, as a conveyance, and belongs to that class of written instruments. The essential requisites

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> of a deed necessary as the foundation of the plea are that it shall by its own terms, or with such aids as the law authorizes, assume or purport to operate as a conveyance. Wofford v. MaKinna, 23 Tex. 46. '

The necessary effect of the Court's opinion was to assume that the instrument was a quitclaim deed to the 320 acres, and, on that basis, to hold that it as sufficient to support the plea. Otherwise, there was that basis, to hold that it was sufficient with the sufficiency of a quitclaim deed to support the plea; the question could have been disposed of by a simple holding that the parenthetical statement did not convert the instrument into a quitclaim deed as to the 320-acre tract, but only modified the warranty.

The majority opinion brushes aside Parker v. Newberry with the statement that the words 'right, title and interest' did not appear in the deed, and the further statement that all the Court held was that use of 'the word 'quitclaim' in a clause releasing a 320-acre tract from the warranty clause did not render the instrument of conveyance ineligible under the five-year statute.' I suggest that this short-handed disposition of Parker v. Newberry does not do justice to the record or to the carefully worded opinion in the case. It is true that the words 'right, title and interest' do not appear in the deed, but the parenthetical statement is that the grantor 'only make(s) a quitclaim deed' to the 320-acre tract. Considering that a quitclaim deed is a 'right, title and interest' deed, as the majority opinion recognizes, the statement is subject to no interpretation other than that as to the 320-acre tract the grantor 'only make(s) a right, title and interest deed.' Moreover, the Court did not make the holding attributed by the majority. The attributed holding assumes, or now decides, that the parenthetical statement modified only the warranty as to the 320-acre tract rather than the deed as a whole, a question directly posed but neither decided nor assumed by the Court in 1892.

It would seem that the carefully worded opinion in Parker v. Newberry should have settled the question of whether a quitclaim deed qualifies as a deed under the five-year statute. It differentiated between the sufficiency of a quitclaim deed as a muniment of title and as a deed for five-year limitation purposes. It declared that for five-year

limitation purposes the character of an instrument is unimportant if it is valid as a conveyance and belongs to the conveyance class of instruments. A quitclaim deed belongs to the conveyance class of instruments and, when valid, is a conveyance of such title as the grantor has. The Court knew this when it wrote. Richardson v. Levi, 67 Tex. 359, 3 S.W. 444 (1887). The Court further declared that the essential requisites to qualify a deed under the statute are 'that it shall by its own terms, or with such aids as the law authorizes, assume or purport to operate as a conveyance.' A quitclaim deed has those essential requisites, and the Court knew it. The Court knew, also, that a quitclaim deed purports to convey only the grantor's right, title and interest in land and does not purport to convey the land. So knowing, the Court carefully refrained from declaring that an essential requisite to qualify a deed under the statute was that it purport to convey the land.

But Parker v. Newberry did not put the issue at rest. It was raised again in this Court in Benskin v. Barksdale, Tex.Com.App., 246 S.W. 360 (1923). The history of that case is enlightening and should be an important consideration in our decision of this case.

Miss Barksdale, owner of record title to certain land, sued Benskin in trespass to try title. Benskin was in possession under a deed from Ellis. The instrument was plainly a quitclaim deed on its face. It purported to convey nothing more than Ellis' 'right, title and interest' in and to the land, and provided that when a note *662 executed by Benskin as part consideration and secured by a vendor's lien was paid, 'this deed shall become absolute as a quitclaim deed.' When the deed was executed, Ellis did not own the record title but held a leasehold interest in the land. Benskin pleaded the five-year statute of limitations as a defense to the suit. Judgment in the trial court was for Benskin on an instructed verdict. The Court of Civil Appeals held the instrument to be only a quitclaim deed, and reversed the trial court's judgment and rendered judgment for Miss Barksdale. 194 S.W. 402. That court recognized that this Court had held in Parker v. Newberry, supra, McDonough v. Jefferson County, supra, and Wofford v. McKinna, 23 Tex. 36 (1859), that 'a quitclaim deed will support a claim of five-year limitation,' but concluded on authority of the undivided interest cases that one will support such a claim only to the extent of the interest actually owned by the grantor. This Court granted Benskin's petition for writ of error which asserted that 'the decision of the Court of Civil Appeals on this phase of the case is in direct, express, irreconcilable conflict with the decision of this Court in Parker v. Newberry, 83 Tex. 428, and McDonough v. Jefferson County, 79 Tex. 535.' Citing those very cases and Safford v. Stubbs, 117 Ill. 389, 7 N.E. 653, as authority, this Court held:

> "The deed is sufficient to support adverse possession and to set in motion the five-year statute of limitation. * * * The statute, in so far as a deed is concerned, demands only that the person having peaceable and adverse possession of real estate be 'claiming under a deed or deeds duly registered.' * * * We think the instrument set out above falls within the class designated as deeds.'

Considering the form of the instrument, the holdings of the Court of Civil Appeals, and the foregoing holding of the Commission of Appeals which it supported by citing Parker v. Newberry and McDonough v. Jefferson County, it would seem plain enough that when this Court approved the Commission's holding we held that a quitclaim deed qualifies as a deed under the five-year statute. But the majority does not recognize that as a fact. The majority opinion states:

> "Benskin recognizes * * * that for an instrument to qualify under the five-year statute it must purport to convey the land[2] and not merely the grantor's interest in the land. * * *

2 Emphasis that of the majority.

"* * *

"The Commission held that he wording of the habendum clause converted the instrument into one which purported[fn2] to convey the land itself and not merely the interest which the grantor had therein.'

I have searched the Benskin opinion in vain for the recognition and holding of which the majority speaks. They simply are not to be found in the opinion. Inasmuch as the instrument did not purport to convey the land but only the grantor's right, title and interest in the land and was expressly characterized by the grantor as a quitclaim deed, and inasmuch as the instrument was expressly held by the Court of Civil Appeals to be only a quitclaim deed, it seems unreasonable to conclude that this Court would hold that it purported to convey the land itself in the absence of a statement in the opinion to that effect. The holding which the majority says was made appears to be drawn as a mere inference from the Court's discussion of the granting and habendum clauses of the instrument, which discussion, according to the majority, indicates that the Court, contrary to the rule laid down in our prior holding in Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915), treated the habendum clause as converting the instrument into a deed purporting to convey the
663 land. The *663 record discloses that there is no sound basis for the inference.

The Court was well aware of the holding in Cook v. Smith when it wrote the opinion in Benskin. In holding the deed from Ellis to Benskin to be only a quitclaim deed, the Court of Civil Appeals not only cited Cook v. Smith, but quoted the very language now quoted in the majority opinion for that court's holding that the granting and habendum clauses of the Benskin deed did not change its character from that of a quitclaim deed. It is unreasonable to infer that being thus remined of the holding in Cook v. Smith by the opinion of the Court of Civil Appeals, the Court would either overlook that holding or would make a directly opposite and conflicting holding without mentioning it. It obviously did neither. It must be admitted that the true meaning of the Court's discussion of the granting and habendum clauses of the Ellis-Benskin deed is at first reading less than clear. It can be made clear by relating it to the question with which the Court was dealing in the light of arguments in the briefs of the parties. As stated by the Court in the Benskin opinion, counsel for Miss Barksdale argued that the instrument was only a quitclaim deed and purported to quitclaim only the grantor's right, title and interest in a leasehold estate. Counsel for Benskin argued in his brief that the deed purported to convey not only Benskin's interest in the leasehold estate but also any and all other right, title and interest which Benskin might own in the land. With issue thus joined, the Court sought its solution in the intention of the parties. The Court's discussion of the granting and habendum clauses is, therefore, not at all related to their legal effect on the character of the instrument as a quitclaim deed or a deed conveying land, as in Cook v. Smith, but is related altogether to their legal effect in disclosing the intention of the parties to quitclaim all right, title and interest or a limited right, title and interest. The Court said that if intention of the parties was to be gathered from the granting clause alone it 'might vary from nothing to the full fee' and, inferentially, thus be limited to an intent to convey only a leasehold estate, but that the habendum clause was not so adaptable and pliable and indicated an intent to convey all right, title and interest in the premises which the grantor might own. That this is a correct interpretation of the Court's discussion is made doubly clear by its conclusion immediately following the discussion: 'We do not think the language of the instrument shows an intent merely to quitclaim the leasehold interest of Ellis.' Having thus concluded that the instrument evidenced on its face an intent to convey all right, title and interest in the premises owned by Ellis, the Court

held, in summary fashion as heretofore indicated, that the deed would support the claim under the five-year statute.

It should be apparent from the foregoing analysis of Parker v. Newberry and Benskin v. Barksdale that this Court has on two prior occasions directly decided the question in this case. In both, our decision has been that a quitclaim deed does qualify as a deed within the contemplation of Art. 5509. The majority does not meet the issue of stare decisis. Instead, the majority says, in effect, that had the Court as now constituted decided Parker v. Newberry, it would have held that the parenthetical statement in the warranty clause of the deed there considered did not modify the entire instrument as to the 320-acre tract but only released the tract from the warranty; and that had the Court as now constituted decided Benskin v. Barksdale, it would not have considered whether the parties to the deed intended that it convey only an interest in a leasehold estate or intended that it convey all of his right, title and interest in the premises, but would have held that the instrument purported to convey all of the grantor's right, title and interest in the premises and that it was, 664 therefore, a quitclaim deed. What the *664 majority would then have held is not indicated except by inference from the holding in the case now before us.

I am not a slave to the rule of stare decisis. When passage of time indicates that court-made law results in grave injustice rather than in justice, I am willing to overrule prior decisions. See Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952). No such claim or showing is made here.

The majority's conclusion is reached largely on reasoning that inasmuch as a deed to an undivided interest will not support an adverse claim under the five-year statute to the whole of a tract of land, a deed to an indefinite and unspecified interest should not be held to support a claim under the statute to all or any part of a tract, although the whole of the tract is held adversely and is openly cultivated, used and enjoyed for the requisite period, and taxes are regularly paid thereon. That is precisely the argument which was made by counsel for Miss Barksdale in Benskin v. Barksdale, except that Parker v. Newberry and McDonough v. Jefferson County were recognized and affirmed by him as sound decisions to the extent of the interest actually owned by the grantor. The following is an except from his written argument before this Court:

> "It is clearly the settled holding of our Court that a deed for an undivided interest in land will not under the five year's statute protect the grantee beyond the interest it purports on its face to convey. Martinez vs Bruni, 235 S.W. 551; Clifton vs Creason, 145 S.W. 323; Willis vs Burke, (7 Tex. Civ. App. 239) 27 S.W. 218; Acklin vs Paschall, 48 Tex. 175; Kelly vs Medlin, 26 Tex. 56.
>
> "This line of authorities is clearly conclusive of the case at bar.'

The opinion of the Court of Civil Appeals reflects that it agreed with the argument. This Court did not.

Another reason for the majority's conclusion appears to be that a quitclaim deed does not 'give notice of the nature and extent of the claim asserted thereunder.' That reason was also urged on this Court in Benskin as a basis for rejecting the five-year limitation defense. The following is an except from the written argument of counsel for Miss Barksdale:

> "It ought to be held and definitely settled that where the instrument of conveyance is only a pure quit claim, as that term is technically employed, and is not on its face a quit claim to the land itself but only purports to quit claim such interest as the grantor then had and no more, it is not sufficient to warrant prescription under the 5 year's statute, for the fundamental reason that it does not give notice that the land itself, that is the true owner's title to the land, is sought to be passed or described.'

The argument, rejected then, is accepted now. Thus the ultimate effect of our treatment of Benskin v. Barksdale is only that we think the Court should have decided the case differently. This is the usual and customary situation in which the rule of stare decisis applies. But instead of honoring the rule of stare decisis and being guided by our own prior decisions, the majority rejects those decisions through misinterpretation and approves as correctly deciding the question the no-writ-history case of Jackson v. Heath, Tex.Civ.App., 325 S.W.2d 453 (1959).

TAX DEEDS

A tax deed is a 'right, title and interest' deed, pure and simple. It does not purport to convey land. It is a quitclaim deed, nothing more. Like voluntary quitclaim deeds, see Threadgill v. Bickerstaff, 87 Tex. 520, 29 S.W. 757 (1895), a tax deed will not support a defense of innocent purchaser. See Sanchez v. Hillyer-Deutsch-Jarratt Co., Tex.Civ.App., 27 S.W.2d 634 (1930), writ refused.
665 Compare: Woodward v. Ortiz, *665 150 Tex. 75, 237 S.W.2d 286 (1951). In this area of the law the two types of instruments are the same character of conveyances and have the same operative legal effect — they are quitclaim deeds. This stands unchallenged by the majority. Under the holdings in Parker v. Newberry and Benskin v. Barksdale, the two types of instruments are also the same character of conveyances and have the same operative legal effect for five-year limitation purposes; they are still quitclaim deeds, but both qualify as 'deeds' within the contemplation of Art. 5509. Their character thus remains consistent. Not so under the holding of the majority in this case. The majority concedes that a tax deed qualifies as a 'deed' under Art. 5509. The concession must be made or a long line of decisions, beginning with Wofford v. McKinna, Kinna, 23 Tex. 36 (1859), must be overruled. In order to honor that long line of decisions and yet hold that a voluntary quitclaim deed will not qualify under the statute, the majority declares that for limitation purposes a tax deed is not a quitclaim deed. Cited as authority for thus turning a tax deed into a Jekyll-Hyde instrument is Wofford v. McKinna, supra, and Seemuller v. Thornton, 77 Tex. 156, 13 S.W. 846 (1890).

Wofford v. McKinna does not support the conclusion. The Court did not hold that a tax deed qualified under the statute because the officer purported to convey the title of the true owner. But the Court did announce a rule for determining whether a deed would qualify. The Court said that for an instrument to qualify under the five-year statute, it must be

> "an instrument, by its own terms, or with such aid as the law requires, assuming or purporting to operate as a conveyance: not that it shall proceed from a party having title, or must actually convey title to the land; but it must have all the constituent parts, tested by itself, of a good and perfect deed."

The holding in the case was that the description of the land was so indefinite as to render the deed void as a conveyance. The deed fulfilled the requirement that it purport to operate as a conveyance, but it did not fulfill the requirement that it have all the constituent parts of a good deed. This Court had an early opportunity in Parker v. Newberry, heretofore discussed, to distinguish Wofford v. McKinna on the very ground here attempted by the majority. The Court could have said that the rule of Wofford did not

apply because the deed there was a tax deed and the deed in Parker was a voluntary quitclaim deed. Instead of doing so, the rule announced in Wofford v. McKinna was adopted and applied to a voluntary quitclaim deed.

Neither is anything said in Seemuller v. Thornton which indicates that the Court was distinguishing between tax deeds and voluntary quitclaim deeds. The Court did state in that case, as the majority points out, that the tax deed at issue 'was in form a deed professing to convey the land,' but the record in the case reveals that its character as a conveyance was not under attack and that it was in fact a 'right, title and interest' deed. Parker v. Newberry was decided just two years after Seemuller v. Thornton by a Court composed of the same three Justices. Wofford v. McKinna was the only authority cited in support of the conclusion reached in both cases. It taxes credulity to suggest that the three Justices-Stayton, Gaines and Henry-would so soon have forgotten that the Court had made a distinction between the two types of deeds in Seemuller v. Thornton. It thus appears that what the Court joined together in 1892, it has now put asunder after seventy-three years of marriage; and contrary to the settled rule, the divorce has been granted on grounds which existed, unhidden, when the marriage ceremony was performed.

ON THE MERITS

I recognize that there are conflicting decisions of the Courts of Civil Appeals on the question in issue, and that arguments of some cogency can be
666 made on both *666 sides of the question. See 9 Baylor Law Review 338. All prior decisions of this Court which have dealt with the question, either directly or indirectly, point to a conclusion that a quitclaim deed does qualify as a deed under Art. 5509.[3] All of the arguments now advanced by the majority for holding that one does not qualify were advanced and rejected in Benskin v. Barksdale. They were rejected there because the Court regarded the question as foreclosed by Parker v. Newberry and McDonough v. Jefferson County. There is also sound reason for rejecting them now.

[3] The conclusion is approved by Professor Lennart v. Larson in 18 Southwestern Law Journal 385, 395.

Art. 5509 does not declare what conveyances are referred to therein as 'deeds.' In 1859 this Court said in Wofford v. McKinna that in enacting the statute the Legislature intended by the use of the word 'deed' to refer to any valid instrument which purported to operate as a conveyance and had all of the constituent parts of a good deed. That interpretation was reaffirmed by this Court in 1892 in Parker v. Newberry. The meaning of the word 'deed' cannot have changed in the meantime. A voluntary quitclaim deed, otherwise valid, meets the test laid down. It purports to operate as a conveyance. It has all the constituent parts of a good deed-it is in writing, has a grantor and grantee, describes the premises, contains words of conveyance, and is signed by the grantor. Meeting those requirements, an instrument is made valid as a conveyance by Art. 1288.

But what of the lack of notice to the true owner of which the majority speaks? Aside from the fact that this reason for holding that a quitclaim deed does not qualify was rejected in Benskin v. Barksdale, there is sound reason for saying that a quitclaim deed gives ample notice. In Kilpatrick v. Sisneros, 23 Tex. 113, 136, this Court declared that 'The object of the statute, in prescribing registry of the deed, as necessary to enable the possessor to avail himself of the five years' limitation, is, to give notice to the owner that the defendant in possession is claiming under the deed.' It is the possession, use and enjoyment of the premises by an apparent stranger, not the record of a deed, which alerts the true owner to the need for action lest he lose his title to the land. He knows that under the statute he can lose his title in five years if the one in possession is paying the taxes on the land and is claiming right of possession under a deed. When he investigates the

records, he finds that the one in possession is paying the taxes as they become due and has registered a deed, albeit a quitclaim deed. While the exact nature and extent of the interest claimed by the possessor is not evident from the deed, as a purdent landowner he should know that the deed would not have been registered by one claiming no title, 9 Baylor Law Review 344, and that the possessor may be claiming the greatest interest which he can acquire under the statute — the entire fee title. If an inquiry of the possessor as to the nature and extent of the interest claimed fails to yield a satisfactory answer, simple diligence should dictate the filing of suit to interrupt the running of the statute.

Under the holding of the majority in this case, one in possession of land who is regularly paying the taxes thereon and is claiming under a quitclaim deed enjoys no more favorable position under the laws of limitation than a naked trespasser who pays no taxes and has registered no instrument of conveyance. I do not believe this was the intent of those laws.

I would affirm the judgments of the courts below.

GRIFFIN and WALKER, JJ., join in this dissent.

667 *667

No. C-1297
Supreme Court of Texas

Roskey v. Texas Health Facilities Com'n

639 S.W.2d 302 (Tex. 1982)
Decided Oct 13, 1982

No. C-1297.

July 21, 1982. Rehearing Denied October 13, 1982.

Appeal from the District Court No. 200, Travis County, Lowry, J.

Wood, Lucksinger Epsetin, William D. Darling, Austin, for petitioner.

Mark White, Atty. Gen., Nancy Lynch, Asst. Atty. Gen., Davis Davis, Fred E. Davis, Austin, for respondents.

PER CURIAM.

This is an appeal from a summary judgment. O. V. Roskey, for himself and as agent for the Burleson County Taxpayers Grievance Committee, sued the Texas Health Facilities Commission, the Burleson County Hospital District and Thomas L. Goodnight Memorial Hospital, Inc., seeking a declaratory judgment that an exemption certificate issued by the Commission was void. The certificate was issued pursuant to section 3.02(a)(4) of the Health Planning and Development Act[1] and authorized the Hospital District to construct a new hospital in order to bring the District's health facilities into compliance with federal and state law. The Hospital District applied for the certificate on April 27, 1979, and the certificate was issued on July 26, 1979. During the interim, section 3.02(a)(4) was repealed, effective May 17. Roskey contends the certificate is void because it was issued after section 3.02(a)(4) was repealed. All three defendants moved for summary judgment on grounds that Roskey and the taxpayers had no standing and had not exhausted their administrative remedies. The trial court sustained the motion for summary judgment on both grounds and dismissed the cause with prejudice. The court of appeals affirmed the judgment of the trial court only on the ground that
303 the taxpayers lacked standing. *303

[1] Tex.Rev.Civ.Stat.Ann. art. 4418h.

In their petition, the plaintiffs alleged they were all taxpaying residents of the Hospital District and that the construction of a new hospital would result in higher taxes. The court of appeals, 630 S.W.2d 844, affirmed the summary judgment, noting there was no summary judgment proof that the District had taken any step toward increasing taxes. The court of appeals improperly placed on the nonmoving taxpayers the burden of proving standing. The movant has the burden of proving as a matter of law his entitlement to summary judgment. Tex.R.Civ.Pro. 166-A; *Missouri-Kansas-Texas Railroad Company v. City of Dallas,* 623 S.W.2d 296 (Tex. 1981); *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex. 1979). The defendants, the movants, produced no summary judgment proof to show that the taxpayers did not have standing.

The defendants contend we should affirm the court of appeals' judgment on the exhaustion of remedies ground. Here also, the defendants failed to produce any summary judgment proof that the taxpayers failed to exhaust their administrative remedies.

The opinion of the court of appeals conflicts with Tex.R.Civ.Pro. 166-A and the opinions of this Court in *Missouri-Kansas-Texas Railroad Company v. City of Dallas, supra,* and *City of Houston v. Clear Creek Basin Authority, supra.* Therefore, pursuant to Tex.R.Civ.Pro. 483 and without hearing oral argument, we reverse the judgment of the court of appeals and remand the cause to the trial court.

No. 06-02-00022-CV
Court of Appeals of Texas, Sixth District, Texarkana

West Trinity v. Chase Manhattan

92 S.W.3d 866 (Tex. App. 2002)
Decided Dec 13, 2002

No. 06-02-00022-CV.

Date Submitted: July 15, 2002.

Date Decided: December 13, 2002.

Appeal from the 191st Judicial District Court, Dallas County, Texas, Trial Court No. 00-08517-J.

867 *867

Rodney L. Hubbard, Law Office of Michael R. Boling, Dallas, for appellant.

Wm. Lance Lewis, Christine D. Roseveare, Lori J. Lamoreaux, Strasburger Price, LLP, Dallas, for appellee.

Before GRANT, ROSS, and CORNELIUS,– JJ.

– William J. Cornelius, C.J., Retired, Sitting by Assignment.

OPINION

WILLIAM J. CORNELIUS, Justice (Retired).

This case involves the priority of liens against residential real estate. Chase Manhattan Mortgage Corporation was awarded summary judgment in the trial court, and West Trinity Properties, Ltd. appeals. We affirm the judgment.

The summary judgment evidence is undisputed. On April 25, 1997, Franklin D. Brooks purchased a house and lot in the Greene Addition of Duncanville and executed and delivered a purchase money note in the principal sum of $89,264.00 to Sun West Mortgage Company. Both Franklin Brooks and his wife, Mildred Brooks, signed a deed of trust securing the note. The note and deed of trust lien securing it were later assigned to Chase. On January 25, 1999, the Greene Home Owners Association (Greene) obtained a judgment lien against the Brookses in the amount of $4,051.61 for past dues owed by the Brookses. In June of 1999, the Brookses stopped making payments to Chase on the promissory note. In October of 1999, Chase notified the Brookses that the promissory note was in default. Two weeks later, Mildred Brooks filed for bankruptcy. According to an affidavit attached to Chase's motion for summary judgment, Chase did not receive notice of Mildred Brooks' pending bankruptcy. On November 12, 1999, Chase notified the Brookses by certified mail of a foreclosure sale on the property scheduled for December 7, 1999. On November 30, 1999, the bankruptcy court dismissed Mildred Brooks' bankruptcy action. James C. Frappier, substitute trustee under Chase's deed of trust, conducted the scheduled nonjudicial foreclosure sale on December 7, 1999. Chase purchased the property at the foreclosure sale and recorded its deed on December 13, 1999.

Three months later, on March 7, 2000, Greene caused the sheriff to conduct a foreclosure sale of the Brooks property to enforce the lien created by the January 1999 judgment it had obtained against the Brookses. At this sale, West Trinity purchased the property for $9,000.00 and obtained a sheriff's deed purporting to convey the Brookses' interest in the property. On August 31, 2000, nine months
868 after *868 Chase's foreclosure sale, Chase attempted to reopen Mildred Brooks' November

1999 bankruptcy case by filing both a motion to reinstate for a limited purpose and a motion for relief from stay. The bankruptcy court dismissed the motions without prejudice and ordered that the validity of the December 7, 1999, sale be resolved by a state court. On November 17, 2000, without seeking a state court's determination of the validity of the original foreclosure sale, Chase and its substitute trustee, Frappier, rescinded and canceled the December 7, 1999, foreclosure sale.

Franklin and Mildred Brooks filed this suit on October 23, 2000, naming West Trinity, Greene, and Chase as defendants. West Trinity cross-claimed against Chase seeking: 1) a declaration that West Trinity has title to the property free and clear of any interest asserted by Chase, 2) removal of the cloud on its title created by Chase's lien, 3) damages for negligence in Chase's foreclosure sale, and 4) an injunction against Chase's foreclosing on the property. The trial court granted summary judgment against West Trinity and in favor of Chase on all grounds, concluding that Chase's lien is superior to West Trinity's interest in the property. In addition, the court dismissed all the Brookses' claims, granted West Trinity a money judgment against the Brookses, and rendered a final judgment incorporating the summary judgment order and held that the foreclosure sale on March 7, 2000, at which West Trinity was the successful buyer, was valid. The effect of the court's judgment is that West Trinity takes the property subject to Chase's prior lien.

Summary judgment under Tex.R.Civ.P. 166a provides a method of terminating a case when it clearly appears that only a question of law is involved and there is no genuine material fact issue. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *see* Tex.R.Civ.P. 166a(c). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d at 223. The nonmovant has the burden to respond to a summary judgment motion only if the movant conclusively establishes its cause of action or defense. *Id*. at 222-23 (citing *Oram v. Gen. Am. Oil Co.*, 513 S.W.2d 533, 534 (Tex. 1974)). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *Id.* at 223 (citing *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)).

Summary judgments must stand on their own merits. *See M. D. Anderson Hosp. Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *Id.*; *see Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). We indulge every reasonable inference and resolve any doubt in the nonmovant's favor. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d at 911. On appeal, the movant still bears the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See M. D. Anderson Hosp. Tumor Inst. v. Willrich*, 28 S.W.3d at 23-24.

In its motion for summary judgment and again on appeal, Chase asserts that, under any conceivable application of the law, it has a superior lien on the property and, therefore, West Trinity's cross-claims fail as a matter of law. On appeal, West Trinity challenges this assertion by raising two different fact issues: 1) whether Chase's December 7, 1999, foreclosure sale was valid, and 2) whether
869 the *869 rescission of the substitute trustee's sale on November 17, 2000, was effective. First, we must determine whether the fact issues West Trinity raises are genuine issues of material fact. If they are not, summary judgment was proper.

The mere existence of a fact question cannot preclude summary judgment; the fact must be material to the claims for which summary judgment is sought. *See Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex.App.-Houston [14th Dist.] 1999, no pet.) (citing *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A fact is "material" only if it affects the outcome of the suit under the governing law. *Id.*

Here, Chase contends that the fact issues presented by West Trinity are not genuine issues of material fact. We agree.

Chase produced summary judgment evidence showing it possessed a valid first mortgage lien on the property owned by the Brookses. This lien was secured by a deed of trust recorded in May 1997. The summary judgment evidence also shows that West Trinity's interest in the property, if any, derives from its purchase at the March 7, 1999, sheriff's sale based on the foreclosure of Greene's judgment lien. Without proof to the contrary, a judgment lien is junior and subject to all equities in existence at the time of the judgment. *See Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled in part on other grounds by Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991).

West Trinity presented no summary judgment evidence to refute Greene's junior lien status. All that West Trinity offers is an unsupported allegation that the Brookses purchased the property "subject to The Greene Homeowners Association's lien for assessments and other approved fees as reflected in the Declaration of Covenants recorded in the Real Property Records of Dallas County, Texas." West Trinity, however, did not make the alleged declaration of covenants a part of the summary judgment evidence, and it is not part of the record before us. Nor is there any summary judgment evidence supporting the proposition that Chase's original lien was ever subject to any other liens or interests. Issues not expressly presented to the trial court may not be considered on appeal as grounds for reversal of a summary judgment. *See Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 458 (Tex.App.-Houston [14th Dist.] 2000, pet. denied); *see also Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979). It is not our prerogative to speculate on the contents of an allegedly pre-existing declaration of covenants, or even whether one actually exists. Absent evidence to the contrary, Chase has shown that its lien is superior to Greene's judgment lien as a matter of law.

Because Chase possessed a superior lien, neither of the fact issues West Trinity presents in this appeal affects Chase's superior interest in the property. Thus, West Trinity has not presented a material fact issue. Regardless of whether the December 7, 1999, foreclosure sale was valid, void, or voidable, and whether the November 2000 rescission was valid, West Trinity's interest in the property, if any, is still subordinate to that of Chase.

A valid December 7, 1999, nonjudicial foreclosure sale, as West Trinity urges us to recognize, would extinguish all junior liens, including Greene's judgment lien. *See Houston Inv. Bankers Corp. v. First City Bank*, 640 S.W.2d 660 (Tex.App.-Houston [14th Dist.] 1982, no writ); *Farm Home*
870 *Sav. Loan Ass'n v. Muhl*, *870 37 S.W.2d 316 (Tex.Civ.App. Waco 1931, writ ref'd). Chase would have title to the land free and clear of any junior liens or interest. Under this scenario, the sheriff's sale could not have passed good title to West Trinity at the March 7, 2000, foreclosure sale. West Trinity could have obtained only what title the Brookses had to convey. *See Allied First Nat'l Bank v. Jones*, 766 S.W.2d 800 (Tex.App.-Dallas 1988, no writ); *see also* Tex. Civ. Prac. Rem. Code Ann. § 34.045(a) (Vernon 1997).

A voidable sale would have the same effect. In Texas, a voidable foreclosure sale, unlike a void sale, is treated as valid until it is set aside, and acts to pass the debtor's title to the purchaser. *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.). The Brookses took no action to set aside the December 7, 1999, sale. Therefore, as a result of the December 7, 1999, sale, Chase would have

had clear title to the property on March 7, 2000, when the sheriff purported to sell it under the Greene judgment lien, so the Brookses would have possessed no title to convey and could not have passed title under the Greene foreclosure to West Trinity. *See Allied First Nat'l Bank v. Jones*, 766 S.W.2d at 804. Under a voidable sale scenario, Chase's interest would still be superior.

Finally, a void December 7, 1999, sale, as is consistent with the trial court's final judgment, would result in Chase retaining its first lien on the property. The effect of this is that all subsequent purchasers would then take title subject to Chase's lien. *See Mercer v. Bludworth*, 715 S.W.2d at 697-98. This was the result of the trial court's final judgment.

Under any theory, West Trinity does not have a superior claim against Chase. Therefore, the trial court did not err in granting summary judgment. Having found summary judgment proper, we do not need to decide the ancillary issues that West Trinity raises regarding the effect of Mildred Brooks' bankruptcy.

For the reasons stated, we affirm the judgment.

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