**Reversed and Remanded and Opinion Filed November 7, 2022**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

---

**No. 05-21-00598-CV**

---

**SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA), AS ASSIGNEE OF 8,794 OF ITS MEMBER PILOTS, Appellant**
**V.**
**THE BOEING COMPANY, Appellee**

---

**On Appeal from the 160th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-21-03072**

---

# MEMORANDUM OPINION

Before Justices Myers, Pedersen, III, and Garcia
Opinion by Justice Myers

Southwest Airlines Pilots Association (SWAPA) appeals the dismissal of its claims against The Boeing Company. SWAPA brings two issues on appeal contending (1) the trial court erred in granting Boeing's motion to dismiss under Rule of Civil Procedure 91a based on the affirmative defense of res judicata, and (2) the trial court should have sustained SWAPA's objection to Boeing's untimely filing of the Rule 91a motion to dismiss. We conclude Boeing's motion to dismiss was not untimely but that the trial court erred by granting the motion to dismiss, and we reverse the trial court's judgment.

## BACKGROUND

SWAPA is a non-profit labor organization and employee association that represents over 9,000 Southwest Airlines pilots. Acting in its representative capacity, SWAPA enters into collective bargaining agreements ("CBAs") with Southwest Airlines. The CBAs define employment terms, including pay, benefits, working conditions, and the approved aircraft that the pilots agree to fly. Southwest pilots pay SWAPA a percentage of their wages as dues.

In 2016, SWAPA entered into a CBA in which SWAPA agreed that its members would operate Boeing's 737 MAX aircraft. In 2018 and 2019, the 737 MAX was involved in catastrophic crashes and as a result, the 737 MAX fleet was grounded worldwide.

In October, 2019, SWAPA filed suit against Boeing on behalf of itself and its members. The petition alleged that SWAPA sought damages on behalf of itself and its pilots "who have collectively lost, and are continuing to lose, millions of dollars in compensation as a result of Boeing's false representations concerning its 737 MAX aircraft, namely that the 737 MAX was safe, airworthy, and was essentially the same as the time-tested 737 aircraft that SWAPA pilots were already flying." SWAPA asserted Texas common law claims for fraudulent and negligent misrepresentation, tortious interference with contract and with an existing business relationship, negligence, and fraud by nondisclosure. SWAPA sought compensation for its member pilots in connection with cancelled or reduced flights following the

grounding of the 737 MAX. SWAPA also sought damages on its own behalf for lost dues from its members and for legal fees incurred in connection with government investigations of the 737 MAX. Boeing filed a plea to the jurisdiction asserting SWAPA lacked standing to bring claims on behalf of its members and that SWAPA's claims were preempted by the federal Railway Labor Act. During the proceedings, SWAPA obtained assignments from some of the member pilots and asserted it had standing as their assignee. Boeing objected that the assignments were void as against public policy. The trial court granted Boeing's plea to the jurisdiction and dismissed SWAPA's case with prejudice. SWAPA appealed the dismissal to this Court. *See Sw. Airlines Pilots Ass'n v. Boeing Co.*, No. 05-20-01067-CV, 2022 WL 951027 (Tex. App.—Dallas Mar. 30, 2022, pet. filed) (*SWAPA I*).

While the appeal of *SWAPA I* was pending, SWAPA obtained assignments from most of its member pilots of their claims against Boeing related to the 737 MAX. In 2021, SWAPA filed this suit against Boeing. The 2021 suit is similar to the 2019 lawsuit. However, SWAPA sued "as assignee of 8,794 of its pilot Members" and not "on behalf of itself and its members" as it had in the 2019 lawsuit. The 2021 lawsuit also omitted SWAPA's claims on its own behalf for lost dues and legal fees that it had alleged in the 2019 lawsuit.

Boeing filed an answer asserting the 2021 lawsuit was barred by res judicata. Boeing attached as exhibits to its answer copies of SWAPA's petition in the 2019 lawsuit and the trial court's order granting Boeing's plea to the jurisdiction and

dismissing SWAPA's suit with prejudice. Boeing then filed a motion to dismiss under Rule 91a, asserting SWAPA's 2021 lawsuit had no basis in law because it was barred by res judicata. The trial court granted Boeing's motion to dismiss and dismissed SWAPA's suit. SWAPA appeals the dismissal under Rule 91a.

While the appeal of the Rule 91a dismissal of the 2021 lawsuit has been pending, this Court decided the appeal of the 2019 lawsuit. We determined that SWAPA lacked associational standing to bring claims on behalf of its members and that the post-petition assignments from its members could not give SWAPA standing because jurisdiction is determined at the time suit is filed. *SWAPA I*, 2022 WL 951027, at *6. However, we observed, "the Assignments might confer standing on SWAPA in the future." *Id.* at *8. We concluded SWAPA had standing to bring claims on its own behalf. We also held the claims were not preempted by the Railway Labor Act, *id.* at *13, and that assignments from the pilots were not against public policy, *id.* at *8. We held the trial court erred by granting the plea to the jurisdiction on SWAPA's claims brought on its own behalf, and we rendered judgment changing the disposition of the other claims to "dismissed without prejudice."[1] *Id.* at *13.

---

[1] Boeing has filed a petition for review of the 2019 lawsuit with the Supreme Court of Texas. As of the date of this opinion, the supreme court has not yet ruled on the petition for review. Boeing has filed a motion requesting that we abate this case until the supreme court either denies the petition for review or grants the petition and renders an opinion and judgment. Because we conclude the trial court erred by granting the Rule 91a motion to dismiss without regard to the merits of the issues in *SWAPA I*, we deny Boeing's motion to abate this appeal.

## RULE OF CIVIL PROCEDURE 91A

Texas Rule of Civil Procedure 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* In ruling on a Rule 91a motion, a court "may not consider evidence . . . and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." *Id.* 91a.6; *see also* TEX. GOV'T CODE ANN. § 22.004(g) ("The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss."). The motion to dismiss must be filed within sixty days after the pleading containing the challenged cause of action is served on the movant. *Id.* 91a.3(a). We review de novo a trial court's ruling on a Rule 91a motion to dismiss. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020).

## Timeliness of the Motion to Dismiss

In its second issue, SWAPA contends the trial court erred by overruling its objection to the timeliness of Boeing's motion to dismiss. Boeing had to file its motion to dismiss within sixty days of being served SWAPA's petition. *See* TEX. R.

Civ. P. 91a.3(a). Boeing was served the petition on March 15, 2021. The sixtieth day following March 15, 2021, was May 14, 2021. Boeing filed a motion to dismiss under Rule 91a on May 14, 2021. However, that motion to dismiss listed the cause number for the 2019 suit, not the 2021 suit. After filing the motion and serving it on SWAPA, Boeing's counsel discussed with SWAPA's counsel scheduling for the motion; SWAPA's counsel did not mention the fact that the motion had the incorrect cause number. On May 20, 2021, when Boeing's counsel contacted the trial court's court coordinator to schedule the hearing, the court coordinator asked Boeing to re-file the motion with the correct cause number. Boeing's attorney stated that was the first time she became aware of an issue with the cause number. On May 25, 2021, Boeing filed its "Corrected Motion to Dismiss Pursuant to Tex. R. Civ. P. 91a." That filing was seventy-one days after Boeing was served with the original petition.

SWAPA objected to the motion to dismiss as being untimely because it was filed seventy-one days after Boeing was served with the petition, but the trial court denied the objection and granted the motion to dismiss. SWAPA argues in its appellate briefing that the trial court erred by granting the motion to dismiss because it was not filed timely.

After the parties briefed the appeal in this case, the supreme court issued its opinion in *Mitschke v. Borromeo*, 645 S.W.3d 251 (Tex. 2022). In *Mitschke*, the supreme court held that a motion for new trial filed within thirty days of the judgment

but that listed the wrong cause number was timely filed and that the error of filing the motion with the wrong cause number should be overlooked in favor of finding appellate jurisdiction. *Id.* at 262–63; *see* TEX. R. APP. P. 26.1(a). The court observed, "Nothing suggests that the misfiling was done from trickery or to mislead anyone, and respondents have presented no argument about how Mitschke's filing the motion in the original docket number could have prejudiced them. It seems implausible that prejudice was even possible under these facts." *Id.* at 263. The court held, "when a party timely attacks an order that grants a final judgment and then files a notice of appeal that is otherwise timely, the court of appeals must deem the appeal to have been timely perfected despite a non-prejudicial procedural defect." The court stated that it was not addressing the situation where a party's misfiling was done with the purpose of causing litigation harm to the other side. *Id.* at 256 n.27.

At submission of this case, SWAPA's counsel brought *Mitschke* to this Court's attention. Counsel told the Court that Boeing's filing the motion to dismiss was not done with the purpose of causing litigation harm. *See id.* SWAPA's counsel also stated that "*Mitschke* is a head shot for us," which we interpret to mean the case is controlling authority contrary to SWAPA's argument that Boeing's motion to dismiss was untimely. Boeing's counsel agreed. We also agree that under these facts, *Mitschke* should apply in this situation and that Boeing's timely filing of its motion to dismiss with the incorrect cause number should not render the motion to

dismiss untimely. The record contains no evidence that SWAPA was prejudiced by the timely filing of the motion with the wrong cause number. We conclude the trial court did not err by denying SWAPA's objection to the timeliness of the motion to dismiss. Although only the "Corrected" motion to dismiss is before us, SWAPA does not assert that the original and the corrected motions to dismiss are substantively different. We overrule SWAPA's second issue.[2]

**Dismissal for Res Judicata**

In its first issue, SWAPA contends the trial court erred by granting Boeing's motion to dismiss on the ground of res judicata.

*Standard of Review*

When a defendant alleges an affirmative defense as the basis for a motion to dismiss under Rule 91a, the court may examine the defendant's answer to determine whether the defense is properly before the court. *Bethel*, 595 S.W.3d at 656. However, in determining whether sufficient facts support an affirmative defense demonstrating that a cause of action "has no basis in law," the court may consider only the plaintiff's petition "together with any pleading exhibits permitted by Rule

---

[2] Rule 91a.3(c) states, "A motion to dismiss must be . . . granted or denied within 45 days after the motion is filed." TEX. R. APP. P. 91a.3(c). In this case, the trial court granted the motion to dismiss 47 days after the May 14, 2021 original motion to dismiss was filed but 36 days after Boeing filed the May 25, 2021 corrected motion to dismiss. No party objected to the trial court's ruling as violating the Rule 91a.3(c) 45-day deadline for the court to rule on the motion, nor does any party argue on appeal that the timeliness of the trial court's ruling affects the outcome of the case. Accordingly, we do not consider whether the ruling was timely or, if it was not, the effect of an untimely ruling. A court's failure to decide a Rule 91a motion to dismiss within 45 days is not jurisdictional. *In re Joel Kelley Interests, Inc.*, No. 05-19-00559-CV, 2019 WL 2521725, at *1 (Tex. App.—Dallas June 19, 2019, no pet.) (orig. proceeding).

59.” TEX. R. CIV. P. 91a.6. “Of course, some affirmative defenses will not be conclusively established by the facts in a plaintiff’s petition. Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a motion to dismiss.” *Bethel*, 595 S.W.3d at 656.

Applying *Bethel*, we look to the motion to dismiss to find the grounds for dismissing the action under Rule 91a. *Id.* at 656 (“Both motions and hearings are avenues by which the movant may present legal theories as to why the claimant is not entitled to relief.”). If one of those grounds is an affirmative defense, we look to the answer to determine whether the affirmative defense has been pleaded and was properly before the court. *Id.* (“[A] court may consider the defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court.”). If it was pleaded, then we look to the petition and any exhibits properly attached to the petition to determine whether the allegations in the petition establish the defense and demonstrate that the action has no basis in law. *See Bethel*, 595 S.W.3d at 656; *see also Owings v. Kelly*, 2020 WL 6588610, at *1 (Tex. App.—Amarillo Nov. 10, 2020, no pet.) (*Bethel* indicates “that we return to the plaintiff’s pleading to ultimately decide whether the affirmative defense warrants dismissal. If this were not so, then there would be no reason for the Court to reference the ‘plaintiff’s petition’ in saying that some defenses will not be conclusively established by the facts in it.”).

Boeing disagrees with this interpretation of Rule 91a.6. Under Boeing's interpretation, courts determining whether facts support an affirmative defense should consider any party's pleading and the exhibits attached to any party's pleading:

> The plain language of Rule 91a expressly provides that the trial court may consider the pleadings "together with any pleading exhibits permitted by Rule 59." Tex. R. Civ. P. 91a.6. Rule 59, in turn, provides for the consideration of "all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense." Tex. R. Civ. P. 59. These provisions work together to allow Rule 91a to fulfill its purpose of providing for the "early and speedy resolution of baseless claims." *In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding). After all, "when it is legally impossible for the plaintiff to recover on the claims in the petition, it is unjust to require the defendant to expend the time and money 'enduring eventual reversal of improperly conducted proceedings.'" *In re Shire PLC*, 633 S.W.3d 1, 19 (Tex. App.—Texarkana 2021, no pet.) (quoting *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014, orig. proceeding) (per curiam)).

We disagree that a court deciding a Rule 91a motion to dismiss may consider any party's pleading and exhibits. Nor do we agree with Boeing's argument that not considering other parties' pleadings and exhibits would leave a defendant with no remedy except "eventual reversal of improperly conducted proceedings."

Rule 91a.6 does not provide "that the trial court may consider the pleadings"; the rule provides the court must decide the motion to dismiss "based solely on the pleading of the cause of action," not "the pleadings" generally of any party as Boeing appears to assert. The "cause of action" referred to in Rule 91a is necessarily the plaintiff's (or counterplaintiff's, in the appropriate case) pleading of the legal basis

for the relief sought in the petition. *See Cause of action*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("A group of operative facts giving rise to one or more bases for suing").

We also disagree with Boeing's assertion that a court, in deciding a Rule 91a motion to dismiss, may consider the exhibits attached to any party's pleading. Rule 91a.6 states, "The court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." According to Boeing, the exhibits attached to its answer were "exhibits permitted by Rule 59," so the trial court did not err by considering them.

Rule 59 provides:

> Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes.

TEX. R. CIV. P. 59. Boeing's exhibits to its answer were "records . . . constituting . . . the matter set up in defense," *id.*, namely, res judicata, and Boeing asserts the trial court should be able to consider those records in determining whether SWAPA's petition had no legal or factual basis.

Rule 91a.1 provides directions for determining whether a cause of action is legally or factually without basis: "*A cause of action* has no basis in law if *the*

*allegations*, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *A cause of action* has no basis in fact if no reasonable person could believe *the facts pleaded*." TEX. R. CIV. P. 91a.1 (emphasis added). It is "the allegations" and "the facts pleaded" in the "cause of action" that determine whether the cause of action has a basis in law or fact. Thus, the determination of whether there is a legal or factual basis is made from the face of the petition, not other parties' pleadings. *See Aguilar v. Morales*, 545 S.W.3d 670, 676 (Tex. App.—El Paso 2017, pet. denied) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to survive FED. R. CIV. P. 12(b)(6) motion to dismiss, claims must set forth "enough facts to state claim to relief that is plausible on its face.")). The exhibits attached to another party's pleading may tend to show the plaintiff's pleading is baseless, but Rule 91a does not permit their consideration. The rule requires the determination of baselessness be made from the allegations in the cause of action and the facts pleaded in the cause of action, not from documents extraneous to the petition and presented by other parties. *See* TEX. R. CIV. P. 91a.1, .6; *see also Raider Ranch, LP v. Lugano, Ltd.*, 579 S.W.3d 131, 134 (Tex. App.—Amarillo 2019, no pet.) (party's "seeking to inject its defensive theory into the Rule 91a procedure by means of an exhibit to its answer and motion, finds no support in the text of the rule itself or in the cases").

The standard of review also demonstrates that other parties' exhibits should not be considered. In considering a Rule 91a motion to dismiss, the court does not

consider evidence and accepts the plaintiff's allegations as true. *See id.* 91a.6; *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 581 S.W.3d 306, 309 (Tex. App.—Dallas 2018), *aff'd*, 595 S.W.3d 651 (Tex. 2020). Granting a motion to dismiss based on the exhibits to another party's exhibits would require the court to treat those exhibits as evidence and to accept those documents as true, both of which are contrary to the standard of review. *See San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 830–31 (Tex. App.—Houston [1st Dist.] 2018) (courts may not take judicial notice of information when deciding Rule 91a motions to dismiss because Rule 91a motions must be resolved solely on the pleadings), *aff'd*, 627 S.W.3d 618 (Tex. 2021).

Boeing also argues that denial of a Rule 91a motion to dismiss asserting the affirmative defense of res judicata will unjustly "require the defendant to expend the time and money 'enduring eventual reversal of improperly conducted proceedings.'" (Quoting *In re Shire PLC*, 633 S.W.3d at 19.) We disagree. Res judicata is a common ground for summary judgment, and summary judgment is an appropriate procedure for proving a defense, such as res judicata, that requires proof of facts not alleged in the plaintiff's pleading. *See* TEX. R. CIV. P. 166a(c); *see also, e.g.*, *Alanis v. U.S. Bank Nat'l Ass'n*, No. 04-21-00021-CV, 2022 WL 3907925, at *6 (Tex. App.—San Antonio Aug. 31, 2022, no pet. h.) (mem. op.) (affirming trial court's grant of motion for summary judgment on ground of res judicata); *Caballero v. Wilmington Savs. Fund Soc'y, FSB*, No. 05-19-01054-CV, 2021 WL 3642256, at *1,

5 (Tex. App.—Dallas Aug. 17, 2021, no pet.) (mem. op.) (same); *Womble v. Atkins*, 314 S.W.2d 150, 153 (Tex. App.—Dallas 1958) (same), *aff'd*, 331 S.W.2d 294 (Tex. 1960); *Couch v. Schley*, 297 S.W.2d 228, 229 (Tex. App.—Waco writ dism'd) (same). Res judicata may also establish that a pleading is groundless and brought in bad faith under Rule of Civil Procedure 13. *See* TEX. R. CIV. P. 13; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001, .004; *Schlapper v. Forest*, No. 03-12-00702-CV, 2014 WL 3809753, at *4 (Tex. App.—Austin July 30, 2014, pet. denied); *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 73 (Tex. App.—El Paso 1994, writ denied). Boeing does not explain why the summary judgment procedure or Rule 13 would not provide appropriate, timely relief for its defense or why its filing a motion for summary judgment or motion for sanctions under Rule 13 would unjustly require it to "expend the time and money enduring eventual reversal of improperly conducted proceedings."[3] (Internal quotation marks omitted.) *See Gamma Group, Inc. v. Home State Cty. Mut. Ins. Co.*, 342 S.W.3d 762, 765 (Tex. App.—Dallas 2011, pet. denied) (standard of review for summary judgment in case asserting res judicata; Court affirmed summary judgment); *Campos*, 879 S.W.2d at

---

[3] Whether Boeing would prevail on a motion for summary or Rule 13 motion for sanctions asserted on the ground of res judicata is not before us in this appeal, and we make no determination of the merits of its res judicata defense in this opinion.

73 (on Rule 13 motion for sanctions, "*Res judicata* clearly barred their survival action, and [the case] was groundless as a matter of law.").[4]

*Preservation of Error*

Boeing also argues SWAPA did not preserve its assertion that the trial court could not consider the exhibits to Boeing's answer because SWAPA did not object to Boeing's argument that the trial court could consider the exhibits. *See* TEX. R. APP. P. 33.1(a)(1) (party must object in trial court to preserve error and obtain ruling on objection). SWAPA's response to the motion to dismiss quotes Rule 91a.6 and states: "In ruling on a Rule 91a motion, a court 'may not consider evidence . . . and must decide the motion based solely on the pleading of the cause of action.'" (Citing TEX. R. CIV. P. 91a.6 and *Bethel*, 595 S.W.3d at 654). This statement of the standard of review should have been sufficient to call to the trial court's attention that in determining the applicability of Boeing's defense, the court could not consider evidence nor anything outside SWAPA's petition. SWAPA also stated, "Boeing's Motion is based solely on its affirmative defense unsupported by the pleadings." This assertion notified the trial court that Boeing's motion was not based on the

[4] Boeing also argues that not allowing a trial court to consider the exhibits in other parties' pleadings that purport to establish a defense "would serve only to incentivize plaintiffs to omit references to their own prior filings and burden courts with improperly filed cases that could otherwise be dismissed." As discussed above, procedures exist for defendants to present evidence proving defenses such as res judicata and obtain prompt disposition of a cause of action—a motion for summary judgment and a Rule 13 motion for sanctions.

factual allegations in SWAPA's petition. We conclude SWAPA preserved its argument for appeal.

*Invited Error*

Boeing also argues SWAPA invited the trial court's error of considering the exhibits to Boeing's answer when SWAPA stated in its response to the motion to dismiss: "The Court should analyze the differences between the two Petitions in detail. If it does so, it would discover the many differences between the two."

In support of its argument that the above-quoted statement constituted an invitation to the trial court to make the error SWAPA asserts, Boeing cites this Court's opinion in *Haler v. Boyington Capital Group, Inc.* where we stated, "A party cannot ask something of the trial court and then complain that the court erred by granting the request." 411 S.W.3d 631, 637 (Tex. App.—Dallas 2013, pet. denied). In *Haler*, the trial court submitted a jury question in the form Haler requested, but Haler complained on appeal that the jury's answer should be disregarded because it did not afford a reasonable basis upon which to enter a judgment. *Id.* We stated, "the doctrine of invited error provides that a party may not complain of an error which the party invited. Because Haler requested the language that he now complains about, we do not consider the merits of the alleged error Haler complains of . . . ." *Id.*

The error SWAPA asserts in this case was the trial court's granting the motion to dismiss when the support for the motion to dismiss was contained in the exhibits

to Boeing's answer and not in SWAPA's petition. That error was invited by Boeing, not SWAPA. SWAPA did not request the trial court to grant the motion to dismiss. SWAPA's statement quoted above, in context within its response to Boeing's motion to dismiss, asserted that the exhibits did not support dismissal because comparison of the exhibits with the petition in this case would show there was no unity of parties, no final judgment on the merits in *SWAPA I*, and different causes of action. SWAPA's argument did not invite the trial court to grant the motion to dismiss, which is the error SWAPA complains of on appeal.

*Application of Rule 91a*

We now consider whether the trial court erred by granting Boeing's Rule 91a motion to dismiss on the ground of res judicata. "The party asserting res judicata must prove: (i) a prior final determination on the merits by a court of competent jurisdiction, (ii) identity of parties or those in privity with them, and (iii) a second action based on the same claims as were raised or could have been raised in the first action." *TRO-X, L.P. v. Eagle Oil & Gas Co.*, 608 S.W.3d 1, 11 (Tex. App.—Dallas 2018), *aff'd*, 619 S.W.3d 699 (Tex. 2021).

For Boeing to be entitled under Rule 91a to dismissal of SWAPA's action on the ground that the action lacked a basis in law because of res judicata, SWAPA's petition had to have alleged facts supporting the three elements of res judicata. SWAPA's petition contains no allegation that there was a prior final determination on the merits before a court of competent jurisdiction. SWAPA's petition makes

only one reference to the 2019 suit: "In accordance with Dallas County Local Rule 1.08, SWAPA discloses that this suit is related to cause no. DC-19-16290, styled *Southwest Airlines Pilots Association (SWAPA) on behalf of itself and its members, v. The Boeing Company*, in the 160th District Court, Dallas County, Texas." This allegation shows SWAPA appeared in different capacities in the two suits. *See McNeil Interests, Inc. v. Quisenberry*, 407 S.W.3d 381, 389 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1982))). The allegation shows SWAPA sued Boeing in the 2019 litigation "on behalf of itself and its members," while in this case SWAPA sued Boeing in the capacity of "assignee of 8,794 of its member pilots." Finally, although SWAPA alleged the two lawsuits were "related," its petition does not show the 2021 suit was based on the same claims that were raised or could have been raised in the 2019 action.

Boeing's "seeking to inject its defensive theory into the Rule 91a procedure by means of an exhibit to its answer . . . finds no support in the text of the rule itself or in the cases." *Raider Ranch, LP*, 579 S.W.3d at 134. Because SWAPA's petition provides no factual allegations supporting Boeing's res judicata defense, the trial court erred by granting the Rule 91a motion to dismiss. *See Reynolds v. Quantlub Trading Partners US, LP*, 608 S.W.3d 549, 557–58 (Tex. App.—Houston [14th

Dist.] 2020, no pet.) (trial court erred by granting Rule 91a motion to dismiss on res judicata; trial court could not take judicial notice of prior pleadings and rulings that were not alleged in plaintiff's petition). *Cf. Smale v. Williams*, 590 S.W.3d 633, 637–38 (Tex. App.—Texarkana 2019, no pet.) (no error in granting Rule 91a motion to dismiss on res judicata when allegations in and exhibits to plaintiff's petition established res judicata).

We sustain SWAPA's first issue.

## CONCLUSION

We reverse the trial court's judgment dismissing SWAPA's claims under Rule 91a. We remand the cause to the trial court for further proceedings.

/Lana Myers//

LANA MYERS
JUSTICE

210598f.p05

**Court of Appeals**
**Fifth District of Texas at Dallas**

# JUDGMENT

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA), AS ASSIGNEE OF 8,794 OF ITS MEMBER PILOTS, Appellant

No. 05-21-00598-CV V.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-21-03072.
Opinion delivered by Justice Myers. Justices Pedersen, III and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA), AS ASSIGNEE OF 8,794 OF ITS MEMBER PILOTS recover its costs of this appeal from appellee THE BOEING COMPANY.

Judgment entered this 7th day of November, 2022.