

Opinion issued July 13, 2021



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-17-00228-CV

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**DARLA LEXINGTON, Appellant**

**V.**

**T. GERALD TREECE, INDIVIDUALLY; J. CARY GRAY, AS  
SUCCESSOR INDEPENDENT ADMINISTRATOR WITH WILL  
ANNEXED OF THE ESTATE OF JOHN M. O'QUINN, DECEASED;  
JOHN M. O'QUINN & ASSOCIATES, PLLC; GIBBS & BRUNS, LLP;  
NEEDMORE RIVER RANCH, LLC; GREG LAMANTIA AND JOSEPH V.  
LAMANTIA, III; SCI TEXAS FUNERAL SERVICES, INC. D/B/A GEO.  
H. LEWIS & SONS FUNERAL DIRECTORS; JOHN M. O'QUINN  
FOUNDATION; AND ROBERT C. WILSON, III, Appellees**

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**On Appeal from Probate Court No. 2  
Harris County, Texas  
Trial Court Case No. 392,247-419**

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## MEMORANDUM OPINION

Appellant, Darla Lexington, challenges the probate court's orders dismissing her claims against appellees, T. Gerald Treece, individually ("Treece"); J. Cary Gray, as Successor Independent Administrator with Will Annexed of the Estate of John M. O'Quinn, deceased ("Executor"); John M. O'Quinn & Associates, PLLC ("O'Quinn Law Firm"); Gibbs & Bruns, LLP ("Gibbs"); Needmore River Ranch, LLC ("Needmore"); Greg LaMantia and Joseph V. LaMantia, III (collectively, "the LaMantias"); SCI Texas Funeral Services, Inc., doing business as Geo. H. Lewis & Sons Funeral Directors ("SCI"); John M. O'Quinn Foundation (the "Foundation"); and Robert C. Wilson, III, for negligent abuse of a corpse, interference with the right of interment, invasion of privacy, intentional infliction of emotional distress, tortious interference, and breach of contract. In four issues, Lexington contends that the probate court erred in dismissing her claims against the Executor and the O'Quinn Law Firm, pursuant to Texas Rule of Civil Procedure 91a,<sup>1</sup> and in awarding them attorney's fees, and erred in granting the pleas to the jurisdiction of the remaining appellees and dismissing her claims for lack of standing.

We affirm in part and reverse and render in part.

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<sup>1</sup> See TEX. R. CIV. P. 91a.

## Background

In her live petition, Lexington alleged that, on October 29, 2009, John O’Quinn died in an automobile collision. In his will, the decedent stated that he was unmarried, and he bequeathed his entire estate to the Foundation. The decedent nominated his friend, Treece, as the sole independent executor.<sup>2</sup> Because the decedent wished to be buried at his 5,000-acre ranch in Wimberley, Texas (the “Ranch”), a location was chosen and an “Affidavit of Dedication for Cemetery Purposes for The O’Quinn Family Cemetery” (“original cemetery”) was recorded in Hays County. The decedent was subsequently interred in a mausoleum at the site.

In 2010, the Executor sought to sell the Ranch to meet the debts of the estate. Because it negatively affected the marketability of the Ranch, it was necessary to relocate the original cemetery. On November 4, 2010, the underlying probate court signed an order vacating the original cemetery dedication and authorizing the disinterment and relocation of the decedent to a more remote location on the Ranch.

Accordingly, on November 8, 2010, the Executor executed and recorded a dedication of a new 0.477-acre portion of the Ranch overlooking the Blanco River as “The New O’Quinn Family Cemetery” (“O’Quinn Cemetery”). As the Ranch was owned by an O’Quinn entity known as New Blanco River Ranch, Ltd. (“New

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<sup>2</sup> On August 1, 2017, the probate court judicially discharged and released Treece, now deceased, as the Executor and appointed J. Cary Gray as Successor Independent Administrator with Will Annexed.

Blanco”), the Executor executed the dedication not only as Executor but as president of JOQ Ranch Management, LLC, the general partner of New Blanco.

Shortly thereafter, the Ranch found a buyer, Needmore, owned by the LaMantias. On March 16, 2011, in settlement of Lexington’s various challenges to the sale of the Ranch, the Executor and Lexington executed a “Ranch Rule 11 Agreement” (“RR11”). Pursuant to its terms, New Blanco promised to convey to Lexington a 40-acre tract of land, known as “Lot 1.” Lot 1 was situated outside of, but abutting, the Ranch and the O’Quinn Cemetery.

As to the O’Quinn Cemetery, the RR11 provided:

[T]he Ranch will execute and record a declaration of covenants and restrictions covering the O’Quinn Cemetery . . . , providing that, for so long as the remains of John O’Quinn and/or the remains of Lexington are located on the O’Quinn Cemetery, then the title owner of Lot 1 will control, own and maintain the O’Quinn Cemetery. However, if the remains of John M. O’Quinn and the remains of Lexington (if any) are no longer located on the O’Quinn Cemetery, then ownership and control of the O’Quinn Cemetery shall be vested in the owner of the Ranch Property.
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Two weeks later, on March 31, 2011, several events occurred. First, the Executor and Lexington executed a Consent Agreement, in which Lexington approved relocating the decedent from the original cemetery to the O’Quinn Cemetery.<sup>3</sup> The Consent Agreement states that New Blanco is “the owner of the real property underlying” the O’Quinn Cemetery.

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<sup>3</sup> The Executor asserts on appeal that Lexington had no actual legal interest in the relocation and that his seeking her approval was a gratuitous gesture to keep peace.

Second, New Blanco sold the 5,000-acre Ranch to Needmore. It is undisputed that, in the deed, New Blanco excepted the O'Quinn Cemetery from the conveyance.

Third, New Blanco and Needmore executed, and recorded in Hays County, a "Declaration of Covenants, Restrictions and Reverter Conveyance" ("Declaration of Covenants") as to the O'Quinn Cemetery. The Declaration of Covenants is not included in the record filed in this appeal. However, it is undisputed that it contains the following provision:

**O'Quinn Cemetery.** *For so long as the remains of John M. O'Quinn are located on or within the O'Quinn Cemetery, then New Blanco and its successors or assigns, as owner of Lot #1, will own, control, maintain, and provide as reasonably necessary for the O'Quinn Cemetery. However, if the remains of John M. O'Quinn are ever removed from the O'Quinn Cemetery, then fee title ownership of the O'Quinn Cemetery shall automatically be conveyed to Needmore or its successors or assigns, as owner of the Ranch, as provided herein in Section 2 below at no additional cost to Needmore. As used herein, the term or reference to "the remains of John M. O'Quinn" shall also include any remains of [Lexington] (if any) to be placed or located within the existing above ground mausoleum located on the O'Quinn Cemetery. So that, any removal of the remains of John M. O'Quinn from the mausoleum shall also include the removal of the remains of [Lexington] (if any). As of the date of this instrument, [Lexington] is alive.*

(Emphasis added.)

Fourth, New Blanco conveyed Lot 1 to Lexington's attorney, Jimmy Williamson, PC, in trust for Lexington. In the deed, New Blanco expressly excepted the O'Quinn Cemetery from the conveyance.

Ongoing during this time were various challenges by Lexington to the settlement of the decedent's estate. She asserted that she was entitled to a substantial portion of the estate, in part, because she was the decedent's spouse by informal marriage. According to Lexington, the dispute was "litigated extensively" in Harris County Probate Court No. Two before the Honorable Mike Wood.

On January 31, 2012, Lexington executed a "Confidential Settlement & Release Agreement" ("Settlement Agreement") with Treece (individually and as Executor), the O'Quinn Law Firm, the Foundation, and Wilson. In the Settlement Agreement, Lexington agreed that, apart from the property granted to her in the RR11 and that which she had previously received, she had no interest in the estate or any of its assets. She agreed to unconditionally release any claims against Treece, in all capacities, the O'Quinn Law Firm, the Foundation, Wilson, all current and former employees and trustees of the O'Quinn Law Firm and the Foundation, and over 100 other entities and individuals. The parties further agreed that the probate court would enter an agreed judgment dismissing Lexington's claims with prejudice. On January 31, 2012, Judge Wood, in Probate Court No. 2, signed an "Agreed Take Nothing Judgment," dismissing all "claims, causes of action, and declaratory judgment actions" the parties asserted.

On August 28, 2012, Williamson conveyed Lot 1 to Lexington. On March 25, 2013, Lexington formed DSL Ranch, LLC. On March 28, 2013, Lexington conveyed Lot 1 to DSL.

On September 24, 2013, New Blanco executed a Cemetery Deed, conveying the O'Quinn Cemetery, and 0.477-acre tract on which it was situated, to the Executor. The Executor then executed a Cemetery Deed, conveying the O'Quinn Cemetery and tract to the Foundation. These were recorded on October 4, 2013.

On June 30, 2014, Ruth O'Quinn (an aunt of the decedent by marriage) sent a letter to Wilson, asking that the decedent's remains be relocated to a cemetery in Pollock, Louisiana, and that he be reinterred next to his family. Accordingly, on September 18, 2014, SCI filed an application for a disinterment permit with the State of Texas. In a letter to the State, SCI represented that the O'Quinn Cemetery was "not a cemetery" and thus Wilson, as president of the Foundation, was authorized to consent to the disinterment. On September 30, 2014, a representative of SCI and two attorneys formerly employed by the O'Quinn Law Firm, Andrew Kumar and Mike Lowenberg, drove across the Ranch (with the permission of Needmore and the LaMantias) to the O'Quinn Cemetery to inspect the mausoleum. A disinterment permit was obtained on October 16, 2014. On November 1, 2014, SCI and Kumar returned to the O'Quinn Cemetery, disinterred the decedent, and transported him to Pollock, Louisiana, where he was reinterred.

On November 4, 2014, Wilson, on behalf of the Foundation, executed a deed conveying the O'Quinn Cemetery and 0.477-acre tract to Needmore.

Asserting that the decedent had been unlawfully disinterred, Lexington brought claims against Treece, individually and as the Executor, the O'Quinn Law Firm, the Foundation, Wilson, SCI, Needmore, and the LaMantias for negligent abuse of a corpse, interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress. She asserted that the defendants had interfered with her right of interment and "lawful possession of [the decedent's] body," physically intruded on her "solitude, seclusion, and private affairs and concerns," and intentionally inflicted emotional distress.

Lexington sued Treece, in his capacity as the Executor, for breach of the RR11, alleging that, pursuant to its terms, the decedent was to be "forever removed" to the O'Quinn Cemetery. She asserted that the Executor breached this provision by disinterring the decedent and moving him to Pollock, Louisiana. She also brought a claim against Treece, individually and in his capacities as the Executor and president of the O'Quinn Law Firm, and against Wilson, as president of the Foundation, for breach of the Settlement Agreement. Although she named certain provisions, she did not allege facts stating a specific breach. She sought rescission and mental anguish damages.



Lexington sued Needmore and the LaMantias for tortious interference with the RR11 and Settlement Agreement. She generally alleged that they “willfully and intentionally interfered with both of those contracts,” causing her actual damages, damages for “lost benefits,” mental anguish, and “injury to reputation.” She further sought exemplary damages.

Finally, Lexington brought a breach-of-contract claim against Gibbs, alleging that it, representing the Foundation, had “participated heavily” in the negotiation of the Settlement Agreement. And, as part of the Settlement Agreement, the parties and their lawyers had agreed in writing to keep the terms confidential. However, on October 30, 2014, a Gibbs partner sent an email to Kumar, through her law firm email account, disclosing certain confidential information about Lexington’s status as the decedent’s common-law spouse. The precise disclosure is redacted in our record and unknown.

In her petition, Lexington generally sought “actual damages, damages for mental anguish, damages for bringing [the decedent’s] body back to Texas and for funeral and burial expenses,” rescission, attorney fees, and costs.

Several of the defendants filed pleas to the jurisdiction. Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias moved to dismiss Lexington’s claims for negligent abuse of a corpse, interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress

(hereafter, “disinterment claims”); Treece (individually), Wilson, and Gibbs moved to dismiss Lexington’s claim against them for breach of the Settlement Agreement; and Needmore and the LaMantias moved to dismiss Lexington’s tortious interference claim against them. Each asserted that Lexington lacked standing to assert her claims because she did not own the O’Quinn Cemetery at the time of the disinterment and because she is not the decedent’s surviving spouse—having voluntarily dismissed such claim with prejudice in these probate proceedings. The probate court granted the pleas to the jurisdiction and dismissed Lexington’s claims against each of the above defendants.

The remaining defendants, Treece (as Executor) and the O’Quinn Law Firm, moved under Texas Rule of Civil Procedure 91a to dismiss Lexington’s disinterment claims. They also asserted that Lexington lacked standing to assert her claims because she did not own the O’Quinn Cemetery at the time of the disinterment and because she is not the decedent’s surviving spouse. The Executor also moved to dismiss Lexington’s claim for breach of the RR11, and the Executor and O’Quinn Law Firm moved to dismiss her claim for breach of the Settlement Agreement, on the ground that her claims were legally and factually baseless. The probate court granted the rule 91a motion, dismissed Lexington’s claims, and awarded the Executor and O’Quinn Law Firm attorney’s fees.<sup>4</sup>

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<sup>4</sup> See TEX. R. CIV. P. 91a.

## **Pleas to the Jurisdiction**

In her fourth issue, Lexington argues that the probate court erred in granting the pleas to the jurisdiction brought by Treece (individually), the Foundation, Wilson, SCI, Needmore, the LaMantias, and Gibbs, and in dismissing her claims against them, because she had standing to assert her claims as the owner of the O'Quinn Cemetery and as the surviving spouse of the decedent.

### ***Standard of Review***

A plea to the jurisdiction challenges a trial court's power to exercise subject matter jurisdiction over a claim and "may challenge the pleadings, the existence of jurisdictional facts, or both." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770-71 (Tex. 2018). We review the trial court's grant of a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In determining whether the plaintiff has met her burden of alleging facts that affirmatively establish the trial court's subject matter jurisdiction, we look to the allegations in the plaintiff's pleadings and construe them in favor of the plaintiff. *Id.* at 226. "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency" and the plaintiff should be afforded the opportunity to amend. *Id.* at 226–27. On the other hand, if the pleadings affirmatively negate the existence of jurisdiction, then the plea

may be granted without allowing the plaintiff an opportunity to amend. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

If the plea challenges the existence of jurisdictional facts, the standard of review is like that of a traditional summary judgment. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *City of Hous. v. Guthrie*, 332 S.W.3d 578, 587 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). “[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). A court may consider evidence as necessary to resolve a dispute over the jurisdictional facts even if the evidence “implicates both the subject matter jurisdiction of the court and the merits of the case.” *Miranda*, 133 S.W.3d at 226. We take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Id.* at 228. If the defendant meets its burden to establish that the trial court lacks jurisdiction, the plaintiff is then required to show that there is a material fact question regarding the jurisdictional issue. *Id.* at 227–28. If the evidence raises a fact issue regarding jurisdiction, the plea cannot be granted, and a fact finder must resolve the issue. *Id.* On the other hand, if the relevant evidence is undisputed or fails to raise a fact issue, the plea must be determined as a matter of law. *Id.* at 228.

## ***Legal Principles***

We review standing under the same standard by which we review subject matter jurisdiction generally. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Standing is implicit in the concept of subject matter jurisdiction and is essential to the authority of a court to decide a case. *Id.* at 443. Standing is never presumed, cannot be waived, and may be raised for the first time on appeal. *Id.* at 443–44. Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. *Miranda*, 133 S.W.3d at 228.

The standing doctrine requires that there be (1) a real controversy between the parties that (2) will be actually determined by the judicial declaration sought. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005); *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (“[S]tanding limits subject matter jurisdiction to cases involving a distinct injury to the plaintiff and a real controversy between the parties, [that] will be actually determined by the judicial declaration sought.” (internal quotations omitted)). The focus is on whether the plaintiff has a sufficient relationship with the lawsuit so as to have a “justiciable interest” in its outcome. *See Lovato*, 171 S.W.3d at 848. A plaintiff has standing when she is personally aggrieved, regardless of whether she is acting with legal authority. *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). The plaintiff must have suffered an “injury in fact,” that is, “an invasion of a legally protected

interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical.” *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied). Without a breach of a legal right belonging to the plaintiff, no cause of action can inure to her benefit. *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976).

To resolve whether a plaintiff has standing, we look to the facts alleged in the petition, but may consider other evidence in the record if necessary. *Blue*, 34 S.W.3d at 555. The standing inquiry “requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 153, 156 (Tex. 2012) (“[E]ach party must establish that he has standing to bring each of the claims he himself alleges—meaning the court must assess standing plaintiff by plaintiff, claim by claim.”); *Neff v. Brady*, 527 S.W.3d 511, 521 (Tex. App.—Houston [1st Dist.] 2017, no pet.). “[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Heckman*, 369 S.W.3d at 153 (“[S]tanding is not dispensed in gross.” (internal quotations omitted)). A plaintiff’s lack of standing to bring some, but not all, of her claims deprives the court of jurisdiction over those discrete claims. *Id.* at

150. If the plaintiff lacks standing to bring all of her claims, the court must dismiss the whole action for want of jurisdiction. *Id.* at 150–51.

Standing to sue may be predicated upon either statutory or common-law authority. *See Williams v. Lara*, 52 S.W.3d 171, 178–79 (Tex. 2001); *SCI Tex. Funeral Servs., Inc. v. Hajar*, 214 S.W.3d 148, 153 (Tex. App.—El Paso 2007, pet. denied). When standing has been statutorily conferred, the common law rules governing standing do not apply. *Williams*, 52 S.W.3d at 178.

### ***Analysis***

Here, we consider Lexington’s standing to bring her (A) disinterment claims (negligent abuse of a corpse, interference with right of interment, invasion of privacy, and intentional infliction of emotional distress) against Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias; (B) tortious interference claim against Needmore and the LaMantias; (C) breach-of-contract claim against Treece (individually) and Wilson, and (D) breach-of-contract claim against Gibbs. *See Heckman*, 369 S.W.3d at 153 (courts “must assess standing plaintiff by plaintiff, claim by claim”).

#### ***A. Disinterment Claims***

##### **1. Negligent abuse of a corpse**

In her petition, Lexington alleged that Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias, negligently disinterred the decedent, in

violation of Penal Code section 42.08 and Health and Safety Code section 711.004. *See* TEX. HEALTH & SAFETY CODE § 711.004(a); TEX. PENAL CODE § 42.08. She asserted that she has standing to assert her claims because she is within the classes of persons that these statutes were designed to protect.

In statutory-standing cases, we analyze the construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls within that category. *Tex. Ass'n of Bus. v. City of Austin*, *Tex.*, 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. denied). We review the trial court's interpretation of a statute *de novo*. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Our primary objective is to effectuate the legislature's intent. *Id.* We ascertain intent by first looking to the plain and common meaning of the words used in the statute. *Id.* We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition, or is apparent from the context, or unless such a construction leads to absurd results. *Id.* at 625–26; *see also* TEX. GOV'T CODE ANN. § 311.011. We presume that the legislature intended a just and reasonable result. *City of Rockwall*, 246 S.W.3d at 626.

Negligence *per se* is a common-law doctrine in which a duty is imposed based on a standard of conduct created by a penal statute rather than on the reasonably prudent person test used in pure negligence claims. *Smith v. Merritt*, 940 S.W.2d 602, 607 (Tex. 1997). To establish negligence *per se*, a plaintiff must prove that:



(1) the defendant’s act or omission is in violation of a statute; (2) the injured person was within the class of persons that the statute was designed to protect; and (3) the defendant’s act or omission proximately caused the complained-of injury. *Ambrosio v. Carter’s Shooting Ctr., Inc.*, 20 S.W.3d 262, 265 (Tex. App.—Houston [14th Dist.] 2000, pet denied).

Texas Penal Code section 42.08 provides that a person commits the offense of “abuse of a corpse” if, as pertinent here, he, “*without legal authority*, knowingly: (1) disinters, disturbs, . . . in whole or in part, carries away, or treats in an offensive manner a human corpse; . . . (4) transmits or conveys, or procures to be transmitted or conveyed, a human corpse to a place outside the state[.]” TEX. PENAL CODE § 42.08 (emphasis added).

Texas Health and Safety Code section 711.004 provides that a person *has legal authority* to remove remains interred in a cemetery with the written consent of:

- (a) the cemetery organization operating the cemetery;
- (b) the current plot owner or owners, and
- (c) and the following persons, in the priority listed:
  - (1) the decedent’s surviving spouse;
  - (2) the decedent’s surviving adult children;
  - (3) the decedent’s surviving parents;
  - (4) the decedent’s adult siblings; or
  - (5) the adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.

*See* TEX. HEALTH & SAFETY CODE § 711.004.

Lexington alleged that Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias were without legal authority to disinter the decedent and transport him to Louisiana because they did not have her written consent as the cemetery organization, the current plot owner, or as the decedent's surviving spouse. *See id.* She asserted that she "had legal claim to each of those three categories, or alternatively, legal claim to at least one or two of them," and that "she was clearly included within the class of persons the statute is designed to protect—e.g., the decedent's family and loved ones, who in this case, also owned and had her name engraved upon an adjacent crypt in the same mausoleum." Thus, Lexington asserted that she had standing because she was within the classes of individuals that section 711.004 was designed to protect.

Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias argued that Lexington lacked standing because the allegations in her petition did not establish that she is a cemetery organization. In addition, they asserted, the allegations and evidence established that she did not own the O'Quinn Cemetery at the time of the disinterment. Rather, at the time of disinterment, the Foundation was the owner of the O'Quinn Cemetery pursuant to a recorded deed. In a September 24, 2013 "Cemetery Deed," the Executor conveyed the O'Quinn Cemetery, and 0.477-acre tract of land on which it was situated, to the Foundation. Further, the Declaration of Covenants did not meet the statutory requirements to

constitute a deed because it did not “grant, sell, and convey” anything to Lexington and thus did not convey the O’Quinn Cemetery to her. And, even if the Declaration of Covenants effectively conveyed an interest in the O’Quinn Cemetery to Lexington, as attendant to her ownership of Lot 1, Lexington alleged in her petition that she conveyed Lot 1 to DSL on March 28, 2013—some 20 months prior to the November 1, 2014 disinterment.

Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias further asserted that the jurisdictional evidence established that the matter of Lexington’s status as the decedent’s surviving spouse had been conclusively established against her previously in these probate proceedings.

Even were we to conclude that section 711.004 confers standing to sue, which we do not, Lexington’s petition and the jurisdictional facts show that she is not within the classes that the statute is designed to protect: (a) a cemetery organization, (b) the cemetery plot owner, or (c) the decedent’s surviving spouse. *See id.*

(a) *Cemetery Organization*

With respect to her claim that she has standing as a cemetery organization, Lexington alleged in her petition that she has paid the upkeep, mowing, maintenance, electricity, and taxes on the 0.477-acre tract and O’Quinn Cemetery. A “cemetery organization” is defined under Chapter 711 as:

- (A) an unincorporated association of plot owners not operated for profit that is authorized by its articles of association to conduct a business for cemetery purposes; or
- (B) a corporation, as defined by Section 712.001(b)(3), that is authorized by its certificate of formation or its registration to conduct a business for cemetery purposes.

TEX. HEALTH & SAFETY CODE § 711.001(7). Thus, Lexington’s allegations do not qualify her as a cemetery organization for purposes of 711.004. *See id.*

(b) *Current Plot Owner*

With respect to her claim that she has standing as the current plot owner, Lexington alleged in her petition that, pursuant to the Declaration of Covenants, recorded March 31, 2011, she, “as the owner of Lot #1,” “own[ed], control[led], and maintain[ed]” the O’Quinn Cemetery. Lexington also alleged, however, that she conveyed Lot 1 to DSL on March 28, 2013 and that the disinterment took place thereafter, on November 1, 2014. That is, even if the Declaration of Covenants effectively conveyed an interest in the O’Quinn Cemetery to Lexington, as attendant to her ownership of Lot 1, she pleaded that she did not own Lot 1 at the time of the disinterment; rather, DSL did.

A limited liability company is a legal entity distinct from its members. *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). As such, its members have no interest in the company’s property. *Id.*; TEX. BUS. ORGS. CODE § 101.106(b). And, DSL is not a party to this lawsuit. Thus,

Lexington's allegations affirmatively demonstrate an incurable defect in jurisdiction. *See Cty. of Cameron*, 80 S.W.3d at 555.

Further, the jurisdictional evidence, namely, a recorded Cemetery Deed dated September 24, 2013, shows that the Foundation owned the O'Quinn Cemetery and land on the date of the disinterment.

(c) *Decedent's surviving spouse*

With respect to her claim that she has standing as the decedent's surviving spouse by informal marriage, Lexington alleged that she publicly called the decedent her husband, and that he publicly called her his wife, on numerous occasions after they agreed to be married and that they subsequently lived together.

Lexington further alleged, however, that, in previously filed lawsuits<sup>5</sup> in these probate proceedings (cause number 392,247 in Probate Court No. 2), she sought to establish that she was "O'Quinn's wife by informal marriage." She noted that the matter was "litigated extensively in Harris County Probate Court Two before the Hon. Mike Wood."

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<sup>5</sup> Lexington cites *Darla Lexington v. T. Gerald Treece, Independent Executor of the Estate of John M. O'Quinn, Deceased, The John M. O'Quinn Foundation, and John M. O'Quinn & Associates, PLLC d/b/a The O'Quinn Law Firm*, No. 392,247-402 (Prob. Ct. No. 2, Harris Cty., Tex.), and *Darla Lexington v. The Executor of the Estate of John O'Quinn*, No. 2010-42055 (125th Dist. Ct., Harris Cty., Tex.) (filed on July 8, 2010; transferred by agreement of the parties to Harris County Probate Court No. 2, before the Hon. Mike Wood, on October 20, 2010).

However, the jurisdictional evidence shows that, in an “Agreed Take Nothing Judgment,” dated January 31, 2012, in cause number 392,247-402, the probate court ordered that Lexington’s “claims, causes of action, and declaratory judgment actions” were “dismissed with prejudice.” “[I]t is well established that a dismissal with prejudice functions as a final determination on the merits.” *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991). Further, a “judgment of dismissal entered by agreement of the parties in pursuance of a compromise or settlement of a controversy becomes a judgment on the merits.” *Essman v. Gen. Accident Ins. Co. of Am.*, 961 S.W.2d 572, 574 (Tex. App.—San Antonio 1997, no pet.).

In sum, Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias met their burden to establish that Lexington lacked standing to assert, and thus the probate court lacked jurisdiction over, her disinterment claims. Lexington was then required to demonstrate a material fact question regarding the jurisdictional issue. *See Miranda*, 133 S.W.3d at 227–28.

In her response, Lexington asserted that the Declaration of Covenants “validly conveyed ownership of the O’Quinn cemetery to [her].” As discussed above, even were we to conclude that the Declaration of Covenants, which was executed between *New Blanco* and *Needmore*, constituted a valid conveyance of the O’Quinn Cemetery to Lexington, as the owner of Lot 1, it is undisputed that Lexington

transferred her interest in Lot 1 to DSL prior to the disinterment. Thus, Lexington did not own Lot 1, whatever its attendant rights, at the time of the disinterment.

Lexington also asserted that there was not a final determination on the merits that she was not the decedent's spouse by informal marriage. At a hearing on the instant pleas to the jurisdiction, she argued: "With respect to the informal marriage claim, this Court is well aware that it is absolutely correct that [she] pursued claims of an informal marriage as a basis for her claim for a substantial portion of the O'Quinn Estate . . . ." She does not dispute that, in the January 31, 2012 "Agreed Take Nothing Judgment" in these probate proceedings, the probate court ordered that "all claims, causes of action, and declaratory judgment actions" she asserted were "dismissed with prejudice." Lexington asserted, however, that the Settlement Agreement expressly provided that no party made any concession as to the existence or non-existence of a common-law marriage.

In *Mossler*, the Texas Supreme Court held that a Houston trial court's dismissal with prejudice of a plaintiff's claim of common-law marriage in her first suit stood as a final judgment on the merits on that issue in her subsequent suit. 818 S.W.2d at 754. There, the plaintiff filed a petition for divorce in Houston, alleging the existence of a common-law marriage. *Id.* at 753. The trial court ultimately issued an order dismissing the petition with prejudice. *Id.* Subsequently, after the plaintiff established residency in Beaumont, she filed a new petition for divorce

there, again alleging the existence of a common-law marriage. *Id.* The trial rendered summary judgment for the defendant on the ground that the Houston trial court had dismissed the same claim with prejudice. *Id.* In upholding the trial court’s dismissal, the supreme court noted that it is well established that a dismissal with prejudice functions as a final determination on the merits. *Id.* at 754. It concluded that allowing the plaintiff to raise the identical matter in Beaumont that was dismissed with prejudice in Houston would allow a party who had a fair opportunity to present her claims in one suit, and whose cause was dismissed with prejudice, to present those same claims in a subsequent suit. *Id.*

Here, like in *Mossler*, Lexington agreed to the entry of a final judgment in these probate proceedings dismissing “all” of her claims. Even if the probate court’s judgment was overbroad, she did not appeal. The legal effect is that the matter is resolved. *See id.* She cannot now be heard to assert that the 2012 judgment was incorrect. And, as the probate court noted at the plea hearing, Lexington cannot repeatedly relitigate her status as surviving spouse in these probate proceedings with every new issue.

It is important to keep in mind the overarching context of these proceedings. Probate proceedings are an exception to the “one final judgment” rule. *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006). “A probate proceeding consists of ‘a continuing series of events,’ and later decisions . . . necessarily may be based on



earlier decisions in the proceeding.” *In Guardianship of Macer*, 558 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In such cases, “multiple judgments final for purposes of appeal can be rendered on certain discrete issues.” *Id.* The purpose is to allow review of “controlling, intermediate decisions before an error can harm later phases of the proceeding.” *De Ayala*, 193 S.W.3d at 578 (internal quotations omitted).

Lexington did not present evidence raising a fact issue as to her standing to assert her claim for negligent disinterment. When, as here, the evidence is undisputed or fails to raise a fact issue, the plea must be determined as a matter of law. *See Miranda*, 133 S.W.3d at 228. Accordingly, we hold that the probate court did not err in granting the pleas of Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias on this claim.

## 2. Remaining disinterment claims

Lexington also alleged in her petition that she had common-law standing to assert her claims for interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress based on her status as the owner of the cemetery plot and as the surviving spouse of the decedent. She alleged that Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias, interfered with her right of interment and denied her “lawful possession of [the decedent’s] body,” without her consent as cemetery operator, owner of the cemetery

plot, or as the decedent's "surviving spouse." She alleged that they invaded her right to privacy by "intentionally and physically intruded upon [her] solitude, seclusion, and private affairs and concerns" by disinterring the decedent from the O'Quinn Cemetery. She alleged that they intentionally caused her distress by disinterring the decedent without her permission, as "the owner of the cemetery plot and/or the surviving spouse." She sought actual damages, damages for mental anguish, and funeral and burial expenses to return the decedent to Texas.

Again, to establish common-law standing, a plaintiff must show both that she has suffered a distinct injury and that there is a real controversy between the parties that the judicial declaration sought will actually resolve. *See Lovato*, 171 S.W.3d at 849. Standing requires that the plaintiff have suffered an "injury in fact," that is, "an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical." *Save Our Springs All.*, 304 S.W.3d at 878.

In their plea to the jurisdiction, Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias asserted that Lexington cannot predicate claims on the basis that she owned Lot 1 at the time of the disinterment or that she is the decedent's surviving spouse. As discussed above, these defendants met their burden to establish that that Lexington did not own Lot 1 at the time of the disinterment and that she is not the decedent's surviving spouse.

Thus, the burden switched to Lexington to demonstrate a material fact question regarding the jurisdictional issue. *See Miranda*, 133 S.W.3d at 227–28. As discussed above, Lexington did not present evidence that raises a fact issue as to her standing to assert these claims. Because Lexington lacked a legally protected interest, she lacked standing to assert her claims for interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress, and the probate court lacked subject matter jurisdiction over her claims. *See Nobles*, 533 S.W.2d at 927 (holding that without breach of legal right belonging to plaintiff, no cause of action can accrue to her benefit); *Save Our Springs All.*, 304 S.W.3d at 878 (holding plaintiff must have suffered an “injury in fact,” that is, “an invasion of a legally protected interest”). Accordingly, we hold that the probate court did not err in granting the pleas to the jurisdiction of Treece (individually), the Foundation, Wilson, SCI, Needmore, and the LaMantias on these claims.

B. *Tortious Interference*

With respect to her claim against Needmore and the LaMantias for tortious interference with the RR11 and Settlement Agreement, Lexington generally alleged that Needmore and the LaMantias “either knew about those contracts and Lexington’s interest in them, or had knowledge of facts and circumstances that would lead a reasonable person to believe there were such contracts in which Lexington had an interest,” and they “willfully and intentionally interfered with both

of those contracts,” causing her actual damages, damages for “lost benefits,” mental anguish, and “injury to reputation.” She further sought exemplary damages.

Needmore and the LaMantias asserted that Lexington’s alleged injuries are predicated on her either being the owner of the O’Quinn Cemetery or the decedent’s surviving spouse. And, she lacks standing to assert her claim because she was not the owner of the O’Quinn Cemetery at the time of the disinterment. Rather, the Foundation was the owner of the O’Quinn Cemetery. Further, Lexington voluntarily dismissed with prejudice her claim to establish her status as the decedent’s common-law wife in these probate proceedings.

As discussed above, Lexington’s allegations in her petition and the jurisdictional evidence establish that she did not own Lot 1 at the time of the disinterment and that she is not the decedent’s surviving spouse. Lexington does not direct us to any evidence that raises a fact issue as to her common-law standing on her claim for tortious interference. When, as here, the evidence is undisputed or fails to raise a fact issue, the plea must be determined as a matter of law. *See Miranda*, 133 S.W.3d at 228. Accordingly, we hold that the probate court did not err in granting the plea to the jurisdiction of Needmore and the LaMantias on this claim.

C. *Breach of Contract by Treece (individually) and Wilson*

Lexington alleged in her petition that, in 2012, she executed the Settlement Agreement with Treece (individually) and Wilson, in his capacity as president of the

Foundation, to resolve the dispute in *Darla Lexington v. T. Gerald Treece, Independent Executor of the Estate of John M. O'Quinn, Deceased, The John M. O'Quinn Foundation, and John M. O'Quinn & Associates, PLLC d/b/a The O'Quinn Law Firm*, Cause No. 392,247-402, in Probate Court No. 2. She alleged that “[a]t least the following provisions of the Settlement Agreement were breached: Sections 1.13, 1.18, 3.1(a)(v), 3.2(e), 3.3(a), 3.5(b), 3.10.” She sought rescission and mental anguish damages.

In their plea to the jurisdiction, Treece (individually) and Wilson asserted that Lexington lacked standing to assert her claim because she did not allege an invasion of a legally protected interest. *See Save Our Springs All.*, 304 S.W.3d at 878 (holding that plaintiff must have suffered “injury in fact,” that is, “an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical”). Without an alleged breach of a legal right belonging to the plaintiff, no cause of action can accrue to her benefit. *Nobles*, 533 S.W.2d at 927.

Further, Lexington did not allege a real controversy between the parties that the judicial declaration she seeks, i.e., rescission, will actually resolve. *See Lovato*, 171 S.W.3d at 849 (there must be real controversy between parties that judicial declaration sought will actually resolve). Moreover, mental anguish damages are not recoverable for a breach of contract. *Latham v. Castillo*, 972 S.W.2d 66, 71

(Tex. 1998). We hold that the probate court did not err in granting the plea to the jurisdiction on this claim. *See Miranda*, 133 S.W.3d at 228 (holding that when evidence fails to raise fact issue, plea must be determined as matter of law).

D. *Breach of Contract by Gibbs*

In her petition, Lexington alleges that, following the decedent's death, she initiated litigation against the estate, the Foundation, and the O'Quinn law firm, claiming that she was entitled to a substantial portion of the estate on the theory that, inter alia, she was the decedent's wife by informal marriage. The dispute was litigated extensively in Harris County Probate Court Two before the Honorable Mike Wood. The case settled on the eve of trial.

Lexington alleged that Gibbs, representing the Foundation, "participated heavily in the negotiation of the settlement terms." As part of the settlement, the parties and their lawyers agreed in writing to keep the terms of the Settlement Agreement confidential. Two days prior to the disinterment, on October 30, 2014, Gibbs, through one of its partners, utilizing her law firm email address, "knowingly, intentionally, and wrongfully breached the confidentiality provision of the settlement agreement by disclosing confidential settlement terms in writing to a third party, Andrew Kumar."<sup>6</sup> Lexington identifies Kumar as the former attorney of the

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<sup>6</sup> Notably, the Settlement Agreement reflects that the O'Quinn Law Firm is a party to the agreement, and it lists, as additional released parties, all current and former employees of the O'Quinn Law Firm, which would include Kumar.

O'Quinn Law Firm who took part in the disinterment. Pointing to emails between Gibbs and Kumar in support, Lexington alleged that she had standing to assert her claim because Gibbs's breach of confidentiality took place two days prior to the November 1, 2014 disinterment and was "clearly used to reassure Mr. Kumar." Thus, she alleged, Gibbs's breach injured her because it facilitated the disinterment.

In its plea, Gibbs argued that Lexington lacked standing because she was not the owner of the plot from which the decedent was removed and is not the decedent's surviving spouse. Gibbs asserted that because Lexington was without standing to contest the disinterment, she was likewise without standing to complain that Gibbs facilitated the disinterment. And, "[l]abeling her action a breach-of-contract claim [did] not change the fundamental nature of her alleged injury." Gibbs also asserted that it is not a party to the Settlement Agreement.

In her response, Lexington argued that Gibbs is bound by the confidentiality provisions in the Settlement Agreement regardless. She sought damages for mental anguish "related to a disinterment Gibbs & Bruns helped accomplish by breaching the terms of the confidentiality provisions in the Settlement Agreement."

Even were we to conclude that Gibbs is bound by the Settlement Agreement and disclosed information to facilitate the disinterment, Lexington remains without standing because the standing doctrine requires that there be a *real controversy* between the parties that will *actually be determined* by a judicial declaration. *See*

*Lovato*, 171 S.W.3d at 849. As discussed above, the jurisdictional evidence shows that Lexington has no legally protected interest in the O’Quinn Cemetery or the disposition of the decedent’s remains. *See Save Our Springs All.*, 304 S.W.3d at 878 (holding that plaintiff must have suffered “injury in fact,” that is, “an invasion of a legally protected interest”). Further, mental anguish damages are not recoverable for a breach of contract. *See Latham*, 972 S.W.2d at 71.

Because Lexington did not present any evidence raising a fact issue as to her standing on her breach-of-contract claim against Gibbs, we hold that the probate court did not err in granting Gibbs’s plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 228 (holding that when evidence fails to raise fact issue, plea must be determined as matter of law).

We overrule Lexington’s fourth issue.

### **Rule 91a Motion to Dismiss**

In her second issue, Lexington argues that the probate court erred in dismissing her claims against the Executor and the O’Quinn Law Firm for lack of standing because she “suffered an individuate harm,” that is, “the defendants caused her to be divested of not only her intended final resting place, but also ownership of the cemetery in which her beloved companion was entombed.” She asserts that “it was error for the probate court to dismiss her causes of action for failure to state a plausible claim.”



The Executor and O'Quinn Law Firm moved to dismiss Lexington's claims, pursuant to Rule of Civil Procedure 91a, asserting (1) that she lacked standing to bring her disinterment claims against them and (2) that her breach of contract claims lacked a legal or factual basis. *See* TEX. R. CIV. P. 91a.1 (authorizing defendant to move for dismissal of a cause of action that "has no basis in law or fact"). And, they sought attorney's fees, pursuant to rule 91a.7. *See id.* at 91a.7.

Specifically, the Executor and O'Quinn Law Firm asserted that Lexington lacked standing to bring her disinterment claims against them, i.e., her claims for negligent abuse of a corpse, interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress, because she was not the owner of the cemetery plot and was not the decedent's surviving spouse. TEX. HEALTH & SAFETY CODE § 711.004(a). They asserted that because Lexington failed to "meet these statutor[ily] required standards, [she] fail[ed] to establish standing in this matter and her claims should be dismissed." And, in addition to her lack of standing, she could not establish the required elements of her claims. Further, they asserted, there was no legal basis for Lexington's contention that the Executor had breached the RR11 or that he or the O'Quinn Law Firm had breached the Settlement Agreement. The probate court granted the rule 91a motion, dismissed Lexington's claims, and awarded the Executor and O'Quinn Law Firm attorney's fees. *See* TEX. R. CIV. P. 91a.7.

As a threshold matter, we first determine the procedural posture in which to review the probate court’s ruling on the rule 91a motion to dismiss. It is well-established that we look to the substance of a motion to determine the relief sought, and not merely to its title, in determining its effect. *Dall. Cty. Republican Party v. Dall. Cty. Democratic Party*, No. 05-18-00916-CV, 2019 WL 4010776, at \*4 (Tex. App.—Dallas Aug. 26, 2019, pet. denied) (mem. op.) (citing *Surgitek, Bristol–Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999)). In *City of Dallas v. Sanchez*, the Texas Supreme Court noted that the “dismissal grounds under Rule 91a have been *analogized* to a plea to the jurisdiction, which requires the court to determine whether the pleadings allege facts demonstrating jurisdiction.” 494 S.W.3d 722, 724–25 (Tex. 2016) (emphasis added). However, in examining *Sanchez*, courts have noted that borrowing a standard or applying it as an analogy does not convert the basis on which the motion arises. *Dallas Cty. Republican Party*, 2019 WL 4010776, at \*4; *see also Wooley v. Schaffer*, 447 S.W.3d 71, 80–84 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (Frost, C.J., concurring) (discussing rule 91a motions and comparing them to jurisdictional pleas); *see, e.g., Schronk v. City of Burleson*, 387 S.W.3d 692, 701 (Tex. App.—Waco 2009, pet. denied) (noting analogy between jurisdictional plea and summary judgment standards but rejecting consequent borrowing of procedures).

In *Dallas County Republican Party*, the appellants brought suit for injunction, asserting that appellees had failed to properly certify certain candidates' applications for inclusion on the primary ballot. 2019 WL 4010776, at \*1. Appellees filed a plea to the jurisdiction and a motion to dismiss pursuant to rule 91a. *Id.* In their plea to the jurisdiction, appellees alleged that the trial court lacked subject-matter jurisdiction over appellants' claims because appellants lacked standing to challenge the eligibility of appellees' candidates, appellants' claims were moot, and there was no basis for appellants' asserted Election Code violations. *Id.* After a hearing on the plea to the jurisdiction and rule 91a motion to dismiss, the trial court signed an order granting both, without indicating its grounds. *Id.* at \*2. The trial court further granted appellees attorney's fees, pursuant to rule 91a.7. *Id.*

On appeal, appellants, conceding that relief related to the election had become moot, sought review of the rule 91a dismissal and award of attorney's fees. *Id.* at \*3. The court of appeals considered whether a rule 91a motion was the appropriate vehicle through which to seek dismissal. *Id.* It noted that the trial court could not award attorney's fees in conjunction with a grant of a plea to the jurisdiction. *Id.* (noting that attorney's fees are not awarded in successful plea to jurisdiction, unless fees are allowed for underlying claim). It further noted that we "look to the substance of a motion to determine the relief sought, not merely to its title," in determining its effect. *Id.* at \*4 (quoting *Abel*, 997 S.W.2d at 601).

The court examined Rule 91a.1, which states:

Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. 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.

*Id.* (quoting TEX. R. CIV. P. 91a). It concluded that, “[o]n its face, the rule addresses the merits of the claims.” *Id.* And, notably, “[n]owhere in the four corners of the rule is jurisdiction mentioned.” *Id.* Whereas a dismissal under 91a is a judgment on the merits, subject matter jurisdiction is a prerequisite to entertaining the merits. *Id.* If a court determines that it lacks jurisdiction, it is obligated to go no further and dismiss. *Id.* “Such a judgment is, per force, not one ‘on the merits.’” *Id.* (citing *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017)).

The appellants in *Dallas* argued that the Texas Supreme Court, in *Sanchez*, had grafted jurisdiction into rule 91a’s reach, essentially rendering every challenge to subject matter jurisdiction a rule 91a case and allowing for the recovery of attorney’s fees. *Id.* The court of appeals, in examining *Sanchez*, concluded that the supreme court had simply recognized that the dismissal grounds under rule 91a had been “analogized” to a plea to the jurisdiction. *Id.* (citing *Sanchez*, 494 S.W.3d at 724). Although the supreme court had acknowledged that the rule 91a motion in that case challenged the court’s subject-matter jurisdiction on the pleaded facts, the

court did not find rule 91a to be the vehicle through which a challenge to subject-matter jurisdiction would arise. *Id.* Instead, the court analogized the plea to jurisdiction procedures and addressed the merits of the jurisdiction issue through the Texas Tort Claims Act, which made the jurisdiction and liability analyses coterminous. *Id.* (citing *Miranda*, 133 S.W.3d at 224) (“The Tort Claims Act creates a unique statutory scheme in which the . . . immunities to suit and liability are co-extensive”). The *Dallas* court concluded that borrowing a standard or applying it as an analogy does not convert the basis on which the motion arises. *Id.*

The *Dallas* court further noted that *Sanchez* “hardly purports to treat jurisdictional determinations under rule 91a as a basis for the award of fees.” *Id.* at \*5. “In fact, no Texas case has ever awarded attorney’s fees under rule 91a.7 where the dismissal resulted from a lack of subject matter jurisdiction.” *Id.*

#### A. *Disinterment Claims*

Here, because the Executor and O’Quinn Law Firm used a rule 91a motion to challenge the probate court’s subject-matter jurisdiction over Lexington’s disinterment claims, the motion effectively constitutes a plea to the jurisdiction, and we review the probate court’s judgment using the standard of review for a plea to the jurisdiction challenging only the pleadings.<sup>7</sup> *See id.* at \*3; *see also City of*

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<sup>7</sup> Again, there are two general categories of pleas to the jurisdiction: (1) those that challenge only the pleadings and (2) those that present evidence to challenge the existence of jurisdictional facts. *City of Austin*, 431 S.W.3d at 822.

*Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 299 (Tex. 2017) (“This Court considers ‘plea to the jurisdiction’ not to refer to a ‘particular procedural vehicle,’ but rather to the substance of the issue raised.”); *City of Austin*, 431 S.W.3d at 822 n.1 (stating that “Rule 91a motion . . . used to challenge the trial court’s subject-matter jurisdiction . . . effectively constitute[d] a plea to the jurisdiction”).

When a plea to the jurisdiction challenges only the pleadings, we determine whether the pleader has alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226. Our de novo review of such challenges looks to the pleader’s intent and construes the pleadings in its favor. *Id.* If the pleadings lack sufficient facts to affirmatively demonstrate the trial court’s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and the plaintiff should generally be given an opportunity to amend. *Cty. of Cameron*, 80 S.W.3d at 555. On the other hand, if the pleadings affirmatively negate the existence of jurisdiction, then the plea may be granted without allowing the plaintiff an opportunity to amend. *Id.*

With respect to her claim against the Executor and O’Quinn Law Firm for negligent abuse of a corpse, Lexington alleged in her petition that they negligently disinterred the decedent without her consent, in violation of Penal Code section 42.08 and Health and Safety Code section 711.004. *See* TEX. HEALTH & SAFETY CODE § 711.004(a); TEX. PENAL CODE § 42.08. She alleged that they were without

legal authority to disinter the decedent and transport him to Louisiana because they did not have her written consent as the cemetery organization, the current plot owner, or as the decedent's surviving spouse. *See* TEX. HEALTH & SAFETY CODE § 711.004(a). She asserted that she “had legal claim to each of those three categories, or alternatively, legal claim to at least one or two of them,” and that “she was clearly included within the class of persons the statute is designed to protect— e.g. the decedent's family and loved ones.” Thus, she alleged that she had standing because she was within the classes of individuals that section 711.004 was designed to protect.

The Executor and O'Quinn Law Firm asserted that Lexington failed to establish standing because she “fail[ed] to meet these statutor[ily] required standards,” citing Health and Safety Code 711.004. They argued that Lexington lacked standing because her pleadings affirmatively demonstrated that she is not a cemetery organization, she has never owned the O'Quinn Cemetery, and she is not the decedent's surviving spouse. They asserted that, although Lexington asserted an ownership interest in the Cemetery through the deed to Lot 1, she also asserted in her petition that she subsequently conveyed Lot 1 to DSL on March 19, 2013. Thus, Lexington's allegations in her petition demonstrate that she did not own Lot 1 at the time of the November 1, 2014 disinterment. Further, Lexington voluntarily

dismissed with prejudice her claim to establish her status as the decedent's spouse in these probate proceedings.

Again, even were we to conclude that section 711.004 confers standing to sue, which we do not, Lexington's petition affirmatively demonstrates incurable defects in jurisdiction. *See Cty. of Cameron*, 80 S.W.3d at 555. Namely, her petition demonstrates that she is not within the classes of people that the statute is designed to protect: (a) a cemetery organization, (b) the cemetery plot owner, or (c) the decedent's surviving spouse.

(a) *Cemetery Organization*

As discussed above and looking only to Lexington's petition, her allegation that she has standing as a cemetery organization because she paid the upkeep, mowing, maintenance, electricity, and taxes on the 0.477-acre tract and O'Quinn Cemetery do not qualify her as a cemetery organization for purposes of 711.004. *See* TEX. HEALTH & SAFETY CODE §§ 711.001(7), 711.004.

(a) *Cemetery Plot Owner*

Also, as discussed above, Lexington alleged in her petition that, pursuant to the Declaration of Covenants, recorded March 31, 2011, she, "as the owner of Lot #1," "own[ed], control[l]ed, and maintain[ed]" the O'Quinn Cemetery. She also alleged, however, that she subsequently sold Lot 1 to DSL Ranch, LLC on March 28, 2013 and that the disinterment took place 20 months later, on November 1, 2014.



Again, a limited liability company is a legal entity distinct from its members. *Sherman*, 486 S.W.3d at 94. As such, members have no interest in the company's property. *Id.*; TEX. BUS. ORGS. CODE § 101.106(b). Thus, Lexington pleaded that she *did not own* Lot 1 at the time of the disinterment; rather, DSL was the owner of Lot 1.

(c) *Surviving Spouse*

Finally, Lexington alleged in her petition that she is the decedent's surviving spouse by informal marriage. She alleged that she publicly called the decedent her husband and that he publicly called her his wife on numerous occasions after they agreed to be married and that they subsequently lived together.

She further alleged, however, that she previously filed claims<sup>8</sup> in these proceedings in the probate court, asserting that she was "entitled to a substantial portion of O'Quinn's Estate" because she was "O'Quinn's wife by informal marriage." She noted that the matter was "litigated extensively in Harris County Probate Court Two before the Hon. Mike Wood" before reaching a settlement. In her petition, she directed the probate court to *Darla Lexington v. T. Gerald Treece*,

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<sup>8</sup> Lexington cites *Darla Lexington v. T. Gerald Treece, Independent Executor of the Estate of John M. O'Quinn, Deceased, The John M. O'Quinn Foundation, and John M. O'Quinn & Associates, PLLC d/b/a The O'Quinn Law Firm*, No. 392,247-402 (Prob. Ct. No. 2, Harris Cty., Tex.), and *Darla Lexington v. The Executor of the Estate of John O'Quinn*, No. 2010-42055 (125th Dist. Ct., Harris Cty., Tex.) (filed on July 8, 2010; transferred by agreement of the parties to Harris County Probate Court No. 2, before the Hon. Mike Wood, on October 20, 2010).

*Independent Executor of the Estate of John M. O'Quinn, Deceased, The John M. O'Quinn Foundation, and John M. O'Quinn & Associates, PLLC d/b/a The O'Quinn Law Firm*, No. 392,247-402 (Prob. Ct. No. 2, Harris Cty., Tex.). There, as discussed above, the matter of Lexington's status as the decedent's surviving spouse was resolved by this probate court's January 31, 2012 "Agreed Take Nothing Judgment," in cause number 392,247-402, when the probate court ordered that all claims, causes of action, and declaratory judgment actions asserted by Lexington were "dismissed with prejudice." "[I]t is well established that a dismissal with prejudice functions as a final determination on the merits." *Mossler*, 818 S.W.2d at 754. And, a "judgment of dismissal entered by agreement of the parties in pursuance of a compromise or settlement of a controversy becomes a judgment on the merits." *Essman*, 961 S.W.2d at 574.

In her response to the Executor and O'Quinn Law Firm's motion to dismiss, Lexington asserted that she has standing to sue because she owned Lot 1 and the O'Quinn Cemetery. As discussed above, her petition demonstrates that she did not own the Cemetery at the time of the disinterment. Further, Lexington asserted that "[n]o court of law has ever ruled that [she] was not O'Quinn's spouse for purposes of preserving or ending disinterment rights, and [she] has never agreed in any court that she was not O'Quinn's spouse for that purpose." As discussed above, this

discrete issue was previously resolved against her in these proceedings, by this probate court.

With respect to her remaining disinterment claims, Lexington asserted in her petition that she has standing to bring her claims against the Executor and O'Quinn Law Firm for interference with the right of interment, invasion of privacy, and intentional infliction of emotional distress based on her status as owner of the cemetery plot and as the surviving spouse of the decedent. She alleged that they interfered with her right of interment and denied her "lawful possession of [the decedent's] body," without her consent as cemetery operator, owner of the cemetery plot, or as the decedent's "surviving spouse." She alleged that they invaded her privacy by "intentionally and physically intruded upon [her] solitude, seclusion, and private affairs and concerns" by disinterring the decedent from the O'Quinn Cemetery. And, she alleged that they intentionally, or recklessly, disinterred the decedent without her permission, as "the owner of the cemetery plot and/or the surviving spouse." She alleged that she suffered actual damages and mental anguish, and she sought damages for bringing the decedent back to Texas and for funeral and burial expenses.

Again, to establish common-law standing, a plaintiff must show both that she has suffered a distinct injury and that there is a real controversy between the parties that the judicial declaration sought will actually resolve. *Brown*, 53 S.W.3d at 305.

Standing generally requires that the plaintiff have suffered an “injury in fact,” that is, “an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical.” *Save Our Springs All.*, 304 S.W.3d at 878.

In their motion to dismiss, the Executor and O’Quinn Law Firm asserted that Lexington lacks standing to assert her remaining disinterment claims because her petition demonstrates that she was not the owner of the cemetery plot and that she is not the decedent’s surviving spouse.

Again, Lexington’s petition affirmatively demonstrates incurable defects in jurisdiction. *See Cty. of Cameron*, 80 S.W.3d at 555. Namely, Lexington pleaded that she did not own Lot 1 at the time of the disinterment. And, her petition demonstrates that the discrete issue of her status as the decedent’s surviving spouse was previously decided against her by final judgment in these probate proceedings.

Because Lexington’s petition demonstrates that she lacked a legally protected interest, she lacked standing to assert her claims and thus the probate court lacked subject matter jurisdiction to hear them. *See Nobles*, 533 S.W.2d at 927 (holding that without breach of legal right belonging to plaintiff, no cause of action can accrue to her benefit); *Save Our Springs All.*, 304 S.W.3d at 878 (holding plaintiff must have suffered an “injury in fact,” that is, “an invasion of a legally protected interest”).

Accordingly, we hold that the probate court did not err in granting the motion to dismiss by the Executor and O’Quinn Law Firm with respect to these claims.

B. *Breach of Contract by the Executor and O’Quinn Law Firm*

Lexington argues that the probate court erred in dismissing, pursuant to rule 91a, her claims that (1) the Executor breached the RR11 and (2) the Executor and O’Quinn Law Firm breached the Settlement Agreement on the ground that her claims have no basis in law or fact. *See* TEX. R. CIV. P. 91a. She asserts that she stated “plausible claim[s].”

The record shows that the Executor and O’Quinn Law Firm challenged Lexington’s breach of contract claims against them pursuant to rule 91a, on the ground that her claims have “no basis in law or fact.” *See id.* And, the probate court granted the motion and dismissed Lexington’s claims.

Again, a dismissal under 91a is a judgment on the merits. *Dall. Cty. Republican Party*, 2019 WL 4010776, at \*1. However, subject matter jurisdiction is a prerequisite to entertaining the merits. *See id.* If a court lacks subject matter jurisdiction, it is obligated to go no further and to dismiss. *Id.* Subject-matter jurisdiction is essential to the authority of a court to decide a case, and standing is implicit in the concept of subject-matter jurisdiction. *Tex. Ass’n of Bus.*, 852 S.W.2d at 443. “Because standing is required for subject-matter jurisdiction, it can be—and if in doubt, must be—raised by a court on its own at any time.” *Fin. Comm’n of Tex.*

*v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013). Here, we review sua sponte the issue of Lexington’s standing to assert her breach-of-contract claims against the Executor and O’Quinn Law Firm. *See Tex. Ass’n of Bus.*, 852 S.W.2d at 443. Thus, we must construe the petition in Lexington’s favor, and if necessary, review the entire record to determine if any evidence supports her standing. *See id.* at 446.

Again, to establish standing, a plaintiff must show both that she has suffered a distinct injury and that there is a real controversy between the parties that the judicial declaration sought will actually resolve. *Brown*, 53 S.W.3d at 305. Standing generally requires that the plaintiff have suffered an “injury in fact,” that is, “an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical.” *Save Our Springs All.*, 304 S.W.3d at 878.

1. Ranch Rule 11 Agreement

In her petition, Lexington alleged that the Executor breached the RR11 at

Section 5, including its subsections and exhibits referenced therein. Also, Exhibit C to the Ranch Rule 11 Agreement (“Consent to Removal of Remains and Relocation of the O’Quinn Family Cemetery” dated March 31, 2011) assured Lexington “[t]hat the remains of John M. O’Quinn, Deceased, located within an above-ground mausoleum on the O’Quinn Family Cemetery . . . be entirely relocated and fully and forever removed to the New O’Quinn Family Cemetery . . . .

She alleged that he breached “[t]his provision” by disinterring the decedent and relocating him to Louisiana. She sought rescission and mental anguish damages.

Lexington seems to allege that the Executor breached the 2011 Consent Agreement by not complying with the term “forever.” The Consent Agreement, which Lexington incorporated in full into her petition, reflects her promise to approve the relocation of the decedent from the original cemetery to the O’Quinn Cemetery. Aside from nominal consideration, there is no reciprocal promise to her. The only signature that appears is that of Lexington.

Lexington does not allege an invasion of a legally protected interest that is “concrete and particularized” or a real controversy that the judicial declaration she seeks, i.e., rescission, will actually resolve. *Brown*, 53 S.W.3d at 305; *Save Our Springs All.*, 304 S.W.3d at 878. Moreover, again, mental anguish damages are not recoverable for a breach of contract. *See Latham*, 972 S.W.2d at 72. Accordingly, we hold that the probate court lacked subject matter jurisdiction over Lexington’s claim against the Executor for breach of the RR11.

## 2. Settlement Agreement

In her petition, Lexington alleged that, in 2012, she and Treece, in his capacity as the Executor and as the president of the O’Quinn Law Firm, executed the Settlement Agreement to resolve the dispute in *Darla Lexington v. T. Gerald Treece, Independent Executor of the Estate of John M. O’Quinn, Deceased, The John M. O’Quinn Foundation, and John M. O’Quinn & Associates, PLLC d/b/a The O’Quinn Law Firm*, Cause No. 392,247-402, in Probate Court No. 2. She alleged that “[a]t

least the following provisions of the Settlement Agreement were breached: Sections 1.13, 1.18, 3.1(a)(v), 3.2(e), 3.3(a), 3.5(b), 3.10.” She did not present any factual allegations regarding a breach of these provisions. She sought rescission and mental anguish damages.

Again, to establish standing, a plaintiff must show both that she has suffered a distinct injury and that there is a real controversy between the parties that the judicial declaration sought will actually resolve. *Brown*, 53 S.W.3d at 305. Lexington does not assert a *distinct injury* or assert a *real controversy* that would be resolved by the rescission sought. *See id.* Again, mental anguish damages are not recoverable for a breach of contract. *Latham*, 972 S.W.2d at 72. Accordingly, we hold that the probate court lacked subject matter jurisdiction over Lexington’s claim against the Executor and O’Quinn Law Firm for breach of the Settlement Agreement.

Accordingly, we overrule Lexington’s second issue.

In her first issue, Lexington generally asserts that the probate court erred in dismissing her claims. Having overruled her specific challenges in her second and fourth issues, we also overrule her first issue.

### **Attorney’s Fees**

In her third issue, Lexington argues that the probate court erred in awarding the Executor and O’Quinn Law Firm attorney’s fees, pursuant to Rule 91a.7, because



they did not establish that their fees were reasonable and necessary. In addition, she asserts, they failed to segregate their recoverable fees.

Rule 91a.7, “Award of Costs and Attorney Fees,” provides:

Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. Any award of costs or fees must be based on evidence.

TEX. R. CIV. P. 91a.7.

As discussed above, however, if a trial court lacks jurisdiction to reach the merits, it does not reach a rule 91a motion. *Dall. Cty. Republican Party*, 2019 WL 4010776, at \*5. A trial court that lacks jurisdiction is obligated to go no further and must dismiss the case. *Id.* “In these circumstances rule 91a is not the ‘vehicle’ by which the case is disposed,” and “jurisdiction is not a ‘ground’ to which 91a is directed.” *Id.*

Because the Executor and O’Quinn Law Firm used a rule 91a motion to challenge the probate court’s subject-matter jurisdiction over Lexington’s disinterment claims, the motion effectively constituted a plea to the jurisdiction. We reviewed the probate court’s judgment using the standard of review for a plea to the jurisdiction challenging only the pleadings and concluded that the probate court lacked subject matter jurisdiction over her claims. *See id.* at \*3; *City of Austin*, 431 S.W.3d at 822 n.1. We sua sponte considered Lexington’s standing to assert her

breach-of-contract claims against the Executor and the O’Quinn Law Firm and concluded that the probate court lacked subject matter jurisdiction over these claims. *See Norwood*, 418 S.W.3d at 581 (“Because standing is required for subject-matter jurisdiction, it can be—and if in doubt, must be—raised by a court on its own at any time.”). Because the Executor and O’Quinn Law Firm are not prevailing parties on their rule 91a motion, the trial court erred in awarding attorney’s fees pursuant to rule 91a.7. *See* TEX. R. CIV. P. 91a.7; *Dall. Cty. Republican Party*, 2019 WL 4010776, at \*5 (“In fact, no Texas case has ever awarded attorney’s fees under rule 91a.7 where the dismissal resulted from a lack of subject matter jurisdiction.”).

We sustain Lexington’s third issue.

### **Conclusion**

We reverse the portion of the probate court’s judgment awarding attorney’s fees to the Executor and the O’Quinn Law Firm and render judgment that the Executor and the O’Quinn Law Firm take no attorney’s fees. We affirm the probate court’s judgment in all other respects.

Sherry Radack  
Chief Justice

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