Opinion issued March 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00215-CV

REMA CHARLES, Appellant

V.

DICKINSON INDEPENDENT SCHOOL DISTRICT, A.C. KANTARA, AND TAYLOR MARINE CONSTRUCTION OF TEXAS, LLC, Appellees

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On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 16-CV-0880

MEMORANDUM OPINION

Appellant Rema Charles filed a bill of review seeking to vacate a prior tax delinquency judgment awarding appellee Dickinson Independent School District ("DISD") and various taxing units delinquent taxes on real property owned by

Charles, foreclosing on the property, and ordering the property sold at a tax sale. She later added appellees A.C. Kantara—who bought the property at the tax sale—and Taylor Marine Construction of Texas, LLC ("Taylor Marine")—to whom Kantara conveyed the property three years later—and asserted various tort and property claims against them and DISD. Appellees each moved for summary judgment on Charles's claims against them, and the trial court granted each appellee's motion for summary judgment. In eleven issues on appeal, Charles argues that fact issues preclude summary judgment.

We hold that the trial court had subject-matter jurisdiction to consider Charles's bill of review against all parties, including DISD, but that DISD enjoys governmental immunity from Charles's remaining claims against it. On the merits of Charles's issues, we affirm.

Background

In 2008, Charles's then-husband conveyed to her certain real property in Galveston County that is at the center of this dispute. In 2013, DISD and various taxing units that are not parties to this appeal sued Charles and her husband for unpaid property taxes for tax years 2006, 2008, and 2011. In January 2014, Charles filed and recorded her deed to the property.

On July 29, 2014, the trial court issued judgment in favor of DISD and the taxing units and against Charles. The judgment listed Charles as a defendant and

stated that she had been served with process and "made an appearance, pro se." The judgment recited that DISD and the taxing units had valid claims for delinquent taxes, penalties, and interest that were secured by tax liens against the property. The judgment showed that Charles owed DISD delinquent taxes for 2008 and 2011 in the amount of $2,430, and that she also owed other taxing units $2,647.01 for delinquent taxes in 2006, 2008, and 2011. The judgment foreclosed on the tax liens and ordered the property sold to satisfy the liens. The net proceeds of the sale were to be distributed to the taxing units, and any excess was to be paid into the registry of the court.

Kantara bought the property at auction with the highest bid for $84,000. It was conveyed to Kantara by sheriff's deed on April 16, 2015, and Kantara filed and recorded the deed on June 4, 2015. After DISD and the taxing units received their share of delinquent taxes, penalties, and interest from the sale, the remaining $79,013.96 in excess proceeds was deposited into the court's registry.

A bankruptcy trustee then filed a post-judgment petition to withdraw these excess proceeds. While the tax delinquency lawsuit was pending, Charles's husband had filed for bankruptcy. A trustee appointed in the bankruptcy proceeding filed a complaint in that proceeding to recover property that the trustee alleged was fraudulently transferred to Charles, including the property at issue in the tax delinquency lawsuit. In a written settlement agreement between the trustee and

Charles in the bankruptcy action, Charles agreed that the trustee would recover the excess proceeds of the tax sale in the tax delinquency lawsuit. The bankruptcy court approved the agreement. The bankruptcy trustee filed its petition to withdraw the excess proceeds in the tax delinquency lawsuit, and the trial court granted the motion. According to the order, "The Trustee and Rema Charles reached an agreement that the Trustee is entitled to the Excess Proceeds upon the terms set out in this Order." The court granted the petition based expressly on its review of "the stipulations and agreement of the parties" and "the evidence presented." Charles's attorney signed the order indicating agreement to and approval of it.

In July 2015, Charles's legal counsel sent Kantara a letter informing him that Charles intended to redeem the property. *See* TEX. TAX CODE § 34.21(a) (providing certain rights of redemption to owner of real property sold at tax sale to purchaser other than taxing unit). The letter denied that "Mr. Charles," presumably referring to Charles, had been "served in the tax suit." The letter stated that Charles "will use the overpayment of taxes" and "the excess funds" as "part of the redemption funds," and it requested "an itemized statement for the sums needed to redeem the property[.]" Kantara responded on July 17, stating that Charles could redeem her property under section 34.21 of the Tax Code for $107,714, and he included an itemized list of the amount he paid for the property plus a statutory redemption

premium and his costs, including his payment of property taxes for tax years 2014 and 2015. *See id.*

In July 2016, Charles filed the underlying original petition for bill of review against DISD only. Her petition sought to set aside and vacate the prior judgment in the tax delinquency lawsuit and to grant her a new trial. Charles listed several defenses she would have raised in the tax delinquency lawsuit, including a violation of her due process rights because she alleged that she was not named as a party or served with process in the tax delinquency lawsuit. She also alleged that she was unable to assert her defenses because of fraud, accident, and wrongful acts.

In March 2017, Charles's counsel sent Kantara a second letter enclosing a notice of her intention to exercise her right of redemption. This document stated that Charles "has in her possession the amount that A.C. Kantara paid at the auction plus the twenty-five percent premium as required by statute," and it requested that Kantara "transfer the property back to [Charles] by way of warranty deed in return for the funds that she has in her possession." Kantara responded to the letter on March 14, 2017, denying Charles's request to redeem her property. Kantara stated that more than one year had passed since Kantara filed and recorded the deed, and therefore the premium had increased to 50%. Kantara also denied Charles's contention that the property was her homestead because it was never designated as her homestead with the appraisal district or tax office and because it "is unimproved

vacant land that has never been occupied, does not contain any habitable structures nor has it been designed or adapted for a *human residence*." This is the last communication between Charles and Kantara in the record on appeal, and there is no indication that Charles took any other action, including sending Kantara payment, to redeem her property.

In April 2017, approximately a month after sending Kantara the second letter, Charles filed a separate lawsuit against Kantara asserting various tort and property claims related to his purchase of the property. She non-suited this lawsuit in October 2017.

On June 28, 2018, Kantara conveyed the property to Taylor Marine by general warranty deed.

In March 2019, Charles filed a supplemental petition in the underlying bill of review, adding Kantara and Taylor Marine as defendants and asserting a cause of action for fraud against Taylor Marine. She filed a second amended petition for bill of review in September 2019, asserting numerous tort and property claims against appellees in addition to the bill of review.[1]

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[1] In addition to the bill of review, Charles asserted claims against DISD for trespass to try title, intentional infliction of emotional distress, invasion of privacy, theft of property, unjust enrichment, and intentional misrepresentation. She asserted claims against Kantara for fraud, theft of property, trespass to try title, unjust enrichment, negligence, intentional infliction of emotional distress, intentional misrepresentation, invasion of privacy, and conspiracy. She asserted claims against DISD for negligence, trespass to try title, unjust enrichment, receipt of stolen

Each appellee filed a motion for summary judgment. In its motion, DISD argued that it was entitled to governmental immunity from Charles's claims against it, including the bill of review. It also argued that Charles's claims are moot because more than two years had passed since the sale of the property and Charles is therefore barred from challenging the sale. DISD attached the sheriff's deed conveying the property to Kantara and a certificate from the Galveston County Clerk showing Kantara filed and recorded this deed.

Kantara filed a combined traditional and no-evidence motion for summary judgment. He argued that Charles's claims are barred by the statute of limitations in section 33.54 of the Tax Code. He alternatively argued that Charles had no evidence to establish her claims and could not establish them as a matter of law.

Taylor Marine filed two motions for summary judgment. Its first motion sought judgment on all of Charles's claims against it on no-evidence grounds. The record does not include a response from Charles to this motion. Taylor Marine's second motion sought partial summary judgment on Charles's trespass to try title claim only. Charles responded to this motion.

In her responses to appellees' motions for summary judgment, Charles generally argued that the judgment in the tax delinquency lawsuit is void because

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property, conspiracy, invasion of privacy, conversion, and intentional infliction of emotional distress.

she was not named as a party or served with process in that lawsuit even though she was the record owner of the property. She argued that DISD's governmental immunity is waived under section 101.021 of the Tort Claims Act. She also argued that she attempted to redeem her property under section 34.01 of the Tax Code and that she paid the property taxes, but Kantara did not allow her to redeem her property. Charles argued that fact issues precluded summary judgment in favor of appellees.

The trial court held a hearing on the motions for summary judgment. At the end of the hearing, the trial court orally granted all appellees' motions for summary judgment. The trial judge stated on the record that he personally signed the judgment in the tax delinquency lawsuit, and he noted the handwritten notation on the judgment stating that Charles appeared, which he said indicated Charles "was there." On this ground, the trial court orally granted DISD's motion for summary judgment. The trial court also stated that it was "troubling" that Charles had not redeemed the property by the time of the hearing in 2019 for "a 2013 tax case."

The trial court subsequently signed written orders granting appellees' motions and rendering summary judgment in their favor. The written orders do not state the grounds for the trial court's rulings. Charles appeals.

Briefing Waiver

DISD contends that Charles presented only a generalized complaint on appeal without offering argument or citing to legal authority or to the appellate record. Thus,

DISD argues that Charles failed to adequately brief her issues as required by the Rules of Appellate Procedure and has therefore waived her issues on appeal. *See* TEX. R. APP. P. 38.1.

Although we liberally construe pro se briefs, we nonetheless require pro se litigants to comply with applicable laws and rules of procedure. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (per curiam); *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978). "Having two sets of rules—a strict set for attorneys and a lenient set for pro se parties—might encourage litigants to discard their valuable right to the advice and assistance of counsel." *Wheeler*, 157 S.W.3d at 444. "Litigants who represent themselves must comply with the applicable procedural rules, or else they would be given an unfair advantage over litigants represented by counsel." *Mansfield State Bank*, 573 S.W.2d at 185; *see also Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.).

As pertinent here, Rule 38.1(g) requires appellate briefs to state "concisely and without argument the facts pertinent to the issues or points presented" and to "be supported by record references." TEX. R. APP. P. 38.1(g). Rule 38.1(i) similarly requires "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i).

Charles filed four briefs: an opening brief and a reply to each appellee's separately filed responsive briefs. Each of Charles's briefs provides argument on her

issues and citations to the record and to legal authority. Except where otherwise stated herein, we disagree with DISD that Charles did not adequately brief her issues. Therefore, we conclude that Charles did not waive all her issues on appeal.

Subject-Matter Jurisdiction

Before turning to the merits of Charles's appeal, we must first address several jurisdictional issues raised by the parties. First, in part of her fifth issue, Charles argues that the trial court improperly entered summary judgment in favor of appellees in the underlying proceeding after the same court previously entered the tax delinquency judgment against her. We construe this argument as a challenge to the trial court's jurisdiction over the underlying lawsuit. Second, Kantara briefly argues in the summary of his argument that Charles lacks standing to assert claims based on her ownership of the property. Third, DISD argues that Charles's claims have become moot because the two-year period to challenge the validity of the tax sale has passed. Fourth, DISD argues that it enjoys governmental immunity from Charles's suit against it.

A. Standard of Review

Courts must have subject-matter jurisdiction to act in a case, and subject-matter jurisdiction "is never presumed and cannot be waived." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993); *Shahin v. Mem'l Hermann Health Sys.*, 527 S.W.3d 484, 487 (Tex. App.—Houston [1st Dist.] 2017,

pet. denied). The plaintiff bears the burden to "to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. Jurisdictional issues present questions of law, which we review de novo. *Shahin*, 527 S.W.3d at 487.

B. Exclusive Jurisdiction over Bill of Review

As stated above, in part of her fifth issue, Charles argues that the trial court improperly entered summary judgment in favor of appellees in the underlying proceedings after the same court previously entered the tax delinquency judgment against her. Taylor Marine questioned whether this argument is a jurisdictional challenge, and it argued that the trial court has exclusive jurisdiction to decide this case because it includes a bill of review. We therefore consider whether the trial court had subject-matter jurisdiction to enter the orders granting appellees' motions for summary judgment.

A bill of review is a direct attack on a judgment that is no longer appealable or subject to a motion for new trial, and a bill of review must be filed in the same court that rendered the prior judgment. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015). The court that rendered the challenged judgment has exclusive jurisdiction over the bill of review. *Id.*

The 56th District Court entered the judgment in the tax delinquency lawsuit that Charles challenges in the bill of review. Therefore, the 56th District Court has

exclusive jurisdiction over the bill of review, and Charles was required to file the bill of review in that court. *Id.* Charles's original petition acknowledged this by specifically alleging, "Jurisdiction is proper in this Court in which the original suit was filed." Her original petition included claims other than the bill of review, and Charles has not cited to any legal authority supporting her argument that the trial court lacked jurisdiction over these claims merely because it entered judgment against her in a prior lawsuit. Thus, we conclude that the trial court properly exercised jurisdiction over Charles's claims.

We overrule Charles's fifth issue to the extent that it challenges jurisdiction.

C. Standing

In the summary of his argument, Kantara argues that Charles lacks standing because she did not own any interest in the property at the time of foreclosure. Charles did not address this issue in her reply brief. We nevertheless address this argument because it concerns the trial court's subject-matter jurisdiction and therefore cannot be waived. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 443–44.

Standing is implicit in the open courts provision of the Texas Constitution, which "contemplates access to the courts only for those litigants suffering an injury." *Garcia v. City of Willis*, 593 S.W.3d 201, 206–07 (Tex. 2019) (quoting *Tex. Air Control Bd.*, 852 S.W.2d at 444); TEX. CONST. art. I, § 13 (providing that courts "shall be open, and every person for an injury done him, in his lands, goods, person

or reputation, shall have remedy by due course of law"). "In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012). The alleged injury must be concrete and particularized, actual or imminent, not hypothetical. *Id.* at 155. "Constitutional harms—whether actual or imminent—are sufficient." *Id.* To constitute a "real controversy," the plaintiff's alleged injury must be fairly traceable to the defendant's conduct. *Id.* Finally, the plaintiff must show her alleged injury is likely redressable by the relief requested. *Id.*

Charles seeks to recover ownership of her property by arguing that the prior judgment from DISD's tax delinquency lawsuit is void. Her bill of review attacks the very judgment that foreclosed on her property and deprived her of her interest in it on the ground that the judgment is void for lack of service, which she alleged violated her due process rights. This alleged unconstitutional deprivation of her property rights states an actual injury that is concrete and particularized, fairly traceable to DISD's alleged conduct in the tax delinquency lawsuit, and redressable by a favorable judgment rendering void the prior judgment as requested by Charles. *See id.*; *see also Garcia*, 593 S.W.3d at 208 ("Garcia seeks reimbursement for the fine he paid, arguing it is an unlawful penalty under the Texas Constitution. This constitutes a concrete, individualized injury. Garcia is out the money he paid to

satisfy an allegedly unconstitutional fine; he therefore has standing to bring this claim for retrospective relief.") (internal citations omitted). Likewise, Charles's other claims against appellees also allege concrete and actual injury fairly traceable to appellees' conduct and likely redressable by the damages she requested. *See Heckman*, 369 S.W.3d at 154. Therefore, we hold that Charles has standing to assert her claims.

D. Mootness

DISD argues that this case is moot because Charles did not ask the trial court to set aside the tax sale within two years as DISD argues is required under Tax Code sections 34.08 and 33.54(a)(2). DISD acknowledges that Charles filed her bill of review before the deadline in these sections—and thus that a "justiciable controversy existed when her petition was filed"—but it nevertheless contends that Charles was also required to request that the court set aside the sale prior to the deadline. Charles did not respond to this argument.

A court cannot decide a case that has become moot during the pendency of the litigation. *Id.* at 162. "A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer 'live,' or if the parties lack a legally cognizable interest in the outcome." *Id.* In other words, "a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Id.* Once a case becomes moot,

the parties lose standing to maintain their claims and the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction. *Id.*; *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983)).

Section 33.54(a) prohibits actions relating to the title of property against the purchaser of the property at a tax sale unless the action "is commenced" either before the first anniversary of the date that the purchaser records the deed or before the second anniversary if the property was the residence homestead of the owner when the tax delinquency suit was filed. TEX. TAX CODE § 33.54(a). Section 34.08(b) prohibits a person from "commenc[ing] an action" against a subsequent purchaser challenging the validity of a tax sale unless the action is commenced within the same deadlines: before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record or before the second anniversary if the property was the residence homestead of the owner. *Id.* § 34.08(b).

After Kantara purchased the property at the tax sale, he filed and recorded the deed on June 4, 2015. DISD does not dispute that the two-year deadline for residence homesteads applies.[2] *See id.* §§ 33.54(a)(2), 34.08(b). Therefore, Charles had to

[2] DISD concedes that a "justiciable controversy existed when [Charles's] petition was filed" on July 29, 2016, which is more than one year but less than two years after the deed was recorded.

commence any action under these sections prior to June 4, 2017. *See id.* §§ 33.54(a)(2), 34.08(b).

Charles filed the underlying bill of review proceeding against DISD on July 29, 2016, and she therefore complied with the deadlines for commencing an action under both sections 33.54(a) and 34.08(b). These sections address only when an action must be commenced. *Id.* §§ 33.54(a)(2), 34.08(b). Contrary to DISD's argument, these sections do not require Charles to take some additional action in the trial court to set aside the tax sale within the statutory deadline.[3] Indeed, the sole reason Charles initiated the bill of review was to request that the trial court set aside the tax sale.

Unless and until the tax sale is invalidated in these proceedings, the prior judgment divesting Charles of her property rights and selling the property at issue remains valid. Charles has a legally cognizable interest in challenging the prior judgment and seeking a new trial via bill of review. *See Heckman*, 369 S.W.3d at 162. If the prior judgment were to be invalidated, Charles would be entitled to a new trial on the tax delinquency issue and potentially a new judgment in her favor. *See*

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[3] We also note that sections 33.54(a) and 34.08(b) apply only to actions against a subsequent purchaser of property at a tax sale, not to actions against a taxing unit such as DISD. *See* TEX. TAX CODE §§ 33.54(a), 34.08(b). Furthermore, the statute of limitations in a bill of review proceeding is generally four years. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015).

id. Charles likewise has a legally cognizable interest in the outcome of her tort and property claims against the parties, and an award of damages would affect Charles's rights and interests. *See id.* Thus, we conclude that Charles's claims are not moot.

E. DISD's Governmental Immunity

DISD argues that it enjoys governmental immunity from all of Charles's claims against it by generally arguing that Charles "failed to present evidence that the legislature has consented to suit[.]" Charles responds that section 101.021 of the Civil Practice and Remedies Code waives DISD's immunity.

School districts like DISD are political subdivisions of the state, and they enjoy governmental immunity from liability and suit to the extent that the Legislature has not waived immunity. *Ben Bolt-Palito Blanco Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) (stating that immunity from liability is affirmative defense, while "immunity from suit deprives a court of subject matter jurisdiction"). For example, the Tort Claims Act provides a limited waiver of governmental immunity for certain tort claims asserted against governmental entities. TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109; *Miranda*, 133 S.W.3d at 224.

Although waiving governmental immunity is generally the prerogative of the Legislature, the judiciary has modified the common-law immunity doctrine and, to

an extent, abrogated the immunity of governmental entities that file suit. *See City of Dallas v. Albert*, 354 S.W.3d 368, 373–74 (Tex. 2011); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). When a governmental entity files an affirmative claim for monetary relief in court, the entity does not have immunity from the opponent's claims that are "germane to, connected to, and properly defensive to" the claims asserted by the governmental entity. *Albert*, 354 S.W.3d at 373–75; *Reata Constr.*, 197 S.W.3d at 378. In that circumstance, the governmental entity is not immune from claims for monetary relief to the extent that they offset the amounts claimed by the governmental entity. *Albert*, 354 S.W.3d at 373–75; *Reata Constr.*, 197 S.W.3d at 378. The governmental entity "must participate in the litigation process as an ordinary litigant as to that claim." *Albert*, 354 S.W.3d at 375; *Reata Constr.*, 197 S.W.3d at 377.

1. Immunity from Bill of Review Proceedings

The Tax Code authorizes taxing units to sue a property owner to recover delinquent property taxes, penalties, and interest. *See* TEX. TAX CODE §§ 33.41(a), 34.01(a); *see also id.* § 1.04(12) (defining "taxing unit" to include school districts). As discussed in further detail below, a bill of review is a direct attack on a judgment that is no longer appealable or subject to a motion for new trial. TEX. R. CIV. P. 329b(f); *Valdez*, 465 S.W.3d at 226.

Charles's live petition primarily seeks the return of her real property, although she also asserts other claims for damages. The prior judgment in DISD's lawsuit against Charles divested Charles of her interest in the property, foreclosed on it, and ordered it sold. Charles did not file a motion for new trial or appeal that judgment, and the time to do so has passed. Therefore, a bill of review is the proper vehicle for Charles to challenge the prior tax delinquency judgment. *See* TEX. R. CIV. P. 329b(f).

Charles's first cause of action against DISD challenges the prior judgment on the grounds that Charles was allegedly neither named as a party nor served in the prior lawsuit that resulted in a default judgment, she has meritorious defenses to the default judgment, and she was unable to assert her defenses because she was not notified of the suit and due to fraud and negligence. This cause of action does not seek damages or allege any injury other than the prior judgment issued against her. Thus, these allegations state the elements for a bill of review. *See Valdez*, 465 S.W.3d at 226.

Neither party has pointed to any authority showing whether governmental entities are immune from bill of review proceedings. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (stating that plaintiff has burden to prove trial court has subject-matter jurisdiction); *Miranda*, 133 S.W.3d at 224 (stating that immunity from suit deprives trial court of subject-matter jurisdiction). Charles generally argues that DISD's immunity is waived under section 101.021 of the Tort Claims Act. *See* TEX. CIV.

PRAC. & REM. CODE § 101.021. But that section waives governmental immunity for the negligent operation or use of a motor vehicle and for "personal injury and death so caused by a condition or use of tangible personal or real property[.]" *Id.* There is no mention of a bill of review in section 101.021. *Id.* And although it mentions real property, the section applies only to personal injury and death caused by a condition or use of the property, which Charles does not allege. *See id.* § 101.021(2).

Rather, Charles challenges the tax delinquency judgment, which is not a subject of section 101.021. To waive governmental immunity, a statute must use "clear and unambiguous language" expressing such an intent. *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 360 (Tex. 2019) (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006), and TEX. GOV'T CODE § 311.034). Charles has pointed to no authority supporting her argument that immunity is waived under section 101.021, and our own research has not revealed any supporting authority. We therefore conclude that Charles has not established that section 101.021 waives DISD's governmental immunity from the bill of review proceeding.

Nevertheless, we note that DISD decided to engage in the litigation process by suing Charles for delinquent taxes, penalties, and interest, and Charles's bill of review challenges the judgment in that prior case. *See Miranda v. Byles*, 390 S.W.3d 543, 551 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (stating that "appellate court can consider matters concerning the trial court's subject-matter jurisdiction sua

sponte"). When a governmental entity files suit, the entity does not have immunity from the opponent's claims that are "germane to, connected to, and properly defensive to" the claims asserted by the governmental entity and to the extent that they offset the amounts claimed by the governmental entity. *See Albert*, 354 S.W.3d at 373–75; *Reata Constr.*, 197 S.W.3d at 378. As to those claims, the governmental entity must participate in the litigation process as an ordinary litigant. *Albert*, 354 S.W.3d at 375; *Reata Constr.*, 197 S.W.3d at 377.

An ordinary litigant must respond to a bill of review challenging a prior judgment in order to protect the litigant's rights in the judgment. *See* TEX. R. CIV. P. 329b(f) (providing for bill of review proceeding to set aside judgment after trial court's plenary power expires). In a bill of review, a petitioner must plead and prove, among other things, that she had a meritorious claim or defense to the prior judgment that she was prevented from making by official mistake or by the opposing party. *See Valdez*, 465 S.W.3d at 220–21. If the bill of review is granted, the prior judgment is vacated and a new trial is held with the parties reverting back to their original status as plaintiff and defendant. *Caldwell v. Barnes*, 154 S.W.3d 93, 98 (Tex. 2004) (per curiam); *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).

Moreover, Charles primarily challenges the tax delinquency judgment by arguing that she was not served with process in that lawsuit, in which DISD was a plaintiff. This challenge is "germane to, connected to, and properly defensive to" the

claims that DISD asserted against Charles in the tax delinquency case. *See Albert*, 354 S.W.3d at 373–75; *Reata Constr.*, 197 S.W.3d at 378. Furthermore, because the bill of review seeks to vacate the prior tax delinquency judgment, Charles is seeking to offset the amounts claimed by DISD. *See Albert*, 354 S.W.3d at 373–75; *Reata Constr.*, 197 S.W.3d at 378; *see also Fort Bend Cty. v. Martin-Simon*, 177 S.W.3d 479, 484 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (stating that governmental entities are not immune from declaratory judgment actions seeking to determine parties' rights under tax statute because suit does not seek to subject entity to liability). That is, the most that Charles can achieve by bill of review is setting aside the tax delinquency judgment and a new trial, in which DISD would be required to prove its entitlement to the delinquent taxes again. *See Caldwell*, 154 S.W.3d at 98; *Baker*, 582 S.W.2d at 408.

DISD decided to expend resources to pursue the tax delinquency litigation, as is its right, and a bill of review is a part of litigation. *See Reata Constr.*, 197 S.W.3d at 375. DISD need not spend additional resources in paying a judgment on the bill of review, so DISD's fiscal planning should not be disrupted. *See id.* DISD cannot initiate suit against Charles and then later claim that immunity protects it from Charles's claims relating to that suit. "In this situation, we believe it would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it."

See id. at 375–76 (citing *Guar. Tr. Co. v. United States*, 304 U.S. 126, 134–35 (1938)).

Our sister courts have held that governmental entities are not immune from bill of review proceedings challenging prior judgments in other types of cases in which the governmental entity initiated the challenged proceedings. *See State v. Aguilera*, No. 13-16-00615-CV, 2018 WL 5987155, at *5 (Tex. App.—Corpus Christi–Edinburg Nov. 15, 2018, no pet.) (mem. op.) (holding that sovereign immunity does not bar bill of review action seeking to vacate prior judgment in civil forfeiture proceeding initiated by State); *Kalyanaram v. Univ. of Tex. Sys.*, No. 03-05-00642-CV, 2009 WL 1423920, at *1, 3 (Tex. App.—Austin May 20, 2009, no pet.) (mem. op.) (holding that sovereign immunity does not bar bill of review action seeking to set aside prior final judgment pursuant to settlement agreement); *State v. Gonzalez*, No. 04-06-00133-CV, 2006 WL 2134643, at *1, 2 (Tex. App.—San Antonio Aug. 2, 2006, no pet.) (mem. op.) (holding that sovereign immunity does not bar bill of review action seeking to vacate prior agreed judgment in civil forfeiture proceeding initiated by State). Accordingly, we conclude that DISD is not immune from the bill of review.

2. Immunity from Tort and Other Claims

Charles also asserts tort and property claims for damages against DISD. Specifically, Charles asserts causes of action for trespass to try title, intentional

infliction of emotional distress, invasion of privacy, theft of property, unjust enrichment, and intentional misrepresentation. She argues that section 101.021 of the Tort Claims Act waives DISD's immunity for these claims against it.

As stated above, section 101.021 waives governmental immunity for the negligent operation or use of a motor vehicle and "personal injury and death so caused by a condition or use of tangible personal or real property . . . ." TEX. CIV. PRAC. & REM. CODE § 101.021. Charles does not allege any claims arising from the operation or use of a motor vehicle or any claims involving personal injury or death. *See id.* Therefore, section 101.021 does not waive DISD's immunity from Charles's claims. Charles has not asserted any other basis for waiving DISD's immunity, and therefore she has not met her burden to demonstrate that the trial court had subject-matter jurisdiction over these claims. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (stating that plaintiff bears burden to demonstrate trial court's jurisdiction).

We note, however, that governmental entities are immune from intentional torts, which comprise most of Charles's claims against DISD. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2); *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001) (stating that governmental entities are immune from conduct arising from intentional torts no matter how claim is pleaded). It is well established that governmental entities are immune from most of causes of action asserted against DISD. *See Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 389 (Tex.

2011) (trespass to try title); *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) (intentional infliction of emotional distress and invasion of privacy); *Lopez v. Serna*, 414 S.W.3d 890, 896 (Tex. App.—San Antonio 2013, no pet.) (theft of property under Theft Liability Act). Charles's claims for unjust enrichment and intentional misrepresentation allege intentional conduct, and therefore DISD retains immunity over these claims. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2); *Petta*, 44 S.W.3d at 580.

To the extent that Charles argues the trial court erred by granting summary judgment because DISD did not identify or negate a single element of her claims, we disagree. DISD argued that it was immune from Charles's lawsuit even if Charles could prove her claims. This constitutes a challenge to the trial court's subject-matter jurisdiction to hear these claims. *See Miranda*, 133 S.W.3d at 224.

We conclude that DISD is immune from all of Charles's claims against it except the bill of review, and therefore the trial court did not err in granting summary judgment to DISD on these claims. We further conclude that the trial court properly exercised subject-matter jurisdiction over Charles's bill of review as well as Charles's claims against Kantara and Taylor Marine.

Bill of Review

In her first, second, third, eighth, ninth, and eleventh issues and the remaining part of her fifth issue, Charles attacks the prior judgment issued against her in DISD's tax delinquency lawsuit.

A. Standard of Review and Governing Law

A bill of review is an equitable proceeding that allows a party to challenge a judgment after the deadline for filing a motion for new trial or an appeal. TEX. R. CIV. P. 329b(f) (stating that, after trial court's plenary power expires, "a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law"); *Valdez*, 465 S.W.3d at 220–21; *Baker*, 582 S.W.2d at 406. "Recognizing the importance our legal system places on the finality of judgments, courts generally allow bills of review only in limited circumstances or as authorized by statute." *Valdez*, 465 S.W.3d at 221. Equitable bills of review are generally subject to a four-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.051; *Valdez*, 465 S.W.3d at 226.

A bill of review is a direct attack on a judgment, and therefore it must be filed in the court that rendered the judgment; only the rendering court may exercise jurisdiction over the bill of review. *Valdez*, 465 S.W.3d at 226. To obtain an equitable bill of review, a petitioner must plead and prove (1) a meritorious claim or defense to the judgment, (2) which the petitioner was prevented from making by

official mistake or by the opposing party's fraud, accident, or wrongful act, and (3) without any fault or negligence on the petitioner's own part. *Id.*; *Baker*, 582 S.W.2d at 406–07.

The petition for bill of review must allege these elements factually and with particularity. *Baker*, 582 S.W.2d at 408. The petitioner must also present prima facie proof supporting the allegations. *Id.* A prima facie meritorious defense is established by showing that the defense is not barred as a matter of law and the petitioner will be entitled to judgment as a matter of law on retrial if no evidence to the contrary is offered. *Id.* Prima facie proof can consist of documents, discovery responses, and affidavits, as well as other evidence the trial court may receive in its discretion. *Id.* The respondent to a bill of review may produce evidence showing that the defense is barred as a matter of law, but factual disputes are resolved in favor of the petitioner for the purposes of this pretrial determination, which is a legal question. *Id.*

If the trial court determines that the petitioner has not established a prima facia meritorious defense, the proceeding terminates and the trial court must dismiss the case. *Id.* The court will only conduct a trial if the petitioner establishes a prima facie meritorious defense. *Id.* At trial, the petitioner has the initial burden of persuasion to prove that the prior judgment was rendered as a result of the opposing party's fraud, accident, or official mistake without any fault or negligence on the petitioner's own part. *Id.* (stating that burden may be "onerous," but it "is a major distinguishing

factor between a bill of review and a motion for new trial"). The bill-of-review respondent then assumes the burden of proving its original cause of action. *Id.*

When a petitioner challenges a judgment based on lack of service of process, however, the petitioner need not prove the first two elements of a bill of review. *Caldwell*, 154 S.W.3d at 96. "[I]f a plaintiff was not served, constitutional due process relieves the plaintiff from the need to show a meritorious defense." *Id.* at 96–97 (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86–87 (1988)). The plaintiff also need not show that fraud, accident, wrongful act, or mistake prevented presentation of a defense. *Id.* at 97.

The petitioner alleging non-service must still prove the third bill-of-review element: that the judgment was rendered without any fault or negligence on the petitioner's part. *Id.* This element is "conclusively established if the plaintiff can prove that he or she was never served with process." *Id.* An individual not served with process cannot be at fault or negligent in allowing a default judgment to be rendered. *Id.* If the petitioner makes this showing, the question of service is properly resolved at trial and not by the trial court in a pretrial proceeding if the material facts are disputed. *Id.* At trial, the petitioner has the burden to prove she was not served with process, thereby conclusively establishing lack of fault or negligence in allowing a default judgment to be rendered. *Id.* at 97–98. If the petitioner proves

non-service, the parties "revert to their original status as plaintiff and defendant with the burden on the original plaintiff to prove his or her case." *Id.* at 98.

It is well settled that a defendant may waive the requirement of service by voluntarily appearing. TEX. R. CIV. P. 124 (stating that judgment shall not be rendered against any defendant unless upon service, waiver of service, or appearance by defendant); *Zanchi v. Lane*, 408 S.W.3d 373, 378 (Tex. 2013); *Jordan v. Hall*, 510 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

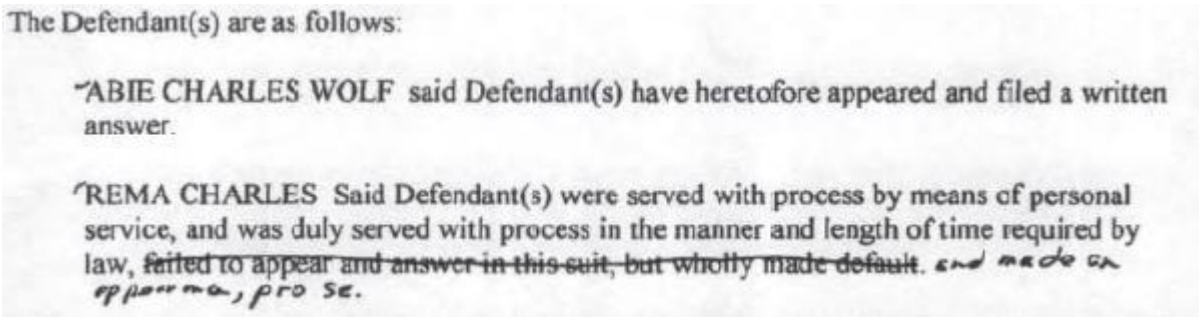
We review a trial court's ruling on a bill of review for an abuse of discretion, indulging every presumption in favor of the court's ruling. *Xiaodong Li v. DDX Grp. Inv., LLC*, 404 S.W.3d 58, 62 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles. *Id.*

B. Analysis

Charles repeatedly argues that she was not named as a party or served with process in the tax delinquency lawsuit, which violated her right to due process and Rule of Civil Procedure 124, rendering the prior judgment void. She also argues that she paid her property taxes before they were due, the tax delinquency judgment violated the takings clause of the Texas Constitution, and a fact issue exists regarding whether she still legally owns the property. Appellees respond that the judgment

recites that Charles was served with process—as well as that she made an appearance pro se—and therefore the judgment is not void.[4]

The judgment in DISD's tax delinquency lawsuit against Charles states:


The Defendant(s) are as follows:

"ABIE CHARLES WOLF said Defendant(s) have heretofore appeared and filed a written answer.

"REMA CHARLES Said Defendant(s) were served with process by means of personal service, and was duly served with process in the manner and length of time required by law, ~~failed to appear and answer in this suit, but wholly made default~~. and made an appearance, pro se.

Despite this recitation that Charles was both served with process and made an appearance, Charles argues that she was not named as a party or served in the tax delinquency lawsuit. She attached a sworn affidavit to her summary judgment responses averring that she "was neither named as a party nor served with citation" in the lawsuit. She also attached an email from DISD's counsel stating, "We do not contest that Mrs. Rema Charles was not personally served in the lawsuit and that the

[4] Appellees also argue that Charles's challenge to the tax delinquency judgment is a collateral attack, not a direct attack, because she did not name all the parties to the tax delinquency lawsuit in her bill of review and because she did not diligently pursue her legal remedies. Appellees did not raise these arguments in their respective motions for summary judgment but have raised them for the first time on appeal. Because summary judgment is not proper on a ground not raised in a motion for summary judgment and because we do not consider arguments raised for the first time on appeal, we decline to consider these arguments. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 33.1(a).

motion for continuance that was filed in her name was not actually signed by her, and therefore she did not make an appearance."[5]

In a direct attack on a judgment, such as by bill of review, recitation of due service in the challenged judgment is not conclusive and the record must affirmatively show that the party was properly served. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973); *Mallia v. Bousquet*, 813 S.W.2d 628, 630 (Tex. App.—Houston [1st Dist.] 1991, no writ). As the primary plaintiff in the tax delinquency lawsuit against Charles, DISD was in a position to produce evidence showing proper service of process on Charles, but it produced no evidence concerning this issue. Instead, it relied on the language in the tax delinquency judgment reciting that Charles was duly served with process. But the recitations in the judgment are not conclusive. *See Whitney*, 500 S.W.2d at 95; *Mallia*, 813 S.W.2d at 630. The record does not otherwise affirmatively show that Charles was served with process in the tax delinquency lawsuit. We therefore agree with Charles that she has raised a genuine issue of material fact on the issue of whether she was served

[5] In an appendix to her reply brief to DISD's brief, Charles attached several documents that are not included in the record on appeal. Documents attached as exhibits or appendices to briefs do not constitute formal inclusion of such documents in the record on appeal, and we cannot consider matters outside the record in our review. *Democratic Sch. Research, Inc. v. Rock*, 608 S.W.3d 290, 305 (Tex. App.—Houston [1st Dist.] 2020, no pet.). Because the documents appended to Charles's reply brief are not included in the record on appeal, we decline to consider them in our analysis.

in the tax delinquency lawsuit, which ordinarily would entitle her to a trial on the issue. *See Peralta*, 485 U.S. at 84 (stating that notice to interested parties is "elementary and fundamental requirement of due process," and "a judgment entered without notice or service is constitutionally infirm") (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)); *Caldwell*, 154 S.W.3d at 97 (stating that if evidence of non-service raises material fact dispute, resolution of service issue "is properly resolved at trial and not by the trial court in a pretrial proceeding").

However, that does not end the inquiry. When a defendant enters an appearance in a lawsuit, any issue regarding service of process or lack thereof is waived. *See* TEX. R. CIV. P. 124; *Zanchi*, 408 S.W.3d at 378; *Jordan*, 510 S.W.3d at 198; *see also Peralta*, 485 U.S. at 84 (stating that judgment entered without service *or notice* "is constitutionally infirm"). Once a defendant makes an appearance, she has actual knowledge of the lawsuit even if she was not personally served with process.

As quoted above, the tax delinquency judgment recites that Charles "made an appearance, pro se." This quote is handwritten into the judgment. Although Charles has consistently and repeatedly disputed that she was served with process in the tax

delinquency lawsuit, she does not dispute that she made an appearance in that lawsuit.[6] And if she made an appearance, the issue of service of process is moot.

Charles also repeatedly quotes an email from DISD's counsel stating that DISD would not contest that she did not make an appearance in the tax delinquency lawsuit. However, without any dispute from Charles on the issue of her appearance, there is nothing for DISD to contest. Moreover, DISD sent the email before Charles added Kantara and Taylor Marine as defendants to the underlying lawsuit, and there is no evidence that Kantara or Taylor Marine conceded the issue. Therefore, the uncontroverted record evidence shows that Charles made an appearance in the tax delinquency lawsuit.

Because Charles made an appearance, she had actual knowledge of the lawsuit and waived any defect in service of process. *See* TEX. R. CIV. P. 124; *Zanchi*, 408 S.W.3d at 378; *Jordan*, 510 S.W.3d at 198; *see also Peralta*, 485 U.S. at 84 (stating that "elementary and fundamental requirement of due process" is "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of

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[6] Charles first mentions lack of appearance in a reply brief on appeal. In reply to Taylor Marine's responsive brief, Charles argues that appellees have no evidence showing that she was served or appeared, and that she has evidence showing she did not enter an appearance. Charles also argues for the first time in her reply brief that the trial court did not follow the proper procedure by having a court reporter prepare a transcript showing which parties appeared. We do not consider arguments that were not presented to the trial court in the summary judgment proceeding but are instead raised for the first time on appeal. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 33.1(a).

the action and afford them the opportunity to present their objections") (quoting *Mullane*, 339 U.S. at 314). Therefore, Charles is not relieved of proving the first two elements of a bill of review. *See Caldwell*, 154 S.W.3d at 96.

To establish the first two elements, Charles argues that she paid her property taxes, which we construe as a defense to the tax delinquency lawsuit. *See Valdez*, 465 S.W.3d at 226 (stating that first element of bill of review is meritorious claim or defense to judgment). Charles alleged that she visited the tax office on January 27, 2015, and paid all of the property taxes that the tax office told her were owed on the property.[7] In support of this allegation, Charles attached a receipt from the Office of the Galveston County Tax-Assessor Collector showing a payment of $1,494.79 on January 27, 2015. The receipt indicates that this payment was for DISD's assessment of 2008 taxes only. However, the tax delinquency judgment, which was signed before Charles paid these taxes, shows that Charles owed DISD $2,340.11 and the other taxing units $2,687.01.

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[7] Charles argues that she paid these property taxes "three days before [the taxes became] due," but we disagree. Under the Tax Code, property taxes "are due on receipt of the tax bill and are delinquent if not paid before February 1 of the year following the year in which imposed." TEX. TAX CODE § 31.02(a); *see id.* § 31.01(a) (requiring tax assessor to "mail tax bills by October 1 or as soon thereafter as practicable"). The taxes that Charles paid in January 2015 were for her 2008 property taxes. These taxes were due by February 1, 2009. *See id.* § 31.02(a). Thus, Charles did not pay the property taxes before they became due.

Charles did not pay any of the delinquent taxes, penalties, and interest prior to judgment issuing in the tax delinquency lawsuit, and therefore payment of taxes could not have been a defense in that lawsuit. The partial payment of taxes that Charles paid in 2015—after judgment issued but before the tax sale—was insufficient even to require DISD and the taxing units to release their tax liens on the property. *See* TEX. TAX CODE § 33.53(e) (requiring payment of tax delinquency judgment before property sold at tax sale in exchange for taxing units releasing tax liens on property). Because Charles did not pay the full amount of the judgment or any part of it prior to judgment issuing, we conclude that payment of her taxes was not a meritorious defense to the tax delinquency lawsuit.

Charles also argues that the tax delinquency judgment violated the takings clause of the Texas Constitution. *See* TEX. CONST. art. I, § 17 ("No person's property shall be taken . . . for or applied to public use without adequate compensation being made, unless by consent of such person . . . ."). Charles offers no analysis of this argument, and she offers no authority establishing that a tax delinquency judgment can constitute a taking under the Texas Constitution or that she was not adequately compensated.[8] *See* TEX. R. APP. P. 38.1(i); *Guimaraes v. Brann*, 562 S.W.3d 521,

[8] The tax delinquency judgment lists the value of the property at $38,000. *See* TEX. TAX CODE § 33.50(a). Kantara paid $84,000 for the property at the tax sale, and more than $79,000 in excess proceeds was deposited into the court's registry after DISD and the taxing units took their shares of delinquent taxes, penalties, and interest. Pursuant to Charles's agreement to settle claims related to the property in

538 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Failure to cite to appropriate legal authority or to provide substantive analysis of the legal issues presented results in waiver of a complaint on appeal."). Importantly, in light of our conclusion above that Charles appeared in the tax delinquency lawsuit, Charles does not argue that she was prevented from asserting a takings claim in that lawsuit without any of her own fault or negligence. *See Valdez*, 465 S.W.3d at 226.

Finally, we disagree with Charles that there is a fact issue regarding whether she legally owns the property. The tax delinquency judgment divested Charles of her interest in the property, and we have already determined that this judgment is valid. *See* TEX. TAX CODE § 34.01(n) (stating that deed issued pursuant to sale of property at tax sale "vests good and perfect title in the purchaser . . . to the interest owned by the defendant in the property subject to the foreclosure . . . subject only to the defendant's right of redemption"). Charles could have redeemed her interest in the property by paying the amount of the tax delinquency judgment before the property was sold, as discussed above, or by paying Kantara to redeem her property. *See id.*

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a separate bankruptcy proceeding, a bankruptcy trustee filed a petition to withdraw the excess funds, and the trial court granted the trustee's petition. *See id.* § 34.04(a), (c). Thus, Charles was compensated for the sale of her property less the delinquent taxes, penalties, and interest, and she assigned the proceeds to the bankruptcy trustee to settle other claims against her relating to the property.

§§ 33.53(e), 34.21(a). Charles did neither, and she therefore has no legal interest in the property.

In sum, Charles appeared in the tax delinquency lawsuit and has not established a meritorious defense to that lawsuit. We therefore conclude that the trial court did not abuse its discretion in granting summary judgment in favor of appellees on Charles's bill of review. Based on our resolution of these issues, we further conclude that the trial court properly granted DISD's motion for summary judgment.

We overrule Charles's first, second, third, fifth, eighth, ninth, and eleventh issues.

Motions for Summary Judgment

Broadly construing her fourth, sixth, seventh, and tenth issues, Charles challenges the trial court's entry of summary judgment in favor of Kantara and Taylor Marine on her remaining claims against them.

A. Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). When the trial court does not specify the ground for its ruling, we will affirm if any of the grounds on which summary judgment is sought are meritorious. *Id.* When there are multiple grounds for summary judgment and the order does not specify the ground on which it was granted, the appellant must negate all grounds on appeal. *Roberts v. T.P. Three*

Enters., Inc., 321 S.W.3d 674, 676 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

When a party moves for summary judgment on both traditional and no-evidence grounds, we first address the no-evidence grounds. *Merriman*, 407 S.W.3d at 248. If the nonmovant fails to produce legally sufficient evidence to meet her burden under the no-evidence standard, then there is no need to analyze whether the movant satisfied his burden under the traditional standard. *Id.*

After an adequate time for discovery, a party may move for summary judgment on the basis that there is no evidence of one or more essential elements of a claim on which the adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Vertex Servs., LLC v. Oceanwide Houston, Inc.*, 583 S.W.3d 841, 848 (Tex. App.—Houston [1st Dist.] 2019, no pet.). To defeat a no-evidence motion, the nonmovant must produce at least a scintilla of evidence raising a genuine issue of material fact as to each element of each claim challenged by the movant. TEX. R. CIV. P. 166a(i); *Vertex Servs.*, 583 S.W.3d at 848. "More than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Vertex Servs.*, 583 S.W.3d at 848 (quoting *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 376 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)).

We review no-evidence motions for summary judgment using the same legal sufficiency standard as directed verdicts. *Merriman*, 407 S.W.3d at 248. Under this standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *Id.* The nonmovant has the burden to produce evidence raising a genuine issue of material fact as to each challenged element of her causes of action. TEX. R. CIV. P. 166a(i); *Merriman*, 407 S.W.3d at 248. A no-evidence challenge will be sustained when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of a vital fact. *Merriman*, 407 S.W.3d at 248.

A defendant who moves for traditional summary judgment bears the burden of proving that no genuine issue of material fact exists on at least one essential element of the plaintiff's causes of action and the defendant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). If the movant meets its burden, the burden shifts to the nonmovant to raise a fact issue precluding summary judgment. *Vertex Servs.*, 583 S.W.3d at 848.

B. Kantara's Motion for Summary Judgment

Charles's live petition asserted causes of action against Kantara for fraud, theft of property, trespass to try title, unjust enrichment, negligence, intentional infliction of emotional distress, intentional misrepresentation, invasion of privacy, and conspiracy. Kantara moved for summary judgment on all of these claims on both no-evidence and traditional grounds. He primarily argued that the statutes of limitations in sections 33.54 and 34.08 of the Tax Code barred these claims because Charles filed suit against him more than two years after he filed and recorded his deed to the property. He also argued that Charles had no evidence to support multiple elements of each of her causes of action, and he requested his attorney's fees. The trial court's order granting Kantara's motion for summary judgment did not state a basis for its ruling.

To show error in this ruling on appeal, Charles must negate all grounds on which Kantara moved for summary judgment. *See Roberts*, 321 S.W.3d at 676. For each element of each claim that Kantara challenged on no-evidence grounds, Charles must show that at least a scintilla of supporting evidence exists in the record. *See* TEX. R. CIV. P. 166a(i); *Vertex Servs.*, 583 S.W.3d at 848. On appeal, Charles generally argues that she "has all the evidence to support her lawsuit" on each of her claims, but she does not identify any of this evidence, cite to it in the record on appeal, or show how it supports each element of each cause of action that Kantara

challenged in his motion for summary judgment. *See* TEX. R. CIV. P. 166a(i); *Vertex Servs.*, 583 S.W.3d at 848.

Moreover, Charles's opening brief did not mention the statute of limitations issues raised in Kantara's motion. *See Roberts*, 321 S.W.3d at 676. She responded to Kantara's statute of limitations arguments in her reply brief, but arguments raised for the first time in a reply brief are waived. *See N.P. v. Methodist Hosp.*, 190 S.W.3d 217, 225 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Furthermore, Charles's sole argument regarding Kantara's attorney's fees is that the trial court "did not comply with the Texas rules by granting the Attorney fees to A.C. Kantara." Charles did not identify the rules to which she refers or say how the trial court did not comply with them.[9] *See Guimaraes*, 562 S.W.3d at 538 (providing that failure to cite to appropriate legal authority or to provide substantive analysis of legal issues waives

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[9] We note that the trial court granted Kantara request for attorney's fees under the Theft Liability Act, which provides that each person who prevails in a suit under the Act "shall be awarded court costs and reasonable and necessary attorney's fees." *See* TEX. CIV. PRAC. & REM. CODE § 134.005(b); *see Int'l Med. Ctr. Enters., Inc. v. ScoNet, Inc.*, No. 01-16-00357-CV, 2017 WL 4820347, at *16 (Tex. App.—Houston [1st Dist.] Oct. 26, 2017, no pet.) (mem. op.) ("A defendant who defeats a [Texas Theft Liability Act] claim is a prevailing party and can recover attorney's fees even if it did not recover actual damages."). Charles's cause of action for theft of property against Kantara alleged that he "unlawfully appropriated the property by taking it without [Charles's] effective consent," and therefore this claim falls under the Theft Liability Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 134.003(a) (providing liability for person who commits theft resulting in damages), 134.002(2) (defining "theft" as "unlawfully appropriating property or unlawfully obtaining services").

complaint on appeal). Because she has not negated all grounds on which Kantara moved for summary judgment, Charles has not demonstrated any error in the trial court's order granting his motion for summary judgment. *See Merriman*, 407 S.W.3d at 248; *Roberts*, 321 S.W.3d at 676.

Charles argues that Kantara did not move for summary judgment on no-evidence grounds because he cited caselaw regarding the moving party's burden in a traditional motion for summary judgment and he did not identify the claim or defense on which he sought summary judgment. However, our review of Kantara's motion reveals that he moved for summary judgment on both traditional and no-evidence grounds. *See Merriman*, 407 S.W.3d at 248 (stating that party may filed combined traditional and no-evidence motion for summary judgment so long as each ground is clearly set forth and otherwise meets standards of motion). Kantara asserted his affirmative defense of statute of limitations and his request for attorney's fees under traditional grounds. *See KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) (stating that defendant moving for summary judgment on statute of limitations defense must establish elements of defense as matter of law). Kantara had the burden to prove this defense and claim and to show that he was entitled to judgment as a matter of law. *See id.*; TEX. R. CIV. P. 166a(c).

Kantara also moved for summary judgment on the ground that Charles had no evidence of multiple elements of each her claims. *See* TEX. R. CIV. P. 166a(i) (stating

that "a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial"). Kantara analyzed each of Charles's causes of action by stating the respective elements with supporting legal authority and by identifying each element he challenged for lack of proof. *See id.* ("The motion must state the elements as to which there is no evidence."). The burden shifted to Charles to produce summary judgment evidence raising a genuine issue of material fact. *See id.* ("The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact."). Therefore, we conclude that Kantara properly moved for summary judgment on no-evidence and traditional grounds.

C. Taylor Marine's Motion for Summary Judgment

Charles's live petition asserted causes of action against Taylor Marine for negligence, trespass to try title, unjust enrichment, receipt of stolen property, conspiracy, invasion of privacy, conversion, and intentional infliction of emotional distress. Taylor Marine filed two motions for summary judgment. Its first motion sought summary judgment on all of Charles's causes of action on no-evidence grounds. The motion set forth the elements of each cause of action supported by legal authority, and it stated each element of each claim which it challenged for lack of proof. *See id.*; *Vertex Servs.*, 583 S.W.3d at 848. Taylor Marine also filed a motion

for partial summary judgment on Charles's cause of action for trespass to try title, asserting numerous bases for seeking judgment on this claim, including Charles's negligence in pursuing legal remedies to regain title to her property, statute of limitations, quasi-estoppel, waiver, and ratification. The trial court granted summary judgment in favor of Taylor Marine without stating a ground for its ruling.

Like her arguments regarding Kantara's motion for summary judgment, Charles does not negate all grounds on which Taylor Marine moved for summary judgment. *See Roberts*, 321 S.W.3d at 676. On appeal, Charles was required to show that a scintilla of evidence exists in the record to support each element of each cause of action challenged by Taylor Marine on no-evidence grounds. *See* TEX. R. CIV. P. 166a(i); *Vertex Servs.*, 583 S.W.3d at 848. Instead, Charles generally argues that she "has all the evidence to support her lawsuit" on each of her claims without identifying any of this evidence, citing to it in the record on appeal, or showing how it supports each element of each cause of action challenged by Taylor Marine. *See* TEX. R. CIV. P. 166a(i); *Vertex Servs.*, 583 S.W.3d at 848. Nor did Charles address any of the arguments raised in Taylor Marine's motion for partial summary judgment. *See Roberts*, 321 S.W.3d at 676. Because she has not negated all grounds on which Taylor Marine moved for summary judgment, Charles has not demonstrated any error in the trial court's order granting Taylor Marine's motion for summary judgment. *See Merriman*, 407 S.W.3d at 248; *Roberts*, 321 S.W.3d at 676.

Furthermore, as Taylor Marine argues, Charles's response to Taylor Marine's motion for no-evidence summary judgment is not included in the record on appeal. Charles argues in her reply brief that she designated her response to Taylor Marine's motion for summary judgment in her request to the trial court clerk to prepare the clerk's record. Although she does not cite to her request in the record on appeal, our review indicates that she filed a request to designate materials to be included in the clerk's record, and her request included her response to Taylor Marine's motion for summary judgment.

The record on appeal consists of the clerk's record and, if necessary to the appeal, the reporter's record. TEX. R. APP. P. 34.1. Generally, the clerk's record must include all pleadings on which the trial was held in a civil case. TEX. R. APP. P. 34.5(a)(1). Any party may file with the trial court clerk a written designation specifying certain items to be included in the record. TEX. R. APP. P. 34.5(b). If a relevant item has been omitted from the clerk's record, the trial court, appellate court, or any party may submit a written request to the trial court clerk to supplement the record on appeal with the omitted item. TEX. R. APP. P. 34.5(c)(1). It is well settled that "[t]he appellant bears the burden to bring forward on appeal a sufficient record to show the error committed by the trial court." *Huston v. United Parcel Serv., Inc.*, 434 S.W.3d 630, 636 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *see Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam) ("The

burden is on the appellant to see that a sufficient record is presented to show error requiring reversal.").

The record on appeal does not clearly indicate why all the documents requested by Charles were not included in the clerk's record.[10] But Charles had the burden to ensure that the record was sufficient to present her issues to this Court. *See Huston*, 434 S.W.3d at 636; *Christiansen*, 782 S.W.2d at 843. In its brief, Taylor Marine put Charles on notice that the record did not include her response to its motion for summary judgment, but there is no indication that Charles requested preparation of a supplemental clerk's record to include the omitted response. *See* TEX. R. APP. P. 34.5(c)(1). Without Charles's response, we are unable to review whether she produced any evidence raising a genuine issue of material fact to defeat Taylor Marine's motion for summary judgment on no-evidence grounds. *See* TEX. R. CIV. P. 166a(i); *Merriman*, 407 S.W.3d at 248; *Vertex Servs.*, 583 S.W.3d at 848.

We note that the property was conveyed to Taylor Marine in June 2018, more than three years after Kantara filed and recorded the deed from the tax sale. This is well after the limitations in sections 33.54(a) and 34.08(b) expired, as discussed

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[10] The record includes the trial court clerk's fourth request to Charles for payment to prepare the clerk's record, but the record does not indicate whether she paid the requested amount. *See* TEX. R. APP. P. 35.3(a) (stating that trial court clerk is responsible for filing clerk's record if notice of appeal is filed and fee paid to prepare record).

above. *See* TEX. TAX CODE §§ 33.54(a) and 34.08(b). A year before this conveyance, in June 2017, the statute of limitations expired, and at that time Kantara could "conclusively presume that the tax sale was valid" and he had "full title to the property free and clear of the right, title, and interest of any person that arose before the tax sale . . . and subject to applicable rights of redemption." *See id.* § 34.08(b). When it purchased the property from Kantara a year later, Taylor Marine was entitled to rely on this conclusive presumption of Kantara's full title to the property free and clear of any right, title, or interest that Charles had in it. We hold that the trial court properly granted summary judgment in favor of Taylor Marine.

We overrule Charles's fourth, sixth, seventh, and tenth issues.[11]

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[11] Charles filed two nearly identical motions for sanctions under section 10.004 of the Civil Practice and Remedies Code against one of the appellees for allegedly providing this Court with untruthful documents and information. *See* TEX. CIV. PRAC. & REM. CODE § 10.004 (authorizing sanctions against person signing pleading or motion in violation of section 10.001). Although the motions generally refer to both Kantara and Taylor Marine, they do not specify which appellee Charles seeks to sanction. And although the motions refer to documents that Taylor Marine filed, they do not specify what information Charles contends is untruthful. *See id.* § 10.002(a) (requiring motion for sanctions to describe "specific conduct violating Section 10.001"). We conclude that Charles's motions do not comply with section 10.002(a) because they do not identify any specific conduct that violates section 10.001. *See id.* Furthermore, section 10.001 applies to the "signing of a pleading or motion as required by the Texas Rules of Civil Procedure," which in turn apply to "justice, county, and district courts"—not to appellate courts. S*ee id.* § 10.001; TEX. R. CIV. P. 2. Accordingly, the Court **denies** these motions.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Justices Kelly, Hightower, and Farris.