

Opinion issued May 10, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00076-CV

TRIPLE P.G. SAND DEVELOPMENT, LLC, HANSON AGGREGATES, LLC, CAMPBELL CONCRETE & MATERIALS, LLC, GULF COAST STABILIZED MATERIALS, LLC, LEHIGH HANSON, INC., SOUTHERN CRUSHED CONCRETE, LLC, JIM BULLOCK PARTNERS, LTD., THE RASMUSSEN GROUP, INC., LGI LAND, LLC, LGI LAND I, LLC, LGI GP, LLC, LGI LAND, LTD., LGI HOLDINGS, LLC, WILLIAMS BROTHERS CONSTRUCTION CO., INC., 45 SLR, INC., BULLOCK CONSTRUCTION, LLC, APCON SERVICES, LLC, B&B AGGREGATES, INC., FRONTIER AGGREGATES, LLC, RIVER AGGREGATES, LLC, LATTIMORE MATERIALS CORPORATION, LIBERTY MATERIALS, INC., TEXAS STERLING CONSTRUCTION CO., EAGLE SAND & GRAVEL, LLC CLEVELAND SAND & GRAVEL, LLC, RGI MATERIALS, INC., AND FORESTAR (USA) REAL ESTATE GROUP, INC., Appellants

V.

EDUARDO AND SPRING DEL PINO, ROBERT AND GLORIA RUGGLES, ROBERT AND DEMETRIA DAWKINS, EDDIE AND JENNIFER DELANEY, LEROY AND CAROLE DELK, MARTIN AND MARIA DENARI, ALBERT DENNLER, ERMI DIAZ, GHAZI AND JACQUELINE DICKAKIAN, MATTHEW CROGHAN AND MARLA DIETZ AND

MARLA DIETZ, GREGORY AND ELIZABETH DILLARD, WILLIAM AND MELISSA DISMUKES, GERARD AND REBECCA DOYLE, KENNETH DUGAS, MARILYNN DULANY, EDWARD AND TAMMY DUMIRE, BERT AND ANNEMARIE DWORAK, BEVERLY DYER, JANINE EGGERS, CHRISTOPHER AND GEORGENA ELLISON, JOHN AND MICHELLE ELY, JOHN AND KELLY FARMER, TYRONE FAUST, KENNETH AND DIANA FEARON, ROBERT AND KAREN FENNELL, DANELL FIELDS, LESLIE FLAKE, JEREMY AND COURTNEY FONTENOT, TYLER AND MIKKI FORD, GAYLES FORWARD-PERKINS, JIMMY FOSTER, LAURA FOSTER, RICK AND JANICE FOX, ANDREW FRANCIS, RICK AND LOUISE FRAZIER, MICHAEL AND DIANNE GIBSON, FRANK AND SUE GIROLAMO, EDWIN AND NICOLE GOLDMAN, JASON GOMEZ, JUAN GONZALEZ AND BENITA TURRUBIARTES, ALLEN HOWARD DEOLIVER AND DEBBIE GRANT, MICHAEL AND MARY GRANT, ALAN AND RHONDA HANEY, BRANDON AND AMANDA HANNA, JACKIE HARMON, MARK AND ELIZABETH HATCH, TARA HEIL, MARY HELMER, JEFF AND MICHELE HEMMER, ROBERT AND LESLIE HENDRY, GAYE HENLEY, JAMES AND MELANIE HENRY, CHARLES HENSLEY, WILLIAM HEPFNER, JASON AND DEBBIE HILLYER, VIRGINIA HAGWOOD, RANDOLPH AND KIMBERLY HOLLAND, KENNETH AND YVONNE HOWARD, DAVID AND DANIA HUETHER, JAMES AND CAROLE JENKINS, JOHN AND LOURDES JENKINS, WALTER AND SUSAN JENKINS, JOANNE JESTER, YU JIN AND XIN HAO, CHRIS AND BRANDEE JOHNSEN, GLENDA JOHNSON, MARCO JOHNSON, STANLEY AND LOWETA JORGENSEN, KELLY AND JAMIE KING, ROBERT AND RITA KING, WILLIAM AND SHERRY KITTS, DENNIS AND ELLEN KLAGER, JOHN AND ANITA KLUG, STEVEN AND GINA KNOWLES, WILLIAM AND MEREDITH KOERNER, GERALD AND NORA KONIECZNY, SAMIR AND CAROLYN KREIT, ERIC AND BRIDGET KRISTIANSEN, LARRY AND CHRISTINA KRUSE, STEPHEN AND JANICE LANEY, RONALD AND SHIRLEY LEGGETT, FRANK LEIDOLF, NORMAN AND DIANE LEMMA, ANDREW AND LORETTA LEMOINE, FREDERICK AND TANYA LENGEFELD, TODD AND MARY LIMBAUGH, CARLYN LLENOS, SHARON LLEWELLYN, GREGORY AND LORRI LUCAS, LASON MACKKEY-HINES, CHRISTOPHER AND

**CHARLES BERRY MADDEN, MANUEL AND JENNIFER MALVAEZ,
DAVID AND CLAUDIA MANTEY, MOLLY MARCHMAN, LINDA
MARTIN, JOSEPH AND EMILY MAUL, DICK AND MILDRED
MCCALL, HOLLIE MCCLELLAN, WALTER MCFERRIN, DANIEL AND
MICHELLE MCGINNIS, ROBERT MCHUGH, JR. AND FRANCINE
MCHUGH, ERIC AND GWEN MCKEE, EDWIN AND ERIN MCLEA,
SHANE AND PAULA MCLEAN, DONNA MCMURRAY, GENE AND
CHRISTI MEDLOCK, JOHN AND DEBBIE MIKAN, JAMES AND
ELEANOR MILLER, DANIEL AND AE MILLMAN, NICOLAE
MITITEANU, MONTE MITTAG, CARL AND AURORA MONTANO,
RONNIE MOORE, FIDEL AND CONNIE MORENO, PAUL AND
KENDALL MORGAN, JOHN AND LORETTA MORMINO, CHAD
MOSES, SASHA MOTE, JOHN AND GURLI MOYELL, BETTY
MURPHY, KEVIN AND MARY MURPHY, ROBIN NABER, THOMAS
AND AMANDA NELSON, II, SAM AND PAULA NIELSEN, JEANIE
NOLLE, JERRY AND KELLI NOON, CARLOS AND MICHELLE
OCHOA, LUIS OCHOA AND JO-ANN NEGRON, PAULA ORTIZ, BRITT
AND YVONNE OWENS, DARRELL OWENS, ROBERT AND MARY
BETH PANZARELLA, STACIA PARMENTER, EDUARDO PARRA AND
MARIA BARRO, DAVID AND MARGE PARROTT, SCOTT AND
STEPHANIE PELFREY, RANDALL AND SHARON PHILLIPS, JIM AND
NANCY PINKERTON, RICARDO PINON, DICK AND PEGGY PIPKIN,
KORI PLOWMAN, CHRISTOPHER PRIDY, KEITH AND CELINA
PROBYN, LANCE AND CAROL PURSLEY, GEORGE QUENZER AND
RAMIRO GARCIA TODD RAINER AND LISA COMBEST, ANDREW
AND CATHLEEN RAYMER, AARON AND JAMIE RENEAU, MARIO
REYES AND MARCELLA YBARRA, GEORGE AND JUDY
RITTENHOUSE, JUSTIN AND ALBAH ROBERT, MARSHALL AND
CHARLOTTE ROBERTS, JEFF AND LEA ROBERTS, JOHN AND MARY
ROCCO, DAVID ROESLER, PATRICK AND KAREN ROLLINS,
DOUGLAS AND SUSAN ROUND, RONALD AND SHARON
ROUNSAVILLE, CHARLES AND PRISCILLA RUDD, PAUL RUDMAN,
ANTHONY RUFFINO, SCOTT AND BROOKE SABRSULA, JOHN AND
TASHAUNA SAM, ANGEL AND WENDY SANTOS, MATHIAS AND
ANDREA SCHLECHT, ALLEN AND LYNETTE SCHMIT, LOREN AND
BARBARA SCHOLTES, ROBERT AND MICHELLE SCOTT, PATRICK**

AND LEESA SHANAHAN, RAMAN AND MEENAKSHI SHANKER, DIANNA SIMMONS, JEFF AND CRICKETT SIMMONS, MICHAEL AND ROSE SLADEK, SYLVIA SLAUGHTER, SIMON AND JESSE SMETHERMAN, GARY AND CASEY SMITH, JAMES AND JEWEL SMITH, WILLIAM AND KARI SMITH, BRANDON AND KRISTEN STANISLAUS, ROBERT AND JILL STARK, GARY AND REBECCA STEINBERGER, BRENDA STEPHENS, ROSS AND SHERRY STEPHENSON, RICHARD AND VICKI STEWART, HOLGER AND PEARL STIBBE, BOB AND COLLEEN STIPPEL, RONNIE AND GERALDINE STOKLEY, JENNIFER STONE, JOHN AND SUSAN STONE, BARRY STRINGER, JASON AND LISA STULTS, DOUG AND MELISSA STURGIS, JAMES SUGGS, ERICK SUJO, TODD AND STACY SVIHOVEC, ANGELA SWANAGAN AND BRENDA SIMMONS, FRITZ AND SANDRA SWANSON, BOGDAN AND BIBIANNA SZOPA, WILLIAM THOMAS, TROY THORNTON, PETE AND MARY TORRES, RAUL AND CATERINA TORRES, ANDRE TRAN AND FRANCY LE, MIGUEL TUM AND MARLEN CICNEROS, FERNANDO AND MARIBEL TURRUBIARTES, ROBERT TYLER AND JONAH MENDELSON, KENNETH AND COLLEEN ULRICH, HAL AND MARY UNDERWOOD, ISAK AND BOBBIE JO VAN DER WALT, BILL AND TERESA VAUGHN, DUSTIN AND AMANDA VEATCH, DAWN VILLANEUVA, SANDRA VIVELL, DAVID AND CHELSEA WALLS, CHARLEY AND KATHERINE WARD, LAWRENCE AND DEBORAH WEDEKIND, MARY WESTHOFF, TERRY AND GLORIA WHITNEY, WILLIAM AND FAYE WILKERSON, CHAD AND KIMBERLY WILLIAMS, GERALD AND JULIE WILLIAMS, NICHOLAS AND NICOLETTA WILSON, JIM AND JANE WISE, JIMMIE AND CHARLOTTE WISENBAKER, TERRY AND LINDA WOODALL, JASON AND CRYSTAL WORLEY, RHONDA WRIGHT, GARY ZELASKO AND CHEN ZHAO, ZHIYONG ZHAO AND LIN YANG, HAROLD AND MARLENE ZUCKERMAN, KINGWOOD BAGEL & SANDWICH COMPANY, GNOME SWEET GNOME LLC, WOODY T. BARKSDALE DDS, JERRY W. BAUTSCH DDS PA, PAT CUNNINGHAM STATE FARM INSURANCE AGENCY, IAN HEALY, DDS, MDS, PLLC, RACHAEL'S GIFTS NORTHEAST, LLC, CHIRON COMMUNICATION SERVICES, LLC, CREEKWOOD DENTAL, INC., KINGWOOD URGENT CARE CLINIC, LLC, A&X ZHAI, LLC, DREI B LLC, MEMORIAL

HERMANN MEDICAL GROUP, ALLERGY & ENT ASSOCIATES, PA, HATEM KHALAF D/B/A KINGWOOD PHOTO LAB, FRANCY LE AND ANDRE TRAN D/B/A S&A NAILS, TRAM LE D/B/A PHOLICIOUS VIETNAMESE RICE NOODLES, GREGORY CONSTANTINOU D/B/A LE TIQUE NAILS, VSR HOLDINGS LLC, SIR ENTERPRISES, INC. D/B/A ROBERTS CARPET & FINE FLOORING, SALIM HUSSAIN, EVAN LEWIS, CRAIG BROWN, AGC HOLDINGS KINGWOOD LLC D/B/A MEMORIAL HERMANN MEDICAL GROUP, DOUGLAS AND KRISTIN HARTUNG, JAMES AND BILLIE HART, CLARA ANDREWS, PATRICIA ACOSTA, WILLIAM AND DEBRA ALGEO, MARIA ARANDA, INA ASH, PATRICK BAILEY, SHANNON AND CATHY BAKER, TYNA BAKER, GREGORY AND AIMEE BENNETT, GEORGE AND CHARLOTTE BENOIT, CAROLEE BOARDMAN, MICAJAH AND JODI BOATRIGHT, GEORGE AND JANET BODMAN, BENARD BONTEMPS, JAMES AND MARTHA BOWEN, NIGEL BRASSINGTON, PATRICIA BRIGHTWELL, COLLEEN CAMPBELL, TINA CENTENO-LEWIS, MIKE AND LINDA CHADDICK, ROLAND AND MURIEL CHEMALI, CHANDA COMBS, JOHN AND GLORIA CONVERSE, KELLY COWIESON, J. DIAMOND AND ASSOCIATES, PLLC., GREGORY AND DIANA DOUGHTIE, WILLIAM AND DARLENE ELSTON, CODY AND LAUREN FELTON, STEPHEN AND RACHEL FISHER, CHESTER AND ANITA FRAZIER, STEVEN AND MARGARET FREEMAN, ROBERT AND SHERRY FURLOUGH, ROBERT AND LANA GARCIA, LUPE GARCIA, ADRIAN GEE, MARYJANE GOMEZ, SEBASTIAN GUIRIN, PAUL HANSEN, JOHN AND KERRI HART, JIMMY AND DIANNE HICKS, WILLIAM AND ELIZABETH HIGGINS, CHARLES AND JULIE HUCKABEE, FAISAL HUSSAIN AND SHAZIA SIDDIQUI, JEFFREY AND BARBRA HYLER, AGNES JIMENEZ, MARCIN AND JOLANTA JURANEK, RICHARD AND SARA KENT, PHILIP AND STEPHANIE KIEF, WERNER AND JIMMIE KIEF, HEIDI KOCH, PHIL AND SANDY KORENEK, PAUL AND MARILYN LABORDE, EUGENE LANCASTER, THEODORE LAPESH, SUE LAWS, JERRY AND MARY LEBUS, RAUL LEGORRETA, PHILIPPE LEONARD, JOSE LLAMOSAS, ROBERT LUCAS, ALEXANDER MADDOX, PAUL MARTINEZ, ROSALIA MARTINEZ, PAULIN MARTINUC, NANCY MATZKE, RONALD AND PAIGE MAY,

RONNIE AND DEBBIE MAYO, DIANA MILLER, ROBERT AND BRENDA MOORE, DENNIS MORRIS, STEVE AND JANET MURAWSKI, IAN AND JACQUELINE MURRAY, JOHN AND MARY LSAVSKY, GARRY AND NANCY PATTON, CHRISTOPHER AND STEPHANIE PERDUE, PIETER AND NICKY POTGIETER, DANA PRADERVAND, MICHAEL AND STACEY PURCELL, TIMOTHY AND SANDI REESE, JANA REID, HELEN REULAND, JOE AND ERICA REYES, THOMAS RODGERS, RICHARD AND LISA RODRIGUEZ, SUSIE ROSENTHAL, RICHARD ROYALL AND LAURA EVAN, PHILIP AND BARBARA RUZISKA, DAVID AND SHELLY SCHNEIDER, MICHAEL AND KELLI SHRANG, MIKE AND KELLY SMITH, JAMES AND EMILY SPAIN, JASON SPRULL, MICHAEL AND RENEE STEVENS, CECILLE STITT, MICHAEL AND JENNIFER STOCK, JEFFREY SUTTON, MARK AND BRENACE SWANNER, JANICE TACKETT, VYONNE TRUSDALE, ARTHUR AND SANDRA VAN DER VORM, BRENT AND SANDRA WALKER, JIMMY WEIDNER, JEREMY AND KRISTA WILLIAMS, ALAN AND BARBRA WILSON, TERI WILSON, BUKIL AND KYUNG YOO, CHARLOTTE ZIMA, YANG-I LIN, RODRICK AND EUNICE DENNIS, CHARLES MADDEN, VINCENT AND FRAN MCCONNELL, NORRIS AND ZENOBIA WASHINGTON, NOE AND MARY JANE CASANOVA, RANDY AND MARILYN BRAUD, RALPH AND JOAN IMPERATO, CHRISTIAN AND MOIRA BUDDE, PATRICIA NICHOLS, MARK AND CARMEN CLEMENCE, RANDY AND SHARI ZIEBARTH, BRIAN AND JILL JOHNSON, BRIAN AND SHIRLEY COLONA, MARK AND ROSIE MABILE, BOB AND ALISON HARRELL, JEFFREY AND STACEY DIAMOND, JEFF AND ANN' CHEL BAILEY, JOZEF AND LORRAINE BOREAS, RUSSELL AND JACQUELINE CHANDLER, LAWRENCE AND ELVIRA CSENGERY, BENJAMIN FLORES, ROBERT AND KIMBERLY GARWOOD, ABDUS AND HUMARA GULL, LEAANN HOFFMAN, RICARDO AND JENNIFER MEJIA, RAFIA QADRI, JACK AND BARBARA SCHOLLARD, JASON AND RACHEL TAYLOR, STEVE AND MICHELLE CONLEY, COREY AND BRYANNA COX, WILLIAM AND MARY MORGAN, MAURICIO AND IMELDA NAVES, ELSON AND LORI ROBERTSON, THOMAS STEGNER, DOUGLAS AND CAROLYN SUELL, BEN AND BYRON WILLIS, TSONG-DAR AND JULIE LIN, MICHAEL AND JESSICA AHEARNE, JED AND JILL ANDERSON,

**WILLIAM AND JUDY BACHMAN, JAMES AND ELIZABETH BELTIS,
DAVID AND JENNIFER BURNLEY, RHUBEN AND SOPHIE COFFEY,
MICHAEL AND ELISSA FONTENOT, DON AND JULIETTA GARRETT,
ANDREW AND DEBBIE GOLDSMITH, JEFF AND KATHLEEN HASSEL,
MICHAEL AND PEGGY HIGGINS, SCOTT AND WRYNN HOMANN,
VICKI LOTT, WILLIAM AND SUSAN MCMAHON, JR., KEVIN AND
KEELY MILLS, SANTIAGO AND CECLILA PACHECO, KENNETH AND
SUZANNE PARR, JAMES AND DIANA RUTHERFORD, PAUL AND
CYNTHIA SCHIKAL, KELVIN AND ELIZABETH SHAW, PATRICK AND
TAWN SMITH, MICHAEL AND MARY STARK, BEN AND CYNTHIA
TRAMMELL, PAUL AND PAULA YALE, MICHAEL AND KRISTI
ZELLER, DAVID AND RHANI BABENDURE, RAINER AND LEA
BAUER, JEFF AND ELAINE BEASON, JULIE BERNELL, CHARLES
AND MAUREEN CASEY, STUART AND MARIELLEN CASTLEBERRY,
SCOTT AND CYRENTIA DUBOIS, ANTHONY AND JACQUELINE
EDEN, DANIEL AND DONNA FOISIE, TOM AND MARY GILBERT,
GARY AND ELLEN GORSKI, ERNEST AND BEVERLY HAUSER, DALE
AND DEBRA JOLY, DICKEY AND DONNA LANEY, SCOTT AND JOY
LEBBIN, JOHN AND ELIZABETH LINDBERG, NEAL AND NICOLE
LUX, MARK AND MARY MARBACH, DAVID MERKLEY, ADAM AND
SARAH MOWERY, MICHAEL AND JANETTA PENN, STEPHEN AND
KATHLEEN RIPP, THOMAS AND LORI SNYDER, BRETT AND JAMIE
THOMAS, TRUMAN AND SALLY WOODWARD, JEREMY AND
JOLENE ADORNA, DARRELL AND JULIE ANTRICH, CARL AND
KATHRYN BARTZ, GREG AND JANINE BATTERTON, STEVEN AND
CHRISTINE BEYER, ROBERT AND TERRI BLEWETT, JAMES AND
MARY BOLTINGHOUSE, KEVIN AND TERI BUTLER, DAN AND
TIFFANY BYERS, JAMES AND MARY BYRD, ANDY RAY, JEFF AND
ELIZABETH ADAMS, BRAD AND HEATHER ADCOCK, PAUL AND
MARCIA AEGERTER, TIM AND IRMA AMES, GERALD ANDREWS,
ALFONSO AND FANNY ARIAS, RAUL AND PILAR ARIAS, DAVID AND
LOIS ATTEBERRY, SAMUEL AND MARY AURILIA, ROBERT AND
SUSAN AWALT, LARRY AND ALETHA BATES, WALTER AND DENIA
BENNETT, GERALD ANDREWS AND LORI BERRY, MARK
BLAYLOCK, JOHN AND RHONDA BLOOMER, ERIC AND CHRISTEL
BOER, JOY BOHLKE, BRIDGET BOUDREAUX AND JOSEPH**

DEGRADO, PHILLIP AND KAREN BOUGHTON, LAUREN AND RHONDA BOYD, BELINDA BOYD-MILLER, LUTHER BRENEK, ALVIN AND CONNIE BREWER, JESUS AND MARIA BRITO, ROBERT AND KRISTI BROWN, DAVID AND KATHERINE BURRESS, CHRISTOPHER BUSH, TOM AND MARILYN BUTLER, ANTULIO AND Y ECENIA CARDENAS, JOHN AND SHERIE CARLISLE, JOHN AND PATTY CARTER, WILLIAM AND GAIL CARTER, DOUGAN CARUTHERS, YVONNE CATALA AND LEENDERT KLUFT, COREY AND JO LANE CHAMBERLAIN, DON AND ANGELA CHESNUT, ROBERT AND ELIZABETH CIPRIANI, RICHARD AND GAIL CLAYDEN, CAROL CLAYTON, PETER AND MELINDA COULTER, JOHN AND PATRICIA CUGINI, PATRICK AND LINDA CUNNINGHAM, RANDY AND SHERRY DAVIS, ROBERT WESTOVER, DANIE BURKHARDT, MARC FRANCIOSA, RICHARD GATHINGS, MARION GILLESPIE, LESTER AND FAYE WILKES, BENSON YUEN, GEORGE RONCHAQUIRA, JEFF AND ELIZABETH EARLY, AARON AND JEANNE HENSON, JAMES AND SHEILA DICKEY, MIKE AND LINDA WOEHST, MIKE WOEHST D/B/A SMILES BY WOEHST, GORDON AND KATHY MAYEAUX, FARROLD BALOTE, JOE MURPHY, JANET PHELPS, AND DON AND BRENDA FISHBECK, Appellees

**On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2020-48333**

OPINION

In this permissive interlocutory appeal,¹ appellants, the “San Jacinto companies,”² challenge the trial court’s order denying their motion to dismiss³ the claims brought against them by appellees, the “Del Pino property owners,”⁴ in the Del Pino property owners’ suit for negligence, gross negligence, nuisance, and violations of the Texas Water Code. In their sole issue, the San Jacinto companies contend that the trial court erred in denying their motion to dismiss.

We affirm.

Background

On February 7, 2020, the Del Pino property owners filed their original petition against the San Jacinto companies, alleging that they own or occupy property in Harris County, Texas in the areas surrounding Lake Houston, including in Kingwood, Atascocita, Humble, Sheldon, Crosby, and Huffman, Texas. According to the Del Pino property owners, in August 2017, Hurricane Harvey developed near the Texas Gulf Coast. On August 24, 2017, Hurricane Harvey was “upgraded to a Category 3 ‘major hurricane’” and “[m]eteorologists warned of torrential rains and

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); TEX. R. APP. P. 28.3.

² We do not list appellants by name in the body of the opinion because of their large number. See, e.g., *Gandy v. Williamson*, 634 S.W.3d 214, 220 n.1 (Tex. App.—Houston [1st Dist.] 2021, pet. denied).

³ See TEX. R. CIV. P. 91a (“[A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.”).

⁴ We do not list appellees by name in the body of the opinion because of their large number. See, e.g., *Gandy*, 634 S.W.3d at 220 n.1.

flooding of 30-40 inches in the greater Houston area” as well as “widespread flooding throughout the Texas Gulf Coast.” Hurricane Harvey “made landfall” on August 25, 2017 and “ultimately stationed itself over Harris County,” “dump[ing] catastrophic rain throughout the county.”

The Del Pino property owners also alleged that Lake Conroe, a reservoir located in Montgomery County, Texas near the “West Fork of the San Jacinto River,” and Lake Houston, a reservoir located in Harris County along the San Jacinto River, were “constructed principally for flood control.” The San Jacinto River flows through both Lake Conroe and Lake Houston and into the Galveston Bay. Lake Houston is situated near the areas of Kingwood, Atascocita, Humble, Sheldon, Crosby, and Huffman. And Lake Houston “receives [water] flow from both the East and West [F]orks of the” San Jacinto River. The Del Pino property owners noted that “much smaller[] tributaries,” including Spring Creek, connect to the San Jacinto River south of Lake Conroe.

According to the Del Pino property owners, since its initial development in 1954, Lake Houston “ha[d] steadily lost its reserve capacity” at “a rapid rate.” That loss of capacity, according to a 2011 study, was “caused by the increased sedimentation being placed in Lake Houston,” and multiple studies “show[ed] that [a] reduced capacity [was] also occurring in the West Fork of the San Jacinto River.” The Del Pino property owners alleged that many of the San Jacinto companies

“own[ed] and/or operate[d] mining facilities within two miles of the East Fork of the San Jacinto River, the West Fork of the San Jacinto River, Spring Creek, and/or Lake Houston,” while others owned or have owned properties close to those waterways. And the San Jacinto companies “discharged or failed to prevent the discharge of processed water, silt, sand, sediment, dirt, and other materials from their facilities . . . into Spring Creek, the West Fork of the San Jacinto River, and the East Fork of the San Jacinto River.” The “omissions, and failures” by the San Jacinto companies caused “the overall capacity” of the waterways to “dramatically decrease[.]” As a result, “when the water came” from Hurricane Harvey, “the rivers and the lake[s] simply could not hold the volume,” causing Lake Houston to backflow and flood the Del Pino property owners’ properties.

The Del Pino property owners brought claims against the San Jacinto companies for negligence, gross negligence, nuisance, and violations of the Texas Water Code. As to their negligence and gross negligence claims, the Del Pino property owners alleged that the San Jacinto companies “owed a duty to [the Del Pino property owners] to implement procedures to reduce the discharge of sediment, silt, sand[,] and other materials into the West Fork of the San Jacinto River, the East Fork of the San Jacinto River, Spring Creek, and Lake Houston.” And the San Jacinto companies breached that duty by “[f]ailing to locate sand mines outside of floodways,” “[f]ailing to increase the width of dikes,” “[f]ailing to decrease the slope

of dikes,” “[f]ailing to control erosion with vegetation,” “[f]ailing to replant areas not actively being mined,” “[f]ailing to avoid clearing areas that w[ould] not soon be mined,” “[f]ailing to protect stockpiles from flooding,” “[f]ailing to mine only above the deepest part of the [San Jacinto] [R]iver,” and “fail[ing] to implement adequate procedures and mechanisms to prevent the discharge of silt, sand, sediment, and dirt into the West Fork of the San Jacinto River, the East Fork of the San Jacinto River, and Spring Creek.” The San Jacinto companies’ conduct resulted in the waterways “losing capacity” and caused flooding of the Del Pino property owners’ properties.⁵ According to the Del Pino property owners, the San Jacinto companies “acted as joint tortfeasors” because the “negligence of each [of the San Jacinto companies] was a proximate cause of the flooding of [the Del Pino property owners’] properties, and [their] negligent conduct [was] inextricably combined.” And “in the event” that the Del Pino property owners’ “injuries and damages c[ould not] be apportioned with reasonable certainty as to each” of the San Jacinto companies, the Del Pino property owners’ “injuries [were] indivisible, and [the San Jacinto companies were] jointly and severally liable for the flooding of [the Del Pino property owners’] properties.”

⁵ Additional negligence allegations were made against appellant, Forestar (USA) Realty Group Inc., by certain appellees.

As to their nuisance claims, the Del Pino property owners alleged that they “ha[d] a private interest in land” and owned property in Harris County in the areas surrounding Lake Houston. And when the San Jacinto companies breached their duty “to implement procedures to reduce the discharge of sediment, silt, sand[,] and other materials in[to] the West Fork of the San Jacinto River, the East Fork of the San Jacinto River, Spring Creek, and Lake Houston,” they caused the waterways to lose capacity, resulting in the “flooding of [the Del Pino property owners’] properties.” The Del Pino property owners stated that the San Jacinto companies’ “negligent conduct resulted in an interference and invasion of [the Del Pino property owners’] private properties, substantially interfering with [the Del Pino property owners’] use and enjoyment of their land, and resulting in [their] suffering [of] substantial damages.” And the San Jacinto companies “acted as joint tortfeasors” because the “negligence of each defendant was a proximate cause of the flooding of [the Del Pino property owners’] properties, and [their] negligent conduct [was] inextricably combined.” Further, “in the event” that the Del Pino property owners’ “injuries and damages c[ould not] be apportioned with reasonable certainty as to each” of the San Jacinto companies, the Del Pino property owners’ “injuries [were] indivisible, and [the San Jacinto companies were] jointly and severally liable for the flooding of [the Del Pino property owners’] properties.”

As to their claims for violations of the Texas Water Code, the Del Pino property owners alleged that Texas Water Code section 11.086 states: “No person may divert or impound the natural flow of surface waters in this [S]tate, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded.”⁶ (Internal quotations omitted.) And the San Jacinto companies, “[b]y failing to prevent the discharge of sediment, silt, sand, dirt, and other materials” into the West Fork of the San Jacinto River, the East Fork of the San Jacinto River, Spring Creek, and Lake Houston, “created a diversion and/or impoundment of the natural flow of surface water” that “proximately caused the flooding of” the Del Pino property owners’ properties, in violation of the Texas Water Code. Additionally, the Del Pino property owners alleged that Texas Water Code sections 26.039 and 26.121⁷ “prohibit[ed] the discharge of sand, silt, dirt, and other materials into or adjacent to any water in the [S]tate.” And the San Jacinto companies’ conduct “constitute[d] a clear violation of the[se] [sections of the] Texas Water Code, which . . . caused [the Del Pino property owners] to suffer significant damages.”

The Del Pino property owners sought damages for the “[c]ost of repairs to real property,” the “[c]ost of replacement or fair market value of personal property lost,

⁶ See TEX. WATER CODE ANN. § 11.086.

⁷ See *id.* §§ 26.039, 26.121.

damaged, or destroyed,” the “[l]oss of use of real and personal property,” the “diminution of [their properties’] market value,” the “[l]oss of income, business income, profits, and business equipment,” and the “[l]oss of good will and reputation.” The Del Pino property owners also sought to recover for “[c]onsequential costs incurred, including but not limited to alternative living conditions or accommodations and lost time from work” and “[m]ental anguish and/or emotional distress.”

Pertinent here, the Del Pino property owners, in their original petition, specifically addressed the timeliness of their original petition’s filing. They alleged that they “exercised diligence and actively pursued their judicial remedies” by timely filing, on August 23, 2019, a plea in intervention in another suit: “*Ellisor, et al[.] v. Hanson Aggregates, LLC, et al.[,]* Cause No. 2018-66557, pending in the 11[th] Judicial District Court of Harris County” (the “*Ellisor* suit”). According to the Del Pino property owners, the trial court in the *Ellisor* suit dismissed their plea in intervention on December 16, 2019 “as insufficient to confer jurisdictional standing upon [the Del Pino property owners]” in that court. But the Del Pino property owners argued that they “timely refil[ed]” their petition in the current case because, in accordance with Texas Civil Practice and Remedies Code section 16.064(a), they

filed their original petition within sixty days of the date of the dismissal of their plea in intervention in the *Ellisor* suit.⁸

The San Jacinto companies answered,⁹ generally denying the allegations in the Del Pino property owners' petition and asserting various affirmative defenses, including that the Del Pino property owners' claims were barred by the applicable statute of limitations.

The San Jacinto companies also filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that the Del Pino property owners' claims had no basis in law or fact because they were barred by the applicable statute of limitations.¹⁰ As the San Jacinto companies explained, the Del Pino property owners' "lawsuit ar[ose] from the massive flooding event that occurred during Hurricane Harvey in August 2017." And the Del Pino property owners brought claims against the San Jacinto companies for negligence, gross negligence, nuisance, and violations of the Texas Water Code, which were subject to a two-year statute of

⁸ See TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a) ("The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if: (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and (2) not later than the 60th day after the date the dismissal or disposition becomes final, the action is commenced in a court of proper jurisdiction.").

⁹ Multiple answers were filed.

¹⁰ See TEX. R. CIV. P. 91a.

limitations.¹¹ Although the Del Pino property owners alleged that they were injured during Hurricane Harvey in August 2017, they did not file their original petition in this case until February 7, 2020—more than two years after their claims had accrued.

The San Jacinto companies also asserted that Texas Civil Practice and Remedies Code section 16.064(a) could not “revive [the Del Pino property owners’] time-barred claims.”¹² Although the San Jacinto companies noted that the Del Pino property owners’ plea in intervention was filed in the *Ellisor* suit on August 23, 2019, making it timely for purposes of the applicable statute of limitations, and the San Jacinto companies’ original petition in this case was filed within sixty days of the dismissal of their plea in intervention in the *Ellisor* suit, the San Jacinto companies stated that Texas Civil Practice and Remedies Code section 16.064(a) could not toll the statute of limitations in this case because the Del Pino property owners’ plea in intervention “was dismissed for lack of a justiciable interest, not for lack of jurisdiction.” (Internal footnote and quotations omitted.) Further, Texas Civil Practice and Remedies Code section 16.064(a) could not toll the applicable statute of limitations for the Del Pino property owners’ claims because the Del Pino property owners filed their plea in intervention in the *Ellisor* suit “with an intentional disregard for the requirements to intervene” and section 16.064(a) “d[id] not apply

¹¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003.

¹² See *id.* § 16.064(a).

when [a party's] first filing was made with intentional disregard of proper jurisdiction.”¹³ (Internal quotations omitted.)

In response to the San Jacinto companies' motion to dismiss, the Del Pino property owners argued that their claims were not time-barred because the applicable statute of limitations was tolled under Texas Civil Practice and Remedies Code section 16.064(a). According to the Del Pino property owners, the requirements of section 16.064(a) had been satisfied because they timely filed their plea in intervention in the *Ellisor* suit—before the statute of limitations on their claims had run—which the San Jacinto companies did not dispute. And after the Del Pino property owners' plea in intervention was dismissed by the trial court in the *Ellisor* suit “for lack of a justiciable interest,” the Del Pino property owners filed their original petition in this case within sixty days of the plea in intervention's dismissal. Finally, according to the Del Pino property owners, there had been no “intentional disregard of proper jurisdiction” by the Del Pino property owners when they filed their plea in intervention in the *Ellisor* suit.¹⁴

As to the San Jacinto companies' argument that section Texas Civil Practice and Remedies Code section 16.064(a) could not apply to toll the statute of limitations

¹³ See *id.* § 16.064(b) (“This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.”).

¹⁴ See *id.*

because the Del Pino property owners’ plea in intervention was not dismissed for a “lack of jurisdiction,” the Del Pino property owners explained that the phrase “dismissed” “because of lack of jurisdiction,” as stated in section 16.064(a), “cover[ed] the entire gamut of reasons a court might decline to exercise jurisdiction in a particular action.” And a dismissal “for lack of a justiciable interest” was a dismissal for “lack of jurisdiction.”¹⁵

After a hearing, the trial court denied the San Jacinto companies’ motion to dismiss. In its order denying the motion to dismiss, the trial court stated that this case was “one of three lawsuits involving a total of over 1,600 plaintiffs making the same claims against over fifty defendants, arising from a massive flooding event that occurred during Hurricane Harvey in August 2017.” Those three lawsuits, which included the *Ellisor* suit, “were all transferred to [the] MDL Pre-Trial Court in May 2020 under the master file *In Re: Harvey Sand Litigation*, Cause No. 2020-48333.” Although the San Jacinto companies “moved to dismiss [the Del Pino property owners’] claims . . . because they [were] barred by [the applicable statute of] limitations,” the trial court found that “the tolling principles of” Texas Civil Practice and Remedies Code section 16.064(a) applied and preserved the Del Pino property owners’ claims because: (1) the Del Pino property owners’ “attempted intervention

¹⁵ Additional replies and responses were filed by both the San Jacinto companies and the Del Pino property owners.

[filed in the *Ellisor* suit] was stricken for lack of a justiciable interest which [was] tantamount to a dismissal for ‘lack of jurisdiction’ as that phrase is used” in section 16.064(a) and (2) “after [the Del Pino property owners’] intervention was stricken in [the *Ellisor* suit], it was refiled in a ‘different court’ of proper jurisdiction as that term is used” in section 16.064(a). The trial court also specifically rejected the San Jacinto companies’ argument that Texas Civil Practice and Remedies Code section 16.064(a) did not apply because the Del Pino property owners’ plea in intervention was filed in the *Ellisor* suit “with intentional disregard of proper jurisdiction.”¹⁶ But the trial court rejected that argument “without prejudice to [the San Jacinto companies’] ability to raise th[e] issue outside the [Texas] Rule [of Civil Procedure] 91a context.”

The trial court then granted the San Jacinto companies permission to pursue a permissive interlocutory appeal of its order denying their motion to dismiss based on the following controlling question of law:

Where a district court strikes an attempted intervention for lack of justiciable interest and the putative intervenor subsequently files an original petition in the same county, which is assigned to a different judicial district than the original suit, is the striking of the petition in intervention a dismissal for “lack of jurisdiction” and is the second suit filed in a “different court” as those terms are used in [Texas Civil Practice and Remedies Code section] 16.064, such that the statute of limitations is tolled to preserve the putative intervenor’s claims?

¹⁶ *See id.*

This Court granted the San Jacinto companies’ petition for permissive interlocutory appeal.¹⁷

Standard of Review

Texas Rule of Civil Procedure 91a allows a party to move for early dismissal of a cause of action against it. *See* TEX. R. CIV. P. 91a; *Ball v. City of Pearland*, No. 01-20-00039-CV, 2021 WL 4202179, at *2 (Tex. App.—Houston [1st Dist.] Sept. 16, 2021, no pet.) (mem. op.). A trial court may dismiss a cause of action under rule 91a if “it has no basis in law or fact.” TEX. R. CIV. P. 91a.1; *Ball*, 2021 WL 4202179, at *2. Relevant here, “[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[s] to the relief sought.” TEX. R. CIV. P. 91a.1; *see also Ball*, 2021 WL 4202179, at *2.

Texas Rule of Civil Procedure 91a “permits motions to dismiss based on affirmative defenses.” *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020); *see also In re Springs Condos., L.L.C.*, No. 03-21-00493-CV, 2021 WL 5814292, at *3 (Tex. App.—Austin Dec. 8, 2021, orig. proceeding) (mem. op.) (trial court could grant rule 91a motion to dismiss claims based on “limitations grounds”); *In re Canfora*, No. 01-21-00128-CV, 2021 WL

¹⁷ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); TEX. R. APP. P. 28.3.

4095580, at *3, 8–9 (Tex. App.—Houston [1st Dist.] Sept. 9, 2021, orig. proceeding) (mem. op.) (conditionally granting mandamus relief from denial of rule 91a motion based on attorney immunity defense and judicial proceeding privilege). In ruling on a rule 91a motion to dismiss, the trial court “may not consider evidence” and “must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits” permitted by the Texas Rules of Civil Procedure. TEX. R. CIV. P. 91a.6; *see also Bethel*, 595 S.W.3d at 654. But “[i]n deciding a [r]ule 91a motion, a court may consider the defendant[s’] pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court.” *Bethel*, 595 S.W.3d at 656. If an affirmative defense cannot “be conclusively established by the facts in [the] plaintiff[s’] petition” and requires consideration of evidence, “such [a] defense[] [is] not a proper basis for a [rule 91a] motion to dismiss.” *Id.*; *see also In re Springs Condos.*, 2021 WL 5814292, at *3.

We review a trial court’s decision on a rule 91a motion to dismiss de novo. *See Bethel*, 595 S.W.3d at 654; *Malik v. GEICO Advantage Ins. Co.*, No. 01-19-00489-CV, 2021 WL 1414275, at *4 (Tex. App.—Houston [1st Dist.] Apr. 15, 2021, pet. denied) (mem. op.). We also review issues of statutory construction de novo. *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). In interpreting statutes, we look to the plain language, construing the text in light of the statute as a whole.” *Id.* We rely on the plain meaning of a statute’s text “as

expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.” *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

Motion to Dismiss

In their sole issue, the San Jacinto companies argue that the trial court erred in denying their motion to dismiss because the Del Pino property owners’ claims against the San Jacinto companies are barred by the applicable statutes of limitations.

In their original petition, the Del Pino property owners brought claims against the San Jacinto companies for negligence, gross negligence, nuisance, and violations of the Texas Water Code, alleging that their properties located in Harris County sustained damage in August 2017 related to Hurricane Harvey when “heavy rain fell” and “surface water was diverted onto land and eventually onto [the Del Pino property owners’] properties.” The parties do not dispute that a two-year statute of limitations applies to the Del Pino property owners’ claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (person must bring suit for injury to real or personal property “not later than two years after the day the cause of action accrues”). Thus, the Del Pino property owners were required to bring their claims against the San Jacinto companies by August 2019—two years after their claims had accrued. The Del Pino property owners filed their original petition in this case on February 7, 2020—more than two years after their claims had accrued. But, in their original

petition, the Del Pino property owners asserted that their claims against the San Jacinto companies were not time barred because Texas Civil Practice and Remedies Code section 16.064(a) applied to this case and tolled the statute of limitations.

Texas Civil Practice and Remedies Code section 16.064(a) provides:

(a) The period between the date of filing an action in the trial court and the date of a second filing in the same action in a different court suspends the running of the applicable statute of limitations for the period if:

- (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
- (2) not later than the 60th day after the date of dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a).¹⁸ Under section 16.064(a), when “a party . . . file[s] suit in a different court and that first-filed suit [is] dismissed for lack of jurisdiction, the statute of limitations may be tolled if the party re-files the suit in a court of proper jurisdiction within sixty days after the dismissal.” *Lewallen v. Cross*, No. 03-14-0026-CV, 2014 WL 4365081, at *4 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.) (noting “[s]tatutory tolling [of statute of limitations] is

¹⁸ Texas Civil Practice and Remedies Code section 16.064(b) states that subsection (a) “does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(b). The trial court ruled that section 16.064(b), which precludes application of subsection (a), does not apply in this case. And the San Jacinto companies state in their briefing that section 16.064(b) is not “at issue in this interlocutory appeal.”

available under section 16.064”). In interpreting section 16.064(a), we are mindful that tolling provisions are remedial in nature and are to be liberally construed. *Winston v. Am. Med. Int’l, Inc.*, 930 S.W.2d 945, 954 (Tex. App.—Houston [1st Dist.] 1996, writ denied); *see also Estate of I.C.D. v. Beaumont Indep. Sch. Dist.*, No. 1:18-CV-137, 2020 WL 1028073, at *6 (E.D. Tex. Mar. 2, 2020) (mem. op. and order) (“Section 16.064 is remedial in nature and should be liberally construed to effect its statutory purpose. Thus, courts have not required literal adherence to [section] 16.064’s requirements.” (internal citations omitted)).

For a party to rely on Texas Civil Practice and Remedies Code section 16.064(a) as a basis for tolling the applicable statute of limitations, that party must comply with the requirements set out in the statute. *See Agenbroad v. Mcentire*, No. 4:12cv480, 2014 WL 12551224, at *1 (E.D. Tex. Feb. 8, 2014) (order). Section 16.064(a) applies when (1) the party’s action is refiled in a different court, (2) the dismissal of the action was based on a lack of jurisdiction, and (3) the action is refiled within sixty days of dismissal. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a); *see also Villarreal v. JP Morgan Chase Bank, Nat’l Ass’n*, No. M-09-141, 2010 WL 11575588, at *2 (S.D. Tex. July 5, 2010) (order). According to the Del Pino property owners, they satisfied the requirements of section 16.064(a) because they timely filed their plea in intervention, containing their claims against the San Jacinto property owners, on August 23, 2019, in the *Ellisor* suit; their plea in intervention

was dismissed for “lack of jurisdiction”; and they filed their original petition with their claims against the San Jacinto companies in a “different court” within sixty days of the dismissal.¹⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a); see also *Villarreal*, 2010 WL 11575588, at *2.

In contrast, the San Jacinto companies assert that the Del Pino property owners cannot satisfy the “dismissed for lack of jurisdiction” requirement set out in Texas Civil Practice and Remedies Code section 16.064(a). See *Lewallen*, 2014 WL 4365081, at *4; see also TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a). According to the San Jacinto companies, the trial court’s decision in the *Ellisor* suit to “stri[k]e [the Del Pino property owners’ plea] in intervention for a lack of the required justiciable interest” was a “matter of judicial prudence” and not “a dismissal for lack of jurisdiction,” as section 16.064(a) requires. In doing so, they rely on the 2019 edition of Black’s Law Dictionary, which defines “lack of jurisdiction” as “[a] court’s lack of power to act in a particular way or to give certain kinds of relief.” See *Lack of Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019) (referencing definition for “want of jurisdiction”); see also *Want of Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “want of jurisdiction” as “[a] court’s lack of power to act in a particular way or to give certain kinds of relief”).

¹⁹ The parties do not dispute that the Del Pino property owners filed their original petition in this case within sixty days of the dismissal of the plea in intervention in the *Ellisor* suit.

We do not believe that in enacting Texas Civil Practice and Remedies Code section 16.064(a), the Texas Legislature intended to have “jurisdiction” read so narrowly. Historically, the term “jurisdiction” has had many meanings, some of which have included justiciability concerns. *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299, 305 (Tex. 2010); *see, e.g., Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685 (Tex. 2020) (subject-matter jurisdiction over declaratory judgment suit requires that “parties have standing, and a ripe, justiciable controversy”). And the precision of the San Jacinto companies’ urged definition does not accurately reflect the ordinary meaning of “lack of jurisdiction” that was in use when section 16.064(a) was enacted. *See Cadena Commercial USA Corp. v. Tex. Alcoholic Bev. Comm’n*, 518 S.W.3d 318, 326–27 (Tex. 2016) (defining terms left undefined in statute “based on their common usage and meaning” at time statute was enacted); *Chamul v. Amerisure Mut. Ins. Co.*, 486 S.W.3d 116, 125 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (narrow definition from 1991 dictionary was not “an appropriate source to discern the meaning of a term incorporated into a statute more than 70 years earlier” and use of that definition was contrary to mandate that workers’ compensation statute be liberally construed). At the time that Texas Civil Practice and Remedies Code section 16.064(a) was enacted, jurisdiction was “a term of comprehensive import” and, much as the Texas Supreme Court observed in *In re*

United Services Automobile Ass’n, had different meanings in different contexts. 307 S.W.3d at 305; *see also Jurisdiction*, BLACK’S LAW DICTIONARY (6th ed. 1990).

Texas Civil Practice and Remedies Code section 16.064(a) was enacted in 1985 as a nonsubstantive recodification of a 1936 statute. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 16.064, 1985 Tex. Gen. Laws 3242, 3257 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.064). At that time, dismissal for “lack of jurisdiction” was understood to mean both dismissal for lack of subject-matter jurisdiction or personal jurisdiction and dismissal “based upon the impropriety of exercising jurisdiction in a particular action.” *Vale v. Ryan*, 809 S.W.2d 324, 326–27 (Tex. App.—Austin 1991, no writ) (emphasis and internal quotations omitted). Texas courts have applied section 16.064(a) to discretionary dismissals such as a federal district court’s refusal to exercise jurisdiction over pendent state-law claims. *See id.*; *see also Sawyer v. Nueces Cty. Sheriff’s Dep’t*, No. 13-97-704-CV, 1999 WL 34973349, at *2–3 (Tex. App.—Corpus Christi—Edinburgh Feb. 11, 1999, no pet.) (not designated for publication) (recognizing section 16.064(a) “applies when a federal court refuses to exercise jurisdiction over a pendent state-law claim” but plaintiff’s claims were not protected because of plaintiff’s failure to refile his claims in Texas state court within sixty days after federal court’s dismissal); *Kaplan v. Clear Lake City Water Auth.*, No. C14-91-01344-CV, 1992 WL 383881, at *5 (Tex. App.—Houston [14th Dist.] Dec.

23, 1991, writ denied) (not designated for publication) (following rule in *Vale* that section 16.064(a) applies to pendent state-law claims dismissed by federal court but concluding section 16.064(a) did not apply to plaintiff's claims because of plaintiff's failure to refile claims in Texas state court within sixty days of dismissal by federal court); *Burford v. Sun Oil Co.*, 186 S.W.2d 306, 315 (Tex. App.—Austin 1944, writ ref'd w.o.m.) (applying predecessor statute to plaintiffs' claims refiled in Texas state court after they were dismissed by United States Supreme Court).

If Texas Civil Practice and Remedies Code section 16.064(a) applies after a discretionary dismissal of a pendent state-law claim in federal court, there is no reason for it not to apply when a plea in intervention is stricken or dismissed for “lack of a justiciable interest,” which is not discretionary. *See In re Union Carbide Corp.*, 273 S.W.3d 152, 154–56 (Tex. 2008). Texas Rule of Civil Procedure 60 provides that “[a]ny party may intervene by filing a pleading subject to being stricken out by the [trial] court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60. “The rule authorizes a party with a justiciable interest in a pending suit to intervene in the suit as a matter of right.” *In re Union Carbide*, 273 S.W.3d at 154. “Because intervention is allowed as a matter of right, the ‘justiciable interest’ requirement is of paramount importance” *Id.* at 154–55. “[I]t defines the category of non-parties who may, without consultation with or permission from the original parties or the [trial] court, interject their interests into a pending suit to which

the intervenors have not been invited.” *Id.* at 155 (noting “the ‘justiciable interest’ requirement protects pending cases from having interlopers disrupt the proceedings”). A party to the pending suit may protect itself from intervention by filing a motion to strike. *Id.* And if any party in the pending suit moves to strike the intervenor’s plea in intervention, the intervenor has the burden to show a justiciable interest in the pending suit. *Id.*

To satisfy the “justiciable interest” requirement, an intervenor must show that he could have brought all or part of the pending suit in his own name. *Id.* (“[T]he intervenor’s interest must be such that if the [pending suit] had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought in the [pending] suit.” (internal quotations omitted)). Thus, in determining whether an intervention is proper, the trial court considers its jurisdiction as limited to the injuries originally at issue in the pending suit. *See id.* at 154–55. If a trial court determines that the intervenor lacks a justiciable interest, it must grant a motion to strike if filed by a party in the pending suit. *Id.* at 154–56. Accordingly, a ruling that an intervenor lacks a “justiciable interest” is not merely a balancing of prudential considerations to arrive at the conclusion that the trial court should not rule on the

plea in intervention but a determination that the trial court *cannot* rule on the plea in intervention.²⁰

For these reasons, we agree with the trial court that the striking or dismissing of the Del Pino property owners’ plea in intervention by the trial court in the *Ellisor* suit was “tantamount to a dismissal for ‘lack of jurisdiction’ as that phrase is used” in Texas Civil Practice and Remedies Code section 16.064(a). And we conclude that the Del Pino property owners satisfied the “dismissed for lack of jurisdiction” requirement set out in section 16.064(a).²¹ *See Lewallen*, 2014 WL 4365081, at *4; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a).

²⁰ Relying on *City of Ranger v. Gholson*, 141 S.W.2d 396 (Tex. App.—Eastland 1940, writ dismissed), the San Jacinto companies assert that another appellate court has purportedly “held that [Texas Civil Practice and Remedies Code section 16.064(a)] does not apply to the dismissal of a p[lea] in intervention.” The San Jacinto companies’ reliance on *Gholson* is misplaced. When that case was decided, an intervenor was required to obtain permission to intervene, and trial court struck the plea in intervention because it was filed “without permission of a judge qualified to grant such permission.” *Gholson*, 141 S.W.2d at 398. As a result, the plea in intervention in *Gholson* was never properly before the trial court. Under Texas Rule of Civil Procedure 60, no such permission is required. *See* TEX. R. CIV. P. 60 (“Any party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party.”). An intervenor is a party for all purposes unless the intervenor’s plea in intervention is successfully challenged by another party in the pending suit. *See Ctr. Rose Partners, Ltd. v. Bailey*, 587 S.W.3d 514, 531–32 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Main Rehab. & Diagnostic Ctr., LLC v. Liberty Mut. Ins. Co.*, 376 S.W.3d 825, 828 (Tex. App.—Dallas 2012, no pet.). *Gholson* provides no guidance as to whether Texas Civil Practice and Remedies Code section 16.064(a) applies when a plea in intervention is struck or dismissed for lack of a justiciable interest.

²¹ Our conclusion is in line with a recent decision by our sister appellate court. *See Triple P.G. Sand Dev., LLC v. Nelson*, No. 14-21-00066-CV, --- S.W.3d ---, 2022 WL 868868, at *4–5 (Tex. App.—Houston [14th Dist.] Mar. 24, 2022, no pet. h.).

The San Jacinto companies also assert that the Del Pino property owners cannot satisfy the “different court” requirement set out in Texas Civil Practice and Remedies Code section 16.064(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a) (“The period between the date of filing an action in the trial court and the date of a second filing of the same action *in a different court* suspends the running of the applicable statute of limitations for the period if: (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.” (emphasis added)); *see also Villarreal*, 2010 WL 11575588, at *2. According to the San Jacinto companies the term “different court,” as contained in section 16.064(a), means a tribunal or place with different jurisdictional rules than the trial court in the *Ellisor* suit where the Del Pino property owners filed their plea in intervention. The San Jacinto companies state that the 11th District Court of Harris County—where the Del Pino property owners filed their plea in intervention in the *Ellisor* suit—and the 129th District Court of Harris County—where the Del Pino property owners filed their original petition in this case—are different “districts” of the “same court” for purposes of section 16.064(a) and cannot meet the “different courts” requirement of the statute.

Contrary to the San Jacinto companies’ assertion, no statute defines all Harris County district courts as a single court, nor does the fact that the Harris County district courts have concurrent subject-matter jurisdiction and personal jurisdiction mean that they constitute one court. Instead, we note that the Texas Constitution refers to “District Courts” in the plural. *See* TEX. CONST. art. 5, § 1; *see also* TEX. CONST. art. 5, § 7 (“Judicial Districts”). And the Texas Government Code governs the transfer of cases between district courts, allowing district court judges to “temporarily exchange benches with the judge of another district court in the county.” TEX. GOV’T CODE ANN. § 24.003(b)(4); *see also id.* § 74.093(d) (referring to “the transfer of cases from one court to another”); *id.* § 74.094(a) (referring to event “in any of the courts”); *id.* § 74.094(d) (referring to “courts, other than the[] [judge’s] own [district court]”). Moreover, the 11th District Court of Harris County—the trial court in the *Ellisor* suit—and the 129th District Court of Harris County—the trial court in this case—were created at different times under separate statutes.²² *See id.* §§ 24.112, 24.231.

²² A federal court, applying Texas law, recently rejected an argument like that asserted by the San Jacinto companies in interpreting a forum selection clause. *See Dynamic CRM Recruiting Solutions LLC v. UMA Educ. Inc.*, No. 21-20351, —F.4th —, 2022 WL 1144780, at *2 n.14 (5th Cir. Apr. 19, 2022) (Willett, J.). The Fifth Circuit observed appellant did not raise an argument on appeal that it made in district court that the term “district courts of Harris County” used in the forum selection clause included the U.S. district court because, according to appellant, “there is only one Harris County district court.” *Id.* “[A]s the district court below correctly noted, there are in fact 24 Harris County district courts.” *Id.*

While it is true that different district courts may act in each other's stead for some purposes, we find no support for the proposition that two different district courts in the same county should be considered the same court for purposes of Texas Civil Practice and Remedies Code section 16.064(a).²³

Here, after determining that the Del Pino property owners lacked a justiciable interest in the *Ellisor* suit, the 11th District Court was required to strike their plea in intervention. *See Union Carbide*, 273 S.W.3d at 154–56. That ruling, though, did not implicate the ability of the 129th District Court to exercise subject-matter jurisdiction over the Del Pino property owners' claims when they filed their original petition in this case. We conclude that the Del Pino property owners' original petition was filed in a "different court" than its previously filed plea in intervention, and the Del Pino property owners satisfied the "different court" requirement set out in Texas Civil Practice and Remedies Code section 16.064(a).²⁴ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a); *see also Villarreal*, 2010 WL 11575588, at *2.

For these reasons, we hold Texas Civil Practice and Remedies Code section 16.064(a) applies to this case to toll the statute of limitations applicable to the Del

²³ We also note that two district courts in the same county would not be considered the same court for purposes of a Texas Rule of Civil Procedure 60 intervention because if they were, a trial court could sever a failed intervenor's claims and would not need to strike the intervenor's plea in intervention. *See In re Union Carbide Corp.*, 273 S.W.3d 152, 155–57 (Tex. 2008).

²⁴ Our conclusion is in line with a recent decision by our sister appellate court. *See Nelson*, 2022 WL 868868, at *5–6.

Pino property owners' claims and the trial court did not err in denying the San Jacinto companies' motion to dismiss.

We overrule the San Jacinto companies' sole issue.

Conclusion

We affirm the order of the trial court.

Julie Countiss
Justice

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