

Affirmed and Majority and Concurring Opinions filed March 29, 2018.



In The

Fourteenth Court of Appeals

NO. 14-16-00991-CV

HOUSTON INDEPENDENT SCHOOL DISTRICT, Appellant

V.

**ALBERT DURRELL, INDIVIDUALLY AND AS NEXT FRIEND OF
MINOR CHILD, C.B.D., Appellee**

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2016-61502**

C O N C U R R I N G O P I N I O N

This appeal presents unanswered questions about the “proper court” for proceedings under Texas Rule of Civil Procedure 202, which governs the taking of depositions when no lawsuit is pending.¹

¹ See Tex. R. Civ. P. 202.

A Rule 202 petition “must . . . be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, *if suit is anticipated*; or (2) where the witness resides, *if no suit is yet anticipated*.”² Under the clear text of Rule 202, a petitioner investigating a potential claim could fall into either category: the petitioner may anticipate filing suit when the petitioner seeks relief under Rule 202, or the petitioner may not yet anticipate filing suit.³

The “Proper Court” When the Petitioner Anticipates Filing Suit

If the Rule 202 petitioner anticipates filing a suit, then venue lies in any county in which venue would be proper for the anticipated suit, and the Supreme Court of Texas has held that a “proper court” in this scenario is one that would have subject-matter jurisdiction over the anticipated action.⁴

The “Proper Court” When the Petitioner Does Not Yet Anticipate Filing Suit

The parties have not cited and research has not revealed any binding precedent addressing the “proper court” for a Rule 202 petitioner who does not yet anticipate filing suit and thus for whom venue for the Rule 202 proceeding is any county in which the witness resides rather than any county in which venue for the anticipated suit would lie.⁵ A Rule 202 petitioner may seek to investigate a potential claim or suit and also anticipate filing suit.⁶ Indeed, in recent cases from

² Tex. R. Civ. P. 202.2 (emphasis added).

³ See Tex. R. Civ. P. 202.1; 202.2(b),(d),(e),(f); 202.3(a); 202.4(a); *In re John Doe*, 444 S.W.3d 603, 605, 607–08 (Tex. 2014) (noting that a Rule 202 petitioner may not anticipate filing a suit).

⁴ See Tex. R. Civ. P. 202.2; *In re John Doe*, 444 S.W.3d at 605, 607–08 (concluding that a “proper court” under Rule 202.2 for a petitioner investigating a potential claim who anticipates filing a suit is a court that would have subject-matter jurisdiction over the anticipated action).

⁵ See Tex. R. Civ. P. 202.2.

⁶ See Tex. R. Civ. P. 202.1; *In re John Doe*, 444 S.W.3d at 604–05.

the Supreme Court of Texas, the petitioner sought Rule 202 relief to investigate a potential claim and also anticipated filing suit.⁷

If a Rule 202 petitioner does not yet anticipate filing a suit, then an anticipated suit does not exist, so it would not be possible to determine whether a court would have subject-matter jurisdiction over it. (In an anticipated suit, potential parties and claims can be identified, but if a suit is not yet anticipated, these variables are not yet known.) In this scenario, a “proper court” would be a court having subject-matter jurisdiction to order the Rule 202 deposition of a witness in a county in which the witness resides.⁸ Because district courts are courts of general jurisdiction and no statute or law provides that district courts lack jurisdiction to order the Rule 202 deposition of a witness in a county in which the witness resides, any district court in a county in which the witness resides would have jurisdiction to order a Rule 202 deposition when the petitioner does not yet anticipate filing a suit.⁹ Simply stated, when no suit is yet anticipated, the general-jurisdiction-court presumption applies,¹⁰ and the Rule 202 petitioner may seek Rule 202 relief in any district court in a county in which the witness resides.¹¹

⁷ See, e.g., *In re City of Dallas*, 501 S.W.3d 71, 73–74 (Tex. 2016) (per curiam) (noting that Rule 202 petitioner sought Rule 202 relief to investigate a potential claim and also anticipated filing suit); *In re John Doe*, 444 S.W.3d at 604–05 (noting that Rule 202 petitioner sought Rule 202 relief to investigate a potential claim and also anticipated filing suit); *City of Dallas v. City of Corsicana*, Nos. 10-14-00090-CV, 10-14-00171-CV, 2015 WL 4985935, at *1 (Tex. App.—Waco Aug. 20, 2015) (noting that Rule 202 petitioner anticipated filing suit), *pet. denied & mand. cond. granted*, 501 S.W.3d 71, 73–74 (Tex. 2016).

⁸ See Tex. R. Civ. P. 202.2.

⁹ See Tex. Const. art. V, § 8; Tex. Gov’t Code §§ 24.007, 24.008; *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) (stating that “[a] Texas district court . . . is a court of general jurisdiction For courts of general jurisdiction, . . . the presumption is that they have subject matter jurisdiction unless a showing can be made to the contrary”) (quotations omitted).

¹⁰ See Tex. Const. art. V, § 8; Tex. Gov’t Code §§ 24.007, 24.008; *Dubai Petroleum Co.*, 12 S.W.3d at 75.

¹¹ See Tex. R. Civ. P. 202.2.

Determining the “Proper Court” in Today’s Appeal

This court must review the trial court’s ruling based upon the record before the trial court when the trial court made the ruling at issue and not based upon events occurring or materials presented after the trial court’s ruling.¹² In his original and first amended Rule 202 petitions appellee Albert Durrell asserted that he was investigating a potential claim, but he did not expressly address whether he anticipates filing a suit. Durrell’s live pleading and the other documents before the trial court when the trial court denied appellant Houston Independent School District’s plea to the jurisdiction indicate that Durrell did not yet anticipate filing a suit. So, the trial court had subject-matter jurisdiction to rule on Durrell’s Rule 202 petition because the trial court is a district court whose general jurisdiction includes jurisdiction to order the Rule 202 deposition of a witness in a county in which the witness resides.¹³

In the alternative, even presuming for the sake of argument that Durrell anticipates filing a lawsuit against one or more parties whose allegedly tortious conduct appears to have caused injury to C.B.D, then a proper court to entertain the Rule 202 petition is a court that would have subject-matter jurisdiction over the anticipated lawsuit.¹⁴ In this scenario, Durrell’s failure to allege that his son’s injuries resulted from the use of a motor vehicle does not compel the conclusion

¹² See *Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961) (holding that appellate court, in determining correctness of a trial court ruling, does not consider events that occurred after the ruling unless they deprive the appellate court of jurisdiction); *Keck v. First City Nat. Bank of Houston*, 731 S.W.2d 699, 700 (Tex. App.—Houston [14th Dist.] 1987, no writ) (concluding that, in reviewing a trial court ruling, it is improper for an appellate court to consider pleadings, actions by the parties, or actions by other courts taking place after the trial court rendered the ruling at issue, unless the subsequent matters deprive the appellate court of jurisdiction).

¹³ See Tex. Const. art. V, § 8; Tex. Gov’t Code §§ 24.007, 24.008; Tex. R. Civ. P. 202.2; *Dubai Petroleum Co.*, 12 S.W.3d at 75.

¹⁴ See *In re John Doe*, 444 S.W.3d at 607–08.

that governmental immunity would deprive the trial court of subject-matter jurisdiction over the anticipated lawsuit. And, Durrell's first issue would lack merit under the majority's analysis.

Conclusion

The trial court did not err in denying appellant's plea to the jurisdiction. Though I join this court's judgment and the majority's analysis as to the second issue, I respectfully decline to join the majority's analysis as to the first issue and instead would analyze the first issue under the framework set forth above.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby (Jamison, J., majority).