TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00631-CV

City of Magnolia, Appellant

v.

Magnolia Bible Church; Magnolia's First Baptist Church; Believers Fellowship; and Ken Paxton, Attorney General of Texas, Appellees

FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-006882, THE HONORABLE DUSTIN M. HOWELL, JUDGE PRESIDING

O P I N I O N

PER CURIAM

This is an interlocutory appeal from an order granting a motion for new trial. Chief Justice Rose and Justice Triana filed concurring opinions concluding that order should be affirmed. Justice Baker filed a dissenting opinion concluding that the trial court's order should be reversed. Accordingly, this Court affirms the district court's order.

Before Chief Justice Rose, Justices Baker and Triana
Concurring Opinion by Chief Justice Rose
Concurring Opinion by Justice Triana
Dissenting Opinion by Justice Baker

Affirmed

December 18, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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

This is an interlocutory appeal from an order granting a motion for new trial in the City of Magnolia's suit to validate an ordinance establishing a new water rate and surcharge on "Institutional/Non-Profit/Tax-Exempt" entities. The City brought the suit under the Expedited Declaratory Judgment Act (EDJA) and provided notice by publication as authorized by the EDJA. *See* Tex. Gov't Code § 1205.043 (providing for notice by publication); *see generally id.* §§ 1205.001–.152 (EDJA). Appellees Magnolia Bible Church, Magnolia's First Baptist Church, and Believers Fellowship (collectively, "the Churches") sought a new trial on the grounds that the City's newspaper notice violated the Churches' due-process rights and, alternatively, that good cause existed to vacate the final judgment under Rule 329. *See* Tex. R. Civ. P. 329 (motion for new trial after notice by publication). I concur with the Court's decision to affirm the district

court's order granting a new trial because, on this record and under the particular circumstances of this case, the notice by publication denied the Churches due process.

BACKGROUND

In March 2018, the City adopted an ordinance relating to the City's water-system rates. *See* Magnolia, Tex., Ordinance O-2018-003 (Mar. 13, 2018).[1] Before adopting the ordinance, the City had two categories for water users—residential and commercial—and the Churches were considered commercial. The ordinance created a new category of water user, the "Institutional/Non-Profit/Tax-Exempt accounts," which was made up of "schools," "churches," certain governmental facilities, and "parks." *See id.* The users in this new category would pay a 50% surcharge to the in-city water rate and other fees. *See id.*

The Churches opposed the new category and surcharge.[2] In July 2018, the Churches sent a letter to the City complaining that the "Institutional/Non-Profit/Tax-Exempt" rate class was discriminatory and stating their intent to "pursue remedy of this wrongful and unequitable policy through available legal recourse and actively seek legislation to reverse this and avoid other cities following suit." Thereafter, a representative of the Churches attended a September 2018 City Council meeting to reiterate their concern with the ordinance and to emphasize that they would bring legal action if it was not reversed.

Based in part on this opposition, the City filed suit in Travis County District Court in November 2018 under the EDJA for declaratory judgment regarding the legality and validity

[1] This ordinance was amended twice. *See* Magnolia, Tex., Ordinance O-2018-015 (Sep. 11, 2018); *id.* O-2018-009 (Aug. 14, 2018) (lowering base rates for "Institutional/Non-Profit/Tax-Exempt" entities as compared to the March ordinance, but leaving overall features, including the surcharge, same).

[2] Magnolia Independent School District also opposed the surcharge but did not participate in this appeal or the underlying proceedings.

of the surcharge on the newly created rate category. *See* Tex. Gov't Code. §1205.021(2). The petition explained that the "Rate and Surcharge are being challenged by customers of the City." The City published notice of the suit in the *Austin American-Statesman* and the *Houston Chronicle* on November 21 and November 28, 2018, as required by the EDJA. *See id.* § 1205.043. The City did not directly notify the Churches of the EDJA suit.

In December 2018, a month after the Travis County suit was filed, the Churches sent another letter to the City complaining that the new institutional water rate violated the Texas Constitution, the Tax Code, and the Texas Religious Freedom Restoration Act (TRFRA), Tex. Civ. Prac. & Rem. Code §§ 110.001–.012, and that the rates were arbitrary and discriminatory. The letter threatened legal action if the City failed to repeal the new water rates. The letter did not reference the City's EJDA action.

The City amended its Travis County EDJA petition in January 2019 and republished notice of the suit in the *Austin American Statesman* and the *Houston Chronicle* on January 16 and January 23, 2019. *See* Tex. Gov't Code § 1205.043. Again, the City did not directly notify the Churches about the suit, and the Churches never made an appearance in the action. The Attorney General, who is required to be notified in an EDJA action, *see id.* § 1205.042, appeared at the bond-validation hearing but raised no objections to the City's rate, explaining that his office had "worked very closely with [the City's] counsel" to provide guidance and that if his office knew of any people "who object or have concerns, [it would] work with them." Ultimately, the Travis County District Court validated the bonds on February 7, 2019, stating: "The Revenues pledged to secure the Bonds are legal and valid, including specifically the Rate and Surcharge"; "The imposition of the Rate is legal and valid"; "The imposition of the Surcharge is legal and valid"; and "The Bonds are legal and valid."

The Churches did not initially file suit as threatened in their letter. Instead, they sought recourse through the legislative process, championing two companion bills that did not pass during the 86th legislative session. *See* Tex. S.B. 2322, 86th Leg., R.S. (2019) (proposing a bill "relating to rates established by municipalities for water and sewer services."); Tex. H.B. 4114, 86th Leg., R.S. (2019)(same).

After failing to obtain legislative relief, the Churches sued the City in May 2019 in Montgomery County District Court, seeking declaratory judgment under the Uniform Declaratory Judgments Act (UDJA), *see* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011, that the institutional water rate is void because it is a tax on a tax-exempt entity; is a discriminatory, arbitrary rate; and is a substantial burden on the Churches' free exercise of religion in violation of TRFRA. In response, the City sent the Churches a letter informing them of the final judgment in the EDJA suit and threatening to seek to have the Churches held in contempt if they did not dismiss the Montgomery County suit. The Churches in turn filed a motion for new trial in the EDJA suit, asserting that the City's notice by publication violated their right to due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), because they had no actual notice of the pending EDJA suit and because the City arguably had notice of their intentions to seek legal recourse. The Churches filed their motion under Texas Rule of Civil Procedure 329, which allows a motion for new trial, filed within two years of judgment, in cases where judgment was rendered on service of process by publication. *See* Tex. R. Civ. P. 329 (authorizing grant of new trial upon showing of good cause). The City opposed the motion, observing that the bonds had already been issued bearing the statement that they were "validated and confirmed by a judgment" that "perpetually enjoins the commencement of any suit [challenging] the provision made for the payment of the principal and interest." The City also

challenged the district court's jurisdiction, arguing that the time limitations for filing a motion for new trial under Rule 329 do not apply to EDJA cases because Rule 329 conflicts with "the provisions for speedy resolution set forth in the EDJA"; the district court lost plenary power over the suit such that the Churches cannot be granted "named party" status in the EDJA suit and thus lacked standing to seek a new trial; and in the alternative, the Churches had no legitimate due-process claim because the suit did not adjudicate their private rights and they were not entitled to special notice. The Attorney General issued a statement supporting the Churches' motion for new trial, asserting that judgments under the EDJA, while intended to be "binding and conclusive," are nonetheless subject to the Texas Constitution and TRFRA, which "override other statutes to protect religious freedom." Based on the "incredibly unique and troubling facts" of the case, the Attorney General explained that due process required the City to have provided the Churches with actual notice of the EDJA suit. After a hearing, the district court granted the motion for new trial on the ground that failure to provide the Churches with individual notice of the EDJA suit deprived them of due process and, alternatively, that the Churches are entitled to a new trial under Rule 329. This interlocutory appeal ensued.[3]

[3] The City appeals under section 51.014(a)(8) of the Civil Practice and Remedies Code because the district court, by granting a new trial, implicitly rejected the City's arguments challenging the court's subject-matter jurisdiction, thus denying what was substantively a plea to the jurisdiction. *See City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 299 (Tex. 2017) (treating jurisdiction-based motion for summary judgment as a plea to the jurisdiction for interlocutory-appeal purposes because "'plea to the jurisdiction' [does] not [have] to refer to a 'particular procedural vehicle,' but rather to the substance of the issue raised"). The scope of our appeal is "the order" denying the plea to the jurisdiction, *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8), which in this case is an order granting a motion for new trial, *see Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 760 (Tex. 2019) (defining scope of interlocutory appeal to encompass the contents of "the order" being appealed).

DISCUSSION

On appeal, the City argues that the district court lacked subject-matter jurisdiction to grant a new trial because the district court's plenary power had expired thirty days after its final judgment. More specifically, the City contends that the Churches' filing of a motion for new trial under rule 329—allowing a motion for new trial within two years after a judgment following citation by publication, *see* Tex. R. Civ. P. 329(a)—did not extend the district court's plenary power because the EDJA scheme for expedited disposal of cases bars application of Rule 329. Further, the City continues, the Churches do not have a meritorious due-process complaint that would give the district court jurisdiction to vacate its judgment because the EDJA adjudicates public rights rather than private rights and because notice by publication is constitutional as to public rights. Finally, the City argues that even if the Churches' have a meritorious due-process complaint, the Churches should have filed a bill of review and that we cannot treat their motion for new trial as a bill of review. *See, e.g.*, *Sweetwater Austin Props., L.L.C. v. SOS All., Inc.*, 299 S.W.3d 879, 890 (Tex. App.—Austin 2009, pet. denied) ("A bill of review is an equitable proceeding brought to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal."). The Churches argue that it was proper for the district court to grant a new trial because their due-process rights were violated by the publication notice and, in the alternative, because "good cause" existed under Rule 329. Because it is key to resolving all the issues in this appeal, I begin by addressing the Churches' due-process claim.

"'The fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339

U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Due process does not require personal service in all circumstances, but any use of substituted notice in place of personal notice—e.g., notice by publication—must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* However, "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. City of New York*, 371 U.S. 208, 212–13 (1962) (citing *Mullane*, 339 U.S. at 318).

The EDJA empowers an issuer of public securities to seek an expedited declaratory judgment concerning "the legality and validity of each public security authorization relating to the public securities," including, as relevant here, the legality and validity of "the imposition of a rate, fee, charge, or toll." Tex. Gov't Code § 1205.021(2)(E). The EDJA requires notice by publication to "interested parties," defined to include all taxpayers and ratepayers within the issuer's jurisdiction. *See id*. §§ 1205.041(a), .043. And the EDJA provides that a final judgment with respect to the public securities is "binding and conclusive" against all "interested parties," regardless of whether they chose to appear or were deemed served by publication notice. *Id*. § 1205.151.

Ordinarily, notice by publication satisfies due process as to the parties bound by an EDJA judgment because the EDJA permits only *in rem* declarations concerning property rights—i.e., that adjudicate a public entity's right to identified property—it does not allow declarations concerning *in personam* rights and liabilities. *See City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444, 454–55 & n. 15 (Tex. 2020) (declining to address due-process challenge to EDJA notice requirement because EDJA does not allow declarations concerning *in*

personam rights and liabilities). Likewise, and relatedly, the usual challenges to public-security authorizations involve public rights—i.e., those brought by a "taxpayer . . . using that status to entitle him to complain about an alleged misuse of public funds or about other public action that has only an indirect impact on his interests." *Richards v. Jefferson County*, 517 U.S. 793, 803 (1996) (internal citations omitted) (distinguishing between public and private actions and noting that states have wide latitude to establish procedures that limit these types of challenges).

Here, however, the Churches seek to challenge the legality and validity of the City's institutional rate on the grounds that it "is a tailored, discriminatory rate as applied to them [because] it violates their personal tax-exempt status and . . . it infringes their exercise of religious freedom." These type of claims—i.e., constitutional challenges to the City's attempt to levy personal funds—fall under the rubric of private actions. *See id.* ("By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring a[private] action . . . ."). And if allowed to stand, the challenged EDJA judgment—which declares, among other matters, that "the [City's] imposition of the [institutional] Rate is legal and valid"—has the effect of extinguishing the Churches' private claims. Accordingly, it must be determined whether due process required that the City give actual notice to the Churches of the EDJA proceeding or whether notice by publication satisfied due process. *See Schroeder*, 371 U.S. at 212–13 (noting that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceeding in question) (quoting *Mullane*, 339 U.S. at 318)); *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012) (engaging in *Mullane* analysis to determine whether notice by publication was sufficient in parental-termination suit).

Under the particular and unique circumstances of this case, notice by publication did not satisfy the Churches' right to due process. Before the City filed its EDJA suit in Travis County District Court, the Churches sent a letter to the City listing the Churches and their pastors by name and stating their intent to litigate if the City refused to withdraw the institutional rate. Further, the City had access to the Churches' addresses through its billing system. *See Mullane*, 339 U.S. at 318 (noting that trustee "ha[d] on its books the names and addresses" of the interest parties); *In re E.R.*, 385 S.W.3d at 565 (relying on fact that State knew mother's identity and was in contact with her to hold that notice by publication was constitutionally insufficient).

Additionally, after the City filed its original EDJA petition, but before it published notice a second time, the Churches sent another letter to the City explaining their position that the institutional rate violated their rights to religious liberty under TRFRA. Thus, the City knew the identity of the Churches and that they were interested in litigating the validity of the institutional rate on constitutional grounds—i.e., in a private action—but did not take any action to directly provide notice or serve the Churches of the EDJA suit filed in Travis County District Court. *See Mullane*, 339 U.S. at 318 ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."); *In re E.R.*, 385 S.W.3d at 560 ("From these decisions, we can distill a common principle: when a defendant's identity is known, service by publication is generally inadequate.") (referencing *Mullane*, 339 U.S. at 314, 319 and other Supreme Court cases, and citing 1 *Restatement (Second) of Judgments* § 2, reporter's note cmt. a (1982)). Accordingly, citation by publication was not proper as to the Churches. *See Schroeder*, 371 U.S. at 212–13 ("The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very

easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.").

Because notice to the Churches was constitutionally insufficient, the resulting judgment was void and can be challenged at any time. *See In re E.R.*, 385 S.W.3d at 566 ("A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time.") (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988)). As such and because there is no dispute that the Churches acted promptly in seeking relief—they filed their motion for new trial in the underlying suit sixteen days after the City notified them of the EDJA judgment—the district court did not err in granting a new trial. *See id.* at 569–70 (holding that because notice by publication deprived mother of due process in parental-termination suit, she was entitled to new trial unless, on remand, it was determined that she delayed in seeking relief after learning of the judgment against her and that granting relief would impair another party's substantial reliance on judgment).

Relying primarily on sections 1205.002 and 1205.068 of the EDJA, the City argues that the EDJA's "plain language preempt[s] any mechanism that would slow down or interfere with an expedited final adjudication," including granting a new trial under Rule 329. *See* Tex. Gov't Code §§ 1205.002(a) ("To the extent of conflict or inconsistency between [the EDJA] and another law, th[e EDJA] controls."), 1205.068(c) ("An order or judgment from which an appeal is not taken is final."); *see also* Tex. R. Civ. P. 329(a) (allowing motion for new trial on judgment following citation by publication and authorizing new trial upon showing of good cause filed within two years of judgment); *Cities of Conroe, Magnolia, & Splendora v. Paxton*, 559 S.W.3d 656, 664 (Tex. App.—Austin 2018) (describing EDJA generally, including notice

procedures, and noting EDJA's "extraordinarily expedited process"), *reversed in part on other grounds by City of Conroe*, 602 S.W.3d 444 (Tex. 2020). More specifically, the City argues that Rule 329 does not apply to EDJA final judgments because it would impermissibly "render a final judgment in an EDJA suit anything *other* than final, binding, and conclusive," and is therefore "preempted." The essence of this argument is that EDJA final judgments cannot be subject to direct or collateral attacks. But even if the City's construction of section 1205.068(c) is correct, the Texas Supreme Court has made it clear that due process prevails over a state statute that restricts the time for challenging a judgment. *See In re E.R.*, 385 S.W.3d at 561–62 (citing *Tulsa Prof'l*, 485 U.S. at 490). In *In re E.R.*, the high court considered the following Family Code provision that imposed a six-month time limit on direct or collateral attacks to parental-termination judgments following citation by publication: "Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed." Tex. Fam. Code § 161.211(b); *see In re E.R.*, 385 S.W.3d at 557–67. After concluding that service by publication was constitutionally inadequate under the circumstances, the court held that the bar in section 161.211 "applies only to parents for whom service by publication was valid" because "complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction" and that "the resulting judgment is void and may be challenged at any time." *Id.* at 566–67. Based on this holding, the Churches here are likewise entitled to challenge the EDJA judgment despite any provisions in the EDJA to the contrary because notice by publication deprived them of due process. *See id.*

That same failure of due process eliminates the need to determine whether Rule 329 applies to EDJA judgments generally or, more specifically, whether the district court here

retained plenary jurisdiction to grant a new trial under Rule 329. First, as noted, judgments void for denial of due process may be challenged "at any time." *Id.* at 563 (considering invalid notice in Rule 329 context); *see Caldwell v. Barnes*, 154 S.W.3d 93, 96–97 (Tex. 2004) (considering invalid notice in bill-of-review context). Further, the remedy for denial of due process is due process. *See Mosley v. Texas Health & Human Servs. Comm'n*, 593 S.W.3d 250, 268 (Tex. 2019) (holding that because denial of due process prevented party from filing motion for rehearing, remedy was to remand for opportunity to file motion for rehearing); *University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 933 (Tex. 1995) (holding that upon proof of protected interest, professor whose contract was not renewed is not entitled to reinstatement but to hearing comporting with due process (citing *Perry v. Sindermann*, 408 U.S. 593, 603 (1972))); *McIntire v. State*, 698 S.W.2d 652, 661–62 (Tex. Crim. App. 1985) (remedy for failure to grant hearing on motion for new trial is a hearing)). Invalid service prevents a party from participating in a trial on the merits, and the remedy for that denial of due process is a new trial. *See In re E.R.*, 385 S.W.3d at 563 (approving of Rule 329 motion for new trial despite statute explicitly displacing Rule 329 because service was invalid). Here, because the invalid service denied the Churches the opportunity to challenge the legality and validity of the institutional rate at the EDJA trial, the underlying EDJA judgment is void and the Churches are entitled to a new trial. Accordingly, I concur with the Court's decision to affirm the district court's order granting a new trial.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Triana

Filed: December 18, 2020

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FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-006882, THE HONORABLE DUSTIN M. HOWELL, JUDGE PRESIDING

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

In this interlocutory appeal from the denial of appellant City of Magnolia's plea to the jurisdiction, the question is whether the district court lacked subject matter jurisdiction to grant a new trial after a bond validation hearing. For the following reasons, I concur with the Court's decision to affirm the district court's denial of the plea.

BACKGROUND

In March 2018, the City adopted an ordinance that created a separate rate class for "Institutional/Non-Profit/Tax-Exempt" entities. The ordinance taxed Institutional/Non-Profit/Tax-Exempt entities a 50% surcharge on the in-city rate and certain fees.[1] The surcharge

[1] In August 2018, the City passed an ordinance amending the March ordinance. The August ordinance lowered the base rates for "Institutional/Non-Profit/Tax-Exempt" entities

allows the City to recoup the cost of providing water service to entities that otherwise do not pay for water-service infrastructure through an ad valorem tax.

Appellees are churches that opposed the surcharge.[2] In a July 2018 letter, Appellees complained to the City that creating the "Institutional/Non-Profit/Tax-Exempt" accounts was discriminatory and stated they would "pursue remedy of this wrongful and unequitable policy through available legal recourse and actively seek legislation to reverse this and avoid other cities following suit." To resolve any potential conflicts regarding the new water rates, the City filed suit in November 2018 under the Expedited Declaratory Judgment Act (EDJA), Tex. Gov't Code §§ 1205.001-.152, seeking a declaratory judgment that its rates are legal and valid, *see id.* §1205.021(2) (permitting an issuer to obtain a declaratory judgment as to "the legality and validity of each public security authorization relating to the public securities" including "the imposition of a rate, fee, charge, or toll . . . ."). The petition stated that the "Rate and Surcharge are being challenged by customers of the City." The City published notice of the suit in the Austin American-Statesman and the Houston Chronicle in accordance with the provisions of the EDJA. *See id.* § 1205.043 (Publication of Notice). In December 2018, a month after that suit was filed, Appellees sent a letter to the City opining that the ordinance setting the new rates violates the Texas Constitution, the Tax Code, and the Texas Religious Freedom Restoration Act (TRFRA) and that the rates are arbitrary and discriminatory. After amending its petition in January 2019, the City republished notice of the suit. The City did not individually notify Appellees that an EDJA suit was pending, and Appellees did not appear in the action.

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compared to the March ordinance, but the overall features, including the surcharge, remained the same.

[2] Magnolia Independent School District also opposed the surcharge but is not participating in this appeal or the underlying proceedings.

At the bond validation hearing, the Attorney General's Office stated that it had "worked very closely with counsel" for the City to provide guidance and also explained that if they know of any people "who object or have concerns, we work with them." Based on that close working relationship, counsel for the Attorney General's Office explained, "that's why there's no objection, no—no fireworks and nothing exciting because we try to have everything ready to go before this hearing." The district court validated the bonds in a February 7, 2019 order stating: "The Revenues pledged to secure the Bonds are legal and valid, including specifically the Rate and Surcharge;" "The imposition of the Rate is legal and valid;" "The imposition of the Surcharge is legal and valid; and" "The Bonds are legal and valid." Appellees did not file suit at that time as threatened in their letter. Instead, Appellees sought recourse through the legislative process, championing two companion bills that did not pass during the 86th legislative session. *See* Tex. S.B. 2322, 86th Leg., R.S. (2019); Tex. H.B. 4114, 86th Leg., R.S. (2019) ("Relating to rates established by municipalities for water and sewer services.").

In May 2019, having failed to obtain legislative relief, Appellees sued the City in Montgomery County, at which point the City sent Appellees a letter informing them of the final EDJA judgment and threatening to move to hold Appellees in contempt unless Appellees dismissed the Montgomery County suit. In response, in June 2019, Appellees filed a motion for new trial in the EDJA suit, asserting that the City's notice by publication violated their right to due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), because Appellees had no actual notice of the pending EDJA suit and the City arguably had notice of Appellees' intentions to seek legal recourse. Appellees further argued that Texas Rule of Civil Procedure 329 allowed them to move for a new trial.

The City opposed the motion, observing that the bonds had already been issued, bearing the statement that they were "validated and confirmed by a judgment" that "perpetually enjoins the commencement of any suit [challenging] the provision made for the payment of the principal and interest." The City also challenged the district court's subject matter jurisdiction, arguing that Rule 329 does not apply to EDJA cases because it conflicts with "the provisions for speedy resolution set forth in the EDJA"; the district court lost plenary power over the suit such that Appellees cannot be granted "named party" status in the EDJA suit and thus lack standing to seek a new trial; and in the alternative, Appellees have no legitimate due process claim because the suit did not adjudicate their private rights and they were not entitled to special notice. The Attorney General's Office issued a statement supporting Appellees' motion for new trial, asserting that judgments under the EDJA, while intended to be "binding and conclusive," are nonetheless subject to the Texas Constitution and TRFRA, which "override other statutes to protect religious freedom." Based on the "incredibly unique and troubling facts" of the case, the Attorney General's Office opined that due process required the City to have provided Appellees actual notice of the EDJA suit. The district court granted the motion for new trial on the ground that failure to provide Appellees individual notice of the EDJA suit deprived Appellees of due process and, alternatively, that Appellees are entitled to a new trial under Rule 329.

"This Court has jurisdiction over this interlocutory appeal only to the extent such jurisdiction is expressly granted by section 51.014(a) of the Texas Civil Practice and Remedies Code." *West Travis Cty. Pub. Util. Agency v. CCNG Dev. Co.*, 514 S.W.3d 770, 773 (Tex. App.—Austin 2017, no pet.) (citing *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001); *Qwest Commc'ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000); *Cherokee Water Co. v.*

Ross, 698 S.W.2d 363, 365 (Tex. 1985) (orig. proceeding) (per curiam)). The City appeals under section 51.014(a)(8) of the Civil Practice and Remedies Code because the district court, by granting a new trial, rejected the City's arguments challenging the court's subject matter jurisdiction, thus denying what was substantively a plea to the jurisdiction. *See City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 299 (Tex. 2017) (explaining that Texas Supreme Court "considers 'plea to the jurisdiction' not to refer to a 'particular procedural vehicle,' but rather to the substance of the issue raised"). On appeal, I would first consider whether the EDJA bars application of Rule 329, in which case the district court would have lacked plenary power to grant a new trial or to allow Appellees to intervene. Only if Rule 329 does not apply would I determine whether due process nonetheless required a new trial under the circumstances presented in this case.[3]

ANALYSIS

Standard of Review

A plea to the jurisdiction challenges the court's authority to decide a case. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)). The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction. *Id.* (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). Because subject-matter jurisdiction is a question of law, a trial court's ruling on a plea to the jurisdiction is reviewed de novo. *Houston Belt & Terminal*

[3] The City also argues that Appellees' motion should not be treated as a bill of review. Appellees agree. "A bill of review is an equitable proceeding brought to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal." *Sweetwater Austin Props., L.L.C. v. SOS All., Inc.*, 299 S.W.3d 879, 890 (Tex. App.—Austin 2009, pet. denied). Because I ultimately conclude the district court had jurisdiction to grant a new trial, I do not consider the City's bill-of-review arguments.

Ry. Co. v. City of Houston, 487 S.W.3d 154, 160 (Tex. 2016). In assessing a plea to the jurisdiction, courts begin by considering the plaintiff's live pleadings and determining whether the facts alleged affirmatively demonstrate that jurisdiction exists. *Heckman*, 369 S.W.3d at 150 (citing *Miranda*, 133 S.W.3d at 226). Mere unsupported legal conclusions do not suffice. *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 737-38 (Tex. App.—Austin 2014, pet. dism'd).

Rule 329's Applicability to EDJA Actions

The City argues that the EDJA's "plain language preempt[s] any mechanism that would slow down or interfere with an expedited final adjudication," including granting a new trial under Rule 329. Resolution of this issue turns on construction of the EDJA and Rule 329, issues which are reviewed de novo. *See Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017); *Marathon Petrol. Co. v. Cherry Moving Co., Inc.*, 550 S.W.3d 791, 799 (Tex. App.—Houston [14th Dist.] 2018, pet. dism'd). The objective is to determine and give effect to the statute's and rule's intent, which is discerned from the plain meaning of the words chosen. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Marathon Petrol.*, 550 S.W.3d at 799; *see also* Tex. Gov't Code § 311.011 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage," but "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). Rule 329 provides:

> In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

Tex. R. Civ. P. 329. The City argues that Rule 329's permission for the court to grant a new trial within two years of the judgment's signing conflicts with the EDJA's provisions for expedited review. As this Court has previously explained, the EDJA

> creates a unique 'in rem' and 'class action' proceeding whereby an 'issuer' of 'public securities' can obtain declarations establishing the 'legality' or 'validity' of the securities and certain related official proceedings . . . through an extraordinarily expedited process in which the Attorney General is presumptively the only other party participating personally.

Cities of Conroe, Magnolia, & Splendora v. Paxton., 559 S.W.3d 656, 664 (Tex. App.—Austin 2018) (citing Tex. Gov't Code §§ 1205.021, .023, .041-.044, .062-.063, .065), *rev'd in part on other grounds and remanded by City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444 (Tex. 2020). For all other persons, "the EDJA prescribes only publication notice directed to four categories of unidentified 'interested parties,' whose members may . . . appear personally, and regardless are deemed to comprise a 'class' that is bound by the judgment by virtue of the publication notice alone." *Id.* (citing Tex. Gov't Code §§ 1205.023, .041, .043, .044, .062, .101-104, .151(b)). Under the statute, Appellees are both "interested parties" and "part[ies] to the action." *See* Tex. Gov't Code §§ 1205.041 (describing as interested parties all persons who are residents, property owners, taxpayers, or have or claim "a right, title, or interest in any property or money to be affected by a public security authorization or the issuance of the public securities"); .044 ("each person described by Section 1205.041(a) is a party to the action" over whom the court has jurisdiction "as if that person were individually named and personally

served"). Any "interested party" may become a "named party" and participate in an EDJA proceeding by filing an answer before the trial date or by "intervening, with leave of court, after the trial date." *Id.* § 1205.062. The EDJA expressly provides, "To the extent of a conflict or inconsistency between [the EDJA] and another law, [the EDJA] controls." *Id*. § 1205.002.

The City specifically argues that Rule 329 conflicts with section 1205.068(c) of the EDJA, which provides: "An order or judgment from which an appeal is not taken is final." *Id.* § 1205.068(c). According to the City, Rule 329 would impermissibly "render a final judgment in an EDJA suit anything *other* than final, binding, and conclusive," and is therefore "preempted." Appellees counter that Rule 329 does not conflict with the EDJA, and they assert that section 1205.068(c) defines a final judgment for the purpose of triggering section 1205.151 ("Effect of Judgment"). I agree with Appellees. Section 1205.151 "applies to a final judgment of a district court in an [EDJA] action," and renders the final judgment "binding and conclusive" against the issuer (here, the City), the attorney general, the comptroller, and "any party to the action," which includes

> all persons who:
>
> (1) reside in the territory of the issuer;
> (2) own property located within the boundaries of the issuer;
> (3) are taxpayers of the issuer; or
> (4) have or claim a right, title, or interest in any property or money to be affected by a public security authorization or the issuance of the public securities.

Id. §§ 1205.041, 1205.151(a)-(b). Section 1205.151 then provides that the final judgment permanently enjoins "any person" from filing any proceeding contesting the validity of:

> (1) the public securities, a public security authorization, or an expenditure of

money relating to the public securities described in the petition;

(2) each provision made for the payment of the public securities or of any interest on the public securities; and

(3) any adjudicated matter and any matter that could have been raised in the action.

Id. § 1205.151(c). Thus, "[r]esolving a controversy through an EDJA action ends that controversy once and for all: a final judgment is binding on all 'interested parties' and is an injunction against future attacks." *San Jacinto River Auth.*, 602 S.W.3d at 451 (citing Tex. Gov't Code §§ 1205.023, .041, .151). Unlike a typical final judgment that disposes of all claims and parties *before the court*, section 1205.151 precludes a judgment that is final under section 1205.068(c), as well as "any matter that *could have been raised* in the action," from being disputed in another legal action by "any person." *Id.* (emphasis added); *see Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205-06 (Tex. 2001) ("A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.") (citing *Jack B. Anglin Co., v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); *Linn v. Arambould*, 55 Tex. 611, 617-18 (1881)); *cf.* Tex. Gov't Code § 1205.061 (allowing a court, on the issuer's motion, to enjoin a legal action that contests the validity of items, including "a tax, assessment, toll, fee, rate, or other charge authorized to be imposed or made for the payment of the public securities" related to a public security); *Ex parte City of El Paso*, 563 S.W.3d 517 (Tex. App.—Austin 2018, pet. denied) ("under the plain language of the EDJA, the district court may enjoin a legal action that disputes or challenges the justness or legality of something done in connection with the public security"). I conclude that the plain language of section 1205.068(c) defines a "final" judgment under the EDJA and does not conflict with Rule 329's provisions

permitting the district court to grant new trial.[4] Therefore, Rule 329 applies to suits under the EDJA.[5]

Because Rule 329 applies, the district court had plenary power to grant the motion for new trial. Although a trial court's plenary power generally does not extend beyond thirty days after a judgment is signed, Rule 329(d) provides, "If the motion [for new trial] is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7)," Tex. R. Civ. P. 329(d); *see id*. R. 329b(a), (d). Rule 306a(7) states, "With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion." Tex. R. Civ. Proc. 306a(7). Paragraph (1) provides, "The date of judgment or order is signed as shown

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[4] By contrast, the legislature has expressly barred Rule 329's application to termination orders in section 161.211 of the Family Code: "Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed." Tex. Fam. Code § 161.211(b); *see id.* § 161.211(a) (prohibiting collateral or direct attack of termination orders "[n]otwithstanding Rule 329" for parents personally served and under other circumstances).

[5] Rule 329(a) expressly applies to "the defendant." Tex. R. Civ. P. 329(a). Neither party argues that use of the term "defendant" rather than "party" precludes Appellees' reliance on Rule 329. The Texas Supreme Court has stated, "'When judgment is rendered on service of process by publication, a *party* has two years to move for a new trial, which the trial court may grant for 'good cause.'" *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012) (quoting Tex. R. Civ. P. 329(a) (emphasis added); *see Sexton v. Sexton*, 737 S.W.2d 131, 133-134 (Tex. App.—San Antonio 1987, no writ) (holding that the trial court abused its discretion in not granting respondent new trial under rule 329 in parental termination suit); *see also* Tex. Fam. Code §§ 102.010 (referring to parties in parental termination suits as "petitioner" and "respondent"), 161.211(a)-(b) (prohibiting collateral or direct attacks of orders terminating parental rights after the expiration of six months, "[n]otwithstanding Rule 329"). Under these precedents, Rule 329 applies to a party who is served with process by publication even where a statute refers to that party by a term other than "defendant."

of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial . . . ." *Id*. R. 306a(1). Rule 329b(e) states,

> If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

Id. R. 329b(e). Appellees timely filed a motion for new trial under Rule 329. As a result, the district court had plenary power to grant that motion. For that reason, I would overrule the City's complaint that the district court lacked subject matter jurisdiction to grant the new trial based on a lack of plenary power. Having concluded that the district court had subject matter jurisdiction to grant the new trial under Rule 329, I do not address the parties' due process arguments. *See VanDevender v. Woods*, 222 S.W.3d 430, 432 (Tex. 2007) ("Judicial restraint cautions that when a case may be decided on a non-constitutional ground, we should rest our decision on that ground and not wade into ancillary constitutional questions.").

Meritorious Defenses

The City further argues that, if Rule 329 applies, Appellees did not meet its requirements because they "failed to set forth a meritorious defense." Appellees alleged three "meritorious defenses." However, analyzing whether the district court erred in granting the motion for new trial is beyond our appellate jurisdiction under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, which permits us to review only whether the district court lacked subject matter jurisdiction. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 208–09 (Tex. 2009) (orig. proceeding) (permitting mandamus review of grant of new trial

and stating, "we have recognized only two instances in which new trial orders are reviewable on appeal: when the trial court's order was void or the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict"). I therefore do not address the arguments relating to Appellees' alleged defenses.

CONCLUSION

Having determined that Rule 329 applied to the underlying suit, I concur with the Court's decision to affirm the district court's order granting a new trial.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Filed: December 18, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00631-CV

City of Magnolia, Appellant

v.

Magnolia Bible Church; Magnolia's First Baptist Church; Believers Fellowship; and Ken Paxton, Attorney General of Texas, Appellees

FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-006882, THE HONORABLE DUSTIN M. HOWELL, JUDGE PRESIDING

D I S S E N T I N G O P I N I O N

For the reasons that follow, I respectfully dissent from the Court's opinion affirming the district court's order granting a new trial.

The dispute in this case involves the interplay between the provisions of the Expedited Declaratory Judgment Act (EDJA), the Texas Rules of Civil Procedure, and the rights of individuals asserting an interest in the subject matter of a suit under the EDJA. The EDJA was enacted to provide "a method of quickly and efficiently adjudicating the validity of public securities and acts affecting those public securities." *Guadalupe-Blanco River Auth. v. Texas Attorney Gen.*, No. 03-14-00393-CV, 2015 WL 868871, at *4 (Tex. App.—Austin Feb. 26, 2015, pet. denied) (mem. op.) (quoting *Hotze v. City of Houston*, 339 S.W.3d 809, 814 (Tex. App.—Austin 2011, no pet.)); *see also Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146,

149 (Tex. 1982) (explaining that EDJA was designed to prevent "one disgruntled taxpayer" from stopping "the entire bond issue by simply filing suit"). The EDJA "allows an issuer to bring a special, expedited declaratory judgment action to validate proposed public securities or to resolve any disputes relating to public securities." *Hotze*, 339 S.W.3d at 814.

To achieve the goal of quickly and efficiently resolving disputes related to public securities, the legislature included rather unusual provisions expediting the review of EDJA determinations, limiting the ability of individuals to challenge determinations made under the EDJA, and precluding future claims that could have been but were not raised in an EDJA proceeding. *See Guadalupe-Blanco River Auth.*, 2015 WL 868871, at *6; *Hotze*, 339 S.W.3d at 814-15. For example, section 1205.068 governs appeals of trial court rulings under the EDJA; mandates that "[a]n appeal under this section . . . takes priority over any other matter, other than writs of habeas corpus"; and directs appellate courts to "render its final order or judgment with the least possible delay." Tex. Gov't Code § 1205.068(e). Additionally, section 1205.068 explains that "[a]n order or judgment from which an appeal is not taken is final." *Id.* § 1205.068(c). Moreover, the EDJA specifies that for qualifying judgments "[t]he judgment, as to each adjudicated matter and each matter that could have been raised, is binding and conclusive against (1) the issuer; (2) the attorney general; (3) the comptroller; and (4) any party to the action, whether" they are "named and served with the notice of the proceedings" or "reside in the territory of the issuer," "own property located within the boundaries of the issuer," "are taxpayers of the issuer," or "have or claim a right, title, or interest in any property or money to be affected by a public security authorization or the issuance of the public securities." *Id.* §§ 1205.041, .151. Section 1205.151 also directs that a judgment under the EDJA "is a permanent injunction against the filing by any person of any proceeding contesting the validity

of," among other things, "any adjudicated matter and any matter that could have been raised in the action." *Id.* § 1205.151(c). Finally, section 1205.002 expressly states that "[t]o the extent of a conflict or inconsistency between this chapter and another law, this chapter controls." *Id.* § 1205.002(a).

After the district court validated the bonds in question under the EDJA, Magnolia Bible Church, Magnolia's First Baptist Church, and Believers Fellowship (the Churches) filed a motion for new trial in the underlying case, and the district court granted the motion. When responding to the City's appellate issues asserting that the district court erred by granting a new trial, the Churches urge that the district court's ruling was proper under Rule of Civil Procedure 329. *See* Tex. R. Civ. P. 329. However, I believe that Rule 329, by its terms, does not apply in circumstances like those present here. Although Rule 329 governs motions for new trial for cases in which service of process is accomplished through publication and authorizes a trial court to grant a motion for new trial filed "within two years after" a judgment is signed, the Rule also explains that it applies to cases in which a "*defendant* has not appeared in person or by attorney of his own selection." *See id.* (emphasis added). Even though the Churches are no doubt "interested parties" as that term is used in the EDJA, *see* Tex. Gov't Code § 1205.041, I am not convinced that the Churches qualify as defendants for the purpose of invoking Rule 329, *see* Tex. R. Civ. P. 329. Moreover, the EDJA specifies that trial courts have jurisdiction over interested parties to the same extent as if they had been "individually named and served," indicating that service by publication under the EDJA constitutes personal service. *See* Tex. Gov't Code § 1205.044. However, as set out above, Rule 329 applies when individuals do not receive personal service and, therefore, would not seem to apply in the circumstances present here. *See* Tex. R. Civ. P. 329.

Even if the language of Rule 329 could be read as applying here, I agree with the City of Magnolia's argument that applying Rule 329 to rulings under the EDJA is inconsistent with the legislative scheme outlined above requiring that these types of cases be resolved as expeditiously as possible, precluding challenges that could have been but were not presented during the EDJA proceeding, and directing that cases in which no appeal is taken are final. *See Cities of Conroe, Magnolia, & Splendora v. Paxton*, 559 S.W.3d 656, 664 (Tex. App.—Austin 2018) (noting "extraordinarily expedited process" created under EDJA), *rev'd in part on other grounds*, 602 S.W.3d 444 (Tex. 2020). Therefore, the EDJA by its own terms would seem to preclude applying Rule 329 in this case. *See* Tex. Gov't Code § 1205.002(a).

In their appellees' brief, the Churches also contend that regardless of whether Rule 329 applies, the district court properly ordered a new trial because their due-process rights were violated. More specifically, the Churches argue that a new trial was warranted because they were not given individual notice of the bond validation hearing even though the City was aware that they were persons "whose legally protected interests" were "directly affected by the proceedings in question" and even though the City knew their names and addresses.[1]

[1] As support for the proposition that service by publication was constitutionally inadequate in this case, the Churches primarily rely on the following two cases: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *In re E.R.*, 385 S.W.3d 552 (Tex. 2012). Although the courts in both of those cases determined that service by publication was inadequate, the circumstances in those cases differed significantly from those present here. *See Mullane*, 339 U.S. at 307-10, 320 (concluding that service by publication for beneficiaries of trusts who were known to trustee managing pooled investment account was inadequate where trust company had notified by mail known beneficiaries when first investment was made); *In re E.R.*, 385 S.W.3d at 555, 566-67, 570 (determining in termination suit that serving parent by publication violated parent's due-process rights "when the State knew the mother's identity, was in regular contact with her, and had at least one in-person meeting with her after it sued to terminate the legal rights to her children").

When confronted with a similar question pertaining to the EDJA, one court has explained that cases requiring "individual mail notice" typically "involve private rights to money and to real property" as opposed to "the public interest in the bond validation proceeding at issue" in that case. *See Jackson v. Waller Indep. Sch. Dist.*, No. H-07-3086, 2008 WL 818330, at *8 (S.D. Tex. March 24, 2008) (mem. op.); *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (explaining that public rights refer to matters arising between government and others subject to its authority relating to performance of constitutional functions of legislative or executive branches); *Texas Ass'n of Long Distance Tel. Cos. (TEXALTEL) v. Public Util. Comm'n*, 798 S.W.2d 875, 881-82 (Tex. App.—Austin 1990, writ denied) (explaining that rate-making power is legislative function). In light of this public versus private distinction, the court concluded that "the publication notice under section 1205.043 of the EDJA was constitutionally sufficient." *Jackson*, 2008 WL 818330, at *10; *see Oil States Energy Servs.*, 138 S. Ct. at 1373.

In light of the preceding, I would similarly conclude that service by publication did not deprive the Churches of due process. Although the Churches contend that their claims regarding the water rate pertain to their private rights to enforce their property-tax exemption, to be free from discriminatory rates, and to avoid undue burdens on their religious exercise, I am not persuaded by the framing of their issues that the dispute at issue in this case involves private, as opposed to public, rights. Because I believe that this case involves public rights, I would conclude that the notice at issue was constitutionally sufficient and, therefore, would not conclude that the underlying judgment was void and subject to attack.

For these reasons, I respectfully cannot join the opinions authored by Chief Justice Rose or Justice Triana and, accordingly, dissent from the Court's opinion affirming the district court's order granting a new trial in this case.

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Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Filed: December 18, 2020