

**AFFIRM in part, REVERSE in part, and REMAND, and Opinion Filed  
June 20, 2024.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-23-00676-CV**

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**FREDERICK ALTYMAN BROWN, JR., Appellant**

**V.**

**JOE JORDAN TRUCKS, INC., Appellee**

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**On Appeal from the 191st Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-21-14024**

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**MEMORANDUM OPINION**

Before Justices Molberg, Nowell, and Kennedy  
Opinion by Justice Kennedy

In this bill-of-review proceeding, Frederick Altyman Brown, Jr. alleges that a summary judgment was rendered against him without proper service of citation. Brown contends that substituted service by publication in the underlying trespass-to-try-title action was improvidently ordered and failed to accurately identify him as the defendant.<sup>1</sup> The parties filed motions for summary judgment in the bill-of-

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<sup>1</sup> More particularly, Brown contends because citation issued in the name of “Frederick Altyman Brown” and not “Frederick Altyman Brown, Jr.” service was fatally defective.

review proceeding. The trial court denied Brown's motion and granted Joe Jordan Trucks, Inc.'s.

On appeal, in a single issue, Brown urges the trial court erred in denying his petition for bill of review because the underlying judgment is void due to lack of personal jurisdiction and Joe Jordan Trucks' attempts to excuse the defective service of citation fail. We reverse the trial court's order granting Joe Jordan Trucks' motion for summary judgment, affirm the trial court's order denying Brown's motion for summary judgment, and remand the case for further proceedings. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

## **BACKGROUND**

### **I. Damages Suit Against American Pride Xpress Logistics, Inc. and Thomas E. Flores**

Prior to instituting its trespass-to-try-title action against Brown, Joe Jordan Trucks filed suit against American Pride Xpress Logistics, Inc. ("American Pride") and Thomas E. Flores seeking damages to real property owned by Joe Jordan Trucks and leased to American Pride (the "Property"). American Pride and Flores claimed to own both Joe Jordan Trucks and the Property. Brown, representing himself, intervened in that lawsuit identifying himself as "Frederick Brown," with an email address of Fabrow9425@gmail.com and a physical address of 2441 Goldfinch Ln., Garland, Texas 75042, and claiming to be a shareholder of an entity he identified as Joe Jordan, Inc., which Brown claimed owned the Property. Brown nonsuited his

claim in that case before trial. Joe Jordan Trucks received a judgment in that case awarding it damages against American Pride and Flores. This Court affirmed that judgment on appeal. *See Am. Pride v. Joe Jordan Trucks, Inc.*, 05-20-00281-CV, 2021 WL 5754807 (Tex. App.—Dallas Dec. 3, 2021, no pet.) (mem. op.).

## **II. Trespass to Try Title Action against Brown**

During the trial of the suit against American Pride and Flores, evidence was introduced showing Flores had purported to deed the Property to “Fredrick Brown” while the case was pending.<sup>2</sup> Thereafter, on December 18, 2019, Joe Jordan Trucks filed a trespass to try title action against “Frederick Altyman Brown,” identifying him as the man to whom Flores had purportedly deeded the Property. Joe Jordan Trucks represented that it was unable to locate Brown and sought and obtained service of citation on Frederick Altyman Brown by publication pursuant to Rule 109 of the Texas Rules of Civil Procedure.<sup>3</sup> Citation by publication was posted in the Daily Commercial Record on January 13, 21, and 27 and February 3 of 2020. The citation by publication identified “Frederick Altyman Brown” as the individual who had been sued and contained the following brief statement of the nature of the suit.

**THIS IS A TRESPASS TO TRY TITLE SUIT FILED BY PLAINTIFF, JOE JORDAN TRUCKS, INC., WHO CLAIMS TITLE TO THE REAL PROPERTY AND IMPROVEMENTS LOCATED AT 8815 CF HAWN FREEWAY, DALLAS, TEXAS,**

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<sup>2</sup> Flores claimed ownership of the Property through a deed from Joe Jordan, Inc. dated December 16, 2016. Flores then purported to convey the Property to Brown on December 19, 2016, by special warranty deed that identified “Frederick Brown” as the individual to whom the recorded deed was to be returned.

<sup>3</sup> The case was initially filed in the 14th District Court. It was later transferred to the 191st District Court.

**HAVING ACQUIRED TITLE TO THIS PROPERTY BY DEED FROM DAVID VARELA, DATED OCTOBER 15, 2010. DEFENDANT, FREDERICK ALTYMAN BROWN, ALSO CLAIMS TITLE TO THIS PROPERTY THROUGH A DEED FROM THOMAS FLORES DATED DECEMBER 16, 2016.**

A return of service was filed in the district court on February 11, 2020. On February 13, 2020, the trial court appointed Karen Washington as attorney ad litem to represent the interests of Frederick Altyman Brown. On February 17, Washington filed an original answer on behalf of Brown denying the allegations in Joe Jordan Trucks' petition. In addition, Washington sent an email to Frederick Altyman Brown at the address Brown had provided when he intervened in the suit Joe Jordan Trucks filed against American Pride and Flores, giving him the cause number in the subject line and advising him that she was appointed by the court to represent his interests and that a judgment could be entered against him if he ignored this matter. Brown replied to her email demanding that she not proceed to represent him and directing her not to contact him again. The email response was signed "Frederick Brown."

On February 28, 2021, Joe Jordan Trucks filed a motion for summary judgment on the grounds that the evidence established Joe Jordan Trucks was the owner of the Property and any attempted transfer of the Property from Flores to Brown was fraudulent as to Joe Jordan Trucks. On March 25, 2021, the trial court signed an order granting Joe Jordan Trucks summary judgment and ordering that Joe

Jordan Trucks recover from Frederick Altyman Brown title to and possession of the Property.

On April 26, 2021, Brown filed a pro se motion for new trial asserting that, on March 26, 2021, he learned through a business associate that the court had awarded ownership of the Property to Joe Jordan Trucks and alleging lack of service. In his motion, Brown listed his address as the address of the Property and his email as Fabrow9425@gmail.com, the same address he had used before and to which Washington sent her email. Brown signed his motion for new trial, “Frederick Brown.” Brown submitted an affidavit in support of his motion for new trial in which he identified himself as “Frederick Brown” and acknowledged that Joe Jordan Trucks had filed suit against him. Brown’s motion for new trial was overruled by operation of law. On September 21, 2021, Brown attempted to appeal the order granting Joe Jordan Trucks title to and possession of the Property. This Court dismissed that appeal for want of jurisdiction because the appeal was untimely. *See Brown v. Joe Jordan Trucks, Inc.*, No. 05-21-00821-CV, 2021 WL 5879184, at \*1 (Tex. App.—Dallas Dec. 13, 2021, no pet.) (mem. op.).

### **III. Bill-of-Review Proceeding**

Brown also filed a pro se petition for bill of review on September 21, 2021, identifying himself as “Frederick Brown,” acknowledging that he was the defendant in the underlying suit, and proclaiming he is the owner of the Property. Thereafter, on November 12, 2021, Brown, through retained counsel, filed an amended petition

for bill of review, in which he identified himself for the first time as “Frederick Altyman Brown, Jr.,” and asserted two alternative grounds for relief by bill of review. First, Brown claimed the judgment in the underlying suit violates Procedural Due Process under the Fourteenth Amendment to the U.S. Constitution because he was not sued or served in his right name.<sup>4</sup> Second, and alternatively, he claimed official mistake asserting an order in the suit against American Pride and Flores led him to believe that Joe Jordan Trucks could not sue him.

On May 9, 2022, Brown filed a motion for traditional summary judgment in the bill-of-review proceeding seeking to set aside the underlying judgment on the ground that service of “Frederick Altyman Brown” by publication was service on the wrong person. Although Brown asserted Joe Jordan Trucks did not establish it diligently attempted personal service before seeking service by publication, he did not challenge the propriety of the trial court ordering service by publication in his motion for summary judgment. In support of his motion, Brown relied on the following:

- his birth certificate listing his name as Frederick Altyman Brown, Jr.;

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<sup>4</sup> With respect to Brown’s due process violation, Brown asserted that the service by publication identified his father, Frederick Altyman Brown, Sr., as the defendant and thus the Order for Service by Publication was in the wrong name. Brown further asserted Joe Jordan Trucks requested service by publication without first attempting personal service on him. In addition, Brown asserted that in the affidavit in support of citation by publication Joe Jordan Trucks engaged in extrinsic fraud by misrepresenting Brown’s address and made the conclusory statement that due diligence had been exercised to locate him, without any supporting facts of any efforts to do so.

- his declaration stating his name is Frederick Altyman Brown, Jr., providing his date of birth and address, and claiming to be the owner of the Property;
- the declaration attached to his first amended petition for bill of review stating he did not receive notice of the judgment against him in the underlying suit and claiming ownership of the Property;
- the original petition in the underlying trespass to try title suit;
- the order for service by publication;
- the answer Karen Washington filed on his behalf;
- the return of service in the underlying suit;
- March 25, 2020 order granting Joe Jordan Trucks summary judgment, signed by Judge Slaughter, the presiding judge of the 191st District Court;
- the docket sheet in the underlying suit;
- Joe Jordan Trucks' initial disclosures in the bill-of-review proceeding; and
- the following additional records from the underlying suit:
  - Joe Jordan Trucks' motion for summary judgment;
  - Brown's amended answer dated September 16, 2021;
  - Notice of appeal dated September 21, 2021;
  - March 26, 2020 order granting Joe Jordan Trucks summary judgment, signed by Judge Moye, the presiding judge of the 14th District Court;
  - March 30, 2020 order to vacate, signed by Judge Moye, vacating the order granting summary judgment and reopening and transferring the case to the related American Pride and Flores case; and
  - Brown's motion for new trial.

In response, Joe Jordan Trucks relied on various documents Brown filed in the suit involving American Pride and Flores wherein he identified himself as “Frederick Brown” and the following documents:

- the special warranty deed from Flores to Brown identifying Brown as “Fredrick Brown;”
- the final judgment in the suit against American Pride and Flores;
- the opinion and judgment of this Court in the suit against American Pride and Flores;
- the original petition in the trespass to try title action;
- the order authorizing service by publication in the underlying case;
- the citation by publication;
- Brown’s motion for new trial;
- the order appointing Washington the attorney ad litem; and
- Washington’s report.

Joe Jordan Trucks asserted (1) the judgment in the underlying case is valid and binding against Brown because he commonly went by “Frederick Brown” and has never used “Junior” or “Jr.” as part of his name, (2) any variance in the name was a misnomer, which does not support the relief requested, (3) Brown’s uncorroborated testimony of lack of service is insufficient, and (4) Brown was either properly sued or he lacks standing to bring the bill of review. The trial court denied Brown’s motion on November 3, 2022.



Thereafter, on February 10, 2023, Joe Jordan Trucks filed its own motion for summary judgment seeking denial of the bill of review proceeding on four grounds: (1) Brown made a general appearance when he filed his motion for new trial, (2) Brown timely filed a motion for new trial and had the opportunity to appeal the final order in the underlying case but failed to do so, precluding relief by bill of review, (3) Brown concedes that the use of the name “Frederick Altyman Brown” in the underlying case was, at worst, a misnomer, and (4) if the final order was entered against Brown he was properly served by publication, and if the final order was instead entered against Brown’s father, then Brown lacks standing to bring the bill of review. In support of its motion, Joe Jordan Trucks relied on the same documents it presented in response to Brown’s motion for summary judgment and the declaration Brown attached to his motion for summary judgment and Brown’s admission that Exhibit H to his motion for summary judgment was a true and correct copy of the docket sheet in the underlying suit. In opposition to Joe Jordan Trucks’ motion for summary judgment Brown relied on his first amended declaration stating his name is “Frederick Altyman Brown, Jr.,” he was not served in the underlying suit, Joe Jordan Trucks used false information to obtain service by publication, no one attempted personal service of citation, and if service had been attempted at the Property, he would likely have received notice because Flores was at the Property and was in contact with him; the declaration of Flores discussing ownership of the Property, and indicating that he had not known Brown to do business in the name of

Frederick Altyman Brown, that Brown got back in touch with him in early 2020, that he alerted Brown that the judgment in the underlying suit had been entered against the Property, and that no one asked him about the whereabouts of Brown since his trial testimony in December 2019 in the case Joe Jordan Trucks filed against American Pride and Flores; and the same records from the underlying case that were attached to his motion for summary judgment. In addition, Brown asked the court to reconsider its ruling on his motion for summary judgment.<sup>5</sup> On July 7, 2023, the trial court granted Joe Jordan Trucks' motion without specifying the grounds therefore and denied Brown's request for reconsideration. This appeal followed.<sup>6</sup>

### **DISCUSSION**

Brown asserts the trial court erred in granting Joe Jordan Trucks' motion for summary judgment and in denying his motion for summary judgment because he was not properly served in the underlying suit and no basis exists to excuse the improper service. Joe Jordan Trucks responds asserting the trial court did not err in granting its motion for summary judgment because (1) Brown generally appeared in the underlying case when he filed his motion for new trial, (2) Brown failed to timely

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<sup>5</sup> After Joe Jordan Trucks filed its motion for summary judgment, Brown filed a sworn second amended petition for bill of review, which does not appear to materially differ from his first amended pleading.

<sup>6</sup> We note that on December 19, 2023, counsel for Brown filed a Suggestion of Death of Appellant notifying the court that Brown passed away in December 2023. Pursuant to Rule 7.1(a)(1) of the Texas Rules of Appellate Procedure, we proceed to adjudicate the appeal as if all parties were alive and the decedent's name may be used on all papers. TEX. R. APP. P. 7.1(a)(1).

appeal the underlying order following the overruling of his motion for new trial and thus, failed to diligently pursue available legal remedies, precluding relief by bill of review, (3) Brown was properly sued and served in the underlying suit because he commonly identified himself as “Frederick Brown” and did not include “Junior” or “Jr.” as part of his name, (4) the evidence Brown presented in opposition to Joe Jordan Trucks’ motion was conclusory and inconsistent with prior statements, and (5) to the extent Brown contends his father was the defendant in the underlying suit, he lacked standing to seek relief by bill of review.

#### **A. Burden of Proof – Traditional Summary Judgment**

A traditional motion for summary judgment requires the moving party to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004). When a plaintiff moves for summary judgment on its own theory of recovery, the plaintiff must prove it is entitled to summary judgment by establishing each element of its claim as a matter of law based upon undisputed or conclusive facts. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). When a defendant moves for summary judgment, it must disprove at least one essential element of the plaintiff’s cause of action or conclusively establish each element of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When both parties move for summary judgment, each party “bears the burden

of establishing that it is entitled to judgment as a matter of law.” *Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993).

A motion for summary judgment must itself expressly present the grounds upon which it is made and must stand or fall on those grounds alone. *Espalin v. Children’s Med. Ctr. Of Dallas*, 27 S.W.3d 675, 688 (Tex. App.—Dallas 2000, no pet.). When the summary judgment order does not state the grounds upon which it is based, the party challenging the order must show that each of the independent arguments alleged in the motion is insufficient to support the order. *Jones v. Hyman*, 107 S.W.3d 830, 832 (Tex. App.—Dallas 2003, no pet.).

#### **B. Burden of Proof – Bill of Review Summary Judgment**

A bill-of-review plaintiff is entitled to summary judgment if it conclusively proves no genuine issue of fact exists as to each element of its bill-of-review action and is entitled to a bill of review as a matter of law. *Comm’rs Court of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997).

A defendant in a bill-of-review proceeding is entitled to summary judgment if it negates, as a matter of law, at least one necessary element of the plaintiff’s bill of review. *Id.*; *Nelson v. Chaney*, 193 S.W.3d 161, 167 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996)).

#### **C. Summary Judgment Standard of Review – Bill of Review**

When a trial court grants summary judgment in a bill-of-review proceeding, the summary judgment standard of review applies on appeal. *See Boaz v. Boaz*, 221 S.W.3d 126, 131 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Thus, our review is de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When the parties file motions for summary judgment on the same issues and the trial court grants one motion and denies the other, we consider both motions, and, if we determine that the trial court erred, render the judgment the trial court should have rendered. *Coastal Liquids Transp., L.P. v. Harris Cnty. Appraisal Dist.*, 46 S.W.3d 880, 883 (Tex. 2001).

#### **D. Bill of Review**

A bill of review is an equitable proceeding to set aside a judgment that is no longer appealable or subject to a motion for a new trial. *Transworld Fin. Serv. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. *Alexander v. Hagendorn*, 226 S.W.2d 996, 998 (Tex. 1950). Thus, a bill of review petitioner must ordinarily plead and prove (1) a meritorious claim or defense to the cause of action that supports the judgment; (2) that he was prevented from making by the fraud, accident or the wrongful act of the opposing party; (3) unmixed with any fault or negligence of his own. *Ortega v. First Republic Bank Fort Worth, N.A.*, 792 S.W.2d 452, 453 (Tex. 1990). Further, the petitioner must ordinarily show that he or she

exercised due diligence to avail himself or herself of all adequate legal remedies against a former judgment before filing the bill of review. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). This requirement is included as part of the third element for obtaining a bill of review. *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 813 (Tex. 2012).

However, when a bill of review is based solely on an *allegation* of non-service, the first and second elements are discharged, and *proof* of lack of service conclusively establishes the third. *Ross v. Nat'l Ctr. for the Emp't of the Disabled*, 197 S.W.3d 795, 797 (Tex. 2006); *Caldwell v. Barnes*, 154 S.W.3d 93, 96–97 (Tex. 2004). Thus, when a petitioner proves that he or she has not been properly served, the petitioner is entitled to a bill of review without a further showing. *Langdon v. Gilbert*, No. 03-14-00491-CV, 2014 WL 7464095, at \*2 (Tex. App.—Austin Dec. 31, 2014, no pet.) (mem. op.). This is true even if the petitioner became aware of the proceedings and failed to participate, because a party who was not properly served has no duty to participate in the proceedings. *Ross*, 197 S.W.3d at 797–98; *Caldwell*, 154 S.W.3d at 97 n.1; *see also Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990) (“[M]ere knowledge of a pending suit does not place any duty on a defendant to act.”). “While diligence is required from properly served parties or those who have appeared . . . those not properly served have no duty to act, diligently or otherwise.” *Ross*, 197 S.W.3d at 798. “Proof of non-service, then, will conclusively establish the third and only element that bill-of-review plaintiffs are required to

prove when they are asserting lack of service of process as their only defense.”  
*Caldwell*, 154 S.W.3d at 97.

The cases Joe Jordan Trucks cites as requiring a bill-of-review plaintiff to have shown diligence in pursuing other post-judgment relief, including a motion for new trial if possible, and appeal therefrom, *see, e.g., Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004) and *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam), do not involve an allegation of improper service and are therefore distinguishable. *See Langdon*, 2014 WL 7464095, at \*2; *see also Ross*, 197 S.W.3d at 798 (concluding court of appeals erred in requiring Ross to act diligently in a case in which he was never served). While Brown filed a motion for new trial, and thus made an appearance, it appears from *Caldwell* and its progeny that he was nevertheless not required to pursue an appeal before seeking a bill of review. *See Caldwell*, 154 S.W.3d at 97; *In re Spiller*, 303 S.W.3d 426, 435 n.4 (Tex. App.—Waco 2010, orig. proceeding) (concluding no service bill-of-review plaintiff was not required to file a notice of appeal because she was not required to exhaust all legal remedies) (citing *Ross*, 197 S.W.3d at 797).

Moreover, Brown’s motion for new trial did not constitute a general appearance that waived his right to raise the issue of personal service because a general appearance must be entered *before* the judgment that is at issue is rendered. *See In re P. RJE.*, 499 S.W.3d 571, 575 n.4 (Tex. App.—Houston [1st Dist.] July 14, 2016, pet. denied); *Williams v. Nexlore Corp.*, 05-09-00621-CV, 2010 WL

4945364, at 83 (Tex. App.—Dallas Dec. 7, 2010, pet. denied) (mem. op.). Here, the trial court rendered judgment in favor of Joe Jordan Trucks on March 25, 2021, and Brown filed his motion for new trial on April 26, 2021. Accordingly, the filing of the motion for new trial did not trigger a waiver of a complaint about service of citation.

### **E. Grounds for Summary Judgment**

As stated *supra*, summary judgment in the context of a bill-of-review proceeding requires the bill-of-review plaintiff to conclusively prove no genuine issue of material facts exists as to each applicable element of its bill-of-review action and the bill-of-review defendant to disprove at least one essential element of the plaintiff's bill of review. *See Comm'rs Court of Titus Cnty.*, 940 S.W.2d at 81. In the context of Brown's bill of review, the only element at issue is the third: lack of fault or negligence on his part.

Brown moved for summary judgment on the ground that service of "Frederick Altyman Brown" by publication, was service on the wrong person. Brown did not seek summary judgment on his additional assertion Joe Jordan Trucks failed to diligently attempt personal service before seeking service by publication.

Joe Jordan Trucks moved for summary judgment asserting four grounds "(1) [Brown] admits filing a motion for new trial in the Underlying Case, which constitutes a general appearance as a matter of law and waives any complaint about lack of services; (2) [Brown's] motion for new trial was timely filed in the



Underlying Case, which means he had an opportunity to appeal the final Order but failed to do so, which defeats the bill of review as a matter of law; (3) [Brown] concedes the use of “Frederick Altyman Brown” in the Underlying case was, at worst, a misnomer, and the law is clear that service of process remains effective when someone is sued and served under a misnomer as opposed to a misidentification; and (4) because [Brown’s] bill of review suffers from a fatal Catch-22: either [Brown] was a party to the Underlying Case, whether misnamed or not, in which case he was properly served by publication; or he was not a party to the Underlying Case, and his alleged father was, in which case he lacks standing to bring this bill of review.” We have already determined the first two grounds asserted by Joe Jordan Trucks lack merit. While Joe Jordan Trucks third and fourth grounds address Brown’s contention the wrong person was named in the service by publication, Joe Jordan Trucks did not address Brown’s separate assertion that service by publication, in the first instance, was not proper because Joe Jordan Trucks failed to seek personal service on him and did not demonstrate diligence sufficient to support service by publication.

#### **F. Service by Publication**

Personal jurisdiction, a vital component of a valid judgment, is dependent upon citation issued and served in a manner provided by law. *Wilson v. Dunn*, 800 S.W.2d 833, 835 (Tex. 1990). Citation by publication is a form of substituted service that, through a small notice published in the classified section of a local newspaper,

is meant to apprise a defendant that her rights are at stake. *In re E.R.*, 385 S.W.3d 552, 558 (Tex. 2012). Courts have accepted this method for more than a century. *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877); *Harris v. Daugherty*, 11 S.W. 921, 922 (Tex. 1889)). When a defendant’s identity is known, service by publication is generally inadequate. *Id.* at 560. Service by publication should be a last resort, not an expedient replacement for personal service. *Id.* at 561.

If service is invalid, it is “of no effect” and cannot establish a trial court’s jurisdiction over a party. *Id.* at 563. With respect to citation by publication, the trial court must “inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant . . . before granting any judgment on such service.” TEX. R. APP. P. 109. A lack of diligence makes service by publication ineffective. *Anderson v. Collum*, 514 S.W.2d 230, 231 (Tex. 1974). A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality. *In re E.R.*, 385 S.W.3d at 565.

On appeal, Brown challenges the grant of summary judgment in Joe Jordan Trucks’ favor because it failed to establish service by publication was, in the first instance, proper. In his bill-of-review pleadings, Brown alleged, in part, service by publication was ineffective because Joe Jordan Trucks failed to establish it diligently attempted to serve him personally before seeking service by publication. Because the propriety of service by publication was an independent basis upon which Brown

asserted a lack of personal jurisdiction, Joe Jordan Trucks had to negate this basis in addition to Brown's contention that the wrong party was named. Joe Jordan Trucks failed to do so. Accordingly, the trial court erred in granting summary judgment for Joe Jordan Trucks. *See Chessher v. Sw. Bell Telephone Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (summary judgment must address every claim raised to obtain dismissal of all claims).

### **G. Brown's Motion for Summary Judgment**

Having determined Joe Jordan Trucks was not entitled to summary judgment, we now consider whether Brown was entitled to summary judgment on his motion. *See Coastal Liquids Transp.*, 46 S.W.3d at 883. In his motion for summary judgment, Brown asserted that by identifying the party it sued in the underlying case as "Frederick Altyman Brown," Joe Jordan Trucks sued and served his father, who does not claim an ownership interest in the Property, rather than himself.

In support of his position service was defective because it did not accurately identify him, Brown relies on cases that primarily involve circumstances where the name on the return differed in such a manner as to alter the identity of the party or individual sued. *See, e.g., Hendon v. Pugh*, 46 Tex. 211, 212 (1876) (return showing service on "J.N. Hendon" when the citation was issued to "J.W.H. Hendon" failed to show with certainty citation was served on defendant); *Rone Eng'g Serv., Ltd. v. Culberson*, 317 S.W.3d 506, 508–509 (Tex. App.—Dallas, 2010, no pet.) (service on "Rone Engineers, Ltd." did not affirmatively

demonstrate service on “Rone Engineering Service, Ltd.”); *Lytle v. Cunningham*, 261 S.W.3d 837, 840–41 (Tex. App.—Dallas, 2008, no pet.) (proper service not affirmatively shown where citation issued to registered agent “Chris Lytle,” and return indicated citation was delivered to “Christopher Lytle”); *Medeles v. Nunez*, 923 S.W.2d 659, 662–63 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (several mistakes in citation including naming “Maria Mendeles,” rather than “Maria Medeles” as the defendant); *Fleming v. Hernden*, 564 S.W.2d 157, 158–59 (Tex. App.—El Paso 1978 (suit named Kent Kidder as defendant, citation by publication directed to Kent Ke dder); *Brown-McKee, Inc. v. J. F. Bryan & Assocs.*, 522 S.W.2d 958, 959 (Tex. App.—Texarkana 1975, no writ) (service on “Brown-McKee Const. Co.” was not valid service on “Brown-McKee, Inc.” absent something in the record indicating that they were the same entity); *Cloud v. McK’y*, 216 S.W.2d 285, 286 (Tex. App.—San Antonio 1948, writ ref’d n.r.e.) (service by publication in tax suit against Helen M. Ball was not valid service on Helen B. McK’y). These cases are distinguishable from the current case because here there is no allegation or showing of an improper spelling of appellant’s name or a variance in the name in the petition, citation and return; rather, Brown asserts the citation was fatally flawed by failing to include the suffix “Jr.” after his name. In this regard, Brown relies on the Texas Supreme Court’s decision in *Uvalde Country Club v. Martin Linen Supply Co.* in which the court concluded the record did not show strict compliance with the rules relating to the issuance, service and

return of citation because the citation was directed to “Henry Bunting” and the return indicated “Henry Bunting” was served when the petition alleged Uvalde Country Club could be served through its registered agent “Henry Bunting, Jr.” 690 S.W.2d 884, 884–85 (Tex. 1985). That case involved a variance in the name from one court document to another. More particularly, the petition showed one name and the service showed another. *Id.*; see also *P & H Transp., Inc. v. Robinson*, 930 S.W.2d 857, 859 (Tex. App.—Houston [1st Dist.] 1996, no writ) (“[e]ach case in which a court held citation was fatally defective based on the name of the defendant involved a variance in the name from one court document to another, e.g., the petition shows one name and the service shows another.”) (citing *Uvalde Country Club*, 690 S.W.2d at 884; *Hendon v. Pugh*, 46 Tex. at 212). Here, there is no variance in the party’s named in the petition, the citation and the return. Thus, this case is distinguishable from *Uvalde County Club*.

In the present case the petition, citation and return all identify the defendant as “Frederick Altyman Brown.” The designation or suffix “Jr.” is a nonessential part of the defendant’s name for purposes of service of process, and the omission of said designation or suffix does not render the defendant’s name misstated, rather the omission merely renders the defendant’s name abbreviated in a common form. *Salza v. Tower*, 683 S.W.2d 797, 799 (Tex. App.—Corpus Christi–Edinburg 1984, no writ); see also *McClinton v. Lloyds*, No. 3:15-CV-3919-D, 2016 WL 4611084, at \*1 (N.D. Tex. Sept. 6, 2016) (predicting Supreme Court of Texas would view

suffix “Jr.” as surplusage that does not affect legal identity of individual). A commonly known diminutive or abbreviation of a name is sufficient to identify a person in the absence of evidence indicating that another person is intended. *See O’Brien v. Cole*, 532 S.W.2d 151, 153 (Tex. App.—Dallas 1976, no writ). Consequently, we conclude that the omission of the designation or suffix “Jr.” in and of itself, does not render service of process fatally defective. *Salza*, 683 S.W.2d at 799. Furthermore, we conclude that the inclusion of Brown’s middle name and the identification of the Property at issue, to which Brown claimed an ownership interest and acknowledged his father did not, are qualifications which insured Brown would be the proper recipient of service. *Id.* Moreover, the summary judgment record establishes when the Property was purportedly conveyed to Brown, he was not identified with the suffix “Jr.” and throughout the course of litigation, including the underlying suit and Joe Jordan Trucks’ suit against American Pride and Flores, Brown consistently referred to himself as “Frederick Brown” and not as “Frederick Brown, Jr.” Accordingly, the use of the name “Frederick Altyman Brown” did not cause service to be defective and the trial court did not err in denying Brown’s motion for summary judgment on this asserted ground. Because we conclude the record shows Brown was named in the petition, the citation and the return, we need not address the parties’ arguments concerning standing. TEX. R. APP. P. 47.1.

We sustain Brown's issue with respect to his contention the trial court erred in granting Joe Jordan Trucks summary judgment. We overrule Brown's issue with respect to his contention the trial court erred in denying his motion for summary judgment.

### CONCLUSION

We reverse the trial court's July 7, 2023 Order Granting Defendant's Motion for Summary Judgment and affirm the trial court's November 3, 2022 Order Denying Plaintiff's Motion for Summary Judgment. We remand this case for further proceedings consistent with this opinion.

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/Nancy Kennedy/  
NANCY KENNEDY  
JUSTICE



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

FREDERICK ALTYMAN BROWN,  
JR., Appellant

No. 05-23-00676-CV      V.

JOE JORDAN TRUCKS, INC.,  
Appellee

On Appeal from the 191st Judicial  
District Court, Dallas County, Texas  
Trial Court Cause No. DC-21-14024.

Opinion delivered by Justice  
Kennedy. Justices Molberg and  
Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** the trial court's order granting Joe Jordan Trucks, Inc.'s motion for summary judgment. We **AFFIRM** the trial court's order denying Frederick Altyman Brown, Jr.'s motion for summary judgment. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 20th day of June, 2024.