

REVERSE and REMAND and Opinion Filed December 27, 2024



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

No. 05-24-00612-CV

**THE PRUITT FAMILY LIVING TRUST, THE SCHUGART FAMILY, LLC
AND PATEL LEGACY TRUST 2022, Appellants**

V.

TOTUS GIFT CARD MANAGEMENT, LLC, Appellee

**On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-23-05872-E**

MEMORANDUM OPINION

Before Justices Nowell, Miskel, and Breedlove
Opinion by Justice Nowell

This suit involves, in part, the alleged breach of fiduciary duties and misrepresentations in the selling of securities. Appellee Totus Gift Card Management, LLC (TGCM) filed a special appearance, which the trial court granted “in all respects” and dismissed with prejudice “any and all claims” asserted by appellants The Pruitt Family Living Trust, The Schugart Family, LLC, and Patel Legacy Trust 2022. The trial court also determined that “based on a lack of personal jurisdiction over TGCM, the Temporary Injunction issued by this Court on December 4, 2023 is void and should be vacated and set aside.”

Appellants raise five issues on appeal. In their first two issues, appellants argue the trial court erred by granting TGCM's objections to the evidence attached to their special appearance response and contend that if the trial court had admitted the evidence, the trial court would have denied the special appearance. In their third and fourth issues, appellants seek to modify the order on the special appearance so their claims are not dismissed "with prejudice" and to clarify the temporary injunction. Finally, appellants contend TGCM waived its special appearance by consistently seeking and obtaining affirmative relief in the trial court.

Because the trial court abused its discretion by sustaining TGCM's objections to appellants' evidence attached to their special appearance response, we reverse the trial court's April 23, 2024 order granting TGCM's special appearance and remand to the trial court for further proceedings.

Procedural Background

The facts are well known to the parties and because we dispose of the appeal on purely evidentiary issues, we provide only the necessary procedural background.

TEX. R. APP. P. 47.1.

Appellants filed suit against TGCM alleging, among other things, breach of fiduciary duties and misrepresentations in the selling of securities. On December 19, 2023, TGCM filed a special appearance alleging it is not subject to general or specific jurisdiction in Texas because it is an Arizona limited liability company. To its special appearance, TGCM attached the Declaration of Scott Walker, the

founding manager and the executive chairman of the board of managers for Totus Group, LLC (the parent entity of TGCM), which included a true and correct copy of TGCM's Articles of Organization. The document listed an address in Red Oak, Texas for TGCM's principal and organizers.

On February 8, 2024, TGCM filed an Amended Declaration of Scott Walker "for the purpose of correcting certain typographical errors contained in the original Declaration and to update and clarify information." Attached to the amended declaration was an Amended Company Operating Agreement, which purportedly "corrected" the address of TGCM's registered office and principal place of business to Scottsdale, Arizona. TGCM also attached an LLC-Statement of Change from the Arizona Corporation Commission noting an Arizona address.

On February 9, 2024, appellants filed a response to TGCM's special appearance and attached twenty-one exhibits. At the hearing held on February 16, 2024, TGCM objected to appellants' referencing exhibits attached to their response and "offering evidence or testimony" because it was "an argument hearing." TGCM argued appellants had not laid a proper foundation, provided a sponsoring witness, or filed a declaration. "The court hears this on the record." TGCM's counsel continued,

I don't think he has the right to bootstrap every document he thinks he wants the Court to look at without the filing of the declaration or some type of sponsoring witness, which I understand we're not going to be having today. So we'd object to the admission or consideration of this

or any other documents that they claim would bear or relate to their arguments.

TGCM maintained that Texas Rule of Civil Procedure 120a required evidence “attached to a pleading or not” to be in the form of a declaration. “Just attaching it to the pleadings doesn’t count.” Appellants argued the documents were authenticated even though their response was not verified. The trial court disagreed, sustained TGCM’s objection, and arguments continued.

At the end of the hearing, appellants said, “I’d like to offer my exhibits,” and TGCM again objected. The court stated, “The only exhibit that you’re able to offer is the one that’s verified, and that’s the deposition.” Appellants emphasized that rule 120a did not require a verified response and urged the court to consider all the exhibits attached to their response. The trial court asked for an order listing the exhibits with “grant” or “deny” blanks and stated it would “make a determination later . . . as I consider everything that’s been discussed up to this point.”

On April 23, 2024, the trial court signed an order excluding all twenty-one exhibits attached to appellants’ special appearance response and sustained TGCM’s evidentiary objections stating, in part,

Although Defendant TGCM did file evidentiary declarations with attached documents for consideration, the Court finds that Plaintiffs, although they have had adequate opportunity to do so, have failed to timely and properly file any sworn declaration or other verified pleading authenticating or providing the required evidentiary foundation for the admission of the Plaintiffs’ Exhibits.

IT IS THEREFORE ORDERED that the objections by counsel for Defendant TGCM to the Plaintiffs’ Exhibits on the basis of failure

to comply with Rule 120a, and for lack of foundation and proper authentication of such Plaintiffs' Exhibits, are hereby, in all respects, SUSTAINED.

On the same day, the trial court granted TGCM's special appearance in its entirety and dismissed appellants' claims with prejudice. It also vacated and set aside a writ of injunction issued on December 4, 2023 pursuant to a temporary injunction entered on November 14, 2023. This appeal followed.

Exclusion of Exhibits Supporting Special Appearance Response

In their first issue, appellants argue the trial court misinterpreted Texas Rule of Civil Procedure 120a and erred by refusing to admit any of the exhibits attached to their special appearance response. TGCM responds appellants failed to properly authenticate the exhibits; therefore, the trial court did not err by refusing to consider them as part of the response or admit them when appellants offered them at the special appearance hearing.

It is undisputed the special appearance hearing was not an evidentiary hearing, and no witnesses were called. After the trial court sustained TGCM's objections to appellants' exhibits, the hearing proceeded with only arguments from counsel. When appellants tried one final time to offer evidence at the conclusion of the hearing, the trial court refused.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011). "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without

regard to guiding legal principles.” *Transcor Astra Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 482 (Tex. 2022) (quoting *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)).

Texas Rule of Civil Procedure 120a provides that a “special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion.” TEX. R. CIV. P. 120a(1). The rule further states, “The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony.” *Id.* 120a(3).

The plain language of rule 120a requires a special appearance be sworn; however, nothing within the rule states a response must be sworn or verified. *Id.* 120a(1). Instead, the rule allows the court to determine the special appearance on the basis, in part, of affidavits and attachments filed by the parties. *Id.* 120a(3). Because rule 120a does not provide specific requirements for authenticating documentary evidence attached to a response, a party may authenticate any offered document as authorized by the rules of civil procedure.

The trial court refused to admit the deposition transcript of Scott Walker¹ and the deposition excerpts of David Jones.² Both depositions contained the reporter’s certification in which the reporter followed the requirements of certification required

¹ Exhibit B to the special appearance response.

² Exhibit S to the special appearance response.

by Texas Rule of Civil Procedure 203.2, thereby authenticating the documents. *See* TEX. R. CIV. P. 203.2. Moreover, the trial court acknowledged during the hearing that the depositions were verified and “the only ones” appellants could offer into evidence. Yet, the trial court subsequently, and likely inadvertently, signed an order excluding them from evidence. TGCM conceded during oral argument it was error for the trial court to sustain the objections to these exhibits. We agree and conclude the trial court abused its discretion by sustaining TGCM’s objections to these documents.³

We next consider the trial court’s refusal to admit the Walker Declaration.⁴ TGCM argued that because appellants’ response was not verified, the declaration was unauthenticated. However, rule 120a(3) does not require a party to file a verified response and instead requires the court to “determine the special appearance on the basis of . . . such affidavits and attachments as may be filed by the parties.” TEX. R. CIV. P. 120a(3). Appellants attached the Walker Declaration to their special appearance response, which they filed with the trial court. Moreover, it was the same Walker Declaration attached to TGCM’s verified special appearance.⁵ TGCM conceded during oral argument it was error for the trial court to strike the declaration.

³ Walker referred to several of the other exhibits struck by the trial court during his deposition.

⁴ Exhibit F to special appearance response.

⁵ The trial court indicated during the hearing that it “ma[d]e a note in my notes to go back and look at” the declaration and the documents attached, which included TGCM’s Articles of Organization listing a Texas address as its principal office. Yet, when signing the order, the court checked the blank for “Not Admitted” to both the declaration and TGCM’s Articles of Organization (Exhibit C to special appearance response).

Similarly, the trial court struck the Amended Company Agreement⁶ listing an Arizona address as TGCM's registered office and principal place of business. This was the same document attached to the Amended Declaration of Scott Walker filed by TGCM to correct "the error" of listing a Texas address. During the hearing, TGCM referred the court to the Amended Company Agreement as evidence indicating a lack of personal jurisdiction.

Through these inconsistent rulings, the trial court excluded the same evidence it presumably considered when granting TGCM's special appearance. A trial court cannot allow one party the benefit of using authenticated evidence to support a special appearance while striking the same authenticated evidence to the detriment of the other side. Because of the trial court's misapplication of rule 120a(3), it stripped appellants of their ability to admit any evidence challenging the special appearance. Stated differently, by striking the evidence relied on by TGCM to support their special appearance, the trial court was left with no evidence upon which it could rule, let alone grant, the special appearance. Accordingly, the trial court abused its discretion by ruling arbitrarily and without reference to any guiding rules or legal principles. *Serv. Corp. Int'l*, 348 S.W.3d at 235; *Transcor Astra Group S.A.*, 650 S.W.3d at 482; *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). We sustain appellants' first issue.

⁶ Exhibit R to the special response.

Questions of personal jurisdiction are always highly fact-intensive. *See Smart Call, L.L.C. v. Genio Mobile*, 349 S.W.3d 755, 763 (Tex App.—Houston [14th Dist.] 2011, no pet.). Because the trial court’s ruling prevented consideration of the merits of the special appearance, we reverse the trial court’s order granting TGCM’s special appearance and remand to the trial court for further proceedings. We need not address appellants’ remaining issues. TEX. R. APP. P. 47.1.

Conclusion

We reverse the trial court’s April 23, 2024 order granting TGCM’s special appearance and dismissing appellants’ claims with prejudice. We remand the case to the trial court for further proceedings.

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/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE



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

JUDGMENT

THE PRUITT FAMILY LIVING
TRUST, THE SCHUGART
FAMILY, LLC AND PATEL
LEGACY TRUST 2022, Appellants

No. 05-24-00612-CV V.

TOTUS GIFT CARD
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E.

Opinion delivered by Justice Nowell.
Justices Miskel and Breedlove
participating.

In accordance with this Court's opinion of this date, the April 23, 2024 order granting appellee TOTUS GIFT CARD MANAGEMENT, LLC's special appearance is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants THE PRUITT FAMILY LIVING TRUST, THE SCHUGART FAMILY, LLC AND PATEL LEGACY TRUST 2022 recover their costs of this appeal from appellee TOTUS GIFT CARD MANAGEMENT, LLC.

Judgment entered this 27th day of December 2024.