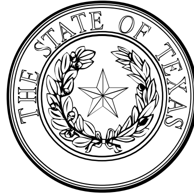
Concur and Dissent and Opinion Filed April 10, 2026



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00629-CV

COLLINGWOOD USA, INC. AND COLLINGWOOD BROOKSHIRE USA, INC., Appellants
V.
MORGAN STANLEY & CO., LLC, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-19958

CONCURRING AND DISSENTING OPINION

Before Justices Goldstein, Breedlove, and Kennedy
Opinion by Justice Goldstein

This appeal once again illustrates the dichotomy between applying well-known rules of civil procedure associated with special exceptions and motions for summary judgment and the ever-evolving application of rule 91a beyond its strict construction. Collingwood challenges, and the majority opinion addresses, the propriety of dismissal under rule 91a as to whether Collingwood's claims have a basis in law and a basis in fact, looking only to the pleadings.[1] Because the majority

[1] Collingwood alleged negligent supervision, violation of the Texas Securities Act, and vicarious liability theories (agency, respondeat superior, and vice principal liability) in order to plead Morgan Stanley

opinion reads as though we are determining the propriety of a summary judgment, I write separately. Further, because the use of rule 91a has evolved to avoid special exceptions and the evidentiary burden of a motion for summary judgment, with the added appeal of an award of attorney's fees,[2] I respectfully dissent.

Texas Rule of Civil Procedure 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id*. "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.*

Other than as to negligent supervision, the majority focuses its analysis on whether Collingwood alleged facts that, if proven, would establish a necessary element to support a cause of action, rather than what a reasonable person could believe. For this reason, I focus on the no-basis-in-fact element.

---

liable for every claim made against Atwan. As to negligent supervision, the majority follows our precedent as the Texas Supreme Court has not spoken to whether this cause of action extends only to the prevention of physical injury and thus fails as a matter of law. Other than encouraging the higher court to provide guidance, I neither join nor address the majority's conclusion that this claim had no basis in law but am constrained by our precedent and do not specifically dissent. As I am so constrained, I reluctantly concur in the decision to affirm the trial court's dismissal of Collingwood's negligent supervision cause of action.

[2] Originally, rule 91a.7 provided that "the court ***must a***ward the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." *See* TEX. R. CIV. P. 91a.7, 76 Tex. B.J. 221, 222 (2013) (Tex. Sup. Ct. 2013, amended 2019) (requiring costs and attorney's-fees award for prevailing party). The current version of rule 91a.7 provides that costs and attorney's fees "may" be awarded to the prevailing party. TEX. R. CIV. P. 91a.7. This amendment, however, applies only to "civil actions commenced on or after September 1, 2019." TEX. R. CIV. P. 91a 2019 cmt. The change in the rule no longer contains the deterrent associated with mandatory imposition of attorneys' fees.

Rule 91a provides a harsh remedy and should be strictly construed. *Davis v Homeowners of Am. Ins. Co.*, No. 05-21-00092-CV, 2023 WL 3735115 at *2 (Tex. App.—Dallas May 31, 2023, no pet.) (mem. op.); *Renate Nixdorf GmbH & Co. KG v. TRA Midland Props., LLC*, No. 05-17-00577-CV, 2019 WL 92038, at *10 (Tex. App.—Dallas Jan. 3, 2019, pet. denied) (mem. op.); *Long v Long,* 681 S.W.3d 805, 816 (Tex. App.—Dallas 2023, no. pet.). Rule 91a is not a substitute for special exception practice under rule 91 or summary judgment practice under rule 166a, "both of which come with protective features against precipitate summary dispositions on the merits." *Long*, 681 S.W.3d at 816; *Royale v. Knightvest Mgmt., LLC*, No. 05-18-00908-CV, 2019 WL 4126600, at *4 (Tex. App.—Dallas Aug. 30, 2019, no pet.) (mem. op.).

A cause of action has no basis in fact "if no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1. The "no basis in fact" prong of rule 91a.1 relates to the believability of the facts alleged by a plaintiff in pleading a cause of action and, thus, seldom rises to a point of contention in the case law. The "no basis in fact" prong is a "factual plausibility standard." *Sanchez,* 494 S.W.3d at 724; *Davis*, 2023 WL 3735115 at *2.

In assessing whether the non-movant's pleading has no basis in law, we apply a fair-notice pleading standard to determine whether the allegations of the petition are sufficient to allege a cause of action. *Thomas v. 462 Thomas Fam. Props., LP*, 559 S.W.3d 634, 639 (Tex. App.—Dallas 2018, pet. denied); *Davis*, 2023 WL

3735115 at *3. A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. *Thomas*, 559 S.W.3d at 639–40. "Even the omission of an element is not fatal if the cause of action may be reasonably inferred from what is specifically stated." *Id*. at 640 (quoting *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceeding)).

The majority cites the Texas Supreme Court's recent application of the fair-notice standard in the context of a rule 91a motion to dismiss as follows:

> These allegations must satisfy our notice-pleading rules, which "require pleadings to not only give notice 'of the claim and the relief sought' but also of the essential factual allegations." . . . "As we have explained many times, a 'cause of action' means the 'fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.'" . . . It is not enough for the plaintiff to provide fair notice of the *claims* alleged because "[t]he pleading of a legal theory, without more, does not provide notice of the facts that could be pleaded to support that theory." . . . The plaintiff must plead "the essential factual allegations supporting those claims," which must be sufficient to support a judgment if ultimately proven.

In re First Rsrv. Mgmt., L.P., 671 S.W.3d 653, 661–62 (Tex. 2023) (orig. proceeding) (citations omitted) (first quoting *Kinder Morgan SACROC, LP v. Scurry Cnty.*, 622 S.W.3d 835, 849 (Tex. 2021); then quoting *id.* at 849 n.63; then quoting *id.* at 850; then quoting *id.* at 849; and then quoting *id.* at 850–51). Nothing in the Texas Supreme Court's opinion provides necessary guidance to help practitioners distinguish between the separate requirements of fair-notice pleading rules, the no-evidence summary judgment standard, or the interim procedural safeguard provided by special exceptions. *See id*.

I would distinguish *In re First Reserve Management* from the instant case, as there was a complete absence of factual allegations to support a claim as opposed to insufficient facts. Morgan Stanley filed special exceptions, as it should under rule 91, as to each cause of action outlining in great detail the purported insufficient facts.[3] This Court has addressed the necessity of special exceptions to remedy insufficient fact allegations in the context of rule 91a.

> Ordinarily, when there is a lack of fair notice or other insufficiency in a pleading, a complaining party is required to invoke special exception practice under rules 90 and 91. *See* TEX. R. CIV. P. 90 (curable pleading defects must be pointed out by timely exception, otherwise the defect is waived); TEX. R. CIV. P. 91 ("A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.").

Longhorn Creek Ltd. v. Gardens of Connemara Ltd., 686 S.W.3d 418, 426 (Tex. App.—Dallas 2024), *pet. denied*, *Gardens of Connemara Ltd. v. Longhorn Creek Ltd.*, No. 24-0271, 2026 WL 179396, at *1 (Tex. Jan. 23, 2026). Justice Young concurred in the denial of the petition for review but wrote separately to highlight for a future case the need to address rule 59 in the context of what pleading exhibits should be considered in the context of ruling on a rule 91a motion to dismiss. *See Gardens of Connemara*, 2026 WL 179396, at *1–*8 (Young, J., concurring). This case presents no such opportunity.

[3] The record neither contains a notice of a hearing on the special exceptions nor a ruling.

Rule 91a does not provide a procedure that allows a court to generally weigh the merits of a case. Rather than obtain the requisite ruling on its special exceptions filed two days after the motion to dismiss, Morgan Stanley argued Collingwood cannot meet an essential element of an asserted cause of action. This approach mirrors the contentions required under summary judgment standards after adequate discovery. *See* TEX. R. CIV. P. 166a.

Having reviewed the pleadings, construing them liberally and indulging all reasonable inferences in favor of Collingwood, I would conclude that the trial court erred by dismissing Collingwood's claims to the extent it based its decision on the claims having no basis in fact.

I concur in the decision to affirm the trial court's dismissal of Collingwood's negligent supervision cause of action; however, in the hopes that the lack of clear guidance regarding the use of rule 91a instead of special exceptions and summary judgment will be addressed by the legislature or the Texas Supreme Court, I respectfully dissent from the remainder of the opinion and judgment.

/Bonnie Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE