

NO. 19A947

In the
Supreme Court of the United States
October Term, 2019

JAMES K. COLLINS AND TONI SHARRETT COLLINS,

Petitioners

v.

D.R. HORTON-TEXAS, LTD.,

Respondent

Appeal from the Supreme Court of Texas
Cause No. 19-0397

**APPLICATION FOR SECOND EXTENSION OF TIME TO
FILE A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT**

TONI L. SHARRETT COLLINS
LAW OFFICE OF TONI L. SHARRETT COLLINS
United States Supreme Court Bar No. 312013
11054 North Hidden Oaks
Conroe, Texas 77384
(281) 827-7749 – Telephone
iceattorney@aol.com
Attorney for Petitioners

March 12, 2020

**To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court
of the United States and Circuit Justice for the Fifth Circuit:**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Petitioners, JAMES K. COLLINS and TONI SHARRETT COLLINS (“COLLINS”), pray for an additional thirty (30) day extension of time to file their petition for a writ certiorari in this Court to and including Monday, May 11, 2020.

On Feb. 21, 2020, Petitioners applied for a sixty (60) day extension to file a petition for a writ of certiorari in the subject case presented to Justice Alito. On Feb. 25, 2020, this court granted Petitioners a thirty (30) day extension of time to and including April 11, 2020. See Exhibit A.

Petitioner and attorney of record, Toni Collins, returned to Houston from an international trip to Tahiti on March 4, 2020. See Exhibit B. On this trip, Ms. Collins was exposed to visiting Chinese, Australians, crowded Catholic masses, a plethora of tourists in the market from the cruise ships docked at the port at Papeete, Tahiti; and, crowded fourteen (14) hour flights with layovers in San Francisco. Ms. Collins has been very ill since her return with a high fever and flu. She is now self-quarantined. Her illness is debilitating and is preventing her from work. She has moved for continuances on her trials, hearings and settings due to her travel abroad, subsequent illness and precautions by the local governments for *Coronavirus*.

To comport with the requirements for an additional extension, be advised of the facts in the subject case. On June 9, 2017, the trial court granted a summary judgment, which is the decision sought to be reviewed. On Dec. 20, 2018, after oral argument, the Fourteenth Court of Appeals of the State of Texas affirmed the trial court's summary judgment. Exhibit C. On July 26, 2019, the Texas Supreme Court denied COLLINS' petition for review. Exhibit D. On Dec. 13, 2019, the Texas Supreme Court denied COLLINS' amended motion for rehearing, being the final ruling. Exhibit E. COLLINS' time to petition for a writ of certiorari in this Court would have expired March 12, 2020 but for the thirty (30) day extension granted by this Court until April 11, 2020. This application is being filed more than 10 days before that time.

Copies of the opinion and orders referenced above are attached. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This case involves whether the Fourteenth Amendment allows a state to enforce a void federal judgment obtained without the personal jurisdiction over and notice to the defendant land owners resulting in an unconstitutional taking of land. The case also presents the issue of whether a court may simply "opine out of existence" the vested property rights of Texas landowners without following the state statutes, rules of survey, property record interpretation and certified patents of the Texas General Land Office in violation of the Tenth Amendment. This Court

can determine whether United States allows title to land be taken from an owner by summary judgment predicated entirely on a void federal judgment contrary to the Fourteenth and Tenth Amendments. The case presents important questions under the Constitution of the United States that were determined adversely to Petitioners by the court below or ignored completely.

Petitioners have at all times been represented in the appellate court by Toni Sharretts Collins, a party to this case and a member of the Bar of this Court. In Dec. 2019, Petitioners celebrated the holidays with family. In January and February, Ms. Collins suffered serious illness related to infection of her artificial hip and compromised immune system. Despite Ms. Collins' illness, she had trial and briefing obligations including a pending adversarial probate jury trial in *Melissa McFaden Estate, et al., v. William Clay McFaden, et al.*, Cause No. 456775-401, Harris County Probate Court 1 and a significant number of *pro-bono* immigration cases. She also has felony trials in the 339th Harris County Criminal District Court beginning March 9, 2020 in *State of Texas v. Kevin Alvarado*, Cause Nos. 1593063, 1593064 and 1606647, which are being carried by district court pending Ms. Collins' recovery and the *Coronavirus* disposition. Ms. Collins hired consulting counsel to assist in presentation of Petitioners' case to this Court. He needs additional time to familiarize himself with the voluminous record (23 volumes and over 6000 pages) and to perform the necessary research to properly frame questions to this Court.

For these reasons, Petitioners respectfully request that an order be entered extending their time to petition for a writ of certiorari in the above-captioned case to and including Monday, May 11, 2020.

Respectfully submitted,


s/ Toni L. Sharretts Collins

TONI L. SHARRETTS COLLINS

March 12, 2020

SCOTUS Bar No. 312913

11054 North Hidden Oaks

Conroe, Texas 77384

(281) 827-7749 – telephone

iceattorney@aol.com

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Toni Sharretts Collins, counsel for Petitioners and a member of the Bar of this Court hereby certify that on the 12th day of March, 2020, a copy of this Application for Second Extension of Time to File a Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to Paul J. McConnell, III; Lange, Hudspeth, McConnell & Tibbets, L.L.P., 1177 W. Loop South, Suite 1700, Houston, Texas 77027, and e-served to pmcconnell@dhmlaw.com, counsel for the respondent herein. I further certify that all parties required to be served have been served.



s/Toni L. Sharretts Collins
TONI L. SHARRETTS COLLINS

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 25, 2020

Mrs. Toni Sharretts Collins
Law Office of Toni L. Sharretts Collins
11054 North Hidden Oaks
Conroe, TX 77384

Re: James K. Collins, et ux.
v. D.R. Horton-Texas, Ltd.
Application No. 19A947

Dear Mrs. Collins:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on February 25, 2020, extended the time to and including April 11, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Clara Houghteling
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

NOTIFICATION LIST

Mrs. Toni Sharretts Collins
Law Office of Toni L. Sharretts Collins
11054 North Hidden Oaks
Conroe, TX 77384

Clerk
Court of Appeals of Texas, Fourteenth District
301 Fannin, Suite 245
Houston, TX 77002



A STAR ALLIANCE MEMBER

Confirmation:

AZ6KZM

Issue Date: December 02, 2019

Traveler
COLLINS/TONILYNN
eTicket Number
0162484615573
Frequent Flyer
UA-XXXXX343
Seats
---/---/---/11B
FLIGHT INFORMATION

Day, Date	Flight	Class	Departure City and Time	Arrival City and Time	Aircraft Meal
Tue, 25FEB20	UA1998	XN	HOUSTON, TX (IAH -BUSH INTL) 9:42 AM	SAN FRANCISCO, CA (SFO) 12:04 PM	
Tue, 25FEB20	UA0115	P	SAN FRANCISCO, CA (SFO) 2:00 PM	PAPEETE PF (PPT) 8:40 PM	Lunch
Tue, 03MAR20	UA0114	PZ	PAPEETE PF (PPT) 10:40 PM	SAN FRANCISCO, CA (SFO) 8:45 AM	Dinner
Wed, 04MAR20	UA1735	XN	SAN FRANCISCO, CA (SFO) 2:31 PM	HOUSTON, TX (IAH -BUSH INTL) 8:24 PM	737-800 Purchase

FARE INFORMATION**Fare Breakdown**

Airfare:	0.00USD
September 11th Security Fee:	11.2
U.S. APHIS User Fee:	3.96
U.S. Customs User Fee:	5.89
U.S. Immigration User Fee:	7
France Airport Tax:	16.4
French Polynesia Departure Tax:	16.8
Per Person Total:	61.25USD

eTicket Total: **61.25USD**

The airfare you paid on this itinerary totals: 0.00 USD

The taxes, fees, and surcharges paid total: 61.25 USD

Award Rules: Additional charges may apply for changes in addition to any fare rules listed.
 RWD/NONEND/-TRAN; VALID UA; NOT VALID AFTER 12/2/2020
 All changes must be made prior to the departure date, or the ticket has no value.

Additional Charges:	Tue., Mar. 3, 2020/MasterCard 8555 was charged 899 USD for the / EDD 01615707622487 899.00 USD for: Premium Cabin Upgrade
	Tue., Mar. 3, 2020/MasterCard 8555 was charged 899 USD for the / EDD 01615707622494 899.00 USD for: Premium Cabin Upgrade
	Mon., Feb. 24, 2020/MasterCard 8555 was charged 1219 USD for the / EDD 01615689154709 1219.00 USD for: Premium Cabin Upgrade
	Mon., Feb. 24, 2020/MasterCard 8555 was charged 1219 USD for the / EDD 01615689154693 1219.00 USD for: Premium Cabin Upgrade

Baggage allowance and charges for this itinerary.**Baggage fees are per traveler**

Origin and destination for checked baggage	1 st bag	2 nd bag	Max wt / dim per piece
2/25/2020 Houston, TX (IAH -Bush INTL) to Papeete PF (PPT)	0.00 USD	0.00 USD	70.0lbs (32.0kg) - 62.0in (157.0cm)
3/3/2020 Papeete PF (PPT) to Houston, TX (IAH -Bush INTL)	0.00 USD	0.00 USD	70.0lbs (32.0kg) - 62.0in (157.0cm)

The service charges for standard first, second and third checked bags (within specified size and weight limits) have been waived based on the fare purchased. Changes to the fare type purchased could result in increased baggage service charges

MileagePlus Accrual Details

From: United Airlines, Inc. <Receipts@united.com>
To: ICEATTORNEY <ICEATTORNEY@AOL.COM>
Subject: eTicket Itinerary and Receipt for Confirmation AZ6KZM
Date: Thu, Mar 12, 2020 3:46 pm



Thu, Mar 12, 2020

Thank you for choosing United.

A receipt of your purchase is shown below. Please retain this email receipt for your records.

Note: There are travel restrictions in place due to the coronavirus. Check our [Important notices page](#) for the latest updates

Confirmation Number:

AZ6KZM

Flight 1 of 4 UA1998

Class: United Economy (NN)

Tue, Feb 25, 2020

09:42 AM

Houston, TX, US (IAH)

Tue, Feb 25, 2020

12:04 PM

San Francisco, CA, US (SFO)

Flight 2 of 4 UA115

Class: United Polaris business (P)

Tue, Feb 25, 2020

02:00 PM

San Francisco, CA, US (SFO)

Tue, Feb 25, 2020

08:40 PM

Papeete, PF (PPT)

Flight 3 of 4 UA114

Class: United Polaris business (P)

Tue, Mar 03, 2020

10:40 PM

Papeete, PF (PPT)

Wed, Mar 04, 2020

08:45 AM

San Francisco, CA, US (SFO)

Flight 4 of 4 UA1735

Class: United Economy (NN)

Wed, Mar 04, 2020

02:31 PM

San Francisco, CA, US (SFO)

Wed, Mar 04, 2020

08:24 PM

Houston, TX, US (IAH)

Traveler Details

COLLINS/TONILYNN

eTicket number: **0162484615573**
 Frequent Flyer: **UA-XXXXX343 Member**

Seats: **IAH-SFO** ----
SFO-PPT ----
PPT-SFO ----
SFO-IAH ----
PPT-SFO
PPT-SFO
SFO-PPT
SFO-PPT

Premium Cabin Upgrade (0161570762249)
 Premium Cabin Upgrade (0161570762248)
 Premium Cabin Upgrade (0161568915470)
 Premium Cabin Upgrade (0161568915469)

Purchase Summary

Method of payment:

Mileage Plus XXXXX102
Master Card ending in 8555
Mon, Dec 02, 2019

Date of purchase:

September 11th Security Fee:	11.20 USD
U.S. APHIS User Fee:	3.96 USD
U.S. Customs User Fee:	5.89 USD
U.S. Immigration User Fee:	7.00 USD
France Airport Tax:	16.40 USD
French Polynesia Departure Tax:	16.80 USD
 Total Per Passenger:	 35000 miles + 61.25 USD

Total:**35000 miles + 61.25 USD**

Additional Purchase Summary

Method of payment:

Master Card ending in 8555
Tue, Mar 03, 2020

Date of purchase:

Premium Cabin Upgrade (Reference Number: 0161570762249):

899.00 USD**Total:****899.00 USD**

Additional Purchase Summary

Method of payment:

Master Card ending in 8555
Tue, Mar 03, 2020

Date of purchase:

Premium Cabin Upgrade (Reference Number: 0161570762248):

899.00 USD

Total: **899.00 USD**

Additional Purchase Summary

Method of payment: **Master Card ending in 8555**
 Date of purchase: **Mon, Feb 24, 2020**

Premium Cabin Upgrade (Reference Number: 0161568915470): **1219.00 USD**

Total: **1219.00 USD**

Additional Purchase Summary

Method of payment: **Master Card ending in 8555**
 Date of purchase: **Mon, Feb 24, 2020**

Premium Cabin Upgrade (Reference Number: 0161568915469): **1219.00 USD**

Total: **1219.00 USD**

Award Rules

Additional charges may apply for changes in addition to any fare rules listed.

RWD/NONEND/-TRAN;VALID UA;NOT VALID AFTER 12/2/2020

MileagePlus Accrual Details

Ineligible to accrue mileage or Premier qualifying credit.

Baggage allowance and charges for this itinerary

Origin and destination for checked baggage	1st bag charge	2nd bag charge	1st bag weight and dimensions	2nd bag weight and dimensions
Tue, Feb 25, 2020 Houston, TX, US (IAH - Intercontinental) to Papeete, PF (PPT - Tahiti)	0 USD	0 USD	70lbs(32kg) - 62in(157cm)	70lbs(32kg) - 62in(157cm)
Tue, Mar 03, 2020 Papeete, PF (PPT - Tahiti) to San Francisco, CA, US (SFO)	0 USD	0 USD	70lbs(32kg) - 62in(157cm)	70lbs(32kg) - 62in(157cm)
Wed, Mar 04, 2020 San Francisco, CA, US (SFO) to Houston, TX, US (IAH - Intercontinental)	0 USD	0 USD	70lbs(32kg) - 62in(157cm)	70lbs(32kg) - 62in(157cm)

Baggage check-in must occur with United or United Express, and you must have valid MileagePlus Premier® Platinum membership at time of check-in to qualify for waiver of service charges for up to three checked bags (within specified size and weight limits).

December 20, 2018



JUDGMENT

The Fourteenth Court of Appeals

JAMES K. COLLINS AND TONI SHARRETT COLLINS, Appellants

NO. 14-17-00764-CV V.

D.R. HORTON-TEXAS LTD, Appellee

This cause, an appeal from the judgment in favor of appellee, D.R. Horton-Texas LTD, signed June 9, 2017, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellants, James K. Collins and Toni Sharretts Collins, jointly and severally, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

Affirmed and Opinion filed December 20, 2018.



In The
Fourteenth Court of Appeals

NO. 14-17-00764-CV

JAMES K. COLLINS AND TONI SHARRETT COLLINS, Appellants

V.

D.R. HORTON-TEXAS LTD, Appellee

**On Appeal from the 284th District Court
Montgomery County, Texas
Trial Court Cause No. 15-04-04236-CV**

O P I N I O N

This case concerns the ownership of land in Montgomery County on which appellee D.R. Horton-Texas Ltd. intends to develop a subdivision.¹ Appellants James K. Collins and Toni Sharett Collins claimed ownership of some of the land

¹ The case was transferred to this court from the Ninth Court of Appeals by Texas Supreme Court Transfer Order. Because of the transfer, we must decide the case in accordance with the precedent of the Ninth Court of Appeals if our decisions otherwise would have been inconsistent with that court's precedent. *See Tex. R. App. P. 41.3.*

being developed, which was adjacent to their homestead and which they referred to as the Sieberman survey. D.R. Horton sued the Collinses to quiet title, for trespassing on its property and for a declaration concerning the boundaries of the respective properties. The Collinses counterclaimed for adverse possession. A year later, the Collinses added claims for trespass, conversion, and malicious prosecution.² D.R. Horton filed a motion for partial summary judgment for a declaration that the Collinses could not claim property rights through the Sieberman survey because (1) the subject property boundary had been judicially determined and (2) the Collinses deed expressly references the judicial determination and, as such, they are estopped to assert rights through the Sieberman survey. The trial court granted the motion.

A few weeks before trial, the Collinses amended their pleadings and added new counterclaims emanating from incidents in 2016. D.R. Horton filed a motion to sever the new claims, which the trial court granted. The Collinses' claims for trespass, conversion, and malicious prosecution were severed, and D.R. Horton's trespass and to quiet title claims and the Collinses' adverse possession claim proceeded to trial. The jury found for D.R. Horton on all claims presented but was not asked to and did not award any damages.

In seven issues, the Collinses challenge (1) the grant of partial summary judgment, (2) that a visiting judge presided over the trial, (3) the denial of their motion for directed verdict, (4) the denial of their motion for judgment notwithstanding the verdict, (5) the denial of their motion for a continuance, (6) the severance of certain of their counterclaims, and (7) the exclusion of certain evidence. We affirm.

² Among the affirmative defenses and new counterclaims in the amended pleading, the Collinses asked the court to declare ownership of the disputed tract in accordance with the Sieberman survey.

Background

The Collinse assert that their rights to the disputed property derive from a grant of 1/3 of a league of land in 1850 from the State of Texas to Frederick Sieberman, who was among the massacred at Goliad. The Collinse claim to have received a quitclaim deed from the heirs of the Sieberman survey in 2015.

D.R. Horton contends that to the extent the Sieberman survey ever existed, it was extinguished by a 1944 federal court judgment in which the boundaries of two other surveys, the James Hodge and the David Thomas, were determined to meet in the area that would have contained the Sieberman survey. This judgment was affirmed by the Fifth Circuit in *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947), and both the judgment and appellate opinion were recorded in the real property records. D.R. Horton additionally maintains that the Collinse are estopped from asserting rights to the disputed property because the deed by which they acquired their homestead property referenced the subdivision plat, which in turn referenced the 1944 judgment recorded in the property records.

The Collinse also assert that even if D.R. Horton is correct that the federal judgment extinguished the Sieberman survey, they adversely possessed the disputed property. As stated, the trial court granted partial summary judgment favoring D.R. Horton on the existence of the Sieberman survey and the Collinse's claim to property rights by way of the survey.³

Eleven days before trial, on March 2, 2017, the Collinse moved for a continuance on the grounds that Ms. Collins's was scheduled for hip replacement surgery on the first day of trial (March 13) and Dr. Collins would not be available

³ The trial court "ordered that [the Collinse] take nothing on their claims related in any manner to the [Sieberman survey]." We construe this as granting the declaratory relief requested by D.R. Horton and denying the declaratory relief requested by the Collinse.

for trial because he needed to cover for other doctors in his practice group who had spring break plans. Attached to the motion was a note from Ms. Collins's doctor stating that she needed the surgery and March 13 was the first available date. The trial court denied the motion. On March 13, before trial began, the Collinsees moved for reconsideration because Ms. Collins was then at the hospital and Dr. Collins was with her. The trial court again denied the motion. The Collinsees were absent for voir dire of the jury panel and for the beginning of testimony, but they were able to attend trial starting with the second day and both were able to testify.

Five days before trial, the trial court severed the Collinsees' claims for trespass, conversion, and malicious prosecution, which involved allegations that D.R. Horton came onto the Collinsees' property and removed a fence and other personal property and that Dr. Collins was unlawfully arrested after he discharged a firearm. The malicious prosecution claim had been added two weeks before trial and also involved allegations against several new cross-defendants, including D.R. Horton employees and Montgomery County Sheriff's Department personnel.

The issues remaining after the grant of partial summary judgment favoring D.R. Horton and the severance of some of the Collinsees' counterclaims went to trial with a visiting judge presiding on March 13, 2017. Ultimately, the jury was asked three questions: two regarding whether the Collinsees had adversely possessed the disputed property and one regarding whether the Collinsees had trespassed on D.R. Horton's property. The jury found that no adverse possession had occurred but the Collinsees had trespassed on D.R. Horton's property. The jury was not asked any damages questions.

The trial court denied the Collinsees' motions for directed verdict and judgment notwithstanding the verdict. In its final judgment, the trial court ordered that an affidavit of adverse possession that the Collinsees had filed in the property records

was “invalid and of no force and effect and . . . null, void, canceled and discharged of record.” The court further permanently enjoined the Collinses from interfering with D.R. Horton’s use and occupancy of the disputed property.

I. Partial Summary Judgment on Declaratory Relief

In their first issue, the Collinses contend that the trial court erred in granting partial summary judgment and thereby resolving all issues pertaining to the existence of the Sieberman survey in favor of D.R. Horton. We review a grant of summary judgment under a de novo standard of review. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm if any of the independent summary judgment grounds is meritorious. *State v. §90,235*, 390 S.W.3d 289, 292 (Tex. 2013). This, in turn, means that when a summary judgment motion alleges multiple grounds and the order granting summary judgment does not specify the ground on which judgment was rendered, the appellant must challenge and negate all summary judgment grounds on appeal. *See, e.g., Davis v. Galagaza*, No. 14–16–00362–CV, 2017 WL 1450582, at *2 (Tex. App.–Houston [14th Dist.] Apr. 18, 2017, no pet.) (mem. op.); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 653 (Tex. App.–Houston [14th Dist.] 2013, no pet.). If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed. *Britton v. Tex. Dep’t of Criminal Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

In its motion, D.R. Horton asserted that (1) the 1944 judgment established the relevant boundaries and (2) the deed by which the Collins acquired their property referenced a subdivision plat that in turn references and recognizes the 1944 judgment and, thus, the Collinses were estopped by deed from asserting the effect of

the judgment. D.R. Horton points out that the Collinsses failed to address the estoppel ground in their opening brief on appeal.

In their reply brief, the Collinsses argue that they did enough in their opening brief by generally challenging the grant of partial summary judgment. This is incorrect. The estoppel ground was independent of the merits of the ground based on the 1944 judgment. *See Galagaza*, 2017 WL 1450582, at *2; *Heritage Gulf Coast*, 416 S.W.3d at 653. Also in their reply brief, the Collinsses attempt to challenge the merits of the estoppel ground. However, we generally do not consider issues raised for the first time in a reply brief and decline to do so here. *See, e.g., HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc.*, No. 14-17-00846-CV, 2018 WL 6217085, at *8 n.10 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, no pet. h.); *Zurita v. Lombana*, 322 S.W.3d 463, 477 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Because the partial motion for summary judgment could have been based on an unchallenged ground, we overrule the Collinsses’ first issue. *See Britton*, 95 S.W.3d at 682.

II. Objection to Visiting Judge

In their second issue, the Collinsses contend that the trial court erred in permitting a “disqualified” judge to preside over the trial. Specifically, they assert that they timely objected to the assignment of the visiting judge, and she was therefore disqualified from sitting pursuant to Government Code section 74.053. Tex. Gov’t Code § 74.053.

Under section 74.053(b), “[i]f a party to a civil case files a timely objection to the assignment [of a visiting judge], the judge shall not hear the case.” An objection under this section must be filed no later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. *Id.* §

74.053(c). The statute requires an immediate objection to an assigned judge to prevent parties from attempting to “sample” the judge before objecting. *In re Canales*, 52 S.W.3d 698, 703 (Tex. 2001) (orig. proceeding).⁴

The Collinses insist that their objection—filed on March 9, 2017, before the visiting judge presided over any proceedings in the case—was timely.⁵ However, in a pretrial conference on February 27, 2017, the district judge informed the parties that a particular visiting judge would be presiding over the trial that was set to begin on March 13. The objection filed on March 9 was therefore not timely because it was filed more than seven days after the Collinses received actual notice of the visiting judge’s assignment. *See Tex. Gov’t Code § 74.053(c)*. Indeed, at the start of trial proceedings on March 13, the visiting judge stated that she could not grant the objection because it was not timely.

As the Collinses point out, the visiting judge apparently signed an order purporting to *grant* the objection on the same day. The signing of this order, however, was clearly a mistake because the visiting judge then presided over the trial and at no point did anyone object to her continuing to preside.⁶ In order to preserve a complaint for appellate review, a party must make a timely and sufficiently specific request, objection, or motion in the trial court. *Tex. R. App. P. 33.1*; *Zewde v. Abadi*, 529 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2017, no pet.). As discussed above, the Collinses’ objection to the visiting judge was not timely, and the Collinses made no objection to the judge continuing to sit after she

⁴ Under section 74.053(c), a trial court may extend the time to file an objection on written motion by a party who demonstrates good cause. The Collinses did not request and the trial court did not grant an extension in this case.

⁵ The Collinses filed their objection on March 9 and presented it to the trial court for a ruling on March 13.

⁶ We further note that the judge subsequently signed the final judgment, which stated that the objection to her sitting was overruled because it was not timely.

mistakenly signed an order granting the untimely objection. *Cf. In re S.Q.*, No. 04-18-00119-CV, 2018 WL 3129434, at *1 (Tex. App.—San Antonio June 27, 2018, pet. denied) (mem. op.) (“[A] party impliedly withdraws an objection by participating in a hearing or trial without advising the assigned judge that an objection has been filed and seeking a ruling.” (citing *In re Carnera*, No. 05-16-00055-CV, 2016 WL 323654, at *2 (Tex. App.—Dallas Jan. 27, 2016, orig. proceeding) (mem. op.))). The Collinse have therefore not preserved anything for review, and we overrule their second issue.

III. Motions for Directed Verdict and JNOV

In issues three and four, the Collinse contend respectively that the trial court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict. We review a trial court’s decision to grant or deny a motion for a directed verdict and a motion for judgment notwithstanding the verdict under a legal sufficiency standard of review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) (explaining that the test for legal sufficiency is the same for directed verdict, judgment notwithstanding the verdict, and appellate no-evidence review). A party challenging the legal sufficiency of the evidence supporting an adverse jury finding on an issue on which it did not have the burden of proof at trial must demonstrate on appeal that there is no evidence to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011).

The problem with the Collinse’s arguments under these issues is that they are challenging the proof concerning trespass to try title, a cause of action that D.R. Horton did not plead and was not tried and therefore was not at issue in this case. D.R. Horton pleaded causes of action to quiet title, for trespassing on its property and for a declaratory judgment concerning the property boundaries.

To prevail in a trespass to try title action, a plaintiff must usually (1) prove a

regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004). *See generally* Tex. Prop. Code § 22.001 (“Trespass to Try Title”). The Collinse assert specifically that D.R. Horton failed to prove a regular chain of conveyances back to the sovereign or superior title. They also repeat their arguments that they had title to the Sieberman survey, an issue that was determined by the partial summary judgment and not at trial.

Even after D.R. Horton pointed out in its brief that the Collinse were challenging a cause of action that it did not pursue, the Collinse did not, in their reply brief, explain how the arguments made could apply to any of D.R. Horton’s actual causes of action.⁷ We decline to make the Collinse’s argument for them. *See Bhatia v. Woodlands N. Houston Heart Ctr., PLLC*, 396 S.W.3d 658, 666 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

We overrule the Collinse’s third and fourth issues.

IV. Motion for Continuance

In their fifth issue, the Collinse contend that the trial court erred in denying their motion for a continuance. The Collinse first requested a continuance five days before trial based on Ms. Collins’s scheduled surgery and Dr. Collins’s need to cover for other doctors. The Collinse re-urged the motion on the first day of trial. The Collinse were then absent for voir dire of the jury panel and for the beginning of

⁷ The jury was asked if the Collinse had trespassed on D.R. Horton’s property, with trespass being defined as “an entry on the property of another without having consent or authorization of the owner. To constitute trespass, entry upon another’s property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property.” D.R. Horton’s quiet title claim sought to remove the cloud on D.R. Horton’s title created by the affidavit of adverse possession filed by the Collinse. In connection with this claim, the jury was asked if the Collinse had adversely possessed the disputed property.

testimony, but they were able to attend trial starting with the second day, and both were able to testify.

We review a trial court's order denying a motion for continuance for a clear abuse of discretion and on a case-by-case basis. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court only abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.* As the Collinsses acknowledge, the absence of a party to a proceeding, standing alone, is not sufficient cause to grant a continuance. *See, e.g., Pena v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00612-CV, 2012 WL 5974076, at *5 (Tex. App.—Austin Nov. 21, 2012, no pet.) (mem. op.). The absent party must show that it had a reasonable excuse for not being present and that its absence would result in prejudice. *Id.*

Assuming without deciding that the Collinsses asserted reasonable excuses for their absences, we turn to their claims that they were prejudiced by missing the first day of trial. The Collinsses specifically argue that they were prejudiced because they were not present during voir dire to determine if the jury selected has any bias against them. They also complain that testimony began without them present to “ascertain any bias” of the witnesses. The Collinsses offer no relevant authority or record citations in support of this alleged prejudice. *See* Tex. R. App. P. 38.1(i) (requiring appellant’s brief to include relevant citations to authorities and the record). They further offer no explanation how their presence would have revealed any possible bias by either potential jurors or testifying witnesses. The Collinsses’ counsel was present and actively participated in trial proceedings on the first day. The Collinsses do not suggest anything that their counsel would have or could have done differently had they also been present. They present no evidence of prejudice they sustained.

Courts finding prejudice have done so based on evidence of prejudice actually

sustained, not on merely speculative or potential prejudice. *See Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 288 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). To hold that the trial court erred under such circumstances would effectively eliminate the requirement that a party demonstrate prejudice in order to obtain a reversal based on the denial of a continuance. *Cf. Henry v. Tax Appraisal Dist. of Bell Cty.*, No. 04-13-00075-CV, 2013 WL 6672512, at *2 (Tex. App.—Beaumont Dec. 18, 2013, no pet.) (mem. op.) (rejecting general assertion of prejudice based on “fairness and due process” as inadequate).

Because the Collinsees fail to demonstrate prejudice resulting from the denial of their motion for a continuance, we overrule their fifth issue.

V. Severance of Counterclaims

In their sixth issue, the Collinsees contend that the trial court erred in severing their counterclaims for trespass, conversion, and malicious prosecution five days before trial. The first two claims, trespass and conversion, concerned allegations that D.R. Horton personnel came onto the Collinsees’ property and removed a fence and other personal property. The malicious prosecution claim was added two weeks before trial and asserted that Dr. Collins was unlawfully arrested after he discharged a firearm. The malicious prosecution claim also involved allegations against several new cross-defendants, including D.R. Horton employees and Montgomery County Sheriff’s Department personnel.

“Any claim against a party may be severed and proceeded with separately.” Tex. R. Civ. P. 41. Accordingly, trial courts have broad discretion in determining when claims should be severed. *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018). A claim is considered properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven

with the remaining action that they involve the same facts and issues. *Id.* In severing cases, courts look to avoid prejudice, do justice, and increase convenience. *In re State*, 355 S.W.3d 611, 613 (Tex. 2011).

The parties primarily dispute the third factor. The Collinsees do not dispute that the controversy involved multiple causes of action or that the severed claims could have been brought as separate lawsuits. They argue instead that the trespass, conversion, and malicious prosecution claims involve the same facts and issues as many of the nonsevered claims because “it was Horton’s claim to the disputed land that was the catalyst” for these torts.

D.R. Horton filed its lawsuit in April 2015. The Collinsees’ trespass and conversion claims concern alleged conduct by D.R. Horton occurring in 2016. The Collinsees alleged that after D.R. Horton’s attorney sent them a letter in June 2016 indicating that D.R. Horton would begin work on one section of the proposed development, D.R. Horton entered the disputed property on July 1 through a different section, where the Collinsees had erected a fence and placed “tables, chairs, umbrellas, and hammocks.” According to the Collinsees, upon entering the disputed property, D.R. Horton destroyed the fence and removed the other personal property items. They claim that the entry itself was a trespass and the destruction and removal of the personal property constituted conversion.

In their malicious prosecution claim, the Collinsees allege that Dr. Collins was unlawfully arrested after an incident at the property during which he fired a shotgun into the ground.⁸ The Collinsees assert that D.R. Horton employees provided false and incomplete information to the prosecutor after the incident, which led to criminal charges being filed. The charges were subsequently dismissed by the prosecutor.

⁸ The Collinsees state that he did this to alert a D.R. Horton backhoe operator to his presence.

Under this claim, the Collinsses added four additional defendants, two employees of D.R. Horton and two employees of the sheriff's office.⁹

We begin our analysis by noting that all three added claims allege transgressions occurring during the pendency of the lawsuit. *See generally In re Liu*, 290 S.W.3d 515, 523-24 (Tex. App.—Texarkana 2009, orig. proceeding) (explaining that trial court could have reasonably concluded that close temporal proximity of alleged torts and possibility that damages were caused by several tortfeasors in combination suggested claims should be tried together). The claims remaining after the severance included the Collinsses' adverse possession and trespass to try title causes of action as well as D.R. Horton's causes of action for trespass, to quiet title, and for a declaration concerning the property boundaries. Although, as the Collinsses argue, the new claims may have had their roots in the property dispute that was part and parcel of the remaining claims, the severed claims concerned different events, different witnesses, some different issues, and, as to the malicious prosecution claim, different defendants than did the remaining claims. Consequently, consideration of the new and remaining claims together may well have caused confusion in the proceedings, particularly for the jury. *Cf. In re Ben E. Keith Co.*, 198 S.W.3d 844, 854 (Tex. App.—Fort Worth 2006, orig. proceeding) (holding trial court erred in refusing to sever claims due in part to likely jury confusion resulting if the claims were tried together). Under these circumstances, we cannot say that the trial court abused its discretion in severing the claims. *See Morello*, 547 S.W.3d at 889. Accordingly, we overrule the Collinsses' sixth issue.

VI. Exclusion of Evidence

⁹ The Collinsses asserted that D.R. Horton employed several off-duty sheriff's deputies to accompany its employees to the property. It is unclear from the Collinsses' pleadings whether the sheriff's employees added as defendants were purportedly working for D.R. Horton at the time of the incident.

Lastly, in their seventh issue, the Collinsses contend that the trial court erred “when it prevented [the Collinsses] from admitting certified complete official government maps into evidence.” In support, the Collinsses first assert that the trial court granted a portion of D.R. Horton’s motion in limine in which it asked the court to exclude certain government records that referenced the Sieberman survey.¹⁰ A trial court’s grant or denial of a motion in limine, however, does not preserve error concerning the admission or exclusion of evidence. *Ferguson v. Plaza Health Servs. at Edgemere*, No. 05-12-01399-CV, 2014 WL 3401116, at *2 (Tex. App.—Dallas July 10, 2014, pet. denied) (mem. op.); *see also Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 600 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (“By such an order, the trial court neither admits nor excludes evidence, but merely requires a party to obtain the trial court’s permission, at the bench or otherwise outside of the jury’s presence, before asking potentially prejudicial questions or introducing potentially prejudicial evidence.”).

To preserve error for the exclusion of evidence after a motion in limine has been granted, a party must, during trial: (1) approach the bench and ask for a ruling, (2) formally offer the evidence, and (3) obtain a ruling on the offer. *Ferguson*, 2014 WL 3401116, at *2. If, at that time, the court rules the evidence inadmissible, the party must further preserve the evidence through an offer of proof. *Id.* The fact that the trial court may have granted a particular portion of D.R. Horton’s motion in limine therefore did not preserve the exclusion of the evidence for our review.

The Collinsses additionally provide two citations to the reporter’s record regarding the alleged exclusion of this evidence. The first citation is to a discussion occurring before trial began, wherein the Collinsses’ counsel expressly agreed that

¹⁰ The Collinsses do not cite to where in the record the trial court granted a motion in limine pertaining to the documents in question.

certain exhibits pertaining to the Sieberman survey were intended only as an offer of proof and were not being offered into evidence for trial purposes—the issue of the Sieberman survey having been disposed of by the partial summary judgment.

At the second citation, D.R. Horton's counsel objected apparently because he thought that Dr. Collins was about to testify that a particular line on an admitted exhibit referenced the Sieberman survey. Far from arguing that Dr. Collins should be permitted to so testify, the Collinses' lawyer apologized to the court and reminded Dr. Collins not to testify about the Sieberman survey.¹¹ The exhibit itself was admitted.

The Collinsses do not cite to any other place in the record for where they offered the allegedly excluded documents into evidence and obtained an adverse ruling. Accordingly, they have not preserved this issue for our review. *See id.*; *see also Indus. III, Inc. v. Burns*, No. 14-13-00386-CV, 2014 WL 4202495, at *12 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied) (mem. op.) (“To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence or a summary of the evidence and secure an adverse ruling from the court.”). We overrule the seventh issue.

We affirm the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Wise, and Jewell.

¹¹ Counsel stated: "I have instructed Dr. Collins not to bring this up, and I'll ask him once again, please don't say that. So I apologize to that extent."

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July 29, 2019 7:29 am

RE: Case No. 19-0397

Melisa Miller, District Clerk
Montgomery County, Texas

DATE: 7/26/2019

COA #: 14-17-00764-CV

TC#: 15-04-04236-CV

STYLE: COLLINS v. D.R. HORTON-TEXAS LTD.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

DISTRICT CLERK MONTGOMERY COUNTY
MONTGOMERY COUNTY COURT
P. O. BOX 2985
CONROE, TX 77305-2985
* DELIVERED VIA E-MAIL *

RE: Case No. 19-0397

DATE: 7/26/2019

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TC#: 15-04-04236-CV

STYLE: COLLINS v. D.R. HORTON-TEXAS LTD.

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MS. TONI L. SHARRETT
LAW OFFICE OF TONI L. SHARRETT
COLLINS
11054 NORTH HIDDEN OAKS
CONROE, TX 77387
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RE: Case No. 19-0397

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MR. CHRISTOPHER A. PRINE (14TH COA)
CLERK, FOURTEENTH COURT OF APPEALS
HARRIS COUNTY 1910 COURTHOUSE
301 FANNIN SUITE 245
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0397
COA #: 14-17-00764-CV
STYLE: COLLINS v. D.R. HORTON-TEXAS LTD.

DATE: 12/13/2019
TC#: 15-04-04236-CV

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

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HARRIS COUNTY 1910 COURTHOUSE
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HOUSTON, TX 77002
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